

# Submission

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## National Human Rights Consultation

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June 2009

People with Disability Australia Incorporated



people with disability

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# 1. People with Disability Australia

## 1.1 About us

People with Disability Australia Incorporated (PWD) is a national disability rights and advocacy organisation. We exist within the international human rights framework and provide a number of activities, which include individual, group and systemic advocacy, consumer protection, information, education and training.

Individuals with disability and organisations of people with disability are our primary voting membership. We also have a large associate membership of people and organisations committed to the disability rights movement.

We were founded in 1980, in the lead up to the International Year of Disabled Persons (1981), to provide people with disability with a voice of our own. We have a fundamental commitment to self-help and self-representation for people with disability, by people with disability.

We have a cross-disability focus – membership is open to people with all types of disability. Our services are also available to people with all types of disability and their associates.

We are governed by a Board of directors, drawn from across Australia, all of whom are people with disability. We employ a professional staff to manage the organisation and operate our various projects. A majority of our staff are also people with disability.

We are part of an international network of disabled peoples organisations through Disabled Peoples International.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated.

We believe that people with disability, irrespective of our age, gender, cultural or linguistic background, religious beliefs, geographic location, sexuality, or the nature, origin, or degree of our disability:

- have a right to life, and to bodily integrity
- are entitled to a decent standard of living, an adequate income, and to lead active and satisfying lives
- are people first, with human, legal, and service user rights that must be recognised and respected
- are entitled to the full enjoyment of our citizenship rights and responsibilities
- are entitled to live free from prejudice, discrimination and vilification
- are entitled to social support and adjustments as a right, and not as the result of pity, charity or the exercise of social control

- contribute substantially to the intellectual, cultural, economic and social diversity and well-being of our community
- possess many skills and abilities, and have enormous potential for life-long growth and development
- are entitled to live in, and be a part of, the diversity of the community
- have the right to participate in the formulation of those policies and programs that affect our lives
- must be empowered to exercise our rights and responsibilities, without fear of retribution.
- Have the right to define the policies and programs that affect our lives
- Ought to be empowered to exercise our rights and responsibilities, without fear of retribution

## **1.2 Our human rights expertise**

PWD has extensive human rights expertise, particularly in relation to people with disability. Our work – advocacy, training, information and consumer protection – is all underpinned by human rights. We recognise people with disability as right-bearers and interpret their needs and concerns in terms of human rights. This affects the work we do as well as how we do our work.

PWD has Special Consultative Status with the Economic and Social Council of the United Nations (UN), and participates in many UN Intergovernmental meetings and non-government forums at both the Asia Pacific and international levels.

We actively engage in human rights mechanisms, such as Government and non-government reporting processes to the UN and engaging with UN Special Procedures:

- We have participated in the development of non-government Shadow Reporting processes for the International Covenant on Civil and Political Rights (ICCPR), the International Covenant for Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CROC), the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In the case of CEDAW, we were a member of the 2006 non-government delegation that participated in the review of the Australian Government at the UN.
- We hosted the UN Special Rapporteur on Adequate Housing at a roundtable to discuss housing rights for people with disability in Australia.
- We facilitated the participation of Indigenous women with disability at the Pacific region consultations on housing rights conducted by the UN Special Rapporteur on Adequate Housing.

PWD has extensive knowledge and understanding of the UN Convention on the Rights of Persons with Disabilities (CRPD). During CRPD development, PWD participated in several of the UN Ad Hoc Committee meetings, and undertook two consultative processes with people

with disability throughout Australia on the CRPD. PWD made over 32 interventions to the Ad Hoc Committee including the last meeting where the draft text was agreed. The final text of CRPD, in many aspects reflects the content of the consultation reports and interventions of PWD.

The involvement of PWD, along with other disabled peoples organisations from around the world, marked an important shift in the development of United Nations instruments. This was the first time that the people directly affected were instrumental in drafting a thematic convention. We believe that this leadership role by people with disability must continue throughout the implementation of CRPD rights.

After Australia signed the Convention in July 2008, PWD, NSW Disability Discrimination Legal Centre (representing the National Association of Community Legal Centres [NACLC]), Queensland Advocacy Incorporated (QAI), the Australian Federation of Disability Organisations (AFDO) and the secretariat of the state and territory disability advisory councils formed a taskforce on the ratification of CRPD ('The Taskforce').

In 2008, the Taskforce undertook a consultation project looking at the Impact of Ratification of the UN Convention on the Rights of People with Disability in Australia on behalf of the Australian Government.

Following the ratification of the Convention on 18 July last year, the Taskforce turned its attention to the implementation of the Convention. With support from the Australian Human Rights Commission and the Australian Council of Social Services, the Taskforce held a full day workshop on 13 November 2008 to begin work to develop a framework for the National Disability Strategy based on the UN Convention.

Most recently, PWD in collaboration with the NSW Disability Discrimination Legal Centre (DDLC) and Queensland Advocacy Incorporated (QAI) have initiated the process for the development of the non-government CRPD Shadow Report.

As a member of the Australian Human Rights Group (AHRG) PWD supports the call for a legally enforceable Human Rights Act.

### **1.3 About this submission**

This submission reflects the range of views gathered by PWD for the purpose of informing the Australian Government's National Human Rights Consultation.

PWD has been actively engaged in ensuring the voice of people with disability is being included in this consultation process by ensuring this submission reflects:

- views expressed, and information provided, by speakers and participants of the DDLC-PWD Hot Topics Forum '*Getting Real on Human Rights - Embracing an Australian Human Rights Act for People with Disability*' held on 8 May 2009. This forum was targeted at representatives of the legal and disability advocacy sectors to discuss key

issues for people with disability which may be highlighted in submissions made to the Human Rights Consultation.

- views expressed by QAI in their submission to the Human Rights Consultation. As a key presenter at the Hot Topics Forum, QAI shared their draft submission to forum participants as a guide for developing views and submissions.
- views expressed by PWD members. On 15 May, PWD held a Members Event to provide an opportunity for members to have input into PWD's submission. Members were also provided with a plain English 'Have Your Say About Human Rights In Australia' submission form, developed by the Human Rights Law Resource Centre and DDLC, which they could use to submit their own personal submissions.
- comments provided by PWD's Human Rights, Citizenship and Justice Portfolio Advisory Group (PAG) on our draft submission. This PAG consists of PWD Board representatives and PWD members.
- the issues and concerns raised by people with disability through PWD's day-to-day work in:
  - providing extensive assistance to people with disability and their associates through its Individual and Group Advocacy service;
  - providing systemic and legal advocacy on local, national and international issues;
  - auspicing the National Disability Services Abuse and Neglect Hotline and the Complaints Resolution and Referral Service;
  - providing information and training on disability rights and consumer information.
- views expressed by a variety of Australian representative organisations governed by persons with disability, the national and state and territory disability advisory councils, and the disability legal services network who participated in a series of consultations conducted in February 2008 undertaken by the Taskforce (see 1.2 above) on the impact of Australia ratifying the CRPD. The Final Report to the Australian Government on the Taskforce consultations includes recommendations on implementation of CRPD and the protection of the rights of people with disability in Australia.

This submission uses the CRPD as its key interpretative aid for the recognition and application of all rights of persons with disability

This submission also includes reference to 'human rights indicators'. *The Human Rights Indicators for People with Disability* is a resource developed by QAI with the intention of promoting awareness, understanding and application of the CRPD. These 'indicators provide specific information on the state and condition of an event, activity or outcome' and attempt to provide 'specific information about the degree to which human rights and fundamental freedoms are 'enjoyed' ('attained' or 'realised')' in a particular context'<sup>1</sup>. The human rights indicators are provided as examples of possible indicators which could be used to measure the realisation of human rights for people with disability to the issues raised by this submission.

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<sup>1</sup> 2008 French, P Disability Studies and Research Institute for Queensland Advocacy Incorporated. Human Rights Indicators for People with Disability. [www.qai.org.au](http://www.qai.org.au)

## 2. Snapshot of Australian people with disability

- Some form of disability affects about one in five Australians, this represents almost 20 per cent or 3.96 million Australians. This number is increasing, particularly as the population ages<sup>2</sup>.
- People with a disability are less likely to have completed a higher educational qualification than those without a disability<sup>3</sup>.
- Fewer people with disability participate in the workforce than those without disability. More people with disability are unemployed than those without disability<sup>4</sup>. When employed, people with disability earn lower wages, on average, than workers without disability<sup>5</sup>.
- People with disability have higher rates of health problems. For example, health problems experienced by people with intellectual disability are often not diagnosed or appropriately treated. Life expectancy is reduced by up to 20 years<sup>6</sup>.
- As a group, women with disability in Australia experience many of the now recognised markers of social exclusion – socio-economic disadvantage, social isolation, multiple forms of discrimination, poor access to services, poor housing, inadequate health care, and denial of opportunities to contribute to and participate actively in society.<sup>7</sup>
- People with disability are three times more likely to be a victim of violent crime. Fifty to ninety percent of women with intellectual disability are likely to be sexually assaulted in their lifetime. There are high rates of assault of people with disability by service providers. The sexual assault of a person with disability is less likely acted on<sup>8</sup>.
- Parents with disability, particularly those with intellectual disability and psychosocial disability are significantly over represented in the child protection system<sup>9</sup>.
- Recent World Bank estimates indicate that people with disability may account for as many as one in five of the world's poorest people<sup>10</sup>.
- Life expectancy for people with disability living in residential care is 54 years<sup>11</sup>, this on average is 27 years less than the average Australian.

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<sup>2</sup> Australian Bureau of Statistics (ABS) (2003) *Disability, Ageing and Carers Summary of Findings*. Another 20 per cent of Australians (4.15 million) have a long-term health condition that does not restrict their everyday activities.

<sup>3</sup> ABS, 2003, *Disability, Ageing and Carers Summary of Findings*

<sup>4</sup> ABS, 2003, *Disability, Ageing and Carers Summary of Findings*

<sup>5</sup> ABS, 2003, *Disability, Ageing and Carers Summary of Findings*

<sup>6</sup> National and NSW Council for Intellectual Disability and Australian Association of Developmental Disability Medicine (2009), *Position Statement on the health of people with intellectual disabilities*.

<sup>7</sup> Women with Disability Australia (WWDA) (2009) *Submission to the National Human Rights Consultation*.

<sup>8</sup> Sexual Assault in Disability and Aged Care, prevention and response for residential services (SADA) (2009)

[www.sadaproject.org.au](http://www.sadaproject.org.au)

<sup>9</sup> Legislative Council Standing Committee on Social Issues, (December 2002) *Care and Support – Final Report on Child Protection Services*, p. 144; Legislative Council Standing Committee on Social Issues, (November 2002) *Making it Happen – Final Report on Disability Services*, p. 126

<sup>10</sup> Ann Elwan (1999) *Poverty and Disability*; a background paper for the World Development Report, World Bank, October 1999. [www.addc.org.au](http://www.addc.org.au)

<sup>11</sup> NSW Ombudsman 2007, *Report of Reviewable Deaths 2007: Volume 1 Deaths of people with disabilities in care*, p 6. [www.ombo.org.au](http://www.ombo.org.au)

### **3. Which human rights (including corresponding responsibilities) should be protected and promoted?**

#### **3.1 *What are human rights?***

Human rights are fundamental rights and freedoms that are intrinsic to every person by virtue of their status as a human being. In this sense, human rights are said to be ‘inalienable’ because they can neither be given to a person, nor can they be taken away from them.

