Submission to the New South Wales Law Reform Commission Open Justice Review on Open Justice and Legal Violence Against People with Disability

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Thank you for the opportunity to make a submission to the New South Wales Law Reform Commission's review of open justice. This submission is on open justice in relation to people with disability in the *parens patriae* jurisdiction, focusing on the Protective List of the Supreme Court's Equity Division ('Protective List') and the Guardianship Division of the New South Wales Civil and Administrative Tribunal ('Guardianship Division'). The key argument is that **it is vital that the NSWLRC recommend reforms (to the extent possible in the scope of its project) to ensure hearings, information, documentation and decisions of the Protective List and the Guardianship Division of the New South Wales Civil and Administrative Tribunal are publicly accessible on an equal basis to other jurisdictions.**

The Protective List and the Guardianship Division are two key New South Wales forums[1] regulating use of restrictive practices in relation to people with disability (e.g., locked accommodation, physical and chemical restraint, sterilisation). Restrictive practices constitute legal violence against people with disability. Thus, contrary to the conventional understanding of the *parens patriae* jurisdiction as protectively and benignly responding to the needs of vulnerable people with disability, an alternative understanding driving this submission is that through the *parens patriae* jurisdiction violence against people with disability is *enabled* and people with disability *become disempowered, incapacitated and violated*. Greater public access to the work of these forums is central to gaining a comprehensive understanding of the justice system's role in restrictive practices, in order to more fully address the systemic issue of violence against people with disability and ensure equality in the justice system for people with disability.

[1] Two others are the Mental Health Review Tribunal and the Children's Court: Martin Gorrick, 'Protective Jurisdiction in New South Wales' (2016) 43 *Australian Bar Review* 205.

1. Open Justice and the *Parens Patriae* Jurisdiction

1.1 Open Justice

The principle of open justice in the Australian court system is a 'fundamental rule of the common law'.[2] Open justice is central to the rule of law, as discussed by Pamela Stewart and Anita Stuhmcke:

> The rule of law—that all members of a society are equally subject to publicly available legal codes and processes —is an overarching principle of the Australian democratic system of government. The rule of law opposes the exercise of arbitrary power. In Albert Venn Dicey's oft-cited formulation, the rule of law 'excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government'. This exclusion of arbitrary power is both aspirational and formal; aspirational as it is an ideal of justice, and formal as the constitutional role of the courts is to hold the Executive to account and to act as a balance against legislative supremacy.
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> The courts themselves are subject to both the aspiration and formality of the rule of law. Open justice, a core principle of the common law, renders judicial authority subject to, and limited by, the rule of law. In the English decision *Scott v Scott*, open justice is reverently described by Lord Shaw as 'a sound and very sacred part of the constitution of the country and the administration of justice' and by Lord Atkinson as 'the best security for the pure, impartial and efficient administration of justice'. The High Court confirmed these sentiments in *Dickason v Dickason* since observing there to be 'a strong tradition of open justice that characterises the courts of this country' and that '[t]he clear authority of this court, of other final courts and of other Australian courts lays consistent emphasis on the fact that the principle of open justice is deeply entrenched in our law'.[3]

However, the principle of open justice is not an absolute end in itself, and is instead a means to the ultimate end of judicial administration of justice. For example, French CJ has stated that:

> It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction

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[2] *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]-[477] (McHugh JA, Glass JA agreeing). See generally Katherine Biber, 'Inside Jill Meagher's Handbag: Looking at Open Justice' (2014) 39(2) Alternative Law Journal 73, 73-74.

[3] Pamela Stewart and Anita Stuhmcke, 'Open Justice, Efficient Justice and the Rule of Law: The Increasing Invisibility of Special Leave to Appeal Applications in the High Court of Australia' (2020 48(2) *Federal Law Review* 186, 188-189.

> or an inferior court's implied powers. This may be done where it is necessary to secure the proper administration of justice.[4]

In a similar vein, McHugh JA has stated that departure from the principle of open justice is only possible where it would 'frustrate the administration of justice':

> A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule.[5]

> … departure from the principle of open justice is only justified where observance of the principle would in fact frustrate the administration justice by unfairly damaging some material private or public interest. To that end, an order restricting the public availability of information will only be made if it is really necessary to secure the proper administration of justice.[6]

> [The rule of in camera proceedings is] not that all litigation must be conducted in public, but that all litigation must be conducted in such a way as to ensure that justice is done.[7]

Cunliffe notes the importance to democratic governance of not limiting open justice: 'Although there are risks inherent in openness, retreating to covertness holds tremendous dangers for the justice system and for democratic governance.'[8]

1.2 Limitations on Open Justice in the Protective List

Parens patriae court proceedings are a well-established exception to the principle of open justice. The *parens patriae* jurisdiction consists of 'jurisdiction over lunatics, idiots and persons of unsound mind' and 'jurisdiction over infants, minors, children and young people'.[9] The *parens patriae* jurisdiction is conventionally described as protectively and benignly responding to the needs of *already* vulnerable people, including vulnerable people with disability.

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[4] *Hogan v Hinch* (2011) 243 CLR 506, [21] (French CJ).

[5] *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]-[477] (McHugh JA, Glass JA agreeing).

[6] *Seven Network (Operations) Ltd v Warburton (No 1)* [2011] NSWSC 385 at [3] per Pembroke J.

[7] *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198 at [165] per Meagher JA.

[8] Emma Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) 40 *Federal Law Review* 385, 411.

[9] GC Lindsay, 'A Province of Modern Equity: Management of Life, Death and Estate administration' (2016) 43 *Australian Bar Review* 9, 10.

