

# HARMONIZATION OF NATIONAL LAWS WITH THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

COUNTRY CASE STUDY  
AUSTRALIA



**ESCAP**  
Economic and Social Commission  
for Asia and the Pacific

# HARMONIZATION OF NATIONAL LAWS WITH THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES



*The shaded areas of the map indicate ESCAP members and associate members.\**

The Economic and Social Commission for Asia and the Pacific (ESCAP) is the most inclusive intergovernmental platform in the Asia-Pacific region. The Commission promotes cooperation among its 53 member States and 9 associate members in pursuit of solutions to sustainable development challenges. ESCAP is one of the five regional commissions of the United Nations.

The ESCAP secretariat supports inclusive, resilient and sustainable development in the region by generating action-oriented knowledge, and by providing technical assistance and capacity-building services in support of national development objectives, regional agreements and the implementation of the 2030 Agenda for Sustainable Development.

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## COUNTRY CASE STUDY AUSTRALIA



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**Cover design:** Blended watercolour shapes are given form by concentric circles, symbolizing the coming together of diverse principles, values and approaches into a balanced, equitably supportive and harmonious structure.

## FOREWORD

The Convention on the Rights of Persons with Disabilities, a landmark human rights instrument, was adopted in 2006 by the United Nations General Assembly. Negotiations on the draft Convention were completed within the shortest duration for any human rights treaty. It entered into force in 2008.

The Convention process united persons with disabilities around the world, including across the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) region.

The China Disabled Persons' Federation hosted the World NGO Summit on Disability in Beijing in 2000 (10-12 March). Participants included leaders of Disabled Peoples' International, Inclusion International, Rehabilitation International, the World Blind Union and the World Federation of the Deaf, as well as national civil society organizations of and for persons with disabilities from ESCAP members and associate members. The theme of the Summit was "The Strategy of the World Disability Movement Towards the New Century." Deng Pufang, Chairperson of the China Disabled Persons' Federation, highlighted the need to adopt a binding international convention on the rights of people with disabilities. In doing so, he urged all socially responsible persons and entities to immediately initiate the process for such an international convention. The Summit adopted the Beijing Declaration on the Rights of People with Disabilities in the New Century.

Following that initiative, ESCAP organized the Regional Workshop Towards a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities in Bangkok in 2003 (14-17 October). The outcome document of the substantive and participatory workshop contained essential elements for a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities, originally drafted by Professor Andrew Byrnes and subsequently referred to as the Bangkok Draft. The Bangkok Draft was highly regarded by the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities that convened annually between 2002 and 2006 at United Nations headquarters in New York.

The idea of a convention first emerged in the ESCAP region. ESCAP attached utmost importance to its germination – throughout the drafting process to its ratification and its implementation. ESCAP played a strong technical assistance role in the drafting of the Beijing Declaration, contributed the Bangkok Draft, which served as the foundation for drafting the Convention on the Rights of Persons with Disabilities, and attended annual sessions of the Ad Hoc Committee.

The Convention represents a departure from the entrenched medical model of disability that views "the disabled" in terms of their medical condition. Instead, the Convention focuses on social parameters and the dignity of the person. It is the first international human rights salvo fired against ableism, the root of discrimination. It seeks to liberate persons with diverse disabilities from the stigma of being disabled. It unites all persons with disabilities regardless of type of disability, background and location. It represents the historic convergence of the hopes, determination and persistent efforts of all peoples committed to the human rights of persons with disabilities. Negotiations in the Ad Hoc Committee were invariably charged with passion and a sense of urgency.

Significantly, the Convention highlights, for the first time, that the absence of action constitutes discrimination and introduces the concept of reasonable accommodation as an important means of tackling disability-related inequitable conditions. This is bold. It is cutting-edge for social transformation.

The real work starts after a State party ratifies the Convention. It begins with the harmonization of domestic legislation with the Convention. An important obligation regarding State party engagement is the timely preparation and submission of reports to the Committee on the Rights of Persons with Disabilities, with provision for parallel reports by non-state actors.

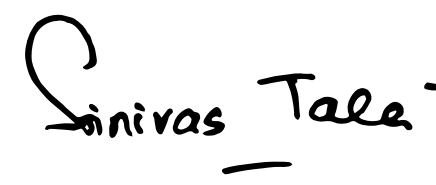
Goal 9 of the Incheon Strategy to "Make the Right Real" for Persons with Disabilities in Asia and the Pacific, which is the guiding document for the Asian and Pacific Decade of Persons with Disabilities, 2013-2022, promotes the speedy ratification of the Convention and effective harmonization of domestic legislation with the Convention.

The ESCAP region faces three "lacks": lack of action to harmonize domestic legislation with the Convention; lack of understanding of the Convention and its concepts; and lack of indigenous knowledge products based on home-grown research on Convention-related matters, particularly on the harmonization of domestic legislation with the Convention.

Against this background, in 2021, ESCAP initiated a research project that has yielded six volumes of analysis. The preparation of the publications involved persons with disabilities and allies from the disability community as researchers, peer reviewers, technical support team members and interns. ESCAP is grateful to the Government of China for its funding contribution to the preparation of this important knowledge product.

The research outcomes offer governments and civil society communities across the region a substantive Asian and Pacific foundation for moving forward on realizing the rights of persons with disabilities. The series is a treasure trove of rich lessons that provide insights into the scope for building, reinforcing and expanding Asian and Pacific harmonization expertise and experiences in the coming years.

It is my hope that actors in all sectors of society – particularly policymakers, organizations of persons with disabilities, other civil society entities, the private sector and the United Nations family active in Asia and the Pacific – will find these six volumes useful and motivating for accelerating endeavours to "Make the Right Real" for persons with diverse disabilities in Asia and the Pacific.



**Srinivas Tata**

Director, Social Development Division  
United Nations Economic and Social Commission  
for Asia and the Pacific

## MESSAGE FROM GERARD QUINN, UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHTS OF PERSONS WITH DISABILITIES

I am delighted for the opportunity to provide words of introduction to the series of six publications resulting from the project *Harmonization of National Laws with the Convention on the Rights of Persons with Disabilities*. The project was initiated by ESCAP as part of its assessing progress in the implementation of the Incheon Strategy to “Make the Right Real” for Persons with Disabilities in Asia and the Pacific.

These publications show that the Convention on the Rights of Persons with Disabilities has stimulated significant changes around the world, including in the States of the ESCAP region, to bring national laws, policies and practices into better alignment with its provisions and thus to bring us closer to the realization of the rights that the treaty guarantees for all persons with disabilities.

I am especially delighted to acknowledge and honour regional actions to advance the Convention. ESCAP has long been to the fore in assisting its member States in implementing the Convention. Its work on disability is a model and an inspiration for other regional groupings around the world.

Treaties are never self-executing. To be effective, they must be owned and internalized. The national case studies and the overview of major developments that emanate from this project demonstrate how the Convention is now central to national disability law and policy in the region.

It is certainly fair to say that ratification of the Convention has had a catalytic effect in most Asian and Pacific States. The national case studies reflect the critical role of a strong civil society, especially organizations of persons with disabilities, and the importance of ensuring that they participate actively and meaningfully in the development of policies of all types, including those of particular relevance to the advancement and participation of persons with disabilities in mainstream society. This strongly validates the vision in the Convention of the co-production of policy between governments and civil society. Indeed, the checking role envisioned by the Convention and played by national human rights institutions in many States in monitoring and providing remedies for violations of the rights of persons with disabilities should be recognized. Together, power, voice and ideas can make a real difference.

Despite the many advances in the Asian and Pacific region and around the world, we remain far from full implementation of the Convention’s guarantees. The full inclusion of persons with disabilities and recognition of their personhood and citizenship are still to be achieved in all our societies – the Convention provides a framework to do so and a call to action to us all to continue our efforts to reach the goals it has set.

Congratulations to ESCAP for bringing these publications to fruition: They provide a wealth of information on the effective steps that States have taken to give effect to the Convention. This information may provide ideas for other States while being frank about the shortfalls and challenges that remain to be overcome.



**Gerard Quinn**

United Nations Human Rights Council Special Rapporteur  
on the rights of persons with disabilities



## MESSAGE FROM ROSEMARY KAYESS, CHAIRPERSON OF THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DIS- ABILITIES

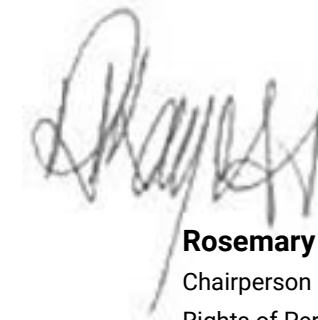
It gives me great pleasure to introduce this series of six publications on the implementation of the Convention on the Rights of Persons with Disabilities in the ESCAP region. The national case studies and the overview analysis provide an illuminating and encouraging review of the impact that the Convention has had in many Asian and Pacific States. At the same time, they identify some major challenges that remain.

The national case studies and overview provide insights into the way that the States parties in Asia and the Pacific have engaged with the Committee on the Rights of Persons with Disabilities, which is the independent expert body established by the Convention to monitor its implementation through a reporting procedure, and through the individual communication and inquiry procedure. The membership of the Committee has included several experts from Asian and Pacific countries.<sup>1</sup>

The material included in these publications shows that ratification of the Convention and the reporting procedure, which involves the Committee providing detailed recommendations to States parties, have stimulated or added momentum to changes to legislation in many fields by which States have sought to bring their national laws into alignment with the Convention obligations. The national case studies highlight the way in which governments, courts and civil society organizations (in particular organizations of persons with disabilities) have engaged constructively with the Concluding observations, General comments and other work of the Committee to achieve the goals of the Convention.

The national case studies and the overview also identify areas where harmonization of national laws still has some way to go, both in terms of amending or reforming laws or in ensuring that legal guarantees bring practical results for persons with disabilities in their everyday lives. I encourage States, civil society organizations and national human rights institutions to continue to review existing laws in all areas to ensure that they are fully compatible with the Convention.

I congratulate ESCAP for initiating this project and commend everyone involved for carrying it through. These publications will provide an extremely useful resource for people in the countries discussed and in other countries who may be looking for innovative ways to ensure that persons with disabilities more fully enjoy their human rights and fundamental freedoms.



**Rosemary Kayess**

Chairperson of the United Nations Committee on the  
Rights of Persons with Disabilities (2021-2023)

<sup>1</sup> Lists of current and former members of the Committee may be found at <https://www.ohchr.org/en/treaty-bodies/crpd/membership>.

## ACKNOWLEDGEMENTS

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Cai Cai, Chief of Gender Equality and Social Inclusion Section, SDD, led the drafting and research team comprising Emeritus Professor Andrew Byrnes, University of South Wales (lead consultant); Yuenwah San, Hon. Senior Advisor on Disability Inclusion; Aiko Akiyama Social Affairs Officer, SDD. Administrative support was provided by Juraporn Sinlapharajanapanich, SDD.

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Kate has a BSc in Anthropology, and a Master's in Community Development and International Public Health. She has also been country lead in both the UK and Australia for the ACTION global health advocacy partnership, working with a network of grassroots advocates across the world to raise awareness and mobilize resources to address health inequity.

Kate would like to thank the Australian disability advocates, experts and leaders who provided inputs into the draft, or from whose expertise the content was drawn: Therese Sands, Rosemary Kayess, Andrew Byrnes, Carolyn Frohmader, El Gibbs, Damian Griffis, June Reimer and Linda Steele.