Human rights are universal norms in the sense that they are recognised by the international community as intrinsic to every person irrespective of their national, cultural, political, geographic, social, religious or temporal context, and any other personal characteristics, such as gender, race, sexuality, age, or disability. They are norms applicable to all persons, at all times, in all societies.

The ultimate source of all human rights is the dignity of the person. Human dignity refers to the inherent worth, uniqueness, equality and autonomy of all human beings, and our ability to realize our potential. Dignity might also be conceptualised as the end goal of human rights. Human rights express the conditions necessary for human dignity to be fully realised.

#### **3.2 *Formal sources of human rights***

In Australia, the principal sources of human rights are United Nations human rights ‘treaties’ that the Australian Government has entered into on behalf of the nation. However, there are other sources of human rights, including Australian constitutional, statutory and common law.

International treaties to which Australia has become a party are binding upon Australia in its relationship with the international community. In other words, Australia is accountable to the international community for ensuring that the rights set out in these treaties are respected, protected and fulfilled within Australia.

PWD believes that all internationally agreed human rights must be protected in Australian law. Australia is currently a Party to the following treaties:

- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Covenant on Civil and Political Rights (ICCPR)
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- Convention Against Torture, and Other Cruel, inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CROC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

### **3.3 *Categorisation of human rights***

Human rights are typically conceptualised as falling into two basic categories:

- Civil and political rights - These are rights that protect the individual from the arbitrary exercise of power by the State, and that protect the individual's right to self-determination free from arbitrary (unlawful) exercise of power by the State. Examples of civil and political rights are the right to life, freedom of movement, freedom from discrimination, the right to vote by secret ballot, freedom of conscience, and freedom of association.
- Economic, social and cultural rights - These are rights that seek to protect and enhance the economic status, social and cultural wellbeing of peoples. Examples of economic and social rights include the right to work, the right to social security, and the right to an adequate standard of living, the right to health and the right to education. With regard to cultural rights it is essential that this include the recognition and protection of traditional lands, territories and resources, as well as the enjoyment of culture, use and preservation of languages, and to not be subjected to forced assimilation or destruction of culture.

Civil and political rights are sometimes referred to as 'fundamental freedoms' or 'negative rights' because they recognise and protect the individual from arbitrary (unlawful) interference by the State. These rights are considered 'immediately realisable' which means that nations must give immediate effect to these rights. In other words, a nation must immediately respect, protect and fulfil civil and political rights in their entirety otherwise it will violate these rights.

Economic, social and cultural rights are sometimes referred to as 'positive rights' or 'positive obligations' because they require nations to take action (rather than refrain from it) to improve the wellbeing of peoples.

Civil and political rights tend to focus on the rights of individuals, whereas economic, social and cultural rights tend to focus on the rights of peoples.

Economic, social and cultural rights are 'progressively realisable,' which means that nations do not have to immediately fully comply with their obligations in relation to these rights, but must work to fulfil these obligations over time. However, it is essential to understand that this does not mean that economic, social and cultural rights are 'indeterminate' or merely 'aspirational' and therefore are incapable of being violated. In fact, many elements of economic, social and cultural rights have quite concrete implications. Moreover, the obligations associated with the progressive framework within which economic, social and cultural rights must be realised are also quite concrete.

Human rights are indivisible, interdependent and interrelated. The realisation of any one human right will often depend upon the realisation of other human rights. For example, fulfilment of the right to vote (democratic self-determination) or of equitable access to public sector employment will often depend upon the realisation of the right to education. For this reason, PWD is strongly opposed to any option for an Australian Charter of Rights that would fail to recognise all those classes of human rights that form part of Australia's international human rights obligations.

In other words, PWD views it as essential that any option for a Charter of Rights recommended by the Consultation Committee incorporate:

- Civil and political rights;
- Economic, social and cultural rights; and
- Rights of specific population groups, including those set out in thematic conventions and declarations.

Economic, social and cultural rights are of particular significance to Australians who have a low socio-economic status, particularly people who face multiple and aggravated disadvantage, including because of impairment and disability. If a Charter of Rights is to benefit the Australian community in an equitable way, it is therefore essential that economic, social and cultural rights are incorporated into any Charter framework.

Action taken to progressively realise economic, social and cultural rights must also be equitably distributed across the population. This means that the most intensive efforts to progressively realise an economic, social or cultural right must be targeted to those individuals and groups who are subject to the most serious deprivation or violation of the right. It would not be enough, for example, that the living conditions of more advantaged individuals and groups continue to improve, while those of disadvantaged individuals and groups did not, or did not do so to at least the same extent.

A number of the treaties that Australia is a Party to can be described as thematic treaties, or containing thematic rights. These rights are interpretations of civil and political, economic, cultural and social rights. They are interpreted to apply to groups in society. These treaties include ICERD, CEDAW, CROC and CRPD. Members of PWD and other people with disability consulted were very clear that for a human rights Act to succeed it must contain all categories of rights.

### ***3.4 Interpretation of human rights for people with disability***

The CRPD was developed in an effort to overcome the 'invisibility' of persons with disability in international human rights law and practice. Although the major human rights covenants apply to persons with disability on an equal basis with others, it is now generally accepted that these treaties have done little in practice to protect, promote and fulfil the rights of persons with disability.

In part, this is because these treaties, both in their formulation and in their implementation, have not penetrated to many of the specific forms of human rights violation persons with disability experience. For the most part, the human rights set out in the major covenants are expressed at a high degree of generality. This is sometimes problematic in a disability context because it may not be obvious how these general statements apply to the specific human rights concerns that persons with disability face. There has also been a general failure to recognise persons with disability as right-bearers and to interpret their needs and concerns in terms of human rights.

CRPD has been conceptualised as an implementation convention; one that sets out a detailed code for how existing rights should be put into practice with respect to persons with disability.

The CRPD is thus an essential supplement and interpretative aid for the recognition and application of the rights of people with disability, however it must be read in conjunction with (rather than instead of) Australia's other human rights obligations.

Any option for a Human Rights Act or similar instrument considered by the Consultation Committee must be explicit in its recognition of the rights of persons with disability enunciated in the Convention on the Rights of Persons with Disabilities (CRPD).

Human rights in their traditional formulation have often failed to penetrate to those human right violations most likely to be, or uniquely, experienced by persons with disability. It was for this reason that the CRPD was developed. Should a Human Rights Act fail to include CRPD rights, it is highly likely that it will also fail to penetrate to the lived experience of persons with disability.

### **3.5 Future interpretations of human rights**

During our consultations for the development of this submission, many participants identified that there are some international human rights treaties that Australia is not yet a Party to, and there are some specific population groups, most notably Indigenous Peoples that do not have their human rights specifically articulated in a legally binding international treaty.

The recognition and elaboration of human rights norms is a continuing process. Australia may still accede to those treaties it has not yet ratified - *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; and *International Convention for the Protection of All Persons from Enforced Disappearance*. New human rights norms will continue to be developed by the international community. Australia may accede to, or ratify, these treaties in future, and it is therefore essential that any Human Rights Act should be flexible enough to permit the seamless future incorporation of new human rights norms into Australian law.

Along with the views of QAI, we suggest that one mechanism that would achieve this is to include a 'declaration' provision in a Human Rights Act that would permit the Australian Parliament to declare human rights enunciated in a treaty to which Australia has become a Party human rights that are to be recognised in Australian law. It would then not be necessary or desirable for a Human Rights Act to be amended by legislative process to recognise additional human rights, where these rights form part of Australia's international obligations.<sup>12</sup>

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<sup>12</sup> This view is articulated in the submission of Queensland Advocacy Incorporated, and reproduced here with the permission of QAI.

## 4. Are these human rights currently sufficiently protected and promoted?

### 4.1 What people with disability told us

The resounding opinion expressed by people with disability during our consultation processes was that they felt let down by current human rights processes, legislative protections and complaint mechanisms. Many people expressed their disappointment in politicians and the judiciary who had failed in their duty to recognise or avoid human rights violations occurring to people with disability, and to immediately remedy such violations when they did occur. People with disability spoke of being disempowered and ignored, ill equipped with knowledge and support needed to be heard and without options for remedy<sup>13</sup>.

Statements from people with disability<sup>14</sup>

“The DDA [Disability Discrimination Act] and other laws are used by bureaucrats and service providers to weasel their way out of their responsibilities”.

“We don’t want something ‘watered down and not inclusive of all rights, we need systemic support mechanisms not just another piece of paper”.

“In Australia, we believe that we have lots and lots of rights which isn’t the case”.

“How can people make informed decisions if they have no idea about what rights they have”.

The fact that human rights violations are commonplace for people with disability, and to a very significant degree, institutionalised in public policy and programmes, does not alter the immediacy with which Governments must act to remedy these violations; indeed, it intensifies the urgency for action<sup>15</sup>.

People with disability expressed feelings of reservation towards the introduction of a Human Rights Act as they were unsure whether it would make a real and practical difference in their everyday lives. Whilst most supported the notion of a Human Rights Act, they were concerned that such an Act may become ‘just another piece of paper’. Their view of human rights and their true benefit is echoed in the following statement made by Michael Dodson, 2009 Australian of the Year who was speaking of the UN Declaration in the Rights of Indigenous Peoples:

“The fact of the existence of human rights standards is not the source of Indigenous disadvantage. Human rights do not dispossess Indigenous peoples, they do not marginalise them, they do not cause their poverty, and they do not cause the gaps in life expectancy and life outcomes. It is the denial of rights that is a large contributor to these things. The value of human rights is not in their

<sup>13</sup> PWD and DDLC (May 2009) Hot Topics Seminar & Human Rights Consultation Members Event.

<sup>14</sup> PWD (May 2009) Human Rights Consultation Members Event.

<sup>15</sup> PWD. (2009) Unpublished Draft Position Statement. Accommodating human rights: A human rights perspective on housing, and housing and support, for persons with disability.

existence; it is in their implementation. That is the challenge for the world with this Declaration. The standards are set. It is up to us to meet them.”<sup>16</sup>

People with disability acknowledged that the introduction of a Human Rights Act is not a panacea, and for this reason strongly advocate that for any Human Rights Act, or indeed implementation of existing obligations expressed in UN Treaties, current and new legislation or government policy to be effective, the Government must also:

- support and actively assist to develop a culture of equality within the ethos of every Australian;
- support and promote a culture of grassroots human rights activism which embraces the value of advocacy;
- provide education through a concerted outreach approach to making human rights real in the lived experience of all Australians, especially those most marginalised such as Indigenous people with disability; and
- ensure that all human rights mechanisms are accessible for everyone.

Additional mechanisms and processes for the protection of human rights are discussed in section 5 below.

#### **4.2 Criticism of Australia’s legal protections against human rights violations**

Consideration of whether human rights in general are protected and promoted in Australia requires scrutiny of our Constitution, our Common Law, our anti-discrimination legislation and the mechanisms which are in place to oversee their application, as well as international law and how it protects human rights in Australia.