For example, equity barrister Martin Gorrick has described the *parens patriae* as:

> persons who have capacity are able to live and to manage their lives independently: by deciding what is best for themselves; and by either taking or leaving the advice of others.
>
> Thus the need for protection arises in circumstances where persons, for whatever reason, lack the capacity to manage their own affairs.
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> Persons who do not have capacity to make certain decisions may be vulnerable; and their welfare may be at stake. If such persons cannot take care of (or manage) themselves they are in need of someone else to guard over their welfare and to take care of them. In this context the Crown (now more readily described as the state) has always assumed a direct responsibility; either to supervise those who have the care of those in need of care; or to facilitate such care itself. The *parens patriae* inherent jurisdiction of the Supreme Court of New South Wales springs from this responsibility.[10]

The Protective List of the NSW Supreme Court's Equity Division is one of the key forums in NSW for hearing matters within the *parens patriae* jurisdiction. It has been described by Justice Geoff Lindsay, Probate and Protective List Judge, Equity Division, Supreme Court of New South Wales as 'focusing on care for those who are in need of protection because of a functional incapacity to manage themselves or their affairs'.[11] He explains:

> The protective jurisdiction is commonly said to be both parental and protective. It exists for the benefit of the person in need of protection, but it takes a large and liberal view of what that benefit is, and it will do on behalf of a protected person not only what may directly benefit him or her, but what, if he or she were able to manage his or her own affairs, he or she would, as a right minded and honourable person, desire to do.
>
> Whatever is to be done, or not done, upon an exercise of protective jurisdiction is generally measured against what is in the interests, and for the benefit, of the person in need of protection.[12]

He further notes:

> The protective jurisdiction of the Court is, almost single mindedly, focused upon the welfare and interests of a person incapable of managing his or her own

[10] Martin Gorrick, 'Protective Jurisdiction in New South Wales' (2016) 43 *Australian Bar Review* 205, 209.
[11] GC Lindsay, 'A Province of Modern Equity: Management of Life, Death and Estate administration' (2016) 43 *Australian Bar Review* 9, 12.
[12] Ibid 13.

> affairs, testing everything against whether what is to be done or left undone is or is not for the interests, and benefit, of the person in need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers.[13]

The limitations on open justice in the context of the *parens patriae* jurisdiction are related to the nature of the court's *parens patriae* jurisdiction introduced in Section 1.1 above. This was explained by French CJ in *Hogan v Hinch*:

> The character of the proceedings and the nature of the function conferred upon the court may also qualify the application of the open-court principle. The jurisdiction of courts in relation to wards of the State and mentally ill people was historically an exception to the general rule that proceedings should be held in public because the jurisdiction exercised in such cases was "parental and administrative, and the disposal of controverted questions … an incident only in the jurisdiction".[14]

Chief Justice French cited the decision of *Scott v Scott*. In *Scott v Scott*, Viscount Haldane LC explained why the *parens patriae* jurisdiction of the court is distinct to the general practice of open courts:

> The case of wards of Court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.
>
> … While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily

[13] Ibid 25.

[14] *Hogan v Hinch* (2011) 243 CLR 506, [21] (French CJ). French CJ cited *Scott v Scott* [1913] AC 417 at 437 per Viscount Haldane LC, as well as *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198 at [165] per Meagher JA.

> governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic.[15]

In a similar vein, Lord Shaw of Dunfermline in *Scott v Scott* stated in relation to 'suits affecting wards' and 'lunacy proceedings':

> these cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs.[16]

Also in *Scott v Scott*, Earl of Halsbury stated:

> There are three different exceptions commonly so called, though in my judgment two of them are no exceptions at all. The first is wardship and the relation between guardian and ward, and the second is the care and treatment of lunatics.
>
> My Lords, neither of these, for a reason that hardly requires to be stated, forms part of the public administration of justice at all.[17]

The Supreme Court of New South Wales has confirmed with me that the NSW Supreme Court's current practice is that all Protective matters are closed court with no access or viewing to the general public. The orders of the Court in this jurisdiction are never published unless the Judge orders it.[18]

1.3 Limitations on Open Justice in the Guardianship Division

The Guardianship Division of the NSW Civil and Administrative Tribunal is another key forum in NSW for hearing matters within the *parens patriae* jurisdiction. The NCAT's website describes the role of the Guardianship Division as being to support people with disability:

> The Guardianship Division determines applications about adults who are incapable of making their own decisions and who may require a legally appointed substitute decision maker.
>
> Applications to the Guardianship Division include:

[15] *Scott v Scott* [1913] AC 417 at 437 per Viscount Haldane LC.
[16] *Scott v Scott* [1913] AC 417 per Lord Shaw of Dunfermline.
[17] *Scott v Scott* [1913] AC 417 per Earl of Halsbury.
[18] Email correspondence on file with author.

- Guardianship orders to appoint a guardian to make personal or lifestyle decisions for someone with decision making disabilities.[19]

The Guardianship Division exercises the *parens patriae* jurisdiction through administering the *Guardianship Act 1987* (NSW). This legislation emerged in the aftermath of deinstitutionalisation and the rise of disability rights and was seen as being more focused on supporting people with disability and – through its tribunal forum – having more accessible procedures.

However, open justice is also limited in the Guardianship Division. Hearings of matters in the Guardianship Division of the New South Wales Civil and Administrative Tribunal ('NCAT') are 'generally open to the public, including media representatives',[20] although sometimes the Tribunal orders the hearing be closed.[21] Moreover, '[b]ecause of confidentiality issues, the Guardianship Division does not publish hearing lists on its website' and it does not 'display hearing lists at the Tribunal'.[22]

While hearings are generally open, there are significant limitations on public access to information, documentation and decisions related to these hearings (this being particularly important noting the role of media and researchers in sharing with the public details of court and tribunal matters in light of the impossibility of all members of the public physically attending hearings[23]). Section 101 of the *Guardianship Act 1987* (NSW) prohibits disclosure of information about New South Wales Civil and Administrative Tribunal Guardianship Division matters. It states:

> A person shall not disclose any information obtained in connection with the administration or execution of this Act unless the disclosure is made:
>
> (a) with the consent of the person from whom the information was obtained,
>
> (b) in connection with the administration or execution of this Act or the *Civil and Administrative Tribunal Act 2013*,
>
> (c) for the purposes of any legal proceedings arising out of this Act or the *Civil and Administrative Tribunal Act 2013* or of any report of any such proceedings,

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[19] NSW Civil & Administrative Tribunal, https://www.ncat.nsw.gov.au/ncat/how-ncat-works/ncat-divisions-and-appeal-panel/guardianship-division.html.

[20] NSW Civil and Administrative Tribunal, Guardianship Division Guideline: Confidentiality, Privacy and Publication, August 2017, [6].

[21] Ibid [7].

[22] Ibid [5].