## NOTE ON TERMINOLOGY

Language both reflects and contributes to the way in which disability and persons with disabilities are viewed in our societies. In most societies, the terms historically used to describe persons with disabilities have set them apart, devalued them as human beings and have insulted and degraded them, contributing to prejudice and stereotypes and fear of persons with disabilities and reinforcing their marginalization and exclusion from full participation in society as equal citizens and members of their communities. These terms reflect “ableist” perspectives that involve the “othering” of persons with disabilities, “ideas, practices, institutions and social relations that presume able-bodiedness, and by so doing, construct persons with disabilities as marginalised . . . and largely invisible ‘others’.”<sup>2</sup> “Ableism against persons with disabilities reflects a preference for species-typical normative abilities leading to the discrimination against them as ‘less able’ and/or as ‘impaired’ disabled people”; it is “supported by the medical, deficiency, impairment categorization of disabled people (medical model)” and “rejects the ‘variation of being’, biodiversity notion and categorization of disabled people (social model).”<sup>3</sup>

There is increasing awareness of the important impact of language. Thus, persons with disabilities and others have seen changes to the way in which we speak about disability as an essential part of the struggle to bring about equality. Changes in terminology often reflect changes in the underlying concepts that have been used to describe and explain impairment and disability, often in derogatory terms. A fundamental starting principle is that, when we choose how to speak about disability, we must all listen to those of us who live with disability and how we/they speak about ourselves/themselves and the terminology we/they prefer be used. Given that language is culturally embedded and the same term can have different connotations, even amongst different groups of those who speak the same language, there will not necessarily be one term that is preferred in all contexts.

The 2022 United Nations *Disability-Inclusive Communications Guidelines* provide guidance as to appropriate ways to speak and write about persons with disabilities and disability issues, as well as to ensure accessibility of communications in different media.<sup>4</sup>

<sup>2</sup> Vera Ann Chouinard, “Making space for disabling differences: Challenging ableist geographies”, *Environment and Planning D: Society and Space*, vol. 15 (1997), pp. 379–380.

<sup>3</sup> Gregor Wolbring, “The politics of ableism”, *Development*, vol. 51 (2008), pp. 252–253; Fiona Campbell, “Inciting legal fictions: ‘Disability’s’ date with ontology and the ableist body of the law”, *Griffith Law Review*, vol. 10. No. 1 (2001), pp. 42, 44–45.

<sup>4</sup> United Nations, “Disability-Inclusive Communications Guidelines”, guidelines (New York, 2022).

Different terms are used in different countries and, even in the same country, to describe the same thing. For example, while “persons with disabilities” is used in the Convention and in the United Nations context, in some countries the term “disabled persons” or “disabled people” is preferred by persons with disabilities. Likewise, while the phrases “disabled peoples’ organizations” (“DPOs”) and “persons with disabilities and their representative organizations” (the latter taken from the Convention) have often been used and continue to be used in many countries, the phrase “organizations of persons with disabilities” (“OPDs”) has been embraced by many organizations of persons with disabilities and the United Nations. The term emphasizes that the relevant organizations to be consulted by government to take part in co-design of policy and in policymaking are organizations made up of and led by persons with disabilities.

In the publications that form part of this project, the authors use both the terminology favoured by the United Nations and that used by persons with disabilities and OPDs in those countries. At the same time, because national laws and policies still sometimes retain outmoded and derogatory language, that terminology is referred to when discussing the continued operation of those laws and their consistency with the Convention. In some cases and in some countries, descriptions such as “differently abled persons” which are intended to valorize the abilities of persons with disabilities are used.



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# 1 INTRODUCTION

Australia is a wealthy country with a high standard of living and a strong human rights sector. Significant gains have been made over recent years in relation to the rights of persons with disabilities.<sup>5</sup>

There are more than 4 million persons with disabilities in Australia,<sup>6</sup> approximately 18 per cent of a population of 25 million people.<sup>7</sup> 1981, the International Year of Disabled Persons, heralded a significant shift in the disability rights movement in Australia, with an increasing emergence of disability activism, and the founding of cross-disability Disabled People's Organisations dedicated to advocating against systemic discrimination faced by persons with disabilities. Since Australia's ratification of the Convention on the Rights of Persons with Disabilities (the Convention) in 2008,<sup>8</sup> sustained advocacy from the disability rights sector has combined with commitment from the Australian Government, resulting in foundational rights-based legislative, policy and practice reform.

Despite the gains in disability rights over recent decades, many persons with disabilities in Australia continue to experience poverty, disadvantage and human rights violations. Aboriginal and Torres Strait Islander persons with disabilities are the most disadvantaged and discriminated against.

Since Australia's ratification, the most comprehensive review of the implementation of the Convention from the perspective of persons with disabilities was the 2013 civil society shadow report to the Committee on the Rights of Persons with Disabilities (the Committee), Disability Rights Now.<sup>9</sup> This case study provides a point in time summary of Australia's progress, and draws on the lessons from Disability Rights Now, as well as 2019 civil society shadow report on the Rights of Disabilities by the Committee Disability Rights Now 2019.<sup>10</sup>

<sup>5</sup> Note: The information on which this national case study is based was current as at 31 December 2021. The ongoing work of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, which is scheduled to issue its final report in 2023, and the election of a new federal government in May 2022, mean that there are likely to be positive legislative and policy developments in relation to the rights of persons with disabilities introduced after that date which are not reflected in this case study.

All the Australian court cases and all the legislation referred to in this study are available at the website of the Australian Legal Information Institute: [www.austlii.edu.au](http://www.austlii.edu.au). Australian federal (Commonwealth) legislation is available at the official government website: [www.legislation.gov.au](http://www.legislation.gov.au).

<sup>6</sup> Australian Institute of Health and Welfare, 2020.

<sup>7</sup> Australian Bureau of Statistics, 2020.

<sup>8</sup> Commonwealth of Australia, 2009.

<sup>9</sup> Australian Civil Society Shadow Report Working Group, 2012.

<sup>10</sup> Australian Civil Society Shadow Report Working Group, 2019.

# 2 DISABILITY IN AUSTRALIA – THE DATA AND DEFINITION

There are no nationally consistent measures for collection and public reporting of disaggregated data across the full range of Convention obligations. This has been repeatedly noted in Concluding observations of the Committee on the Rights of Persons with Disabilities on Australia's reports.<sup>11</sup>

In an initiative that has the potential to tell a much more comprehensive story about the experiences of persons with disabilities in Australia, the Commonwealth and State and Territory governments are currently working together to develop a cross-jurisdictional National Disability Data Asset (NDDA). The NDDA aims to better link data sources together, improve quality and comparability, and make data accessible to audiences while protecting privacy. The NDDA has an Advisory Council that includes persons with disabilities and their representative organizations. Work on the NDDA commenced in 2020, and NDDA pilots link national level data with data from South Australia (SA), New South Wales (NSW), Victoria (VIC) and the National Disability Insurance Agency (NDIA).<sup>12</sup>

Currently, the primary source of data on people with disabilities is from the Australian Bureau of Statistics (ABS). The main ABS data sources of relevance are:

- The Survey of Disabilities and Carers (SDAC)<sup>13</sup> – this is a large, national survey designed to measure the entire spectrum of disability through more than 120 questions. The survey captures data from private dwellings (including self-care retirement villages, and disability residences), but does not capture all people with disability, for example those who are homeless, in jail or correctional facilities, in boarding houses or other forms of accommodation, and those in very remote or discrete Aboriginal and Torres Strait Islander communities.
- The Personal Safety Survey (PPS)<sup>14</sup> – is currently the best available source of population-level estimates of the prevalence of different types of violence experienced by persons with disabilities in Australia. The PPS also focuses on private dwellings, excluding people living in institutional or residential settings and those people who require communication support. The design of the survey focuses on intimate partner violence, and thus does not reflect the range of other perpetrators of personal violence experienced by people with disability – for example, support workers. The PPS does not currently collect demo-

graphic information for some population cohorts, including transgender and gender-diverse people and Aboriginal and Torres Strait Islander people.

- The National Aboriginal and Torres Strait Islander Social Survey (NATSISS)<sup>15</sup> also collects data on disability, but again is limited to private dwellings, excluding data such as from institutional settings, relating to those experiencing homelessness or in prison and out of home care. Research conducted by the First Peoples Disability Network notes that Aboriginal and Torres Strait Islander persons with disabilities, particularly those with cognitive impairment, represent some of the most isolated and excluded people in society, and the understanding of intersectionality makes it reasonable to presume that the prevalence of disability is higher for those Aboriginal and Torres Strait Islander people not living in private dwellings. The First Peoples Disability Network also notes critical cultural factors that influence the collection and interpretation of data relating to Aboriginal and Torres Strait Islander persons with disabilities. For example, there is traditionally no word for “disability” in Aboriginal and Torres Strait Islander culture, and disability discourse and diagnostic terminology are not always understood and accepted. In addition, Aboriginal and Torres Strait Islander people may not trust the way data is used or fear they may be discriminated against for disclosing disability, and therefore may not engage with data collection processes.<sup>16</sup>

The Australian Institute of Health and Welfare (AIHW) uses a variety of data sources (including the above listed ABS data) in their reports. For example, the *People with Disability in Australia 2020* report uses 21 sources of data on persons with disabilities, although they note that the definition and population scope for this data vary (to illustrate, see Annex).

The Australian Census and other Australia Bureau of Statistics (ABS) surveys<sup>17</sup> (SDAC, NATSISS, PSS) are based on the World Health Organization's (WHO) International Classification for Functioning, Disability and Health (ICF),<sup>18</sup> defining a person as having disability (or long-term health condition) if they have one or more conditions that has lasted, or is likely to last, for six months or more that restricts daily activities.

Not all Australian datasets employ definitions based on the ICF, for example the National Health Survey,<sup>19</sup> which collects health statistics, including on long-term health conditions, mental wellbeing, and health risk factors, uses a shorter set of questions to identify disability (the Short Disability Module). The National Disability Insurance Scheme (NDIS) bases eligibility for the scheme on a narrower concept of disability in terms of people who have a significant impairment to their functional capacity. There is no statutory definition of disability included in key legislation, including the *National Disability Insurance Scheme Act (2013)*,<sup>20</sup> that fully aligns with the Convention definition. However, the NDIS Act 2013 and the National Disability Insurance Scheme (Becoming a Participant) Rules 2016 set out the criteria for when a person meets the “disability

<sup>15</sup> Australian Bureau of Statistics, 2016.

<sup>16</sup> Avery, S, 2018.

<sup>17</sup> Survey of Disability, Ageing and Carers (SDAC); National Aboriginal and Torres Strait Islander Survey (NATSISS); Personal Safety Survey (PSS).

<sup>18</sup> World Health Organization, 2002.

<sup>19</sup> Australian Bureau of Statistics, 2018.

<sup>20</sup> The *Disability Discrimination Act 1992* (Commonwealth), s 4, defines ‘disability’ in terms of impairment but in its application to discrimination in particular areas also includes social barriers that arise for actions based on those impairments. The *Fair Work Act 2009* (Cth), which provides protection against ‘adverse action’ in work on the basis of ‘physical or mental disability’ in s 351 and other grounds, does not define disability. See Allen, D, 2018.

<sup>11</sup> Committee on the Rights of Persons with Disabilities, 2013c, CRPD/C/AUS/CO/1, paras. 53-56; Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, paras. 57-58.

<sup>12</sup> National Disability Data Asset. <https://ndda.gov.au/>.

<sup>13</sup> Australian Bureau of Statistics, 2020.