George Williams<sup>17</sup> summarises that Australia’s protection of human rights is, overall, “ad hoc”, and that it is hard to find the specified rights, as they are scattered amongst the various legal mechanisms mentioned above. Spencer Zifcak and Alison King<sup>18</sup> see that Australia’s legal protections against human rights violations are “patchy” and “incomplete”.

Paraphrasing from these authors:

- The Australian Constitution considers a few Express Constitutional Rights, namely the trial by jury (Section 80), freedom of religion (Section 116) and rights of residents in States (Section 117). The Constitution also contains Implied Constitutional Rights, but it is then up to particular judges to arrive at findings which argue the intention of the draughters of the Constitution from the wording contained within the document. The assessment of these protections is that they are weak, for a number of reasons including the number of rights that are not expressed, but also because in most cases the Express Constitutional Rights are only required to be made explicit within Commonwealth legislation.

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<sup>16</sup> Michael Dodson (2009), speaking at the Australian government’s announcement on the UN Declaration on the Rights of Indigenous Peoples.

<sup>17</sup> Williams, G. (2007). *A Charter of Rights for Australia*, UNSW Press, Sydney.

<sup>18</sup> Zifcak, S. and King A. (2009) *Wrongs, Rights and Remedies. An Australian Charter?* Australian Collaboration, Victoria.

- Common law does address rights, but makes judgements based on previous case law, thus on the rights that have previously been recognised and protected. As a mechanism for addressing and promoting the rights of people who have not benefited equally under the law, it is not effective in highlighting rights that have been overlooked and largely ignored in relation to marginalised groups (on the basis of sex, disability and race for example). Judges are “reluctant to develop the law to recognise basic freedoms”.
- Commonwealth and State Anti-Discrimination Acts covering racial, sex, disability and age discrimination are not a comprehensive guarantee of equal treatment in Australia. Amongst other weaknesses, they are too segmented and do not provide adequate protections to people whose human rights are being violated on several grounds; “they are vulnerable to amendment and repeal by subsequent legislation”<sup>19</sup>; and address only individual cases and do not adequately challenge the systemic discrimination, and its ongoing impact, in the covered areas.
- There is the Human Rights and Equal Opportunity Commission Act (1986), which defines the work of the Australian Human Rights Commission (AHRC). This Commission plays an important role, particularly in the promotion of human rights, through its division into various areas headed by Commissioners. The AHRC can investigate, and where appropriate try to resolve by conciliation, complaints of unlawful discrimination, discrimination in employment and some breaches of human rights by the Commonwealth or interstate trading companies. In cases of unlawful discrimination, where complaints cannot be resolved or are terminated for some other reason, complainants can make an application to the Federal Court for the court to hear the allegations. However the AHRC makes no recommendations in relation to these matters.

In relation to complaints of certain types of discrimination in employment and breaches of human rights, the AHRC can make a finding that discrimination or a breach has occurred and makes a report to the Attorney General for tabling in Parliament. Such reports may contain recommendations about what should occur. However, the Commission's findings and recommendations in these cases are not enforceable.

Commonwealth and State discrimination legislation covers a range of specific groups (such as sex, disability, race), but addresses only individual cases and does not adequately challenge the systemic discrimination, and its ongoing impact, in these areas.

- Australia has signed and ratified a number of United Nations treaties and conventions, including most recently the Convention on the Rights of Persons with Disabilities. However, despite being rightly proud of its support of such international mechanisms, this country has not enacted legislation, either at a Commonwealth level nor required it of the States, which puts such mechanisms into effect. This means that if a person's human rights in Australia are breached; there is no way for that person to seek redress under Australian law.

From the point of view of people with disability, whose rights have long been ignored, disability discrimination legislation was enacted to ensure that basic rights were recognised and protected as individuals. However, disability discrimination legislation does not address many

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<sup>19</sup> Zifcak, S. and King A. (2009). Ibid, page 25

of the institutional, systematic and individual human rights violations facing people with disability (see 4.4). The lack of express rights in any of Australia's legal frameworks, and the lack of capacity of our specific anti-discrimination legislation to effect systemic change, means that the protection and promotion of human rights for people with disability in Australia is likely to be lower even than that afforded by other citizens.

### **4.3 Opposition to a human rights charter**

Some opponents of a human rights charter make the following arguments:

1. a charter of human rights will place too much power in the hands of the judiciary to make rights determinations that currently are handled in policy;
2. that the judiciary does not have the expertise to handle this task capably;
3. that this will weaken our democratic processes, by taking such matters out of the hands of elected politicians, and placing it in the hands of unelected judges; and
4. that human rights are adequately covered in common law, and where there are deficiencies this is currently handled by devising suitable public policy.

Strength is lent to this argument by statements like "Australia's record in protecting the rights of its citizens is the envy of most nations"<sup>20</sup>. Very little empirical evidence is tendered to back this up, and quickly debate switches to the need for a focus on responsibilities as well as rights.

The issue of adequate protection in current legal structure has been dealt with in section 4.2 above. The set of objections to a charter of rights, as a means of better protecting and promoting human rights, based on the notion that any such charter will divert power away from the parliamentary process, and confer it instead onto the judiciary, requires a response:

- We reject the assertion that a human rights charter will damage democracy, primarily on the basis that a well-constructed charter (as outlined in section 3 above) that actively promotes and protects human rights will result in a wider level of empowerment across all sections of the community, a community of self-determining and capable individuals participating in a robust democratic process.
- Secondly, these are broad assertions, and some case studies presented in their defence are largely anecdotal rather than indicative of a body of case law that will collapse if a charter is introduced. Case studies that promote a charter deal with very difficult and fundamental human rights issues, such as torture and unlawful detention, and identify how the judiciary is currently mindful of human rights, yet bound to abide by Australian law, which has been drafted in contravention of those rights. One of the principal aims of the charter is to ensure that legislation arising from policy takes adequate account of human rights, and is more carefully drafted to ensure that rights are not overlooked, or that the rights of one group do not take precedence over those of another.
- Thirdly, how well the human rights charter protects both the human rights of individuals, and the key principles of our democracy, will be determined by how well the charter is

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<sup>20</sup> Leeser, J. (2009). Bill of rights surprise: it could wind back legal protection for victims, *Sydney Morning Herald*, Monday May 25, 2009.

drafted, and its capacity to ensure that human rights are not applied in ways that override each other. As well, the charter needs to proscribe specific actions that should arise if and when certain rights are found to have been breached, or where potential breaches occur in drafted legislation of stated policy.

- Fourthly, human rights cannot be protected by politicians or bureaucrats. Politicians can and should make laws that protect human rights, however, they are often responsible for making oppressive laws that cause claims for human rights protection. The judiciary administer and enforce the legislation. “Human rights can only be protected by some independent third party. And that is why claims against the government, or challenges to legislation, must necessarily be adjudicated by the courts. They are established, independently of government and parliament, for precisely such a purpose. To put the matter another way, if we were to leave the protection of human rights in the hands of politicians or bureaucrats, they would, inevitably and unavoidably, be acting as judges in their own cause”<sup>21</sup>.

#### **4.4 Human rights for people with disability are not sufficiently protected and promoted**

Persons with disability are subject to multiple and aggravated forms of human rights violation, including the neglect of their most basic survival related needs. These human rights violations do not only occur in far off places that lack enlightened legislation and policies, or the resources needed to meet basic needs. They occur every day, in every region, of every State and Territory in Australia. Virtually every Australian with disability encounters human right violations at some points in their lives, and very many experience it every day of their lives.

However, in 2009, in this country it is possible for persons with disability to die of starvation in specialist disability services, to have life-sustaining medical treatments denied or withdrawn in health services, to be raped and assaulted without any reasonable prospect of these crimes being detected, investigated or prosecuted by the legal system, and to have their children removed by child protection authorities on the prejudiced assumption that disability simply equates with incompetent parenting.<sup>22</sup>

Using the rights set out in CRPD<sup>23</sup> and key Human Rights Indicators, the following sections provide some key examples of current human rights violations against people with disability.

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<sup>21</sup> Zifcak, S. and King A. (2009) *Wrongs, Rights and Remedies. An Australian Charter?* Australian Collaboration, Victoria, p 56

<sup>22</sup> These points are contained in the submission made by Queensland Advocacy Incorporated to the National Human Rights Consultation, and reproduced here with permission.

<sup>23</sup> To keep our arguments succinct, the Articles referenced throughout this section are extracts of the key elements of the Article that have the most relevance to the examples provided.

#### 4.4.1 Freedom of expression and opinion, and access to information

Article 21 of the CRPD states:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.

Many people with disability lack awareness and knowledge of their rights or where to go if they do recognise their rights have been denied. For people with cognitive impairments (developmental disability, acquired and organic brain impairment, psychosocial disability, dementia, neurological impairment such as Autism Spectrum Disorder) this is a particular problem. The barriers to a 'knowledge of rights' include:

- poorer education opportunities and outcomes for people with disability;
- limited or no accessible information otherwise available to their non-disabled peers about rights and how to use them;
- limited or no alternative and augmentative communication systems to communicate with others;
- limited access to independent advocacy services and support;
- lack of control over their own lives and alternative choices;
- no national, comprehensive approach to seek the voices of children and young people with disability or to ensure that they are able to access information of benefit to children and young people<sup>24</sup>.

*Sarah is a woman with a mild intellectual disability and cerebral palsy. Sarah lives in group home where she receives 24 hour support. She wishes to make a complaint about the quality of the care being provided by the group home staff however she cannot use a telephone, does not have access to an independent advocate and is reliant on her support staff as her means to come and go from her home. Sarah would have to rely on the very people she wishes to make a complaint about in order to pursue her complaint and ensure her human rights are met.<sup>25</sup>*

*People with disability don't complain because their mind is shaped by the lack of choice: "if you don't have choice, I guess you just get along with it. You're stuck with it"<sup>26</sup>*

Key Human rights indicators<sup>27</sup> for freedom of expression and opinion and access to information include:

<sup>24</sup> PWD (2005) *Children and Young People with Disability in Australia, Report Card, UN Convention on the Rights of the Child.*

<sup>25</sup> PWD, Individual and Group Advocacy Service, case study.

<sup>26</sup> PWD & Disability Studies and Research Institute. (2009) Unpublished Informant Interview - *Rights Denied: Toward a national policy agenda on abuse, neglect and exploitation of people with cognitive disability.*

<sup>27</sup> French, P Disability Studies and Research Institute for Queensland Advocacy Incorporated (2008). *Human Rights Indicators for People with Disability.* [www.qai.org.au](http://www.qai.org.au)

- Persons with disability have freedom to seek, receive and impart information and ideas on an equal basis with others.
- Persons with disability have freedom to seek, receive and impart information and ideas through all forms of communication of their choice.
- Public information is available to people with disability in accessible formats.
- Public information is accessible to persons who use assistive communication devices.
- Public information is made available in accessible formats in a timely manner and without additional cost to the person with disability.
- Mass media is accessible to persons with disability
- Australian Sign Language is officially recognised and its use is promoted.

#### **4.4.2 *Equal recognition before the law and access to justice*<sup>28</sup>**

Article 12 of the CRPD states:

States Parties:

- reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law;
- shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
- shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity;
- shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.