[23] See, eg, Miiko Kumar, 'Keeping Mum: Suppression and Stays in the Rhinehart Family Dispute; (2012) 10 *Macquarie Law Journal* 49.

(d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or

(e) with other lawful excuse.

Maximum penalty: 10 penalty units or imprisonment for 12 months, or both.

Relatedly, s 65 of the *Civil and Administrative Tribunal Act 2013* (NSW) provides that:

(2) A person must not, except with the consent of [the Guardianship Division], publish or broadcast the name of any person--

(a) who appears as a witness before [the Guardianship Division] in any proceedings, or

(b) to whom any proceedings in [the Guardianship Division] relate, or

(c) who is mentioned or otherwise involved in any proceedings in [the Guardianship Division],

whether before or after the proceedings are disposed of.

: Maximum penalty--

(a) in the case of a corporation--100 penalty units, or

(b) in any other case--50 penalty units or imprisonment for 12 months, or both.

(3) This section does not prohibit the publication or broadcasting of an official report of the proceedings that includes the name of any person the publication or broadcasting of which would otherwise be prohibited by this section.

(4) For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person.[24]

Moreover, NCAT can restrict disclosures concerning Guardianship Division proceedings, including by reason of the 'confidential nature of any evidence or matter'.[25]

Furthermore, while parties have a right to see documents related to their matter, a person who is not a party to a case will only be able to access documents subject to ss 4 and 101 of the *Guardianship Act 1987* (NSW). Information about a case cannot be published or broadcast if 'it could, or is likely to, identify anyone involved in a case in

[24] *Civil and Administrative Tribunal Act 2013* (NSW) s 65.
[25] *Civil and Administrative Tribunal Act 2013* (NSW) s 64.

the Guardianship Division', the information is legally prohibited from being published or broadcast (e.g., as per s 101 of the *Guardianship Act 1987* (NSW)) or the Tribunal has made a confidentiality order about the information.[26]

Not all decisions made by the Guardianship Division are published. The Guardianship Division only 'publishes some of its decisions on the NSW Caselaw website',[27] and generally 'without including the name of any party (except a statutory party such as the NSW Trustee and Guardian), witness or any other person mentioned or otherwise involved in the proceedings'.[28] The effect of this is that a very limited number are published on the NSW Case Law website.[29] For example:

- 2020: 37 published decisions
- 2019: 32 published decisions
- 2018: 49 published decisions

However, the number of published decisions can be contrasted with a high number of finalisations of matters in the Guardianship Division:

- 2019-2020: 12,716 applications finalised[30]
- 2018-2019: 11,662 applications finalised[31]

While the figures presented above are not directly compared (e.g., they are for different time periods), it appears that only a very small proportion of Guardianship Division decisions are being published.

In its review of the *Guardianship Act 1987* (NSW), the NSWLRC attributed the limitations on public accessibility to the sensitivity of these matters:

> Because cases in the Guardianship Division often involve deeply personal issues, there are rules to protect the privacy of people involved in these cases.[32]

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[26] NSW Civil and Administrative Tribunal, Guardianship Division Guideline: Confidentiality, Privacy and Publication, August 2017, [12]; on confidentiality orders see [17]-[18]
[27] NSW Civil and Administrative Tribunal, Guardianship Division Guideline: Confidentiality, Privacy and Publication, August 2017, [3].
[28] Ibid [4].
[29] NSW Case Law, https://www.caselaw.nsw.gov.au/.
[30] NSW Civil and Administrative Tribunal, *NCAT Annual Report 2019-2020* (2020) 43.
[31] NSW Civil and Administrative Tribunal, *NCAT Annual Report 2018-2019* (2019) 38.
[32] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987: Question Paper 4 Safeguards and Procedures*, February 2017, 65-66.

1.4 Conclusion

It follows from the conventional understanding of the *parens patriae* jurisdiction that open justice in forums considering these matters is unnecessary and inappropriate. This is because this jurisdiction is shifted from the public sphere of the justice system as court to the private sphere of the justice system as father. Public scrutiny of these matters is then akin to intrusively peering in through the window of a house observing the private affairs of the family. The overwhelming sense is that there is 'nothing to see here', because the court is operating in a self-evidentially protective and benign jurisdiction responding to the needs of vulnerable people with disability.

Yet, in the context of the home and the family, feminist activism and feminist legal scholarship over decades has highlighted that the public/private divide is artificial and serves to conceal violence within domesticated settings *and* exclude those experiencing such violence from the justice system. Limiting open justice in the *parens patriae* jurisdiction has a similar impact in relation to violence against people with disability, as I now turn to discuss.

2. Restrictive Practices and Violence Against People with Disability

The *parens patriae* jurisdiction is central to enabling (and, through limiting open justice, concealing) violence against people with disability in the form of restrictive practices.

In Australia 47% (2.7 million) people with disability over the age of 15 have experienced violence in day-to-day and formal care settings, compared with 36% of people without disability.[33] Yet, this is only self-reported cases of physical violence and sexual violence that falls within criminal legal understandings of violence. This figure excludes non-consensual interventions in the bodies and lives of people with disability permitted by law specifically on the basis of disability. These are referred to as 'restrictive practices'.

2.1 Restrictive Practices

Restrictive practices have been defined as:

> a term used in Australia to refer to any action, approach or intervention that has the effect of limiting the rights or freedom of movement of a person.
>
> Restrictive practices can be used across Australia, as a last resort, to prevent or protect people from harm. This includes a perceived risk of harm. This may include preventing or protecting an individual or others from behaviours referred to as 'challenging behaviours' or 'behaviours of concern'.

[33] Australian Institute of Health and Welfare, 'People with Disability in Australia, 2020' (2020) 145-146.

Restrictive practices include:

- seclusion, where a person is confined to a physical space and prevented from leaving. An example is locking a person in a room for a set period of time.
- the use of restraints, which may be:
    - physical, for example, holding a person down on the ground so they cannot move in a hospital
    - chemical, for example, using medication to sedate a person
    - mechanical, for example, tying a person to a chair in a classroom, disconnecting the power of an electric wheelchair or taking a person's communication device away from them
    - environmental, for example, locking a garden area or fridge in a group home to stop people accessing it
    - psychosocial, for example, constantly telling a person that doing an everyday activity is too dangerous, without reasonable justification.[34]

Restrictive practices include non-consensual sterilisation and abortion in relation to people with disability.