<sup>14</sup> Australian Bureau of Statistics, 2016.

requirements” for support under the NDIS: these are based on a combination of having an impairment which is permanent and which “affect[s] the person’s capacity for social or economic participation.”<sup>21</sup>

These variations mean that disability is not consistently identified across all data collections or administrative sources. Throughout its combined second and third periodic reports (2019 periodic report) to the Committee on the Rights of Persons with Disabilities, the Australian Government noted administrative data sources,<sup>22</sup> including data collected by government agencies such as the police (The Health of Australia’s Prisoners Report<sup>23</sup>), health (The National Aboriginal and Torres Strait Islander Health Survey<sup>24</sup>), family and community services (data relating to the number of children engaging in the child protection and out-of-home care (OOHC<sup>25</sup>), schools (the Nationally Consistent Collection of Data on School Students with Disability<sup>26</sup>) and data collected by the National Disability Insurance Agency.<sup>27</sup> This administrative data has limitations in terms of scope and disaggregation when it comes to persons with disability.<sup>28</sup>

In its 2019 Concluding observations on Australia, the Committee on the Rights of Persons with Disabilities made a number of specific recommendations in relation to data collection, as well as raising concerns about a “lack of nationally consistent measures for the collection and public reporting of disaggregated data

on the full range of obligations contained in the Convention.”<sup>29</sup>

The Committee also recommended that Australia “in conjunction with the Office of the National Data Commissioner, develop a national disability data framework to ensure appropriate, nationally consistent measures for the collection and public reporting of disaggregated data on the full range of obligations contained in the Convention, especially with regard to women, children and Aboriginal and Torres Strait Islander persons with disabilities.”<sup>30</sup>

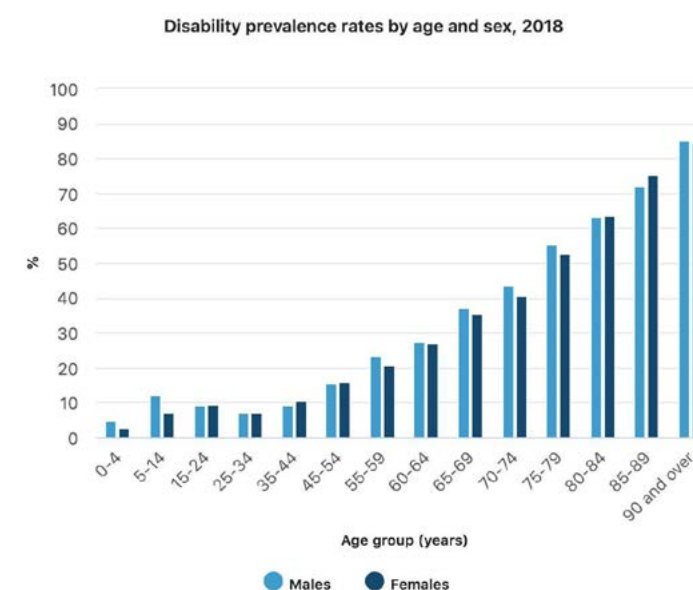
## 1. What the data tells us about disability in Australia

Data summarized below is sourced from the Australian Bureau of Statistics (ABS) 2018 ‘Survey of Disability, Ageing and Carers (SDAC),<sup>31</sup> and the Australian Institute of Health and Welfare *People with Disability in Australia 2020* report.<sup>32</sup>

Around one in six (18 per cent) persons in Australia have a disability (4.4 million). Another 22 per cent of persons in Australia have a long-term health condition but no disability. Of the approximately 4.4 million, 1.4 million people (5.7 per cent of the population) have severe or profound disability. Australia has an ageing population with 44 per cent prevalence of disability in people aged 65 and over.

Prevalence of disability differs by age and sex (currently SDAC data does not disaggregate by gender identification). An estimated 9.2 per cent of males and 9.5 per cent of females aged 15–24 years have disability, 13 per cent of males and females aged 15 to 64 years have disability, 49 per cent of males and 50 per cent of females aged 65 years and over have disability.<sup>33</sup>

Figure 1 Disability prevalence rates by age and sex, 2018



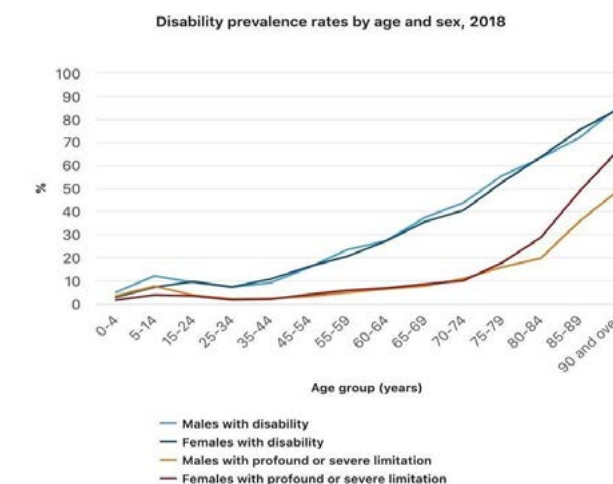
Source: Australian Bureau of Statistics, Disability, Ageing and Carers, Australia: Summary of Findings 20\*

The level of severe or profound disability varies with age: 6.0 per cent of males and 3.0 per cent of females aged 0 to 14 years have severe or profound disability; 3.6 per cent of males and 3.3 per cent of females aged 15 to 24 years have severe or profound disability; 3.2 per cent of males and females aged 15 to 64 years have severe or profound disability; 15 per cent of males and 20 per cent of females aged 65 years and over have severe or profound disability.<sup>34</sup>

<sup>33</sup> Australian Bureau of Statistics, 2019b.

<sup>34</sup> Australian Bureau of Statistics, 2019b.

Figure 2 Disability prevalence rates by age, sex and limitation, 2018



Source: Australian Bureau of Statistics, Disability, Ageing and Carers, Australia: Summary of Findings 20\*

For about 3 in 4 (77 per cent) of persons with disability, their main form of disability (the main condition that causes the most problems) is physical. This includes diseases of the:

- musculoskeletal system and connective tissue (30 per cent), such as back problems and arthritis;
- ear and mastoid process (8.4 per cent), such as hearing loss and tinnitus;
- circulatory system (6.3 per cent), such as heart disease and stroke;
- nervous system (6.7 per cent), such as cerebral palsy and multiple sclerosis (ABS 2019b).

For the remaining 1 in 4 (23 per cent), their main form of disability is mental or behavioural, including:

- intellectual and developmental (6.5 per cent), such as intellectual disability and autism;
- mood affective (3.8 per cent), such as depression;
- dementia and Alzheimer disease (2.6 per cent) (ABS 2019a, 2019b).

<sup>21</sup> NDIS Act 2013, s 24(1) and National Disability Insurance Scheme (Becoming a Participant) Rules 2016, Part 5. See *Mulligan v National Disability Insurance Agency* [2015] FCA 544; (2015) 233 FCR 201, [15]-[16], [51]-[56].

<sup>22</sup> Attorney-General’s Department, 2018.

<sup>23</sup> Australian Institute of Health and Welfare, 2020.

<sup>24</sup> Australian Bureau of Statistics, 2019.

<sup>25</sup> Data on out of home care is collected by State and Territory departments responsible for child protection, as part of programme planning and local case management processes. Datasets differ in scope and disaggregation.

<sup>26</sup> Nationally Consistent Collection of Data on School Students with Disability <https://www.nccd.edu.au/>.

<sup>27</sup> See: <https://data.ndis.gov.au/> for more information about the data collected by the NDIA.

<sup>28</sup> For example, the Nationally Consistent Collection of Data on Schools Students with Disability only collects data about school students with disability who receive an adjustment – issues with this data include that it does not capture children with disability who may require, but are not accessing support through their school.

<sup>29</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 57.

<sup>30</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 57.

<sup>31</sup> Australian Bureau of Statistics, 2018.

<sup>32</sup> Australian Institute of Health and Welfare, 2020.



Prevalence varies across Australia's states and territories, due in part to their differing age structures in different locations. Over one-quarter (26.8 per cent) of people in Tasmania had disability, higher than all other states and territories, followed by the Australian Capital Territory and South Australia (both 19.4 per cent).

## 2. Children with disabilities

In 2018, 357,500 or 7.7 per cent of children under 15 were reported as having a disability. The proportion of children with disability increased from 6.9 per cent (295,900) in 2012: An estimated 9.6 per cent of males and 5.7 per cent of females aged 0 to 14 years have disability.

Children in inner regional areas<sup>35</sup> were more likely to have disability than children in major cities (10.4 per cent or 80,400 compared with 7.0 per cent or 239,700). Boys in inner regional areas were twice as likely as girls in inner regional areas to have disability (13.5 per cent of 52,800 boys compared with 6.6 per cent or 25,100 girls).

Of all children, 4.5 per cent (209,300) had profound or severe disability and 1.6 per cent (72,800) had moderate or mild disability. Boys were twice as likely as girls to have profound or severe limitations (6.0 per cent or 143,800 compared with 3.0 per cent or 67,200).

### Type of disability of children aged 0-14, by classified disability group (per cent), 2018

DISABILITY TYPE	PER CENT CHILDREN AGED 0-14
Intellectual	4.5
Sensory and speech	3.1
Psychosocial	2.7
Physical restriction	1.8
Head injury, stroke, or acquired brain injury	0.2
Other	1.6

# 3 INTERNATIONAL OBLIGATIONS AND DOMESTIC ACTIONS

Australia signed the Convention on 30 March 2007 and ratified it on 17 July 2008. Australia is also party to the Optional Protocol to the Convention (20 September 2009). At the time of ratification of the Convention, Australia made interpretative declarations in relation to articles 12, 17 and 18 of the Convention. These interpretative declarations allow for substitute decision making (where necessary as a last resort and subject to safeguards),<sup>36</sup> compulsory treatment (where necessary as a last resort and subject to safeguards); and restrictions and health requirements for people from other countries seeking to enter, or remain in Australia.<sup>37</sup>

Australia is party to another six core United Nations human rights treaties (ratification dates in brackets): the International Covenant on Civil and Political Rights ICCPR (1980); the International Covenant on Economic, Social and Cultural Rights ICESCR (1976); the International Convention on the Elimination of All Forms of Racial Discrimination ICERD (1975); the Convention on the Elimination of All Forms of Discrimination against Women CEDAW (1983); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment CAT (1989); the Convention on the Rights of the Child CRC (1991).

Australia is also party to the (First) Optional Protocol and the Second Optional Protocol to the International Covenant on Civil and Political Rights (1991); the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2006); the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2007); the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (2009); the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2018). Australia has accepted individual complaints procedures under the ICERD, the ICCPR, CEDAW, CAT and the CRPD, and the inquiry procedures under the CAT, OPCRPD and OPCEDAW. It is not a party to the Optional Protocol to the ICESCR.

## 1. International obligations in national law

Australia has a federal political system, with a central Commonwealth Government (the Australian Government), six states and two mainland territories. Section 51 of the Australian Constitution confers on the Commonwealth

<sup>35</sup> "Inner Regional Australia" is defined in the remoteness structure as those areas where geographic distance imposes some restriction upon accessibility to the widest range of goods, services and opportunities for social interaction.

<sup>36</sup> Disability Royal Commission, 2020, p. 4.

<sup>37</sup> United Nations, 2022.



legislature the power to make laws with respect to a long list of subject-matters including in relation to “external affairs” which includes “power to enact legislation that implements the terms of those international agreements to which Australia is a party.”<sup>38</sup>

The Australian Government may enter into international treaties pursuant to the executive power invested in the government of the day, and has the power to pass domestic legislation to give effect to these obligations; the states and territories may also legislate to give effect to treaties in pursuance of their general legislative power, provided the laws do not conflict with a federal law (in which case the federal legislation prevails to the extent of any inconsistency). However, on ratification, treaties do not automatically impose obligations, or create rights in Australian domestic law. It is only through domestic legislation that treaty rights become legally enforceable.