Article 13 of the CRPD states:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others.

##### **4.4.2.1** Australian law and subsequent institutional mechanisms for dealing with complaints do not sufficiently protect or promote the human rights of people with disability:

- Complaint handling agencies are often inaccessible for people with disability. Barriers can include structural and physical access barriers, information and complaint procedures in inaccessible formats (eg. complaints to be provided

<sup>28</sup> The issues raised in this section are taken from the unpublished draft preliminary research findings produced by PWD & Disability Studies and Research Institute, May 2009, Rights Denied: Toward a national policy agenda on abuse, neglect and exploitation of people with cognitive disability. The final report of this Research including its extensive recommendations addressing priorities for criminal law reform, civil law reform, institutional reform and disability service system reform and capacity building priorities are expected to be published in the near future. The full final report will be available from [www.pwd.org.au](http://www.pwd.org.au)

in writing) and centralised agencies with few outreach mechanisms, therefore placing a heavy reliance on the complainant being able to come to them when they lack the means to do so.

- The human rights of persons with disability expressed by CRPD are not comprehensively incorporated into Australian domestic law and therefore remain unattainable.
- The Australian Human Rights Commission has a relatively narrow jurisdiction with respect to human rights. The Commission's power to monitor Australia's compliance with international human rights treaties is limited to those international instruments scheduled to, or declared under S 47 of the Human Rights and Equal Opportunity Commission Act. These instruments do not currently include the CRPD or the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

**4.4.2.2** Overwhelming evidence demonstrates that people with disability living in low cost housing options such as licensed and unlicensed boarding houses are not afforded appropriate protections from abuse, neglect and exploitation.

Existing legislative frameworks, in a number of States, are inadequate to promote and protect rights. In NSW for example, the Department of Ageing, Disability and Home Care (DADHC) responsible for the regulation of legislation for licensed boarding houses for people with disability continues to work under a piece of legislation, the Youth and Community Services Act 1973, they believe to be 'ultra vires' and unenforceable. By continuing to licence premises under this Act and allow for the placement of people with disability in such settings, the State is complicit to the resultant abuse, neglect and exploitation of this extremely vulnerable group of people with disability.

The standards to which a licence is subject provide only minimum standards in relation to service quality and are not commensurate with those expected of funded or government provided accommodation services of either the same size, configuration or catering to the same client group.

Independent complaint mechanisms such as the NSW Ombudsman fail to make an impact with its recommendations for improvements in service delivery and promoting the rights and best interests of persons using these services.

Analysis undertaken by PWD of the NSW Ombudsman's Disability Reviewable Death Annual Reports which make recommendation for the prevention or reduction of deaths of people with disability living in care, shows the following:

- to date, 21 recommendations have been made with regard to issues in Licensed Boarding Houses since the Annual Report of Disability Deaths in 2004 published in November 2005;
- these 21 recommendations include issues relating to first aid requirements of staff, good practice standards for medication management and entry and screening practices to ensure appropriate placement of people with disability.

All recommendations are made as a result of systemic problems identified as contributing to the death of boarding house residents;

- since the initial Annual Report, each years subsequent recommendations appear to be revised versions of the previous years recommendations;
- only one recommendation made to NSW Health has been completed in full;
- the DADHC have not fully completed, to the satisfaction of the Ombudsman, any of the recommendations made to it. It has partially completed one recommendation, made in 2006;
- The CRPD's Article 10 – Right to Life, makes specific reference to obligations that requires States Parties such as the NSW Government, DADHC and Ombudsman to take to ensure that persons with disability enjoy the right to life on an equal basis with others. Given the right to life is a civil and political right it is considered 'immediately realisable'. This means that States Parties must give immediate effect to these rights; and
- CRPD Article 16 – Freedom from Exploitation, Violence and Abuse requires States Parties to take appropriate measures to prevent all forms of exploitation, violence and abuse including ensuring all facilities for people with disability are effectively monitored by independent authorities and all instances of exploitation, violence and abuse against people with disability are identified, investigated and, where appropriated, prosecuted.
- PWD strongly believes, that the issues highlighted by the Ombudsman's Disability Reviewable Death Annual Reports is direct evidence of human rights violations which result in abuse and neglect and in the premature or preventable deaths of people with disability.
- Furthermore, a result of the lack of progress to meet recommendations, people with disability, in particular those living in boarding houses, *continue* to experience abuse and neglect and to be at risk of and die from preventable deaths. This is evidence of violations of Articles 10 and 16 of the CRPD.

Very little protection from retribution exists for people with disability in licensed boarding houses and even less so in the unlicensed boarding house sector. These centres operate as 'closed environments' and it is almost impossible to fully protect the complainant from threats and acts of retribution, as it is very difficult to keep the identity of the complainant private from staff or boarding house proprietor.

Boarders and lodgers have no explicit tenancy rights under the NSW Residential Tenancies Act 1987<sup>29</sup> and are therefore at great risk of eviction and homelessness if they make complaints.

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<sup>29</sup>Newtown Neighbourhood Centre (2003) *Opening doors - Boarders & Lodgers Project Report into the conditions and residents of unlicensed boarding houses in the Marrickville LGA for the Department of Ageing, Disability and Home Care.* [http://www.newtowncentre.org/\\_pdfs/opening\\_these\\_doors.pdf](http://www.newtowncentre.org/_pdfs/opening_these_doors.pdf)

Governments have used hostels and boarding houses as a cheap way of dealing with unmet need. They have closed many of their own congregated living facilities, yet appear quite happy for workers to continue to place people with disability in hostels and boarding houses allowing the private sector to run inferior facilities with dire consequences to their residents<sup>30</sup>.

**4.4.2.3** The principal legislation providing for service user complaints about specialist disability services that are provided, funded, or licensed by the NSW Government is the Community Services (Complaints, Reviews and Monitoring) Act, 1993 (CS CRAMA) administered by the NSW Ombudsman. These legal and institutional arrangements have a number of important strengths, among them a wide range of complaint, review and monitoring functions, and compulsory powers conferred by the legislation, and the status of the Ombudsman's office.

However, there are also a number of key structural weaknesses in these arrangements which significantly hinder people with disability from gaining the full benefit intended by the stated objectives and principles of CS CRAMA. For example, the failure of the legislation to:

- explicitly incorporate the human rights of persons with disability, and require the application of human rights standards in application of the Ombudsman's complaint handling, investigation and, review functions;
- explicitly require the Ombudsman to recognise and address the multiple and aggravated forms of human rights violation and disadvantage that results from the intersection of impairment and disability with another characteristic including racial, cultural or linguistic minority status, indigenous status, gender and age;
- provide personal remedies;
- explicitly require and authorise the Ombudsman to scrutinise the conduct of Ministers of the Crown in addition to Government Departments and non-government agencies. This is a very significant shortcoming with respect to disability services in NSW, where many functions under the Disability Services Act 1993 (NSW) are reposed in the Minister directly, and where the Minister is the direct provider of many disability services.
- empower the Ombudsman to compel agencies to undertake recommendations intended to give effect to the Objects and Principles of CS CRAMA and the Ombudsman's key functions. One example to illustrate this point is the inability of the Ombudsman to compel agencies to implement recommendations made under its systemic death review functions, where recommendations as to policies and practices to be implemented by government and service providers are made with the express intention to prevent or reduce the deaths of children

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<sup>30</sup> Queensland Advocacy Incorporated (2002) *Legislation and Life – The Residential Services (Accreditation) Act 2002 and the lives of vulnerable people with disability inappropriately placed in supported accommodation hostels and boarding houses.* [http://www.qai.org.au/documents/doc\\_143.pdf](http://www.qai.org.au/documents/doc_143.pdf)

with disability in care, at risk of death due to abuse or neglect or people (whether or not a child) with disability living in residential care. (CS CRAMA Part 6 S36 (1) (b)) (as per example provided above).

A further gap which significantly impacts on the realisation of human rights of people with psycho-social impairments or brain-injury is that CS CRAMA provides no protection for people who use community-based services funded by the Minister for Health.

**4.4.2.4** Similar disability services legislation has been passed in every State, following the enactment of the Disability Services Act (Commonwealth) 1986, and the subsequent Commonwealth State Disability Agreement in 1993, which apportioned responsibility for administration and provision of disability services between the Commonwealth and the various States and Territories. There remains a clear discrepancy amongst the States and Territories about the amount of funding provided per head, the quality of services, the type of services, the eligibility for service provision, and the recourse to appeal if poor service, inadequate service, or no service is provided.

Regulation of disability services in New South Wales does not comply with legislated requirements aimed at protecting the human, legal and service user rights of persons with disability, including the right to freedom from abuse, neglect and exploitation.

The Disability Services Act 1993 (NSW) provides the framework for the provision, funding and regulation of disability services by the New South Wales Government. It purports to mandate a 'rights-based approach' to the funding of disability services, and to service delivery more generally, by reposing very detailed duties in the Minister administering the Act to recognise and apply certain human rights related standards in all decisions to provide and fund disability services. The Act also confers rights of appeal on service recipients and their associates against decisions to provide or fund disability services where such conduct fails to comply with these standards. Additionally, the Act requires the Minister to conduct regular periodic reviews of all provided and funded services to ensure their compliance with these standards, and such compliance is a precondition to the continuing provision or funding of these services.

In practice, these provisions of the Act are ignored by the Minister and the Department of Ageing, Disability and Home Care. Arrangements for the provision and funding of disability services do not comply at all, or only partly comply, with the explicit terms of the Act.

Consumer appeal rights are articulated with the performance of particular duties under the Act. However, as these duties are not performed, it is usually impossible for service users to exercise their rights of appeal. Moreover, whereas the Disability Services Act 1993 (NSW) envisages a 'public' process of funding allocation, capable of providing notice to affected persons of the decisions that impact on their lives, in fact information about these allocation decisions and

processes in not made publicly available, and in practice, is very difficult or impossible to obtain.

These failures to observe the explicit requirements of the Act have the effect, and in some instances the purpose, of depriving persons with disability of their rights to appeal against poor quality disability services provided or funded by the New South Wales Government.

Key Human Rights Indicators<sup>31</sup> for the examples provided in this section relating to equal recognition before the law and access to justice include:

- All persons with disability are recognised at all times and in all situations as persons with legal rights and duties.
- Persons with disability are able to exercise legal capacity on an equal basis with others.
- Persons with disability enjoy effective access to justice at all stages of the legal process.
- Procedural accommodations are made in the legal process to ensure effective participation of persons with disability in the justice system in whatever role they encounter it.
- Appropriate training is provided to all justice agency personnel to ensure access to justice to people with disability.

#### **4.4.3 Freedom from exploitation, violence and abuse**

Article 16 of the CRPD states:

States Parties shall:

- take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects;
- also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognise and report instances of exploitation, violence and abuse;
- shall ensure that protection services are age, gender and disability sensitive;
- shall ensure that all facilities and programs designed to serve persons with disabilities are effectively monitored by independent authorities;
- take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who

<sup>31</sup> 2008 French, P Disability Studies and Research Institute for Queensland Advocacy Incorporated. *Human Rights Indicators for People with Disability*. [www.qai.org.au](http://www.qai.org.au)

become victims of any form of exploitation, violence or abuse, including through the provision of protection services; and

- put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Substantial national (and international) research provides evidence that people with disability are over-represented as victims of all forms of abuse and neglect. Abuse relates to physical, sexual, psychological, financial, legal/civil, and systemic abuse as well as constraints and restrictive practices. As for neglect, it can be physical, emotional, passive, or wilful.