There is absence of data specifically on restrictive practices and First Nations people. However, it has been observed that 'there is some evidence of overrepresentation of Aboriginal people and Torres Strait Islanders in guardianship systems around Australia'.[35]

Restrictive practices are non-consensual in the sense that an individual with disability is subjected to these interventions irrespective of their consent. However, the absence of the individual's consent is legally irrelevant because by reason of the *parens patriae* jurisdiction particular Courts and Tribunals have the jurisdiction to either authorise specific restrictive practices or appoint third parties as substitute decision-makers to make decisions individual's behalf about restrictive practices on the on an ongoing

[34] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Restrictive Practices Issues Paper*, May 2020, 1-2.

[35] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987*, Report 145 (2018) 47 [5.16]; see also 35-36 [4.35]-[4.37].

basis. In New South Wales, the Protective List and the Guardianship Division are two key forums for *parens patriae* matters and thus for regulation of restrictive practices.[36]

Restrictive practices can only legally be used in relation to people with disability (and primarily people with cognitive impairments or psychosocial disability). This is primarily because the legal frameworks regulating their use apply to people without mental capacity to make their own decisions. Their disability-specific nature is also associated with medicalised understandings of people with disability in terms of 'challenging behaviour' and 'behaviour intervention' and 'behaviour support'.

2.2 Growing Concern about Restrictive Practices as Violence Against People with Disability

The United Nations Committee on the Rights of Persons with Disabilities ('UN CRPD Committee') considers the use of restrictive practices and the substituted decision-making and compulsory treatment laws regulating their use to be contrary to human rights in the United Nations Convention on the Rights of Persons with Disabilities ('CRPD'). These rights include rights to equality and non-discrimination (Article 5), legal capacity (Article 12), liberty (Article 14), personal integrity (Article 17), freedom from torture and cruel, inhuman and degrading conduct (Article 15) and violence (Article 16).[37] The UN CRPD Committee has consistently urged States Parties to review such practices and related legislation and bring them in line with the CRPD. For example, Maker and McSherry summarise that:

> The UN Committee on the Rights of Persons with Disabilities, which monitors implementation of the CRPD, has repeatedly expressed its concerns about the use of restraint. It has recommended action to reduce or abolish restraint in its 'concluding observations' on reports submitted to it from many States Parties to

[36] Martin Gorrick, 'Protective Jurisdiction in New South Wales' (2016) 43 *Australian Bar Review* 205; GC Lindsay, 'A Province of Modern Equity: Management of Life, Death and Estate administration' (2016) 43 *Australian Bar Review* 9; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987: Question Paper 4 Safeguards and Procedures*, February 2017; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987: Question Paper 5 Restrictive Practices*, February 2017; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987: Question Paper 6 Remaining Issues*, February 2017, 55-57; Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (2019) <http://austlii.community/wiki/Books/CapacityAndTheLaw/> chs 6, 7, 15.

[37] See, e.g., Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Equal Recognition before the Law* (CRPD/C/GC/1, United Nations, 19 May 2014) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>; Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on Equality and Non-Discrimination* (CRPD/C/GC/6, United Nations, 26 April 2018) 2[9] <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en>. See also Juan Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (United Nations Human Rights Council, 1 February 2013) <https://www.refworld.org/docid/51136ae62.html>.

> the Convention including Slovenia, Luxembourg, the United Kingdom, Ethiopia, Thailand, Croatia, Germany, Denmark, the Republic of Korea, Mexico, Kenya and Australia.[38]

In its 2019 Concluding Observations on Australia, the UN CRPD Committee stated it was 'seriously concerned about':

> Legislation, policies and practices that allow for psychotropic medication, physical restraint and seclusion under the guise of "behaviour modification" or restrictive practices against persons with disabilities, including children, in any setting, such as justice, education, health, psychosocial and aged care facilities;[39]

The UN CRPD Committee urged Australia:

> Establish a nationally consistent legislative and administrative framework for the protection of all persons with disabilities, including children, from psychotropic medication, physical restraint and seclusion under the guise of "behaviour modification" and the elimination of restrictive practices, including domestic discipline/corporal punishment, in all settings;[40]

Australian Disabled People's Organisations ('DPOs') – organisations that are led by and made up of people with disability – argue that restrictive practices constitute violence and discrimination against people with disability and contribute to structural discrimination and segregation. DPOs advocate for law reform to prohibit and redress restrictive practices and abolish existing legal frameworks regulating restrictive practices.[41]

In the 2015 final report to its inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, the Senate Community Affairs References Committee considered 'disability-specific interventions', including restrictive practices.[42] In relation to restrictive practices, the Committee expressed the

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[38] Bernadette McSherry and Yvette Maker, 'Restrictive Practices: Options and Opportunities' in Bernadette McSherry and Yvette Maker (eds), *Restrictive Practices in Health Care and Disability Settings: Legal, Policy and Practical Responses* (Taylor & Francis Group, 2020) 3, 3.

[39] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia, Adopted by the Committee at Its 511th Meeting (20 September 2019) of the 22nd Session* (CRPD/C/AUS/CO/2-3, United Nations, 15 October 2019) para 29(a).

[40] Ibid para 30(a).

[41] Carolyn Frohmader and Therese Sands, *Submission to the Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings* (Australian Cross Disability Alliance (ACDA), 2015) 72 <https://wwda.org.au/wp-content/uploads/2013/12/ACDA_Sub_Sen_Inquiry_Violence_Institutions.pdf>.