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Commonwealth),<sup>39</sup> all new bills introduced into the Australian Parliament and disallowable legislative instruments made under Commonwealth laws must be accompanied by a Statement of Compatibility with Human Rights. This is meant to provide a detailed assessment of the compatibility of legislation with rights recognized in the seven core international human rights treaties that Australia has ratified. Under this Act, a Parliamentary Joint Committee on Human Rights<sup>40</sup> was also established in 2012. This Committee examines all bills and legislative instruments for compat-

ibility with human rights, and then reports its findings to both Houses of Parliament. Whilst the Committee provides valuable analysis, a criticism of this procedure is that the review by the Committee has had only limited impact on legislation even when the Committee identifies serious human rights issues.<sup>41</sup>

Australia does not have a constitutional Bill of Rights, or legislative Human Rights Act at the federal level. A number of jurisdictions have specific human rights legislation that protects predominantly civil and political rights (with some protection of economic and social and indigenous rights) and processes for scrutinizing the compatibility of bills with human rights (Victoria, the Australian Capital Territory, Queensland and the Northern Territory), which offer different levels of protection for persons with disabilities.<sup>42</sup> For example, in the context of Victoria, the Victorian Charter of Human Rights and Responsibilities requires the Victorian Civil and Administrative Tribunal (VCAT), when making guardianship and administration orders and decisions to comply with human rights standards.<sup>43</sup>

In Queensland, legal advocates have used the relatively new *Human Rights Act 2019 (Queensland)*<sup>44</sup> at hearings before the Mental Health Review Tribunal, in guardianship and administration matters before the Queensland Civil and Administrative Tribunal, and in complaints to the Queensland Human Rights Commission.

As the Convention on the Rights of Disabilities is not domestic “law,” it cannot be directly enforced in the courts. However, there are instances of courts and tribunals referring to the Convention in the course of interpreting legislation. This is permissible when a statute makes specific reference to a treaty or is intended to give effect to it and the words of the statute are capable of being interpreted to comply with the treaty obligation; otherwise the words of the domestic law prevail.<sup>45</sup> For example, there are instances of administrative review tribunals interpreting provisions of the *National Disability Insurance Scheme Act 2013* (Commonwealth) by reference to the Convention; section 3(1) (a) of that Act states that one of the objects of the Act is to “in conjunction with other laws, give effect to Australia’s obligations under the [Convention] . . .”<sup>46</sup>

There are also examples of courts and tribunals referring to the Convention when interpreting mental health legislation in accordance with standard principles of statutory interpretation.<sup>47</sup> Moreover, as noted previously, it has been held that VCAT must give additional attention to the human rights implications of guardianship and administration orders and decisions it is asked to make.<sup>48</sup> However, the Convention is not determinative of court and tribunal legal outcomes.

Some Australian legislation, such as the

*National Disability Insurance Scheme Act 2013* (Commonwealth) has been established to explicitly respond to Convention obligations, whilst other legislation gives effect to the treaty through the inclusion of specific provisions relating to persons with disabilities.

Whilst there has been no comprehensive examination or study to assess the extent to which the law and practice in Australia complies with the Convention, a 2020 report by Emeritus Professor Ron McCallum AO (a former member and chairperson of the Committee on the Rights of Persons with Disabilities) commissioned by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, has critiqued the Australian Government’s compliance with the Convention, while a report from the Australian Government Solicitor to the Royal Commission summarized key elements of Australia’s legislative framework affecting persons with disabilities.<sup>49</sup>

## 2. Responsibility for implementation of the Convention

The Department of Social Services (DSS) (under the political supervision of the Minister for Social Services and the Minister for the National Disability Scheme<sup>50</sup>) and the Attorney-General’s Department (AGD) (under the

<sup>38</sup> See *Ryan v Commissioner of Police, NSW Police Force (No 2)* [2021] FCA 106 (16 February 2021), para. 119. Under the *Acts Interpretation Act 1901* (Cth), s 15AB a treaty referred to in an Act may be taken into account ‘to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision taking into account its context, purpose and the object underlying the Act or to determine the meaning of the provision when it is ambiguous.’

<sup>39</sup> See, for example, *PNFK and National Disability Insurance Agency* [2018] AATA 692 (28 March 2018); *WRMF and National Disability Insurance Agency* [2019] AATA 1771 (8 July 2019). However, it is important to note this has not always been interpreted to the benefit of claimants with disability. For example, in *WRMF and National Disability Insurance Agency* the Tribunal Member interpreted Art 23 of the Convention as not extending to “sexual rights,” although this did not impact on the member’s ultimate decision to allow the claimant’s review of the rejected request under the NDIS for the services of a sex therapist; and this was affirmed on appeal by the Full Court of the Federal Court in *National Disability Insurance Agency v WRMF* [2020] FCAFC 79 (12 May 2020). The Convention has also been cited in legal submissions in guardianship tribunal matters, although it is unclear to what extent these impacted on the tribunal’s decision: See, eg, *SZH* [2020] NSWCATGD 28 (24 November 2020).

<sup>40</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009). In this case, art. 25 (right to health) was interpreted as supporting non-consensual mental health treatment even when the individual did not want the treatment.

<sup>41</sup> *PJB v Melbourne Health* [2011] VSC 327 at 329. See, for example, a matter regarding a tubal ligation performed on a 25-year old disabled woman pursuant to guardianship legislation: *ZEH (Guardianship)* [2015] VCAT 2051 (30 December 2015).

<sup>42</sup> Australian Government Solicitor, 2020.

<sup>43</sup> Following the May 2022 election.

<sup>38</sup> Commonwealth of Australia, 1900.

<sup>39</sup> Commonwealth of Australia, 2011.

<sup>40</sup> More about the role of the Committee can be accessed: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Role\\_of\\_the\\_Committee](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Role_of_the_Committee)

<sup>41</sup> Hutchinson, Z, 2018, p. 106.

<sup>42</sup> *Charter of Human Rights and Responsibilities Act 2006* (Victoria); *Human Rights Act 2004* (Australian Capital Territory); *Human Rights Act 2019* (Queensland). Summary of some significant cases (mainly from Victoria) can be found here: <https://www.hrlc.org.au/human-rights-case-summaries>.

<sup>43</sup> *PJB v Melbourne Health* [2011] VSC 327 at 329 (referring to the Convention as relevant to the interpretation of rights in the Charter). See, eg, a matter regarding tubal ligation of a 25-year old disabled woman pursuant to guardianship legislation: *ZEH (Guardianship)* [2015] VCAT 2051 (30 December 2015).

<sup>44</sup> Parliament of Queensland, 2019.

Attorney-General) are joint focal points within the federal Government regarding the implementation of the Convention.

Responsibility for the National Disability Strategy (NDS), which is Australia's policy mechanism to drive implementation of the Convention, lies within DSS; however, DSS has no authority to leverage rights-based changes in policy and practice across Commonwealth, State and Territory jurisdictions. In addition, the role of DSS is not explicitly connected to the portfolio responsibility of the AGD for driving the implementation of Australia's human rights policy agenda, and leading engagement with the United Nations human rights treaty system.

In its 2019 Concluding observations on Australia's combined second and third periodic reports, the Committee on the Rights of Persons with Disabilities recommended that an Office of Disability Strategy be established to ensure effective coordination, and further recommended that the Parliament amend legislation to ensure that the Australian Human Rights Commission has the power to independently monitor the implementation of the Convention in accordance with article 33(2) of the treaty.<sup>51</sup> To date, the Australian Government has not established this mechanism as recommended.

### 3. Interaction with other international frameworks

Between 2004 and 2006, Australian Disabled People's Organizations (DPOs) were involved in the development of the Convention on the Rights of Persons with Disabilities, organized national and member consultations, and supported delegates with disability to attend drafting sessions of the United Nations Ad Hoc

Committee and related regional meetings at the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP).

The disability rights movement in Australia emerged in the 1960s and 1970s; it thus preceded the adoption of the Convention. Australian DPOs played a role in supporting the realization of the Convention and the principles of the treaty continue to underpin the disability rights movement in Australia. Persons with disabilities, and DPOs in Australia also draw on Australia's human rights commitments across other areas of international law and are actively engaged with other treaty body reporting processes, such as to the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child. To a lesser extent, DPOs and disability advocacy organizations refer to the Sustainable Development Goals (SDGs), and the *Incheon Strategy to "Make the Right Real" for Persons with Disabilities in Asia and the Pacific* (Incheon Strategy) in domestic advocacy related to Australian law and policy.

Persons with disabilities were appointed to the Disability Reference Group for Australia's *Development for All Strategy 2015-2020* (extended to 2021), which articulates Australia's international development assistance as it relates to persons with disabilities. However, there is limited engagement with Australian DPOs in the implementation of the Strategy, apart from through DPO representation in the Australian Disability and Development Consortium (ADDC).<sup>52</sup>

The Department of Foreign Affairs and Trade is responsible for Australia's reporting against the Sustainable Development Goals (SDGs). The Government has established a Reporting Platform,<sup>53</sup> and Australia undertook a voluntary

review in 2018,<sup>54</sup> which drew on actions from across community, business and civil society. The review refers to Australia's human rights responsibilities, including for persons with disabilities, and references the National Disability Strategy and National Disability Insurance Scheme. The review also notes disability-specific development investments. Much of the activity reported in the voluntary review mirrors the actions reported in treaty body processes (including to the Committee on the Rights of Persons with Disabilities), but there is no explicit link made between the frameworks.

At Australia's second Universal Periodic Review cycle in 2016, Australia made a voluntary commitment to advance the 2030 Agenda for Sustainable Development. Australia has provided support for the Washington Group on Disability Statistics, including hosting the 17<sup>th</sup> meeting of the group in Sydney in 2017. In the voluntary review of the SDGs, Australia noted the utility of the Washington Group's work in relation to the collection of disaggregated data against the Convention and the SDGs.

<sup>51</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 62(c).

<sup>52</sup> The ADDC is a network of partners, mainly international development organisations focused on persons with disabilities. Australian DPOs have a permanent position on the Executive Committee <https://www.addc.org.au/>

<sup>53</sup> The reporting platform can be accessed: <https://www.sdgdata.gov.au/>

<sup>54</sup> Department of Foreign Affairs and Trade, 2018.

# 4 REPORTING PROCEDURE

## 1. Australia's initial report

Australia's initial report under the Convention was submitted in December 2010.<sup>55</sup> The Committee on the Rights of Persons with Disabilities developed a List of Issues at its ninth session in April 2013<sup>56</sup> and the government responded to these in July 2013.<sup>57</sup> Australia's initial review occurred at the tenth session of the Committee in September 2013.

The Australian Government delegation in 2013 was composed of representatives from the Attorney-General's Department (AGD), the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), now the Department of Social Services (DSS), and the Australian Permanent Mission in Geneva, on behalf of the Department of Education, Employment and Workplace Relations, the Department of Immigration and Citizenship and the Australian Agency for International Development (AusAID). The Government delegation met with civil society in Geneva.

The Australian Human Rights Commission (AHRC) also submitted a report<sup>58</sup> to the initial review of Australia, and the then Disability Discrimination Commissioner (Graeme Innes)

attended the session in Geneva with a policy staff member from the Disability Rights Unit within the AHRC.

A collaborative civil society process was initiated by leading Australian DPOs to draft a shadow report for the initial Committee review of Australia. The *Disability Rights Now*<sup>59</sup> report analysed Australia's performance against every Convention article, was endorsed by over 80 organizations, and made over 130 recommendations. In addition to the report, civil society prepared fact sheets for use in briefing Committee members and the report was produced in easy read format, with the Executive Summary in Auslan.<sup>60</sup>

A Project Coordinating Committee led the project, with support from a Project Group composed of representatives from DPOs, disability representatives and advocacy organizations. Community consultations were undertaken in the form of a listening tour - this involved project members travelling to capital cities to consult with persons with disabilities. The project group received pro-bono support from a legal firm, including facilitation of consultation in each State and Territory and initial drafting of the civil society report.