Yet, at present, there is no Australian organisation, either government department or non-government agency, which provides substantial facts and figures around abuse and neglect occurring to people with disability. However, the CRPD urges States Parties to collect and disseminate statistics and data in order to identify the barriers faced by people with disability in exercising their rights (CRPD Article 31).

Due to increased vulnerability, people with cognitive impairment are even more exposed to abuse and neglect than other groups of people with disability. The over-representation of people with disability as victims of abuse and neglect has been particularly reported in relation to those living in supported accommodation where the perpetrators commonly are service providers, other service users or visitors<sup>32</sup>.

Abuse and neglect against people with disability and particularly against people with cognitive impairments, often goes undetected, unreported, non investigated, non prosecuted and unpunished. The successful detection, investigation and prosecution of abuse and neglect of people with cognitive impairment requires, in many instances, a particular value-base, expertise, and practice that is simply not present, or capable of being generated, in mainstream law enforcement agencies<sup>33</sup>.

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<sup>32</sup> Connelly, G. and J. Keilty (2000). Making A Statement. An Exploratory Study of Barriers Facing Women with Intellectual Disabilities when Making a Statement about Sexual Assault to the Police. Sydney, Intellectual Disability Rights Service Inc.

Community Services Commission and Intellectual Disability Rights Service (2001). Crime prevention in residential services for people with disabilities. A discussion paper., Community Services Commission and Intellectual Disability Rights Service.

Goodfellow, J. and M. Camilleri (2003). Beyond Belief, Beyond Justice: The difficulties for victims/survivors with disabilities when reporting sexual assault and seeking justice. Final report of stage one of the sexual offences project. Victoria, Melbourne, Disability Discrimination Legal Service Inc.

Lievore (2005). No Longer Silent. A study of women's help-seeking decisions and service responses to sexual assault. A report prepared by the Australian Institute of Criminology for the Australian Government's Office for Women.

The Disability Council of NSW (2003). A Question of Justice. Access and participation for people with a disability in contact with justice system., The Disability Council of NSW.

French, P. (2007). Disabled Justice. The barriers to justice for persons with disability in Queensland, Queensland Advocacy Incorporated.

<sup>33</sup> PWD & Disability Studies and Research Institute. (May 2009) Unpublished *Draft Preliminary Research Findings Rights Denied: Toward a national policy agenda on abuse, neglect and exploitation of people with cognitive disability.*

Commonly incidents of abuse and neglect are not recognised as such, but rather as the failure of the service system supporting people with disability. As an example, in its Annual Reports of Reviewable Deaths, the NSW Ombudsman does not use a context or language of 'abuse and neglect' in reviews or findings on the death of people with disability in care. The reports acknowledge that certain deaths of people with disability in care may have been prevented if more effective systems were in place to identify and manage risks. They also highlight concerns about how well services support the individual needs of people with disability. However, they do not acknowledge the failure of these systems as violations of the human rights of people with disability, or as incidents of abuse and neglect.

People with disability living in licensed boarding houses often report concerns to PWD advocates about the management of their finances by the managers/licensees of their boarding houses. The person's finances are managed by the Office of the Protective Commissioner (OPC) which directly pays the boarding house for lodgings (rent and meals). The OPC also pay the boarding house licensees comfort money for the clients which could be up to \$25.00 per week. This is meant for the clients to buy anything for themselves (e.g. cigarettes, clothing, food etc). Most managers will hold the money from the clients and distribute the items such as cigarettes over the fortnight. This practice constitutes financial abuse.

The following case study is representative of the lack of appropriate responses to abuse and neglect of people with disability both by disability service providers and the criminal justice system:

Rhonda is a 37 year old woman with an intellectual disability and has moderate support needs. She lives in a residential group home.

Rhonda was sexually assaulted by a male carer employed in her group home. Using her limited language and gestures Rhonda disclosed to another staff person that she had been sexually assaulted. This staff member contacted the Police.

Rhonda found it difficult to articulate all the details of the assault and the order in which they took place. There was no medical evidence of injury.

Police conducted an investigation, however due to Rhonda's anxiety of court processes<sup>34</sup>, concerns about her ability to be a 'reliable witness'<sup>35</sup>, her communication style, concerns

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<sup>34</sup> 'Court processes may make little sense [to people with intellectual disability], cause great frustration and anxiety. For example, a person with cognitive disability may be called to attend Court at 10:00am along with 30 other matters in that list. They may not comprehend why they must wait (sometimes several hours) for their matter to be called. They may become confused, frustrated or loose concentration and leave the Court. The experience of sitting for several hours in a crowded waiting room may also be very anxiety provoking for a person with psychosocial disability'. 2007, French. P. Disability Studies and Research Institute for Queensland Advocacy Incorporated Disabled Justice The Barriers to Justice for Queenslanders with Disability May 2007 p 97.

<sup>35</sup> 'persons with intellectual impairment may be easily confused during cross-examination, and are particularly susceptible to leading questions. The credibility of their evidence is therefore often readily undermined' 2007, French. P. Disability Studies and Research Institute for Queensland Advocacy Incorporated Disabled Justice The Barriers to Justice for Queenslanders with Disability May 2007 p 97.

about how she would be perceived by the court<sup>36</sup> and the impact of her disability on her giving evidence the matter was not prosecuted.

A few months ago, the alleged perpetrator was still employed in a disability staffing agency. Two further sexual assaults on residents with moderate and high support needs have since been reported to the Police from the services where he works, but again no action has been taken.<sup>37</sup>

Key Human Rights Indicators<sup>38</sup> for freedom from exploitation, violence and abuse include:

- Persons with disability are effectively protected from all forms of exploitation, violence and abuse.
- Protection from exploitation, violence and abuse is effective both within and outside the home (that is, both in the public and private spheres).
- Women and girls with disability are effectively protected from all forms of exploitation, violence and abuse that have a gender dimension.
- Children and young persons with disability and older persons with disability are effectively protected from all forms of exploitation, violence and abuse that have an age dimension.
- Persons with disability, their families and carers are effectively informed and educated in relation to strategies to avoid, detect and report all forms of exploitation, violence and abuse.
- There are effective laws and policies that ensure that harms against persons with disability are identified, investigated and prosecuted.
- All specialist facilities and programs for persons with disability are effectively monitored by independent authorities to safeguard against exploitation, violence and abuse of persons with disability.
- Persons with disability who are victims of harm have access to effective recovery, rehabilitation and social re0intergration programs and services.

#### **4.4.4 Children with disability and respect for home and family**

Article 7 of the CRPD states:

States Parties:

- shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children;

<sup>36</sup> Some judicial offices may hold negative attitudes towards persons with disability, and be poorly informed about contemporary approaches to disability and human rights, and disability and access to justice issues. The Barriers to Justice for Queenslanders with Disability May 2007 p 97.

<sup>37</sup> Case study provided to PWD by the North Sydney Sexual Assault Services.

<sup>38</sup> 2008 French, P Disability Studies and Research Institute for Queensland Advocacy Incorporated. Human Rights Indicators for People with Disability. [www.qai.org.au](http://www.qai.org.au)

- in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration; and
- shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 23 of the CRPD states:

States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others so as to ensure that:

- the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised;
- the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognised;
- persons with disabilities, including children, retain their fertility on an equal basis with others.
- ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, State Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families;
- ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents;
- where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

**4.4.4.1** Australian social policy, legal and political systems fail to view children and young people with disability as children and young people first. The focus is on disability-related needs and specialist disability related interventions to the exclusion of child related needs such as emotional and developmental well-being. Thus, children and young people with disability are not generally, or as a matter of course, included when developing or examining policies and programs on issues or concerns relating to children and young people.

While the disability service system has generally adopted the philosophical principles that children with disability are children first, that they should grow up in their own families or, where this is not possible, in alternative family environments, these principles are not always realised in practice. Some children with disability are still being placed in institutional environments, such as group homes and adult residential care facilities, while others drift in the specialist disability respite system for extended periods of time in continuing or successive respite placements<sup>39</sup>. Others drift in short-term crisis placements, waiting for extensive periods of time for their long-term support arrangements to be resolved. These situations give rise to significant care and protection issues.

The disability service system has generally failed to develop appropriate service models and practice frameworks that meet the needs of children. Unlike the child protection system, practices such as planning to restore the child to their family, planning for permanent alternative placement and recognising the developmental needs and interests of the child are not universally applied in the disability service system. A major factor in this is that disability service legislation and service standards are adult focused and do not contain specific provisions for children. This reinforces the focus of services on the disability of the child with an emphasis on treatments, medication and behaviour management, rather than on their developmental needs and interests<sup>40</sup>.

PWD strongly supports genuine deinstitutionalisation of the disability service system and family based care for children with disability. While the shift to deinstitutionalisation has meant that the majority of children with disability in Australia are now cared for by their families at home, the disability service system does not always adequately support families to be able to successfully maintain this situation. The system's inadequacies and high unmet need significantly contribute to family breakdown, dysfunction and crisis, with the result that many children are at risk or the victims of abuse and neglect. The end result is that families view out-of-home care as the only option for the family to remain functional or avert breakdown<sup>41</sup>.

Some children with complex medical and health care needs and/or are dependent on medical technology and support, live for long periods of time in acute public hospitals or permanently in private hospitals specifically set up to care for children with disability. Some of the children in these institutional environments have been placed there following a care and protection court order, while others are there because their families are unable to provide the level of support and care they need. Acute health outcomes may be achieved in these facilities, but as with all institutional settings, they are not conducive to the long-term health, well-being and development of children.

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<sup>39</sup> Community Services Commission (1998) respite Care – A System in Crisis, A review of the respite care system in NSW by the Community Services Commission.

<sup>40</sup> Community Services Commission, (2000) Inquiry into the Practice and Provision of Substitute Care in NSW, p 51.

<sup>41</sup> G Llewellyn, P Dunn, M Fante, L Turnbull & R Grace, (1996) Families with Young Children with Disabilities and High Support Needs – Report to Ageing and Disability Department, p 1.

It is recognised that there is problematic and deficient practice in the child protection system for all children. In relation to children with disability, there is a failure to adequately acknowledge, assess and factor a child's disability and related needs into case management which can have a significant, long term effect. In particular, the child protection system often neglects to assess support needs of a child with disability, does not engage with other service systems effectively and does not have case managers skilled in working with children with disability. The result is placement breakdown and multiple placements; contact with the juvenile justice system; no or minimal family contact.

**4.4.4.2** Non-therapeutic sterilisation of people with disability is a particularly egregious form of human rights abuse and one that impacts particularly on girls and women with disability. There is substantial anecdotal evidence that unlawful sterilisation of children and young people with disability, mostly girls continues to occur in the absence of medical needs such as diseases of the reproductive tract. Sterilisation is an irreversible medical procedure with lifelong physical, psychological and social consequences.