[42] Senate Community Affairs References Committee, *Final Report: 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* (November 2015)

view that 'the right to liberty is a fundamental human right. The committee is concerned with the extent to which restrictive practice is used, and is deeply concerned with the system which allows service providers to arbitrarily deprive people of their liberty.'[43] It noted that '[c]learly, in many cases what is deemed to be a necessary therapeutic or personal safety intervention is in fact, assault and unlawful deprivation of liberty.'[44] The Committee recognised the centrality of legal incapacity to restrictive practices:

> At the heart of the issue of legal incapacity is the concept of decision-making for a number of reasons. First, when decision-making is removed from the hands of a person, it becomes easy for the decision-maker—whether it be parent, carer, or departmental officer—to then make decisions on behalf of that individual that may seem 'to be in their best interests' but may actually be completely counter to the wishes of that person. Second, in every situation where a person has been forced to cede their own autonomy to another, there is the opportunity for abuse of that decision-making power. Finally, when the erosion of control from people with disability is normalised it makes it easier for society to accept that even those people with disability not subject to a legal guardianship order can have their will subverted as happens with the use of restrictive practices or forced medical treatments.[45]

The Committee acknowledged negative impacts of legal appointment of guardianship and its potential for abuse:

> The loss of legal capacity has multiple flow-on consequences, one of which is the appointment of guardianship. In many cases guardianship is a positive protective measure, but in too many cases the appointment of a guardian can have a severe negative impact on people's lives:
>
> The guardianship process could be considered an abuse itself, particularly because of the loss of rights it entails.
>
> In more serious cases, guardianship could be sought in order to enact abuse or neglect: Evidence has shown that even well-meaning guardians can inflict abuse or neglect through lack of understanding of their role or by being risk averse.
>
> The fact that a vulnerable person may be prevented through guardianship arrangements from lodging a complaint is also a form of abuse. In many cases,

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<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report> ch 4.

[43] Ibid 99.

[44] Ibid 115.

[45] Ibid 74.

> the prevention of reporting violence, abuse and neglect leads to the indefinite perpetuation of inappropriate actions.[46]

The current Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability is exploring restrictive practices. In May 2020 it released an issues paper specifically on restrictive practices, on the basis that:

> Our working definition of violence and abuse includes restrictive practices. Some consider it a 'disability-specific' form of violence.
>
> Restrictive practices can cause serious physical injury, psychological harm and may cause death. Psychological harm may include trauma, fear, shame, anxiety, depression and loss of dignity. Restrictive practices can damage relationships and trust between a person with disability and the person carrying out the restrictive practice, such as a support worker, doctor or teacher. They can increase power imbalances and feelings of helplessness and lead to a loss of independence.[47]

Therefore, there is growing recognition of restrictive practices as violence against people with disability and of the harmful role of legal frameworks regulating restrictive practices.

2.3 The Role of Courts and Tribunals in Regulating Restrictive Practices

Even though restrictive practices are understood as causing physical and psychological harm to individuals subjected to them, they are not legally recognised as assault, false imprisonment or domestic violence in criminal and civil law. Thus, people with disability are not able to access redress for the harm done by restrictive practices, as I have written:

> Generally law protects individual autonomy and personal inviolability by rendering non-consensual physical contact or restriction of liberty unlawful, as assault or false imprisonment. However, while the absence of an individual's consent typically renders unlawful any violence against that individual, disability-specific coercive intervention is not recognised in law as unlawful violence, even though it is not consented to. To understand this contradiction, it is necessary to consider how criminal and civil law defines unlawful violence. Absence of consent is typically a defining element of unlawful violence (for example, criminal offences of assault, or torts of battery and false imprisonment). In very general terms, criminal law defines assault, and civil law battery, in terms of non- consensual interpersonal physical contact or the non-consensual threat

[46] Ibid 86–87.

[47] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Restrictive Practices Issues Paper*, May 2020, 1.

> of such contact (although consent does not always negate assault where the contact occasions actual bodily harm or worse). Pursuant to the tort of false imprisonment, restraint and seclusion is unlawful where it involves the non-consensual deprivation of liberty in a delimited space. Disability-specific coercive intervention does not constitute unlawful violence or imprisonment because of certain defences to criminal responsibility and tortious liability that operate to exclude certain conduct related to disabled people. These defences include third-party consent to medical treatment on behalf of an individual who does not have capacity to consent; the doctrine of necessity; and lawful authority (that is, where there is statutory or judicial authority for the intervention or confinement). The operation of these legal exceptions to unlawful violence means that restrictive practices and other such disability-specific coercive interventions do not attract liability under civil or criminal law. For individuals subjected to disability-specific coercive interventions, there is no access to remedies under tort law or victims' compensation statutory schemes, and no possibility of perpetrators being punished under criminal law. While there might be scope for imposing criminal or civil liability where the intervention or confinement is enacted negligently or contrary to law, this does not unsettle the fundamental legality of the intervention or confinement per se.[48]

Therefore, the violence of restrictive practices is *legally regulated* (rather than prohibited) and the criminal and civil justice systems are *complicit* in *enabling* (rather than redressing) this violence. It follows that, rather than seeing restrictive practices as therapeutic, benign, protective and non-violent, they can instead be understood as '*lawful* violence' and – by reason of their application only to be people with disability on the basis of perceptions of their disability or related mental incapacity – as 'disability-specific lawful violence'.[49]

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[48] Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge, 2020) 55-56.

[49] Linda Steele, 'Disability, Abnormality and Criminal Law: Sterilisation as Lawful and "Good" Violence' (2014) 23(3) *Griffith Law Review* 467; Linda Steele, 'Temporality, Disability and Institutional Violence: Revisiting In Re F' (2017) 26(3) *Griffith Law Review* 378; Linda Steele, 'Disability, Abnormality and Criminal Law: Sterilisation as Lawful and "Good" Violence' (n 278) 472–473; Linda Steele, 'Restrictive Practices in Australian Schools: Institutional Violence, Disability and Law' in R Dixon, K Trimmer and YS Findlay (eds), *The Palgrave Handbook of Education Law for Schools* (Palgrave Macmillan, 2018); Linda Steele, 'Sterilisation, Disability and Wellbeing: The Curative Imaginary of the "Welfare Jurisdiction"' in C Spivakovsky, K Seear and A Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 2018). See also CT Sheldon, KR Spector and M Birdsell, 'Uncovering Law's Multiple Violences at the Inquest into the Death of Ashley Smith' in A Daley, L Costa and P Beresford (eds), *Madness, Violence and Power: A Critical Collection* (University of Toronto Press, 2019); Claire Spivakovsky, 'The Impossibilities of "Bearing Witness" to the Institutional Violence of Coercive Interventions in the Disability Sector' in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 2018).