A competitive Expression of Interest (EOI) process selected a six-person "Australian Civil Society Parallel Report Group Delegation" to travel to Geneva. This delegation, all of whom were persons with disabilities, was funded by the Australian Human Rights Commission, and the Department of Families, Housing, Community Services and Indigenous Affairs. An additional four members of the Australian Civil Society Project Group were funded through their organizations or alternative sources. In addition to this process led by persons with disability, additional civil society submissions were made to the Committee by a number of human rights civil society organizations (CSOs).

During the Committee session, Australian civil society launched a photographic exhibition focused on Aboriginal and Torres Strait Islander persons with disability, and hosted a private side event to highlight priority issues to Committee members and other stakeholders.

The Government did not formally respond to the civil society shadow report, or to the report of the Australian Human Rights Commission.

## 2. Australia's combined second and third periodic reports

Australia's combined second and third reports were submitted on 7 September 2018,<sup>61</sup> and the Committee review commenced on 9 September 2019.<sup>62</sup>

A Civil Society Working Group, consisting of many of the organizations involved in the initial review, conducted consultation and drafted a shadow report *Disability Rights Now 2019*<sup>63</sup> that was submitted to the Committee in July 2019.

Associated fact sheets on key issues were also drafted, and these were once again made available in accessible formats.<sup>64</sup> Community consultation was limited for this second review and was primarily undertaken by DPOs and representative organisations with their members, including targeted consultation with persons with intellectual disability. Pro bono support was provided by a legal firm, and the preparation process was funded by the Australian Attorney-General's Department (AGD).

The Civil Society Working Group facilitated an EOI process and selected seven persons with disability to travel to Geneva for the hearing before the Committee. Travel, accommodation and the associated costs of delegates were funded by the Department of Social Services. Once again, civil society organized an art exhibition and a side event. The AHRC also submitted a report,<sup>65</sup> and the incumbent Disability Discrimination Commissioner, Ben Gauntlett, attended the review. The Australian Human Rights Commission hosted meetings before the session between the government and civil society delegations in Australia and, in Geneva, the Australian Human Rights Commission, the civil society delegation and the Government delegation met.

Little had changed in the six years between the first and second Australian periodic reviews. *Disability Rights Now 2019* acknowledged some of the positive reforms that had occurred, including the implementation of the National Disability Insurance Scheme (NDIS) and the establishment of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission). However, both the 2019 civil society report and the 2019 Australian Human Rights Commission report to the Committee

<sup>55</sup> Attorney-General's Department, 2010.

<sup>56</sup> Committee on the Rights of Persons with Disabilities, 2013a, CRPD/C/AUS/Q/1.

<sup>57</sup> Committee on the Rights of Persons with Disabilities, 2013b, CRPD/C/AUS/Q/1/Add.1.

<sup>58</sup> Australian Human Rights Commission, 2013.

<sup>59</sup> Australian Civil Society Shadow Report Working Group, 2012.

<sup>60</sup> Auslan = Australian Sign Language, the majority sign language of the Australian Deaf community.

<sup>61</sup> Attorney-General's Department, 2010.

<sup>62</sup> Disabled People's Organizations Australia provided input to the List of Issues for Australia adopted at the Committee's 18th session, accessed here: <https://dpoa.org.au/sub-list-issues-18th-session-crpd/>

<sup>63</sup> Australian Civil Society Shadow Report Working Group, 2019.

<sup>64</sup> The fact sheets can be accessed here: <https://dpoa.org.au/crpd-review-factsheets/>

<sup>65</sup> Australian Human Rights Commission, 2019a.



identified concerns that had largely still not been addressed through substantive change to the law, policies or practices, including denial of legal capacity, forced sterilization, indefinite detention of persons with disabilities without conviction, segregated education, high unemployment rates, and failure to implement the National Disability Strategy. Persons with disabilities still experienced poverty, disadvantage and human rights violations, and this was particularly acute for Aboriginal and Torres Strait Islander peoples and communities.

The Committee's 2019 Concluding observations to Australia noted the "lack of progress" and "serious delays"<sup>66</sup> in addressing areas of concern raised in the initial review. The Committee's 2019 Concluding observations reiterated many of the recommendations made in 2013.

Following the review in September 2019, the civil society delegation requested a follow-up meeting with DSS and the AGD, but this offer was not taken up by the Government.

Australia's third cycle Universal Periodic Review (UPR) occurred in 2021, and a civil society report contained a specific section relating to a number of the Concluding observations of the Committee on the Rights of Persons with Disabilities.<sup>67</sup> Key issues were raised with Australia by member States of the Human Rights Council during the UPR review, including the indefinite detention of persons with disability, and the high levels of youth imprisonment.

In December 2021 the Government released a new national strategy on disability, *Australia's National Disability Strategy 2021-2031*, to which the Commonwealth, state and territory governments have committed.<sup>68</sup> This is the

primary policy mechanism through which Australia implements its obligations under the Convention. The Strategy notes that the reports under the Convention by the Government and non-governmental organizations and the Concluding observations of the Committee on the Rights of Persons with Disabilities 'informed the development of the Strategy,'<sup>69</sup> although no detailed analysis of how the Strategy responds to specific recommendations of the Committee is provided in the Strategy and does not appear to be available elsewhere on the public record.

As of the end of 2021, there had been no substantive changes to laws, policies or practices as yet in direct response to the Committee's 2019 Concluding observations. This was likely in part due not only to the process under way for the development of the NDS, but also to the investigations of the Disability Royal Commission, scheduled to conclude in September 2023.

### 3. Dissemination of the Convention, Committee documents and government reports

The Commonwealth Attorney-General's Department (AGD) website has information about Australia's treaty body obligations. The AGD developed a publicly accessible database<sup>70</sup> with the purpose of drawing together United Nations human rights treaty body recommendations for Australia. This database notes the Government responses to decisions or recommendations, but as of mid-2021 this database was only current to 2015. The AGD website

also has a page specific to disability rights and the Convention on the Rights of Persons with Disabilities, although at the time of writing it had not been updated with the 2019 Committee Concluding observations. This information is not available in accessible formats.

The DSS provides limited information in relation to the Convention, primarily linked to the NDS. The Convention is available in Auslan on the DSS website.<sup>71</sup> The website of the Australian Human Rights Commission provides links to the accessible versions of the Convention developed for the United Kingdom's Department for Work and Pensions (easy read and child-friendly version). None of the above-mentioned websites provide an accessible version of the 2019 Concluding observations on Australia's report.

### 4. Individual communications against Australia under the Optional Protocol to the Convention

Notable complaints to the Committee on the Rights of Persons with Disabilities under the Optional Protocol in relation to Australia include the following.

#### "Unfit to plead" provisions

In *Noble v Australia*<sup>72</sup> Martin Noble, an Aboriginal man with intellectual disability, was accused of sexual criminal offences against children. In March 2003, he was declared

unfit to plead in the District Court of Western Australia. A custody order was made and he was held in a correctional facility under mental health legislation, until his release in 2012. Mr Noble claimed violations of his rights under articles 5, 13, 14 and 15 of the Convention. The Committee found violations of article 5 (1) and (2), 12 (2) and (3), 13 (1), 14 (1) and 15. They considered that "in the absence of any criminal conviction, he was detained on the basis of disability, and that the indefinite detention to which he was subjected amounts to inhuman and degrading treatment, both in contradiction of the CRPD". Reforms of Western Australia mental health legislation are currently underway, with a statutory review to consider the operation and effectiveness of the *Mental Health Act 2014* (Western Australia) commencing in 2021.

In 2019, the Committee upheld two complaints in relation to the similar Northern Territory (NT) legislation, the *Criminal Code Act 1983* (NT)<sup>73</sup> in relation to unfit to plea provisions - *Leo v Australia*<sup>74</sup> and *Doolan v Australia*.<sup>75</sup> Both cases had first been taken to the Australian Human Rights Commission, which found violations of the individual's rights under articles 14(1), 19, 25, 26(1) and 28(1) of the Convention. In both cases, the Commission made non-binding recommendations to the Australian and Northern Territory Governments for effective individual and systemic remedies. However, the Australian Government rejected the Australian Human Rights Commission's findings, claiming the Commission, in hearing the complaints, had acted outside its jurisdiction.<sup>76</sup>

<sup>71</sup> The Auslan videos can be accessed on the website of the Department of Social Security: <https://www.dss.gov.au/the-United-nations-convention-on-the-rights-of-persons-with-disabilities-uncrpd-in-auslan-australian-sign-language>.

<sup>72</sup> *Noble v Australia*, Committee on the Rights of Persons with Disabilities, 2016d.

<sup>73</sup> Northern Territory Government, 1983.

<sup>74</sup> *Leo v Australia*, Committee on the Rights of Persons with Disabilities, 2019a. For a summary of the case, see <https://remedy.org.au/cases/41/> and for the response from the Government, see Attorney-General's Department, 2020.

<sup>75</sup> *Doolan v Australia*, Committee on the Rights of Persons with Disabilities, 2018c. For a summary of the case, <https://remedy.org.au/cases/42/> and for the response from the Attorney-General's Department see <https://www.ag.gov.au/sites/default/files/2020-10/Doolan-v-Australia-182013-Australian-Government-Response.DOCX>

<sup>76</sup> *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/other/AusHRC/2014/80.html>.

<sup>66</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 5(b).

<sup>67</sup> Australian NGO Coalition, 2020.

<sup>68</sup> <https://www.disabilitygateway.gov.au/document/3106/>.

<sup>69</sup> 'Appendix 1: Development of the Strategy' in *Australia's Disability Strategy 2021-2031*, 45, 46.

<sup>70</sup> The Attorney General's Department database can be accessed here: <https://www.ag.gov.au/rights-and-protections/publications/united-nations-human-rights-recommendations-database>



The Committee on the Rights of Persons with Disabilities found that the Australian Human Rights Commission findings in relation to Mr Leo's complaint were unenforceable and "can therefore not be considered as effective remedies" – also noting that Australia and the Northern Territory lacked any bill of rights (para. 5.3). In both cases, the Committee found breaches of articles 15, 14, 13, 12 and article 5 - both complainants had been subjected to inhuman and degrading treatment, denial of legal capacity, deprivation of liberty, were indefinitely detained, were housed with convicted persons and received involuntary treatment.<sup>77</sup>

In 2015, while *Doolan v Australia* was before the Committee, the Department of Social Services funded a project entitled "Unfit to Plead"<sup>78</sup> to investigate the circumstances surrounding indefinite detention. The 2016 Senate Committee inquiry on *Indefinite detention of people with cognitive and psychiatric impairment in Australia*<sup>79</sup> also examined the issues raised in those cases. The report made recommendations for comprehensive law, policy and programme reform to address indefinite detention of people with cognitive and psychiatric impairment. The Australian government has not, to date, responded to the inquiry report.