There is also a lack of attention given to ensuring consistency in the law and procedure across jurisdictions, to prevent 'shopping' across these jurisdictions to allow sterilisation to be performed. Children and young people with disability taken outside Australia for the purpose of undergoing sterilisation procedures are not provided with the same protections as they would have within Australia<sup>42</sup>.

In August 2003, at a meeting of the Standing Committee of Australian Attorneys-General (SCAG), Ministers agreed to develop a nationally consistent approach to the authorisation procedures required for the lawful sterilisation of minors with a decision making disability. The primary emphasis of the SCAG was not on the prohibition of this human rights abuse, but on the elaboration of the circumstances and principles under which it can occur.

However, PWD argues that non-therapeutic sterilisation of children and young people with disability is a procedure to which neither a parent, or a child, or a court or Tribunal may consent. The circumstances and principles for uniform national legislation should essentially be protective rather than permissive.

At the March 2008 Standing Committee of Attorneys General (SCAG) meeting, Ministers agreed to discontinue working on the development of a nationally consistent approach to the authorisation procedures required for lawful sterilisation of minors with cognitive disability. While the SCAG has now discontinued its work on authorising non-therapeutic sterilisation, there is no focus within Australia of prohibiting this human rights abuse despite UN recommendations to do so. In September 2005, following consideration of the Australian Government's second and third periodic report on the Convention on the Rights of the Child, the Committee on the Rights of the Child adopted the following concluding observation in relation to the sterilisation of children to the Australian Government:

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<sup>42</sup> Based on anecdotal information provided to People with Disability Australia about children and young people being taken overseas to enable sterilisation procedures to occur.

“prohibit the sterilization of children, with or without disabilities, and promote and implement other measures of prevention of unwanted pregnancies... “

PWD’s position is that the Australian Government needs to make it an offence to perform non-therapeutic sterilisation of a child under the age of 18 years unless there is a serious threat to life or health, and an offence to perform non-therapeutic sterilisation of adults with disability in the absence of informed consent unless there is a serious threat to life or health. Such a provision ought also to make it an offence to procure, or seek to procure, such a procedure, and to assist or aid and abet in such a procedure.

**4.4.4.3** Parents with disability, particularly women and particularly those with intellectual disability and psychosocial disability are significantly over represented in the child protection system.<sup>43</sup> The prejudicial assumptions about the parenting capacity of people with disability means that disability is “constructed as a risk factor for abuse and neglect rather than as an indicator of possible support needs”.<sup>44</sup>

It is more likely that parents with disability will have at least one child, if not more removed early in life, and approximately “1 in 6 children in out-of-home care will have a parent who has a disability”.<sup>45</sup>

However, evidence provided at the NSW Legislative Council Inquiry into Disability Services and the Inquiry into Child Protection Services demonstrate that when family support programs and sufficient community-based mental health services are provided to parents with disability, the outcomes for their children are not significantly different from other children.<sup>46</sup> This is in direct contrast to the more negative outcomes of children who are in out-of-home care. Despite this, there are almost no services in Australia that recognise the need for intensive parenting support or that provide intensive parenting support to parents with disability.

Key Human Rights Indicators<sup>47</sup> for children with disability and respect for family and home include:

- Children and young persons with disability enjoy all human rights and fundamental freedoms on an equal basis with other children.
- Children and young persons with disability are able to express their views on all matters that affect them.
- Persons with disability do not experience discrimination in relation to any matter concerning marriage, family, parenthood and relationships.

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<sup>43</sup> Legislative Council Standing Committee on Social Issues, (December 2002) *Care and Support – Final Report on Child Protection Services*, p. 144; Legislative Council Standing Committee on Social Issues, (November 2002) *Making it Happen – Final Report on Disability Services*, p. 126

<sup>44</sup> Legislative Council Standing Committee On Social Issues, (December 2002) *ibid.*, p. 145

<sup>45</sup> Legislative Council Standing Committee on Social Issues, (November 2002) *op. cit.*, p. 126

<sup>46</sup> Legislative Council Standing Committee On Social Issues, (December 2002) *op. cit.*, p. 147; Legislative Council Standing Committee on Social Issues, (November 2002) *ibid.*, p. 126

<sup>47</sup> 2008 French, P Disability Studies and Research Institute for Queensland Advocacy Incorporated. Human Rights Indicators for People with Disability. [www.qai.org.au](http://www.qai.org.au)

- Persons with disability, including children with disability; retain their fertility on an equal basis with others.
- Persons with disability have access to appropriate assistance, where necessary, to assist them with the performance of their child-rearing responsibilities.
- Children with disability are accorded the same rights as other children to family life.
- Children with disability are effectively protected from concealment, abandonment, neglect and segregation.
- Children with disability and their families are effectively supported with early intervention, comprehensive information, and services and support.
- Children with disability are not separated from their parents on the basis of the disability of either the child or of one or both parents.
- Children with disability unable to live with their immediate family are provided with alternative care within their wider family, or if this is not possible, within the community in a family setting.

#### **4.4.5 Women with disability**

Article 6 of the CRPD states:

States Parties:

- recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms; and
- shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

**4.4.5.1** The over-representation of women with disability in part-time, casual and lower paying jobs or their sole reliance on government payments means that women with disability are one of the poorest groups in Australia. There is a connection between poverty and health, well-being and the exacerbation of impairments and conditions. Financial hardship impacts on obtaining quality housing, skills development and meeting the additional costs associated with disability, such as accessible transport, personal care needs, specialist aids and equipment and medical care.<sup>48</sup>

The lack of accessible childcare centres and outside school hours care makes it extremely difficult for many women with disability to obtain care for their children

<sup>48</sup> For a fuller discussion on poverty and people with disability see Senate Community Affairs References Committee (2004), *A hand up, not a hand out: Renewing the fight against poverty*, Report on Poverty and Financial Hardship available on the website of the Commonwealth Government at [www.aph.gov.au/senate/committee/clac\\_ctte/completed\\_inquiries/2002-04/poverty/report/](http://www.aph.gov.au/senate/committee/clac_ctte/completed_inquiries/2002-04/poverty/report/)

so they can work. Women with disability may have to travel further and / or pay more to make use of accessible childcare. This situation is especially difficult if the child also has a disability as many childcare centres and outside school hours care options will not accept children with disability or will impose conditions on their enrolment. While this may constitute discrimination, women with disability may not pursue a complaint, deciding that it's not worth the time and effort involved, and it does not address the immediate need for childcare.

The marginal difference between women with disability and men with disability in relation to government payments is revealing when examining the numbers of women with disability compared to men with disability in receipt of the Disability Support Pension (DSP). This shows a much greater difference, with 280,000 women with disability compared to 420,000 men with disability on the DSP, a 40:60 percentage difference. This difference indicates that while a larger number of men with disability are receiving the DSP, a large number of women with disability are in receipt of other government payments, including Parenting Payment and Carers Payment. In other words, it appears that women with disability, like women in general may undertake more parenting and caring responsibilities than men with disability.

- 4.4.5.1** Women with disability report difficulty accessing mainstream health services such as preventative breast and cervical screening, due to inadequate policy frameworks which do not include women with disability as target groups, lack of data on women with disability and the prevalence of cancers, the physical inappropriateness of the medical equipment used, costs (even if a doctor bulk bills the accessible transport and carer costs associated with the appointment can be prohibitive), and the manner in which these procedures are performed.
- 4.4.5.2** Women with disability experience restrictions in realising their rights to full reproductive freedom (the right to sex education, to informed consent regarding birth control, to terminate a pregnancy, to choose to be a parent, and to access reproductive information, resources, medical care, services, and support)<sup>49</sup>. These rights are also outlined in Article 23, *Respect for and the Family* of CRPD.
- 4.4.5.3** Women with disability are at greater risk of physical, sexual, and emotional or psychological abuse as well as to other forms of violence, such as institutional violence, chemical restraint, drug use, control of reproduction, medical exploitation, isolation, humiliation, and harassment. Abuse and violence can be perpetrated by intimate partner as well as relatives, caregivers, co-patients, residential and institutional staff, service providers, strangers, institutions, and social structures.

Abuse and violence against women with disability is highly prevalent in group residential settings. Because the concept of domestic and family violence is a phenomenon commonly associated with personal domestic settings, abuse and violence against women with disability often goes unidentified and unacted on in these settings.

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<sup>49</sup> <http://www.wwda.org.au/motherhd2006.htm>

The lack of support options might prevent women from escaping from a violent situation, or rebuilding their lives after doing so. Support services (refuges, crisis services, emergency housing, legal services, health and medical services, violence prevention services) are physically inaccessible to women with disability or exclude these women on other grounds. When they are available and accessible, they do not understand the intersections between gender, disability and violence and are therefore inappropriate. Thus, women with disability are much more likely to be 'forced' to remain in an abusive relationship.

Key Human Rights Indicators<sup>50</sup> for women with disability include:

- The pre-existing gender inequality of women and girls with disability is recognised in all aspects of CRPD implementation effort.
- Women and girls with disability enjoy all human rights and fundamental freedoms on the basis of equality with men and boys.
- Positive measures are in place to ensure the development, advancement and empowerment of women and girls with disability, and their ability to exercise their human rights and fundamental freedoms.

#### **4.4.6 Equality and non- discrimination and participation in cultural life**

Article 5 of the CRPD states:

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;
- 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; and
- take all appropriate steps to ensure that reasonable accommodation is provided in order to promote equality and eliminate discrimination.

Article 30 of the CRPD states:

States Parties shall recognise the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

- enjoy access to cultural materials in accessible formats;
- shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

<sup>50</sup> 2008 French, P Disability Studies and Research Institute for Queensland Advocacy Incorporated. Human Rights Indicators for People with Disability. [www.qai.org.au](http://www.qai.org.au)

**4.4.6.1** Aboriginal and Torres Strait Islander people with disability experience the denial of the most fundamental of human rights, such as access to adequate shelter, education, employment, health. They are significantly under-represented on a population basis in beneficial social programs due to a number of policy and structural failures. These include services that are poorly targeted and located, as well as culturally insensitive or inappropriate services.

Aboriginal and Torres Strait Islander people with disability experience multiple layers of discrimination. Many live in extreme poverty due to multiple disadvantages.

Human rights, including disability rights, originate in Western or Anglo-centric concepts of reason and the individual, which can be at odds with different cultural beliefs and practices. Aboriginal and Torres Strait Islander people with disability are at the periphery of the human rights movement. Put simply they are often unaware of what is meant by the term 'human rights'. It is critical that a concerted outreach approach aimed at educating Aboriginal and Torres Strait Islander people with disability about their human rights as they relate under the CRPD and Declaration on the Rights of Indigenous Peoples is urgently undertaken.

**4.4.6.2** Government and non-government service providers fail to meet the needs of Aboriginal and Torres Strait Islander people with disability, who engage with the service sector more often by accident than design. Two common reasons for this include:

- the service sector does not provide a culturally appropriate service. An example to illustrate this is respite services located far away from Aboriginal population centres, which means that Aboriginal people with disability and their carers have to leave their community to access such services. This presents a problem because it is perceived as being not unlike removal practices where Aboriginal people were forcibly removed from their communities. On a practical level it also makes for a serious imposition upon the Aboriginal person with disability and their associates because they may have to travel long distances but without the means or access to transport to do so<sup>51</sup>; and
- meaningful information about the services is not provided in accessible ways. The Aboriginal Disability Network strongly advocates that the most effective and culturally appropriate way to achieve this end is to engage with Aboriginal communities directly in their own community settings.