2.4 Conclusion

Contrary to the conventional understanding of the *parens patriae* jurisdiction introduced in Section 1 above, I submit that the *parens patriae* jurisdiction is actually a jurisdiction in which violence against people with disability is enabled and through which people with disability *become* disempowered, incapacitated and violated. On this basis, the longheld limitation on open justice in forums hearing *parens patriae* matters is unsustainable and itself contributes to the concealment of this violence and, therefore, must be reformed.

3. The Need for Open Justice in Restrictive Practices

In this section I identify three reasons why the NSWLRC should reform the current limitation to open justice in relation to the *parens patriae* jurisdiction, in order to facilitate public access to hearings, information, documentation and decisions of the Protective List and the Guardianship Division of the New South Wales Civil and Administrative Tribunal on an equal basis to other jurisdictions. These three reasons are: transparency and accountability in the justice system, recognition of human right to equality in the justice system, and unseating ableism in the justice system.

3.1 Transparency and Accountability in the Justice System

The principle of open justice has been described as 'one of the most pervasive axioms of the administration of justice in common law systems'.[50] It has been generally recognised that without open justice practices 'abuses may flourish undetected.'[51] The Queensland Law Reform Commission ('QLRC') considered open justice in the context of its project on confidentiality in guardianship law. In its final report published in 2007, it identified 3 rationales for open justice as expressed in the common law, all of which demonstrate the important role of open justice practices in transparency and accountability:

> Central to the *disciplinary rationale* of open justice is that it acts as a safeguard against judicial 'partiality, arbitrariness, or idiosyncrasy' and is thus a means of accountability. The disciplinary rationale also views open justice as acting as a check on legal counsel and against dishonest testimony.
>
> An open court has also been said to fulfil an *educative function* by informing the public about the law and legal process, and by prompting judicial arbiters to educate themselves in 'prevailing public morality and thereby avoid public criticism'. Open justice also promotes predictability and consistency in decision-

[50] JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29(2) *UNSW Law Journal* 147.
[51] *Russell v Russell* (1976) 134 CLR 495, 520.

making in that both decision-makers and those advising people about the law are aware of previous decisions and can act accordingly.

Finally, under the *investigative rationale*, it has been argued that an open court facilitates the production of additional witnesses and therefore plays an important part in securing completeness of testimony.[52]

The QLRC made a series of recommendations directed to enhancing public access to information about Guardianship Tribunal matters. For example, it recommended that the *Guardianship and Administration Act 2000* (Qld) should be amended so that 'a person may generally publish information about a Tribunal proceeding', although this cannot identify the individual subject to the proceedings. [53] In making its recommendations, the QLRC identified 'the principle of open justice' as one of three principles guiding its recommendations.[54] In explaining the importance of 'open justice' in the guardianship context, the QLRC noted:

> … the need for the community to have confidence in the guardianship system. The submissions as a whole revealed some mistrust in the system, and issues of confidentiality often underpinned those concerns. The Commission is of the view that an effective guardianship system must not only be functioning properly, but be seen to be doing so. It considers that greater openness will bring both the accountability and transparency that will strengthen community confidence. Further, an integral part of community confidence in the guardianship system is increasing public awareness of its role, and greater openness will also facilitate the achievement of this goal.[55]

The QLRC was of the view that the benefits of greater transparency and accountability outweighs the potential impacts on privacy:

> the Commission is of the view that insufficient weight has been given to the important role that open justice [plays] in promoting and safeguarding the rights and interests of adults with impaired capacity, both individually and as a group. Open justice fosters greater accountability and transparency which can improve decision-making by and for the adult. … In giving greater weight to the role that openness in decision-making can play in promoting and safeguarding the adult's rights and interests, the Commission acknowledges that there may be less

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[52] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, volume 1, Report No 62 (2007) 53 [3.29]-[3.31]. See also Queensland Law Reform Commission, *Public Justice, Private Lives: A Companion to the Confidentiality Report*, MP No 42 (2007).

[53] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, volume 1, Report No 62 (2007) 368-372 [7.324].

[54] Ibid 90-91 [3.156].

[55] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987*, Report 145 (2018) 83 [3.127].

> priority given to some of the adult's interests, such as his or her privacy. It nevertheless considers such an approach, which enhances the quality of decision-making, will serve to advance the adult's interests overall.[56]

In contrast, the recent NSWLRC inquiry into the *Guardianship Act 1987* (NSW) did not consider open justice and instead focused on the issue of privacy.[57] Thus, the issue of open justice in the NSW guardianship context has not been thoroughly considered in previous NSWLRC projects.

The issue of open justice in relation to restrictive practices has also recently been considered in the context of the Court of Protection ('CoP'). The CoP is a court operating in England and Wales which was established by the *Mental Capacity Act 2005* to 'make financial or welfare matters for people who can't make decisions at the time they need to be made (they 'lack mental capacity')'.[58] It hears matters relating to the *parens patriae* jurisdiction, and has restrictions on public access to its work.[59] Series et al held a workshop to discuss open justice and their report on the outcomes of the workshop emphasise the importance of transparency:

> Proceedings in the Court of Protection involve a delicate balance between transparency and open justice, on the one hand, and the preservation of the right to respect for privacy for the intimate details of the life of the person who is alleged to lack capacity. All participants expressed support for the principle of 'open justice'. Media reporting on CoP cases, and the publication of judgments, were said to be important for the following reasons:
>
> - To enhance public understanding of the CoP's work;
>
> - To protect against miscarriages of justice;
>
> - To promote public confidence in the court;
>
> - 'Open' and 'accessible' judgments were said to be important for access to justice for litigants in person who might not have access to law reports or legal advice.
>
> It was also suggested that media reporting could include facts and details which were not apparent in a published judgment but which might aid public

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[56] Ibid 83 [3.129].

[57] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987*, Report 145 (2018) ch 16; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987: Question Paper 4 Safeguards and Procedures*, February 2017, 65-66.

[58] *Court of Protection*, https://www.gov.uk/courts-tribunals/court-of-protection.

[59] Lucy Series, Phil Fennell, Julie Doughty and Luke Clements, *Transparency in the Court of Protection: Report on a Roundtable* (2015) https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Transparency20in20the20Court20of20Protection20Report.pdf 12-20.