Since 2016, there have been a number of review processes in the Northern Territory relevant to legislation that leads to the indefinite detention of persons with disability; however, as of mid-2021 the provisions in the legislation remain. The Northern Territory Government

commissioned a review of health services provided to people in contact with the criminal justice system or within the youth justice system who had a mental health problem or a cognitive impairment. The review report was released in 2019.<sup>80</sup> As of May 2021, the Northern Territory Department of Health had released a discussion paper to inform a review of the *Mental Health and Related Services Act (1998)*. In March 2021, the Disability Royal Commission held a hearing in relation to the experiences of people with cognitive disability in the justice system and civil society called for a specific hearing by the Commission into indefinite detention of Aboriginal and Torres Strait Islander persons with disability.<sup>81</sup>

### Equal access to the justice system

A number of cases have been taken to the Committee on the Rights of Persons with Disabilities in relation to individuals being denied the right to act as jurors. The cases of *Beasley v Australia*<sup>82</sup> and *J.H. v Australia*<sup>83</sup> were brought by persons who were deaf and who had been refused the opportunity to be selected for jury duty on the ground that the applicable legislation did not permit a sign language interpreter to be provided to a juror.<sup>84</sup> In both cases, the Committee found breaches of article 5 (denial of reasonable accommodation), as well as a lack of accessibility (article 9). The Committee also found a denial of the right to freedom of expression and opinion (article 21) and, in the case of *Beasley v Australia*, found breaches of article 13 (access to justice) and article 29

(right to participate in public and political life).

In both cases, Australia rejected the Committee's Final Views, maintaining that providing Auslan interpreters in the courtroom and jury room was not a reasonable accommodation.<sup>85</sup> In its response to *J.H. v Australia*, the Government referred to two further cases, *G.B. v Australia* and *M.L. v Australia* in relation to article 21,<sup>86</sup> stating that the article is relevant to the accessibility of information, particularly public documents, provided by the Government to the general public and that the *travaux préparatoires* also confirmed the understanding that "the obligation contained within article 21(b) is to be realized progressively, subject to the limitations on the resources of States."<sup>87</sup> Most Australian State and Territory regimes still refuse to accommodate deaf jurors.<sup>88</sup> This is despite a number of Australian and other international studies that show that this can be done without any prejudicial impact on an accused person's fair trial in most cases.<sup>89</sup>

### Right to participate in political and public life

In *Fiona Given v Australia*,<sup>90</sup> Ms Given, who has physical disability, requested access to electronic voting in order to vote by secret ballot in the 2013 Federal Elections. Under the *Commonwealth Electoral Act 1918*<sup>91</sup> blind persons and visually impaired persons may use these systems via telephones or computers, and electoral officials may allow a person to assist persons with disability to fill in ballot papers or may assist those persons themselves. Ms Given did not qualify for this accommodation, as she had physical impairment rather than being blind or vision-impaired. The Committee found

that Australia had failed to fulfil its obligations under article 29 by limiting Ms Given's right to participate in public and political life, and had also breached its obligations under sections of article 5, article 4 and article 9.

<sup>77</sup> McCallum, R., 2020, p. 76.

<sup>78</sup> The project was funded as part of the National Disability Research and Development Research Scheme. Partners were the intellectual Disability Rights Service, University of NSW, Victoria aboriginal Legal Service, Northern Australian Aboriginal Justice Agency <https://socialequity.unimelb.edu.au/projects/unfitness-to-plead>.

<sup>79</sup> Senate Standing Committee on Community Affairs, 2016.

<sup>80</sup> David McGrath Consulting, 2019.

<sup>81</sup> First Peoples Disability Network media release <https://fpdn.org.au/advocates-call-for-greater-focus-on-indigenous-people-with-disability-in-detention/>

<sup>82</sup> *Beasley v Australia*, Committee on the Rights of Persons with Disabilities, 2016a. For a summary of the case, see <https://remedy.org.au/cases/39/>

<sup>83</sup> *J.H. v Australia*, Committee on the Rights of Persons with Disabilities, 2018d. For a summary of the case, see <https://www.internationaldisabilityalliance.org/crpd-committee-interpretation#LinkJH>

<sup>84</sup> See also *Lockrey v Australia*, Committee on the Rights of Persons with Disabilities, 2016b. For a summary of the case, see <https://www.internationaldisabilityalliance.org/crpd-committee-interpretation#LinkMichael>.

<sup>85</sup> Attorney-General's Department, 2020a.

<sup>86</sup> See Attorney-General's Department, 2016.

<sup>87</sup> Attorney-General's Department, 2020a, para.36.

<sup>88</sup> Some of these jury laws also exclude other persons with disabilities, e.g., NSW under the Jury Act 1977 (New South Wales) s 14 excludes a blind person from being on a jury.

<sup>89</sup> Spencer, D. et al., 2017.

<sup>90</sup> *Given v Australia*, Committee on the Rights of Persons with Disabilities, 2018a.

<sup>91</sup> Commonwealth of Australia, 1918.

# 5 CONSTITUTIONAL AND LEGAL PROTECTIONS

## (articles 4 and 5, Convention on the Rights of Persons with Disabilities)

The Australian Constitution contains no provision for, and makes no explicit reference to, disability, or persons with disability. This is reflective of the broader issue that the Australian Constitution does not contain a “bill of rights”; it contains only a few express and limited rights, which have been supplemented by an even more limited number of implied rights, such as the right to vote and freedom of political communication. It contains no general guarantee of equality before or under the law or of equal protection of the laws. The “implied” Constitutional right to vote is limited by legislation (section 93 of the *Electoral Act*) which excludes any person from voting if they have been imprisoned for more than three years for an offence against the law of the Commonwealth or of a State or Territory,<sup>92</sup> or are someone who “by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting”, thus excluding persons with intellectual disabilities.<sup>93</sup>

So far as ordinary legislation is concerned, a 2020 report on persons with disabilities and the Australian Constitution, commissioned by the Disability Royal Commission, notes that in the 1970s and 1980s the Commonwealth Government had “expanded its support for persons with disabilities, and started to legislate for the protection of the rights of persons with disabilities”, reflecting “the Commonwealth’s obligations towards persons with disabilities through a rights lens”. The authors cite the *Disability Discrimination Act 1992 (Commonwealth)* and the *National Disability Insurance Scheme Act 2013 (Commonwealth)* as important examples.<sup>94</sup>

Whilst there is no explicit constitutional or legislative obligation that requires public bodies to act in accordance with the obligations in the Convention or other human rights treaties, Australia has the following national legislation that directly addresses issues of particular concern to persons with disabilities:

- A. Disability Discrimination Act 1992 (Commonwealth) (DDA).<sup>95</sup> The objects of the DDA are:
1. To eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
    - (a) Work, accommodation, education, access to premises, clubs and sport;
    - (b) Provision of goods, facilities, services and land;
    - (c) Existing laws; and
    - (d) Administration of Commonwealth laws and programmes;
  2. To ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community;
  3. To promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

Associated standards arising from the DDA relate to specific areas:

1. Disability Standards for Education (2005);
  2. Disability Standards for Accessible Public Transport (2002);
  3. Access to Premises - Buildings Standards 2010 (Access Code).
- D. National Disability Insurance Scheme Act 2013 (Commonwealth) (NDIS Act).<sup>96</sup> establishes the National Disability Insur-

ance Scheme (NDIS). The Act’s objectives recognize that, in conjunction with other laws, it gives effect to Australia’s obligations under the Convention on the Rights of Persons with Disabilities. The Act facilitated a fundamental shift to individualised disability support, recognising that persons with disabilities have the same right as other members of Australian society to realize their potential for physical, social, emotional and intellectual development. Nonetheless, some aspects of the Act undermine the provisions of the Convention, including enabling restrictive practices in NDIS-funded services and enabling funding of segregated housing and employment.

- E. Fair Work Act 2009 (Commonwealth) (Fair Work Act).<sup>97</sup> prohibits “adverse action” in employment on number of grounds, including physical or psychosocial disabilities, providing a civil remedy provision to discrimination on the basis of disability. However, this Act also allows subminimum wage payment for persons with disabilities who are working in disability supported employment (otherwise referred to as “sheltered workshops”).<sup>98</sup>

- F. Social Security Act 1991 (Commonwealth) (SS Act) (Social Security Act)<sup>99</sup> and Social Security (Administration) Act 1999 (Commonwealth) (SS (A) Act)<sup>100</sup> allow for social security payments and benefits relevant for persons with disabilities, including the disability support pension (DSP). Under the Act access to social security benefits is generally restricted to Australian permanent residents or citizens residing permanently in Australia. While most income support payments have up to a four-year

<sup>95</sup> Commonwealth of Australia, 1992.

<sup>96</sup> Commonwealth of Australia, 2013.

<sup>97</sup> Commonwealth of Australia, 2009.

<sup>98</sup> Under the Supported Employment Services Award 2020.

<sup>99</sup> Commonwealth of Australia, 1991.

<sup>100</sup> Commonwealth of Australia, 1991.

<sup>92</sup> *Roach v Electoral Commissioner* [2007] HCA 46; (2007) 233 CLR 162.

<sup>93</sup> Savery, J., 2015.

<sup>94</sup> Stubbs, M., 2020.

waiting period, the Age Pension and DSP have traditionally had a 10-year qualifying residence requirement.

All States and Territories have legislation which prohibits discrimination, including on the basis of disability,<sup>101</sup> for example the *Anti-Discrimination Act 1977* (New South Wales),<sup>102</sup> the *Equal Opportunity Act 2010* (Victoria),<sup>103</sup> the *Equal Opportunity Act 1984* (South Australia)<sup>104</sup> and the *Northern Territory Anti-Discrimination Act 1992*.<sup>105</sup> Three jurisdictions (Australian Capital Territory, Victoria and Queensland) have statutory charters of rights that provide protection against discrimination on the basis of disability generally and in the enjoyment of listed rights.

## 1. Rights-based approach to legislation

Australian anti-discrimination legislation reflects a rights-based approach to persons with disabilities, but focuses on individual equality along disability lines. It does not capture the more complex understanding in the Convention of structural and intersectional discrimination, and certain contexts of exclusion and segregation are explicitly exempt from the DDA.

NDIS legislation is premised on autonomy, inclusion and participation of persons with disabilities. However, the NDIS Act provides for the appointment of nominees (either appointed at the request of the participant, a third party, or by the NDIA CEO), and it appears there has been an increase in guardianship orders associated with individuals accessing the NDIS because of its limited decision-making

framework. Moreover, the NDIS introduced a structure for regulating (not abolishing) restrictive practices in NDIS-funded services. This undermines legal capacity, autonomy and inviolability. As well as funding disability support that enables employment in the open labour market, NDIS legislation also supports segregated employment (also referred to as “sheltered workshops”). Despite the principles and promise of the NDIS, segregation continues to be central to education, housing and work.

A recent analysis for the Disability Royal Commission of Australia’s compliance with the Convention notes that the DDA does not use the words “reasonable accommodation” and “disproportionate or undue burden”.<sup>106</sup> Instead, the DDA prohibits discrimination, both directly and indirectly, on the ground of a failure to make “reasonable adjustments”, unless making the adjustment would impose “unjustifiable hardship” on another person. The courts have noted that the changes to the Act introduced after ratification of the Convention that included an explicit duty to provide reasonable adjustments need to be read in light of the definition of “reasonable accommodation” in the Convention, as the amendments were intended to give effect to the treaty.<sup>107</sup>

Nonetheless, a court case in 2017 demonstrated the limitations of the “reasonable adjustment” provision. In *Sklavos v Australian College of Dermatologists*<sup>108</sup> (2017), the Full Court of the Federal Court found that, in order for disability discrimination to have occurred, not only must a person with disabilities show that disadvantage to that person had occurred due to a failure to provide a reasonable adjust-

ment, but that the failure to provide the adjustment was caused by the person’s impairment, namely, that a person’s impairment (i.e., in the case of Sklavos, psychosocial disability) was the reason that the reasonable adjustment was denied. This is near impossible to prove, unless an employer is explicit in the motivation (for example, “I refuse to make adjustments for you due to your psychosocial disability”).