Furthermore, it is not uncommon for non-Aboriginal service providers to make comments such as 'they look after their own' as an excuse for not seeking to engage with Aboriginal communities in their service catchment areas.

Aboriginal people with disability experience indirect and direct racial discrimination from service providers. Very few Aboriginal people with disability access the Commonwealth Racial Discrimination Act 1975 because there are very few ways to measure race discrimination. Also, complaints bodies are not culturally accessible.

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<sup>51</sup> Aboriginal Disability Network New South Wales (2007) *Telling it like it is - A report on community consultations with Aboriginal people with disability and their associates throughout NSW, 2004-2005*.  
[http://www.pwd.org.au/adnsw/news/telling\\_it\\_like\\_it\\_is.doc](http://www.pwd.org.au/adnsw/news/telling_it_like_it_is.doc)

**4.4.6.3** Aboriginal people with disability are more likely to go to jail for a minor crime than others, and they are more likely to be involved in the criminal justice system because of the negative attitudes of the police. In goal, they generally experience abuse and neglect, including the lack of appropriate care for those with psychosocial disability.

Aunty Flora (not her real name) lives in a small regional town in Western NSW. Aunty Flora is a member of the stolen generations. She was removed from her family at age 6, and whilst living in a girl's home she became blind in one eye at age 10.

She is now 85 years old.

She has lived the majority of her life without any knowledge that there is neither a Blind Persons Pension to which she was entitled nor services available for people who are blind or with vision impairments

Aboriginal people with disability in a small regional community are charged twice the rate to use the accessible community transport bus as non-Aboriginal people living in the same community. This is an example of direct discrimination on the grounds of disability, yet community members are reluctant to raise a grievance because they are afraid that the service will be withdrawn altogether.

A young Aboriginal man with mental illness living in a large regional town experiences a psychotic episode. His episode results in him removing his clothing and running down the main street. The police pick him up and he is placed in gaol. He appears before the local magistrate and is sentenced to a term in prison. There is no intervention or support made available for his mental illness which is the cause of this behaviour.

Key Human Rights Indicators<sup>52</sup> for equality, non-discrimination and participation in cultural life include:

- The law shields persons with disability from harm in the same way it does for others.
- Persons with disability are effectively protected from discrimination on the grounds of disability, and on all other grounds.
- Persons with disability are able to use the law to protect or pursue their interests on an equal basis with others.
- All appropriate steps are taken to ensure the provision of reasonable accommodation of the needs of persons with disability.
- Persons with disability take part in cultural life on an equal basis with others.
- The specific cultural and linguistic identity of persons with disability is recognised.

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<sup>52</sup> 2008 French, P Disability Studies and Research Institute for Queensland Advocacy Incorporated. Human Rights Indicators for People with Disability. [www.qai.org.au](http://www.qai.org.au)

#### 4.4.7 Liberty of movement and nationality

Article 18 of the CRPD states:

States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others.

**4.4.7.1** Currently there is no entitlement to the receipt of required services across all States and Territories, and within the Commonwealth jurisdiction. This is very much at odds with the rights-based principles of disability services legislation, which places the onus on each jurisdiction to provide the supports necessary to enable people with disability to access opportunity in the community, to the same extent as people who do not experience disability.

There are currently few disability programs which operate on a National level. Consequently, the complexity and differential application of service systems, including different eligibility criteria and waiting lists for service access as well as different service types and models, effectively means that people with disability cannot move around the country as freely as other citizens.

People with acquired brain injury living in Tasmania can access a specialised respite service option provided by Headway Tasmania which is unique to this State. Should a person with acquired brain injury relocate to NSW they would be unable to access this same specialised service.

A child with a disability living in Victoria attending their local school cannot receive the same level of teachers aid support if they were to move to NSW. This is due to disability classifications determining a child's eligibility for classroom support varying from State to State. The net result of this is that a child with high support needs in Victoria who requires a teachers aid for a full school day may be supported to receive an education in a fully inclusive fashion within their local school, but the same child in NSW would have no other option than to attend a segregated, 'special education' setting as such levels of support are not available<sup>53</sup>.

**4.4.7.2** Australia's migration laws continue to violate the human rights of people with disability. The *Migration Act 1958* is exempt from the discrimination provisions of the *Disability Discrimination Act 1992*. Potential migrants and refugees to Australia are subject to a health assessment in order to determine their eligibility. The assumed future costs associated with health condition or disability is taken into account as part of the assessment procedure. There is no assessment of the positive contributions people with disability can and do make to our communities.

The health test means that migrants and refugees with disability are routinely refused entry to Australia as a result of an assessment of the potential health costs associated

<sup>53</sup> 2009 People with Disability Australia, Individual Advocacy Service

with their illness or disability. It also means that many families supporting people with disability make a difficult decision to leave behind a family member in order to build a life in Australia. In cases involving humanitarian entrants, these family members with disability will remain in extremely vulnerable situations.

Some refugees and migrants are granted exemptions under the current arrangements. However, waivers are determined through a decision making process which is inconsistent, can be arbitrary in nature and therefore potentially unfair.

Key Human Rights Indicators<sup>54</sup> for liberty of movement and nationality include:

- Persons with disability enjoy the liberty of movement within and across national borders on an equal basis with others.
- Persons with disability are able to choose their own residence on an equal basis with others.
- Persons with disability are able to choose their nationality on an equal basis with others.

#### **4.4.8 Living independently and being included in the community**

Article 19 of the CRPD states:

States Parties recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Australia's ratification of the CRPD places onus on various levels of governments to meet the rights-based outcomes described within the instrument. One amongst these is the requirement to ensure that people with disability enjoy much more control over the supports and services that they require to live independently than they have had in the past.

The long and sorry history of forced incarceration, and the abuses that have occurred within congregate care settings in which people with disability have exercised no control, serves as

<sup>54</sup> 2008 French, P Disability Studies and Research Institute for Queensland Advocacy Incorporated. Human Rights Indicators for People with Disability. [www.qai.org.au](http://www.qai.org.au)

the catalyst for specific measures that reverse the locus of control. Such measures build upon the growing body of evidence that user-controlled supports are not as open to abuse, deliver enhanced outcomes, and cost no more than traditionally run services.

Articles 12, 19 and 26 of the Convention should lead to the passing of specific legislation that requires all levels of government to adhere to its existing disability services legislation, in terms of the outcomes that are required for individuals with disability. Of importance here is a specific, independent, regulatory mechanism to monitor compliance with these rights-based outcomes, which also offer redress for those people whose rights are not being addressed.

Currently individualised funding options are available only partially in most States and Territories, and there is no entitlement to convert service funds to the person's own control, as there is guaranteed by legislation in the United Kingdom (the Direct Funding Act 1996), or in other jurisdictions in the United States of America and Canada by means of disability services policy.

The legislative and policy responses will respond better in a jurisdiction where the rights articulated in the UN Convention are inscribed in a Human Rights Act. In the Australian context, this will assist us to move away from the disparate and piecemeal approach to offering individualised supports across the various jurisdictions, and the requirement to report on outcomes also guard against the cynical application of unit-costed, administrative arrangements, applied in the guise of individualised supports.

Key Human Rights Indicators<sup>55</sup> for living independently and being included in the community include:

- Persons with disability live in the community with choices equal to others.
- Persons with disability are included, and participate in the community.
- People with disability are able to choose their place of residence on an equal basis with others.
- Persons with disability are not obliged to live in any particular living arrangement.
- Persons with disability have access to a range of in home, residential and other community support services necessary to support living and inclusion in the community and to prevent isolation and segregation from the community.
- Community services and facilities for the general population are available to persons with disability on an equal basis with others and are responsive to their needs.

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<sup>55</sup> 2008 French, P Disability Studies and Research Institute for Queensland Advocacy Incorporated. Human Rights Indicators for People with Disability. [www.qai.org.au](http://www.qai.org.au)

## 5 How could Australia better protect and promote human rights?

As is evident from the information outlined in sections 3 and 4 above, the human rights of people with disability are not sufficiently promoted or protected in Australia, and many human rights violations are experienced by people with disability on a daily basis.

While there was general agreement during our consultations, outlined in section 1.3, that people with disability support a Human Rights Act, there was also general agreement that a Human Rights Act needed to be robust in its framework and application; and that a Human Rights Act needed to be supported by a range of additional measures. The exclusion or marginalisation of people with disability from human rights protections necessitates a comprehensive range of legislative, policy, educative and program measures to ensure genuine and effective protection of our human rights.

The following section contains discussion and recommendations that would give effect to comprehensive human rights protections for people with disability.

### 5.1 *Incorporation of international human rights treaties into domestic law*

As discussed in section 3.2 above, PWD believes that all internationally agreed human rights treaties that Australia is a Party must be incorporated into Australian domestic law. This is essential if Australia is to fully implement its commitment to fulfil the obligations contained in the international human rights treaties.

While it may be argued that many of the human rights contained in international human rights treaties have been incorporated into Australia anti-discrimination and service provision legislation, this only represents partial incorporation at best. For example, in the case of the CRPD, it may be argued that the *Disability Discrimination Act, 1992* and the *Disability Services Act, 1986* and their state and territory counterparts incorporate some major elements of the CRPD, they certainly do not incorporate all elements, nor do existing provisions cover all elements of those rights that are incorporated in part.

### 5.2 *Human Rights Act*<sup>56</sup>

PWD supports the adoption of a Human Rights Act that would provide a fundamental mechanism for the identification, prevention and remedy of the human rights violations that are experienced by many Australians, and in particular, people with disability.

Along with QAI, we believe that a Human Rights Act must:

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<sup>56</sup> The discussion in this section is largely drawn or reproduced in whole from the *Submission to the National Human Rights Consultation* developed by Queensland Advocacy Incorporated (QAI), and with the permission of QAI. This reflects our strong endorsement of the recommendations contained in QAI's submission.

- include a mechanism that will allow the Australian Parliament to ‘declare’ new human rights norms to which Australia becomes a Party to be human rights recognised in Australian law (as discussed in section 3.5 above);
- incorporate civil and political rights; economic, social and cultural rights; and rights of specific population groups, including those set out in thematic conventions and declarations (as discussed in sections 3.2 and 3.3 above);
- include explicit recognition of the human rights of people with disability enunciated in the Convention on the Rights of Persons with Disabilities (as discussed section 3.4 above).