> understanding of a case, whilst published judgments were important as a corrective against poor or inaccurate journalism.[60]

The report of the workshop documents examples of where the media reporting of matters raised public awareness about deprivation of liberty.[61]

Writing in the context of open justice and mental health law, media law academic Mark Pearson notes the importance of greater public scrutiny of the deprivation of liberty of people with disability:

> The field is ripe for further research and is also overdue for legislative reform opening the courts and tribunals to greater scrutiny so that the public can be better educated about the people affected by mental illness and the processes involved in dealing with them, and better informed about the decisions that deprive so many of their fellow citizens of their liberty.[62]

Drawing on all of these observations, it is submitted that greater public access to the work of the Protective List and Guardianship Division is central to enhanced transparency and accountability of the justice system which, through its regulation of restrictive practices, is engaged in making decisions that can cause considerable harm to people with disability.

Public access to the work of the Protective List and the Guardianship Division as a means of enhancing transparency and accountability is *particularly* significant in relation to restrictive practices for four further reasons. First, access to the work of these forums is central to DPOs, disability rights advocates and academics being able to construct a systemic and empirical picture of violence against people with disability and in turn facilitating advocacy and research directed towards ending violence against people with disability. For example, during 2020 the Guardianship Division published two of its decisions in the context of COVID-19 significantly expanding the scope of guardianship orders in relation to restrictive practices.[63] A colleague and I subsequently made a submission about these decisions to the Royal Commission into

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[60] Lucy Series, Phil Fennell, Julie Doughty and Luke Clements, *Transparency in the Court of Protection: Report on a Roundtable* (2015) https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Transparency20in20the20Court20of20Protection20Report.pdf 2.

[61] Lucy Series, Phil Fennell, Julie Doughty and Luke Clements, *Transparency in the Court of Protection: Report on a Roundtable* (2015) https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Transparency20in20the20Court20of20Protection20Report.pdf 16 (Steven Neary), 21 (Manuela Sykes).

[62] Mark Pearson, 'Mental Illness, Journalism Investigation and the Law in Australia and New Zealand' (2011) 17(1) *Pacific Journalism Review* 90, 99. See also Mark Pearson, Tom Morton and Hugh Bennett, 'Mental Health and the Media: A Comparative Case Study in Open Justice' (2017) 9(2) *Journal of Media Law* 232.

[63] *UZX* [2020] NSWCATGD 3 (3 April 2020), *GZK* [2020] NSWCATGD 5 (23 April 2020).

Violence, Abuse, Neglect and Exploitation of People with Disability.[64] Without publication of these we would not have been aware of these worrying legal developments. Yet, because not all decisions made by the Guardianship Division are published it was impossible for my colleague and I to get a complete picture of the impact of these two decisions on the work of the Guardianship Division (e.g., whether similar decisions had been made in other matters) and when we sought this information from the NCAT Registry, we were directed to s 101 of the *Guardianship Act 1987* (NSW).[65]

In the 2015 final report to its inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, the Senate Community Affairs References Committee noted the absence of data:

> The committee notes that there are currently no nationally consistent data sets available to describe the extent of violence, abuse and neglect of people with disability. This raises two fundamental problems. First, there is overwhelming anecdotal evidence of violence, abuse and neglect of people with disability—made in submissions and during public hearings to this inquiry. There is a need to formally recognise and quantify the extent of this abuse. The second issue is that the absence of official nationally consistent data sets in itself is a critical roadblock to these issues being addressed. Nationally consistent data on this issue is an essential element to guide long-term policy development to eliminate instances of violence, abuse and neglect against people with disability.[66]

It also noted the challenge of quantifying the scope of the problem of violence:

> The committee notes with great concern, the lack of reliable and consistent data on violence, abuse and neglect of people with disability, and the complete lack of data on the outcomes of reporting and investigations. It is impossible to adequately address an issue that has not properly been identified. Part of the work to eliminate violence and abuse of people with disability must surely include quantifying the precise nature of the problem.[67]

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[64] Claire Spivakovsky and Linda Steele, Submission on Restrictive Practices and Emergency Planning and Response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2020).

[65] Personal email communication on file with author.

[66] Senate Community Affairs References Committee, *Final Report: 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* (November 2015) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report> 37-38.

[67] Ibid 68.

The Committee made a series of recommendations concerning data collection in relation to violence against people with disability.[68] While the Committee was focused on data on violence perpetration, I submit that its concerns are also relevant to justice system data on violence enablement. Public accessibility to the work of the Protective List and the Guardianship Division provides a wealth of quantitative and qualitative information on restrictive practices to deepen understanding of the extent that law is entangled in sustaining violence against people with disability. Moreover, conventional data collection on violence – such as the ABS Personal Safety Survey – does not extend to violence in the form of restrictive practices[69] such that it is important to have direct access to data at the front end of Court and Tribunal authorisation, rather than the tail end of perpetration.

Second, and relatedly, failure to facilitate public accessibility to the work of the Protective List and the Guardianship Division contributes to a public apathy towards addressing this violence. In not 'counting' this violence (or making it available to the public to be counted), the civil justice system sends the message these interventions are not legible as violence and that people with disability do not count as grievable victims worthy of public concern.[70] This contributes to the 'detoxification'[71] of restrictive practices.

Third, lack of public accessibility becomes a continuation of the secretive and closed nature of the segregated and closed settings in which violence through restrictive

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[68] Ibid xxiii-xxiv.

[69] Anne Kavanagh, Sally Robinson and Jess Cadwallader, 'We Count what Matters, and Violence Against People with Disability Matters', *The Conversation*, 27 November 2015 <https://theconversation.com/we-count-what-matters-and-violence-against-people-with-disability-matters-51320>.

[70] Anne Kavanagh, Sally Robinson and Jess Cadwallader, 'We Count what Matters, and Violence Against People with Disability Matters', *The Conversation*, 27 November 2015 <https://theconversation.com/we-count-what-matters-and-violence-against-people-with-disability-matters-51320>. See also Claire Spivakovsky, 'The Impossibilities of "Bearing Witness" to the Institutional Violence of Coercive Interventions in the Disability Sector' in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 2018).