Interpretations of the DDA and the education standards in *Purvis v NSW*<sup>109</sup> suggest it is more difficult for a student with disability to claim discrimination than for other students to do so on grounds such as race or sex, due to the defence of unjustifiable hardship, provisions that do not occur in other human rights legislation.<sup>110</sup>

At the State and Territory level, there is legislation related to substitute decision-making (guardianship)<sup>111</sup> and compulsory treatment (mental health legislation)<sup>112</sup> which enable compulsory treatment and restrictive practices. In addition to these specific statutory regimes, the courts also have inherent authority to decide on these matters by reason of their *parens patriae* (or welfare) jurisdiction.<sup>113</sup> There is also Commonwealth and State/Territory forensic mental health legislation related to persons with disabilities in the criminal justice system<sup>114</sup> which enables detention (including indefinite detention) and restrictive practices of individuals who have not been convicted of criminal offences.

## 2. The impact of discrimination law for persons with disability in Australia

There are limitations to the extent that the DDA and other laws address discrimination for persons with disabilities in Australia:

- The structure of Australian anti-discrimination legislation presents barriers to legal remedies for those people who face intersectional discrimination.<sup>115</sup> This limits the extent that the law can address complex forms of discrimination faced by some of the most marginalized in the community, for example, Aboriginal and Torres Strait Islander persons with disabilities.
- Australian anti-discrimination legislation is complaints-based, requiring individuals to understand their rights and initiate actions to address discrimination. Where a complaint is taken to the Australian Human Rights Commission, and conciliation occurs, there is often a power imbalance (with complaints made against Government agencies or private businesses). For many persons with disabilities, legal support and disability advocates play a crucial role in initiating and negotiating a discrimination complaint process. Where conciliation is unsuccessful, an individual can take the complaint to the Federal Court, or Federal Circuit Court, but the cost of doing so can be prohibitive.

<sup>101</sup> Each of the states and territories has anti-discrimination legislation that prohibits discrimination on the basis of disability. See generally Rees, N., Rice, S. and Allen, D, 2018, pp. 332-21.

<sup>102</sup> New South Wales Government, 1977.

<sup>103</sup> Victoria Government, 2010.

<sup>104</sup> South Australia Government, 1984.

<sup>105</sup> Northern Territory Government, 1992.

<sup>106</sup> McCallum, R., 2020, p. 16.

<sup>107</sup> Federal Court of Australia, 2014, *Watts v Australian Postal Corporation* [2014] FCA 370; (2014) 222 FCR 220, paras. 18-27.

<sup>108</sup> Federal Court of Australia, Full Court, 2017, *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; (2017) 256 FCR 247, on appeal from [2016] FCA 179. An application for special leave to appeal to the High Court of Australia, the country’s apex court, was refused in February 2018: *Sklavos v Australasian College of Dermatologists* [2018] HCASL 7.

<sup>109</sup> [2003] HCA 62; (2013) 217 CLR 92.

<sup>110</sup> Campbell, C., 2007.

<sup>111</sup> *Guardianship Act 1987* (New South Wales); *Guardianship and Management of Property Act 1991* (Australian Capital Territory); *Guardianship and Administration Act 1995* (Tasmania); *Guardianship and Administration Act 1993* (South Australia); *Guardianship and Administration Act 1990* (Western Australia); *Guardianship and Administration Act 2000* (Queensland); *Guardianship of Adults Act 2016* (Northern Territory).

<sup>112</sup> *Mental Health Act 2007* (New South Wales); *Mental Health Act 2014* (Vic); *Mental Health Act 2013* (Tasmania); *Mental Health Act 2016* (Queensland); *Mental Health Act 2014* (Western Australia); *Mental Health and Related Services Act 1998* (Northern Territory); *Mental Health Act 2015* (Australian Capital Territory); *Mental Health Act 2009* (South Australia).

<sup>113</sup> The *parens patriae* jurisdiction is an extraordinary jurisdiction which has only one criterion – what is in the best interests of the child: <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/4-purposes-of-laws-relevant-to-family-violence/child-protection-law/>

<sup>114</sup> Commonwealth of Australia, 1914.

<sup>115</sup> Australian Human Rights Commission, 2019b, pp. 6-7.



- The DDA does not directly address systemic discrimination, for example, providing for investigations against companies or government departments that repeatedly discriminate: complaints are lodged and conciliated separately. Positive measures (affirmative actions) are permitted under the DDA, and the Australian Human Rights Commission has the power to conduct inquiries into systematic discrimination, although it only has recommendatory powers.
- The DDA does not have provisions to address vilification and hate crimes. Although this form of discrimination is, to varying degrees, accounted for in some State and Territory legislation (for example, section 19 of Tasmania's *Anti-Discrimination Act 1998* prohibits anyone from inciting hatred, including against persons with disabilities), a lack of recognition of disability hate crime (in comparison to hate crime motivated by race or gender) means it is often characterized as abuse and penalized lightly.<sup>116</sup> In general, very few hate crimes have been prosecuted in Australia.

In 2012, an exposure draft of a federal *Human Rights and Anti-Discrimination Bill 2012 (Draft Bill)*<sup>117</sup> was released. This Bill would have consolidated the four separate discrimination acts<sup>118</sup> into a new statute, potentially making it easier to bring an intersectional discrimination claim, although this could not be tested. The Bill did not progress, suggesting that "intersec-

tionality is not a concept well understood by Australian legislators and policy-makers."<sup>119</sup>

Complaints under the *Disability Discrimination Act 1992* consistently make up the largest number of complaints made to the Australian Human Rights Commission (44 per cent of complaints lodged with the Commission in 2019-2020) and the number of complaints about disability discrimination has consistently increased over recent years.<sup>120</sup> Of 1,006 complaints in 2019-2020, 27 per cent were made by people with mental health/psychosocial disabilities, and 19 per cent by people with physical disabilities (19 per cent). The highest number of complaints were in relation to goods, services, and facilities (563); employment (298); the disability standards (183); education (128) and access to premises (122). Some complaints relate to a number of areas. According to the Australian Human Rights Commission, 48 per cent of complaints were successfully resolved through conciliation, 22.5 per cent were terminated with no reasonable prospect of conciliation, and 16 per cent were discontinued.

Whilst there are some limitations to the *Disability Discrimination Act*, it has been observed in a recent report to the Disability Royal Commission on Australia's compliance under the Convention that "while the DDA does not fully align with article 5 of the Convention Australia's network of federal, State and Territory anti-discrimination laws does prohibit most instances of disability discrimination."<sup>121</sup>

In its 2019 Concluding observations to Australia, the Committee on the Rights of Persons with Disabilities reiterated concerns

raised in 2013 and recommended that the Australian Government strengthen anti-discrimination laws to address intersectional discrimination; enable representative complaints; enable complaints regarding disability hate crimes; and ensure persons with disabilities can effectively make complaints about denial of reasonable accommodation.<sup>122</sup>

### 3. Affirmative measures

Section 45 of the *Disability Discrimination Act 1992* (DDA) provides for special measures, providing that it is not unlawful to do an act that is reasonably intended to ensure that persons with disabilities have equal opportunities in relation to the provisions of the Act, or afford persons with disabilities goods or access to facilities, services or opportunities, or grants, benefits or programmes. Similar provisions in other discrimination legislation (in particular sex and race discrimination legislation) are intended to protect beneficial measures for some groups from being undermined by complaints by other groups. However, the need for these special measures in the DDA is less, since even without this measure it is not possible for a person to make a valid claim of discrimination because the person does not have disability, or does not have particular disability as identified as benefiting from the opportunity the measure affords. However, the measures do provide protection for requests for information to access opportunities (such as proof of disability, or questions relating to work place adjustment needs), which may be seen as discriminatory.<sup>123</sup>

In General comment No. 6, the Committee on

the Rights of Persons with Disabilities cautions that specific measures "must not result in perpetuation of isolation, segregation, stereotyping, stigmatization or otherwise discrimination against persons with disabilities." For this reason, "States parties must consult closely with and actively involve representative organizations of persons with disabilities when they adopt specific measures."<sup>124</sup> In Australia, these affirmative actions are not necessarily successful, or in line with article 27.

For example, the *Australian Public Service Commissioner's Directions 2016*<sup>125</sup> identify affirmative measures relating to persons with disabilities. The measure requires the individual to have been assessed by a Disability Employment Service provider as being likely to be "unable to compete successfully on merit in a competitive selection process." The *RecruitAbility* scheme provides persons with disabilities an opportunity to progress to the next stage in recruitment processes when opting into the scheme, meeting the minimum requirements for the job, and declaring they have disability.

In New South Wales, the *Public Works and Procurement Regulation 2014* (clause 5)<sup>126</sup> promotes the procurement of goods and services directly from Australian Disability Enterprises (ADES – otherwise known as sheltered workshops). Government agencies are not required to conduct open tenders when engaging ADES. Other jurisdictions have policy frameworks that enable preference to ADES (for example, Victoria's Social Procurement Framework).<sup>127</sup> As discussed later in this paper, ADES segregates persons with disabilities, and enables employers to pay persons with disability lower wages, contrary to the Convention.

<sup>116</sup> Australian Broadcasting Corporation media article <https://www.abc.net.au/news/2010-08-07/disabled-australians-subjected-to-hate-crimes/935662>.

<sup>117</sup> Parliament of Australia, 2012.

<sup>118</sup> *Age Discrimination Act 2004* (Commonwealth), *Disability Discrimination Act 1992* (Commonwealth), *Racial Discrimination Act 1975* (Commonwealth), *Sex Discrimination Act 1984* (Commonwealth). All Australian federal (Commonwealth) legislation is available at [www.legislation.gov.au](http://www.legislation.gov.au)

<sup>119</sup> McCallum, R, 2020, p. 19.

<sup>120</sup> Australian Human Rights Commission, 2020c.

<sup>121</sup> McCallum, R, 2020, p. 21.

<sup>122</sup> Committee on the Rights of Persons with Disabilities, CRPD/C/AUS/CO/2-3, para.10.

<sup>123</sup> Human Rights and Equal Opportunity Commission, 2004.

<sup>124</sup> Committee on the Rights of Persons with Disabilities, 2018, CRPD/C/GC/6, para. 29.

<sup>125</sup> Made under subsections 11(1), 11A(1) and (2) and 15(6) of the *Public Service Act 1999*.

<sup>126</sup> New South Wales Government, 2014.

<sup>127</sup> Victoria Government, 2019.



# 6 COURTS AND TRIBUNALS (articles 4, 12 and 13, Convention on the Rights of Persons with Disabilities)

## 1. Access to justice

Access to justice often requires legal representation. Given the high number of persons with disabilities who live on low incomes, the cost of legal services is prohibitive. The Australian Government funds disability advocacy services and community legal centres, but underfunding means that many persons with disabilities cannot access this support. For example, the Administrative Appeals Tribunal (the forum in which reviews of the merits of many government administrative decisions can be sought) is a no costs jurisdiction, meaning that participants must bear their own legal costs. Persons with disabilities have access to funded advocates or a legal representative to assist with this process. There are particular gaps in support services for people in regional and remote areas, and for Aboriginal and Torres Strait Islander persons with disabilities. There are also other challenges to accessing legal

services, for example, people in institutional settings might not be able to communicate with lawyers or even know of the availability of legal services, and those who have experienced state/institutional violence might distrust legal services and the justice system.<sup>128</sup>

As discussed elsewhere in this paper, the denial of legal capacity restricts individual rights across the justice system; including unfitness to plead in the context of criminal defendants with disability, inability to give evidence as a witness in criminal or civil hearings, and inability to be a party to court matters (the use of “tutors” in civil litigation and “guardians ad litem” in child care and protection matters).<sup>129</sup> Persons with disabilities are often not provided with the disability support they require to engage with or navigate the justice system (whether as victim, witness, complainant, defendant or litigant), and people who work in the legal and justice system are not trained to respond appropriately and identify support requirements.