A Human Rights Act that is robust in its framework and application must also address the following key elements:

- 5.2.1 Any proposal for a Human Rights Act must be applicable only to natural persons, rather than to other legal personalities. PWD believes that the rights of other legal entities (such as corporations) ought to be protected in other ways. Allowing other legal personalities to claim human rights protection under a Human Rights Act would undermine public confidence in such an instrument.
- 5.2.2 PWD also believes that any proposal for Human Rights Act must apply (and be capable of being invoked) by any person subject to an Australian law. This would include all persons within Australian Territory (whether or not they are Australian citizens or residents) and all persons in other territories whose rights are affected by the operation of Australian law. For example, we view it as essential that a person with disability who is an applicant for residency or citizenship of Australia is able to invoke human rights standards set out in an Australian Human Rights Act should it be necessary to do so.
- 5.2.3 Persons with disability will sometimes not have instrumental capacity to protect or secure their human rights. They will rely upon others (such as a family member, friend or advocate) to act on their behalf. For this reason, PWD believes it is essential that any Human Rights Act permit recognition of a personal representative of a person with disability who ought to be capable of acting on that persons behalf to exercise any right and remedy available under the designated instrument. Any supported or substitute decision-making arrangement must include appropriate safeguards against abuse that are consistent with those required by Article 12 of the Convention on the Rights of Persons with Disabilities.
- 5.2.4 Many human rights violations that persons with disability experience are of a systemic or structural nature. Additionally, many persons with disability are extremely disempowered, lack personal and social resources, do not have instrumental capacity, or are exposed to retribution and stigma if they attempt to exercise a right or remedy. For these and other reasons, PWD believes it is essential that any proposal for a Human Rights Act includes broad standing provisions that will permit appropriate representative and advocacy organisations to take action in the public interest to exercise any right or remedy available under the instrument on behalf of an affected class of persons. This will be a key means of ensuring that human rights actually penetrate to the lived experience of persons with disability.

- 5.2.5 Persons with disability, along with some other groups, will require assistance both on an individual and class basis to ensure that their human rights are recognised, respected, protected and fulfilled. In the absence of such assistance, a Human Rights Act will be substantially meaningless for these groups. It is therefore essential that the introduction of any Human Rights Act is supported structurally by the funding of appropriate advocacy organisations capable of ensuring access to justice for these groups. We note that a similar initiative was included as part of the implementation framework for the *Disability Discrimination Act* 1992 when it was first introduced. Disability Discrimination Legal Services were funded in each Australian State and Territory to assist persons with disability to secure their rights under the Act. In PWD's view, these services ought to be augmented with additional jurisdiction and resources to become broader 'disability rights centres,' to assist persons with disability to exercise their rights under a Human Rights Act.
- 5.2.6 PWD believes that any Human Rights Act must include a robust operational framework that will ensure that the rights it recognises are achieved in practice. The following operational mechanisms are essential:
- All Bills introduced to the Australian Parliament ought to be required to be accompanied by a 'compatibility statement' that outlines in detail how the Human Rights Act is consistent with human rights, and any areas of inconsistency;
  - Courts and tribunals exercising federal jurisdiction ought to be required to interpret Australian laws compatibly with human rights;
  - Courts and Tribunals exercising federal jurisdiction ought to have the power to declare a legislative instrument (or an element of a legislative instrument) incompatible with human rights (or a human right). This ought to have the effect of rendering the legislative provision inoperative, unless re-enacted by the Australian Parliament;
  - All Commonwealth public authorities ought to be required to act compatibly with human rights and to take human rights into account in decision-making;
  - All non-government entities receiving public funding to provide services to the public ought to be required to act compatibly with human rights and to take human rights into account in decision-making;
  - Individuals and classes of persons ought to be able to make complaints to the Australian Human Rights Commission (AHRC) about the violation of any human right incorporated into a Human Rights Act. These complaints ought to be capable of conciliation by the AHRC. If conciliation is unsuccessful, such complaints ought to be capable of enforcement by a Federal Court or Tribunal;
  - The Australian Human Rights Commission ought to be provided with specific jurisdiction to conduct own motion inquiries into grave or systemic human right

violations. Reports from such enquiries ought to be required to be tabled in both houses of the Australian Parliament within 30 days of their production;

- The Australian Human Rights Commission ought to be empowered to make own motion complaints about human rights violations affecting an individual or class of persons. These complaints ought to be capable of enforcement in a Federal Court or Tribunal;
- The Human Rights Act ought to include provisions that make it an offence for any person to take detrimental action (including harassment, intimidation and victimisation) against a person who makes a complaint that a human right has been violated.
- The Human Rights Act ought to include provisions that require officers of public authorities and publicly funded non-government organisations providing public services to report violations of human rights to the Australian Human Rights Commission for investigation;
- The Human Rights Act ought to include provisions that provide strong whistleblower protection for persons who report violations of human rights to relevant authorities for investigation;
- The Australian Human Rights Commission ought to be provided with a plenary power to develop and recommend to the Australian Parliament mandatory human rights standards to give effect to a human right (or human rights) incorporated into any Human Rights Act. Such standards, if adopted by the Parliament, ought to be binding upon all Commonwealth agencies, and all non-government agencies that receive public funding to provide services to the public;
- A requirement that the Australian Government develop and publish a whole of government National Human Rights Action Plan on a progressive basis (renewable every 3 years) to give effect to the human rights recognised in any Human Rights Act;
- A requirement for all Commonwealth agencies to develop agency specific progressive human rights action plans (renewable every three-years) to give effect to the human rights recognised in any Human Rights Act.

5.2.7 In relation to our proposal for an individual and group complaint mechanism to be established that will provide remedies for the violation of the Human Rights Act, PWD believes it is essential that this be designated a 'costs-free' jurisdiction, so that persons whose rights are violation will not be discouraged from bringing complaints.

5.2.8 PWD also believes that any Human Rights Act must include a potent performance framework that will ensure that the rights it recognises are achieved in practice. This performance framework ought to include the following mechanisms:

- A National Office of Human Rights Policy Co-ordination ought to be established in the Department of Prime Minister and Cabinet under high level executive

leadership. This Office ought to be provided with strategic operational responsibility for the National Human Rights Action Plan and for the coordination of agency-level human rights action plans;

- A Joint Standing Committee on Human Rights ought to be established by the Australian Parliament. This Committee ought to have among its functions:
  - Scrutiny of all Bills introduced to the Parliament and their associated compatibility statements. Such scrutiny ought to include a requirement that the Committee undertake public consultations and conduct its activities in public;
  - An annual public inquiry process into progress in the realisation of human rights recognised in any Human Rights Act, and the effectiveness of implementation measures. This inquiry process ought to include a requirement that the Committee undertake public consultations and conduct its activities in public.

### **5.3 Other policy, education and program measures**

During our consultations, participants strongly expressed the view that a Human Rights Act was not the only measure required to promote and protect the rights of people with disability, and that other policy, education and program measures needed to be implemented in conjunction with a Human Rights Act. These measures include:

#### **5.3.1 National audit of laws, policies and programs<sup>57</sup>**

CRPD rights are not fully realised in Australian laws, policies and programs. There are a number of sub-optimal laws, policies and programs, some outlined in section 4 of this submission that require review and development so as to ensure the full realisation of CRPD rights in the Australian context.

There are also many areas of non-compliance with existing Australian laws, also outlined in section 4 that purport to recognise and protect the human rights of persons with disability.

Major areas of concern include:

- Disability discrimination law – particularly with respect to the duty to provide reasonable accommodation; limits on the categories of persons protected; limits on the areas of life covered; the exclusion of particular categories of state and non-state actors; the relative inaccessibility and cost of enforcement for individuals;
- Disability services law – particularly with respect to the lack of compliance with the principles and objectives of the legislation; the lack of remedies for violations; and the lack of entitlement to essential support services;

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<sup>57</sup> 2008 French. P, Disability Studies and Research Institute for the Australian Task Force on CRPD Ratification. *Final Report to the Australian Government Departments of Families, Housing, Community Services, and Indigenous Affairs, and Attorney-General - Consultations with Australian representative organisations governed by persons with disability, disability advisory councils, and the disability legal services network on the impact of ratification of the Convention on the Rights of Persons with Disabilities.*

- Laws and regulations relating to the built environment – particularly with respect to public infrastructure, residential dwellings, and in relation to emergency egress;
- Guardianship and administration laws – particularly with respect to the absence or ineffectiveness of procedural safeguards; the failure to implement in some cases the principle of the least restrictive alternative; and the failure to ensure the effective promotion and support of alternatives to substitute decision-making;
- Mental health laws – particularly with respect to the absence or ineffectiveness of procedural safeguards for compulsory treatment, the failure to implement in some cases the principle of the least restrictive alternative; and the failure to ensure the effective promotion and support of alternatives to compulsory treatment;
- Child protection laws – particularly with respect to the failure to provide adequate protection and support for children with disability, and discriminatory practices in relation to parents with disability;
- Migration law – the discriminatory restrictions on persons with disability migrating to Australia, and the denial or restriction of social security benefits and support services to migrants with disability;
- Critical levels of unmet demand for essential support services, including personal care, daily living support, accommodation, therapy, aids and appliances.

In light of these and other challenges, PWD believes that the Australian Government should undertake a national audit of laws, policies and programs in relation to persons with disability. PWD believes this is essential to full realisation of rights for people with disability and it would aid the effectiveness of a Human Rights Act.

It is noted that there has not been a high level review of this nature since the Handicapped Programs Review of 1982-1986, which followed Australia's observance of International Year of Disabled Persons in 1981. PWD strongly argues that the ratification of the CRPD has necessitated such a high level review, and that it would provide the basis for the ongoing formulation of the National Disability Strategy currently being developed by the Australian Government. It is also argued that such a review would result in the reinvigoration of, and recommitment to, a disability rights agenda across all sectors of the community, following an extended period of stagnation and regression.

### **5.3.2 Representative advice<sup>58</sup>**

The CRPD places major emphasis on the participation of persons with disability and representative organisations for persons with disability in policy development, implementation and monitoring.

In this respect, PWD views the establishment or enhancement of representative consultative mechanisms as a key priority for CRPD implementation. Key measures include:

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<sup>58</sup> 2008 French. P, Disability Studies and Research Institute for the Australian Task Force on CRPD Ratification. Final Report to the Australian Government Departments of Families, Housing, Community Services, and Indigenous Affairs, and Attorney-General - Consultations with Australian representative organisations governed by persons with disability, disability advisory councils, and the disability legal services network on the impact of ratification of the Convention on the Rights of Persons with Disabilities.

- composition of government and independent advisory and consultative bodies in relation to disability policy by persons with disability drawn from representative organisations, who are accountable to a grass roots constituency;
- the establishment or enhancement of systematic and/or structural linkages (such as advisory committee and consultative structures) between the Australian Human Rights Commission and the proposed National Office of Human Rights Policy Coordination and representative organisations for persons with disability.
- recognition of the vital role of existing representative organisations, who are accountable to a grass-roots constituency, such as PWD, other Disabled Peoples Organisations and representative bodies.

### **5.3.3 Human rights education**

Participants at our consultation sessions highlighted that greater emphasis is required on the promotion of rights, what they are and how they work and what happens when they are in conflict. A key protective measure of human rights is a properly informed community.

Human rights education that aims to develop a culture of equality and rights with the Australian community was viewed as essential to promoting and protecting human rights. This could be achieved by:

- incorporating human rights into the education system, in the same way that tolerance and diversity has been included in the primary and secondary school curriculum of some States and Territories;
- providing specific, accessible education and training programs to people with disability, particularly those people with disability who are in segregated education or residential facilities with no access to information that is generally provided to the community;
- providing human rights education through a concerted outreach approach to make human rights 'real' for particularly marginalised people with disability such as Indigenous people with disability and people with disability living in rural and remote locations.

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