[71] For example, Frohmader and Sands note in the context of the use of the terms 'abuse' and 'neglect' rather than 'violence': 'regardless of setting or context, violence against people with disability in Australia continues to be conceptualised, downplayed and "detoxified" as "abuse" or "neglect" or "service incidents," or "administrative infringements" or a "workplace issue to be addressed" - rather than viewed as "violence" or crimes. This widespread tendency to downplay and re-frame violence as "abuse" or as a "service incident" results in denying people with disability the legal protections and justice extended to other people.': Carolyn Frohmader and Therese Sands, *Submission to the Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings* (Australian Cross Disability Alliance (ACDA), 2015) 9 <https://wwda.org.au/wp-content/uploads/2013/12/ACDA_Sub_Sen_Inquiry_Violence_Institutions.pdf>.

practices is often perpetrated (e.g. group homes, disability residential institutions, sheltered workshops).[72]

Fourth, open justice is particularly important because the decisions made in the Protective List and Guardianship Division relating to restrictive practices can have significant impacts on people with disability. Conventionally, open justice is recognised as particularly significant in the criminal justice context by reason of the possibility of loss of liberty. However, legal outcomes in the Protective List and Guardianship Division relating to restrictive practices can also result in loss of liberty and in ways that can even surpass what is legally possible through criminal law. For example, legal outcomes can include detention (e.g., in group homes, disability residential institutions or residential aged care facilities), with no fixed end date. Indeed, in its 2016 final report on its inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia, the Senate Community Affairs References Committee[73] considered restrictive practices pursuant to guardianship orders as constituting 'indefinite detention'.[74] Legal outcomes can also involve interventions beyond deprivation of liberty, including permanent or long-term removal of menstruation and reproduction, chemical restraint, having a mobility device inactivated to prevent physical movement, or being tied to a chair or bed for long periods of time.

3.2 Human Right to Equality in the Justice System

The second reason for greater public accessibility to the work of the Protective List and the Guardianship Division is that people with disability should be entitled to open justice on an equal basis to others, as a matter of human rights. In a context where the very existence of legal frameworks enabling disability-specific violence is profoundly discriminatory, the procedural context in which these legal frameworks operate as

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[72] On violence in closed and institutional settings, see Patsie Frawley and Bronwyn Naylor, 'Human Rights and People with Disabilities in Closed Environments' (2014) 31 *Law in Context* 74; Senate Community Affairs References Committee, *Final Report: 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* (November 2015) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report>.

[73] Senate Community Affairs References Committee, *Final Report: Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (text, Commonwealth of Australia, 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report>.

[74] Ibid 162[8.40], 166[8.59]. For a critical discussion of guardianship and indefinite detention, see Linda Steele, 'Troubling Law's Indefinite Detention: Disability, the Carceral Body and Institutional Injustice' (2021) 30(1) *Social and Legal Studies* 80.

entitling people with disability to lower standards of open justice sustains their inequality in the justice system.

Article 13.1 of the CRPD on access to justice states:

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

Article 5.1 and 5.2 on equality and non-discrimination states:

> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

Both of these Articles highlight the importance of *equal* treatment in the justice system. To the extent that we continue to have the discriminatory and segregating *parens patriae* jurisdiction (noting that the ultimate realisation of human rights would be the abolition of this jurisdictions and related forums and legal doctrine), people with disability involved in matters in this jurisdiction should be subject to the *same* standards of open justice as are enjoyed by people in *other* jurisdictions. Limiting open justice at the jurisdictional level (rather than on a case-by-case basis as is apparent in other contexts[75]) facilitates structural discrimination and segregation along disability lines in the justice system.

3.3 Unseating Ableism in the Justice System

The third reason for public accessibility to the work of the Protective List and the Guardianship Division is the need to unseat ableism embedded in the justice system.

The conventional justification for limiting open justice in relation to the *parens patriae* jurisdiction is premised on paternalistic and ableist assumptions about people with disability and, in turn, the role of the justice system in relation to people with disability. The common law limitation discussed in *Hogan v Hinch* and *Scott v Scott* (see Section 1.2 above) is implicitly premised on the assumption that the Court is acting in the private affairs of the family like a caring and loving parent (or,

[75] See, e.g., the discussion 'sensitivity' in Katherine Biber, 'Inside Jill Meagher's Handbag: Looking at Open Justice' (2014) 39(2) Alternative Law Journal 73, 74-75.

historically, father) towards their child. The legislative limitations in the Guardianship Division are implicitly premised on the assumption of the need for privacy arising from the combination of the sensitivity of the matters and the vulnerability of people with disability (see Section 1.3 above).

These assumptions construct the *parens patriae* jurisdiction as inherently benevolent and as coming to the rescue of helpless people with disability to protect them from threats to their safety and wellbeing *external* to the justice system. These assumptions construct people with disability as inherently violable (by forces external to the justice system) by reason of their inherent incapacity and vulnerability associated with their disability. Yet, in light of the role of the *parens patriae* jurisdiction in regulating restrictive practices, what these assumptions actually do is facilitate both the concealment of legal violence done *through the justice system* and the role of the justice system in *disempowering and incapacitating* people with disability and *making them violable*. Noting the centrality of open justice to the rule of law and democratic governance (discussed in Section 1.1 above), ultimately these paternalistic and ableist assumptions exclude people with disability contribute to the impossibility of recognising people with disability as full legal subjects and citizens and their exclusion from full political community and humanness.[76]

4. Conclusion

Recognition of the role of the *parens patriae* jurisdiction in legal violence undermines both the conventional understanding of this jurisdiction as protectively and benignly responding to the needs of vulnerable people with disability and the longstanding rationale for limiting open justice in forums hearing matters falling within this jurisdiction. Greater public access to the work of the Protective List and the Guardianship Division is central to gaining a comprehensive understanding of the justice system's role in restrictive practices, in order to more fully address the systemic issue of violence against people with disability and ensure equality in the justice system for people with disability.

In order to prevent violence against people with disability, realise their human rights and achieve their equality in the justice system and society more broadly, it is vital that the NSWLRC recommend reforms (to the extent possible in the scope of its project) to ensure hearings, information, documentation and decisions of the Protective List and the Guardianship Division of the New South Wales Civil and Administrative Tribunal are publicly accessible on an equal basis to other jurisdictions.

[76] See similar discussion in the context of criminal law: Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge, 2020) 56.