As noted in the 2019 civil society shadow report to the Committee on the Rights of Persons with Disabilities, there are no nationally consistent measures to regulate jury composition; inconsistencies mean that Deaf people in particular are unable to serve on juries under some State and Territory laws. As noted previously, in a number of cases against Australia under the Optional Protocol, the Committee has found violations of the Convention in this regard – but legislative change has not yet happened.

The 2019 Concluding observations of the Committee on the Rights of Persons with Disabilities recommended that Australia “in close consultation with persons with disabilities, through their representative organizations, ensure effective access to justice for persons with disabilities, without any discrimination.” The Committee specifically recommends the adoption of legislation in all jurisdictions to ensure equal participation of persons with disability on juries, and the development of “nationally consistent disability justice plans across governments to ensure that persons with disabilities, particularly those whose reasonable and procedural accommodations are not adequately met, are supported in accessing the same legal protections and redress as the rest of the community.”<sup>130</sup>

## 2. Avenues for recourse

Complaints under the *Disability Discrimination Act 1992* (DDA) are taken to the Australian Human Rights Commission for conciliation. If a complaint under the DDA is not resolved by the Australian Human Rights Commission, the case can be taken to the Federal Court for adjudication. The Federal Court is a costs jurisdiction, which means that a complainant

risks having to pay the other party’s costs if the complaint is not successful. The court costs regime acts as a disincentive to enforcement of the rights of persons with disabilities, preventing access to justice as provided for under article 13 (1).<sup>131</sup> Complaints in relation to employment discrimination are taken to the Fair Work Commission under the *Fair Work Act 2009*. Disability discrimination complaints in a number of areas may also be brought under State and Territory anti-discrimination legislation.

If a person with disabilities who seeks access to the NDIS is denied that access or a person who is receiving support under the NDIS is unhappy with a decision in relation to the funded support plan, the person may seek a review of that decision through the internal National Disability Insurance Agency review process. If that is not successful, the person may make an application for external review to the Administrative Appeals Tribunal (AAT), which can review the decision on the merits of the case. Participants can only appeal to the AAT in relation to “reviewable decisions” as specified under section 100(6) of the *National Disability Insurance Scheme Act 2013*. When a matter is referred to the AAT, a “practice direction” prescribes a consultation between the NDIA and the person before it reaches the Tribunal. As of September 2020, a total of 4,319 cases had been taken to the AAT, with 3,356 being resolved before hearing. Only 73 cases had gone to hearings and received a substantive decision.<sup>132</sup>

Mental health and guardianship tribunals hear cases under the relevant state legislation. It is important to note that, in addition to court and tribunal proceedings directed towards enhancing rights, there are also court and tribunal proceedings directed towards removing rights. These include those related to coercive

<sup>128</sup> Australian Law Reform Commission, 2014.

<sup>129</sup> Australian Law Reform Commission, 2014.

<sup>130</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para 25 (b).

<sup>131</sup> In some jurisdictions, a protective cost order can be sought.

<sup>132</sup> Parliament of Australia, 2020.

interventions and forced treatment, such as guardianship and mental health tribunals and state/territory Supreme Court *parens patriae* jurisdictions, and state removal of children from parents with disability via Children's Courts.

A number of Australian jurisdictions also have statutory powers of court diversion available in mainstream criminal courts. For example, in New South Wales, magistrates in local courts can dismiss the charges laid against a defendant who is "cognitively impaired", "suffering from mental illness" or "suffering from a mental condition" and discharge the individual into care, assessment, treatment or support.<sup>133</sup> Under the legislation, magistrates also have the power to order a "mentally ill person" appearing before them on criminal charges to be taken to a mental health facility and detained for assessment (potentially leading, in turn, to involuntary detention and treatment under civil mental health legislation), be placed in the care of a responsible person, or be subject to a community treatment order. The charges against a person under this order are taken to be dismissed six months after the order is made, unless the individual is brought back to court during that period (s 33). Similar provisions to those in New South Wales exist in Australia's federal jurisdiction (*Crimes Act 1914* (Commonwealth), s 20 BQ), the *Northern Territory (Mental Health and Related Services Act* (Northern Territory) s 78; see also ss 78A–78E), and the *South Australia (Sentencing Act 2017* (South Australia), s 30).<sup>134</sup>

### 3. Rights-based processes and adequate remedies for violations of the rights of persons with disabilities

Some jurisdictions, such as New South Wales, Victoria and Western Australia, have versions of equal treatment bench books to guide court officials and judicial officers,<sup>135</sup> including a chapter on persons with disability. Ron McCallum suggests that court procedures conducted in accordance with bench book guidelines demonstrate Australia's compliance with article 13.<sup>136</sup>

Guardianship and mental health legislation and state/territory Supreme Court *parens patriae* jurisdictions in Australia deny or restrict the legal capacity of persons with disabilities, including within the judicial and tribunal system. Moreover, the effect of the decisions of these courts and tribunals (i.e., coercive treatment and forced treatment) enable violations of a variety of rights, including rights to freedom from violence, freedom from torture, personal integrity, freedom of expression, independent and community inclusion, and right to privacy.

The Committee on the Rights of Persons with Disabilities expressed concern in its 2019 Concluding observations that Australian legislation continues to view some persons with disabilities as unfit to plead, as well as about the ongoing use of substituted decision-making to assist persons with disabilities "unable to navigate the legal system by themselves."<sup>137</sup> The Committee subsequently recommended that Australia "Bring all state, territory and federal legislation, including criminal laws and policies,

in compliance with the Convention to ensure due process guarantees for all persons with disabilities and ensure a review of the legal situation of persons whose equal recognition before the law is restricted and who have been declared unfit to stand trial."<sup>138</sup>

In addition, the Committee recommended that Australia "[e]liminate substitute decision-making, provide gender and culture-specific individualized support, including psychosocial support, for persons with disabilities in the justice system, make information accessible and provide community-based sentencing options."<sup>139</sup>

### 4. Practical and capability limitations on access to remedies for persons with disabilities

Persons with disabilities face barriers in seeking remedies for discrimination and rights violations. Limitation periods and changing corporate/charity entities engaged in service delivery and/or institutions can make it difficult to access justice for historical violations. In addition, many violations are enabled by law and thus no remedy is available.<sup>140</sup> People still in institutional living arrangements can encounter difficulties in accessing legal services and fear of reprisal can be a disincentive to making a complaint or bringing legal action against a current service provider.

The 2013 Concluding observations, adopted by the Committee following its review of Australia's initial report, expressed concern in relation to a lack of training for judicial officers, legal practitioners and court staff on ensuring access to justice for persons with disabilities, as well as lack of guidance for persons with disabilities on how to access justice.<sup>141</sup> In its submission to the 2019 second and third periodic review, the Australian Government reported that training was under way.<sup>142</sup> However, as noted by the Australian Human Rights Commission, "training will only be effective alongside laws and policies that recognise the legal capacity of people with disability on an equal basis as others."<sup>143</sup>

In its Concluding observations in 2019, the Committee recommended that "training modules on working with persons with disabilities and the Convention are incorporated into mandated training programmes for police officers, prison officers, lawyers, judicial officers, judges and court staff."<sup>144</sup>

A 2020 report to the Disability Royal Commission on Australia's compliance with the Convention recommended further research into what accommodations are granted to persons with various disabilities in practice in Australia's courts and tribunal rooms, and how the operation of these accommodations can be improved.<sup>145</sup>

<sup>138</sup> Ibid., para. 26(c).

<sup>139</sup> Ibid., paras. 26(c) and (e).

<sup>140</sup> See as to the principle of *ubi jus ibi remedium* [where there is a right there is a remedy], see : <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803110448446>

<sup>141</sup> Committee on the Rights of Persons with Disabilities, 2013c, CRPD/C/AUS/CO/1, para. 27.

<sup>142</sup> Attorney-General's Department, 2018, pp. 149-155.

<sup>143</sup> Australian Human Rights Commission, 2019a, p. 18, para. 58.

<sup>144</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 26(f).

<sup>145</sup> McCallum, R, 2020, p. 64.

<sup>133</sup> New South Wales Government, 1990, s 32.

<sup>134</sup> Commonwealth of Australia, 1914; Northern Territory, 1998; South Australia, 2017.

<sup>135</sup> The following can be viewed online: Supreme Court of Western Australia, *Equal Justice Bench Book*, (2009) 2<sup>nd</sup> ed, ch. 4 People with disabilities; Judicial Commission of New South Wales, *Equality before the Law Bench Book*, (2019) 15<sup>th</sup> ed, ch. 5 People with disabilities; Judicial College of Victoria and the Victorian Equal Opportunity & Human Rights Commission, *Disability Access Bench Book*, (2016); Supreme Court of Queensland, *Equal Treatment Bench Book*, (2016), ch. 11 Persons with disability.

<sup>136</sup> McCallum, R., 2020, p. 62.

<sup>137</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 25(e).

# 7 NATIONAL HUMAN RIGHTS INSTITUTIONS AND OTHER MECHANISMS

(article 33, Convention on the Rights of Persons with Disabilities)

The Australian Human Rights Commission is accredited as an “A” status National Human Rights Institution. The Commission is an independent statutory body, made up of a president and seven commissioners, established by the *Australian Human Rights Commission Act 1986*.<sup>146</sup> One of these Commissioners is the Disability Discrimination Commissioner, appointed pursuant to the *Disability Discrimination Act 1992* (Commonwealth). The first Disability Discrimination Commissioner was appointed in 1992; the current Commissioner, Dr Ben Gauntlett, began his five-year term on 7 May 2019.

The Commission’s functions include education and awareness training, investigating and conciliating complaints of unlawful discrimination, conducting national inquiries and reporting on human rights issues. Under the DDA, the Commission can issue guidelines “for the avoidance of discrimination” on the grounds of disability. Most recently, the Disability Discrimination Commissioner has led work to develop two sets of guidelines: *Equivalent Access under the Disability Standards for Accessible Public Transport 2002* (Commonwealth)<sup>147</sup> and *Guidelines on the rights of people with disability in health and disability care during COVID-19* (2020).<sup>148</sup>

The Disability Discrimination Commissioner has also participated in regional activities, such as the 2019 ASEAN Intergovernmental Commission on Human Rights Regional Dialogue on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community (Gender Perspectives on Disability Rights).

In addition to the Australian Human Rights Commission, there are equivalent bodies under State and Territory laws that also specifically address violations of the rights of persons with disabilities. These include Victoria’s Equal Opportunity and Human Rights Commission; the New South Wales Anti-Discrimination Board; the Northern Territory Anti-Discrimination Commission; and Western Australia’s Equal Opportunity Commission. As previously mentioned, remedies for discrimination in relation to employment matters can also be sought through the federal Fair Work Commission.

<sup>146</sup> Commonwealth of Australia, 1986.

<sup>147</sup> The Commission partnered with the Department of Infrastructure, Transport, Regional Development and Communications to develop the guidelines. They provide guidance on the equivalent access provisions of the Disability Standards for Accessible Public Transport 2002 (Commonwealth) (Transport Standards), their interaction with the Disability Discrimination Act 1992 (Commonwealth), and practical help on assessing equivalent access measures.

<sup>148</sup> The purpose of these Guidelines is to provide practical guidance on how to apply a human rights-based approach to decision-making that takes into account the rights of people with disability, within the health system in the context of the current pandemic.





# POLICYMAKING

## (article 4, Convention on the Rights of Persons with Disabilities)

### 1. National Disability Policy

The National Disability Strategy 2021-2031 (NDS)<sup>149</sup> is Australia's national policy framework to guide Australia's implementation of the Convention on the Rights of Persons with Disabilities. This strategy was preceded by the National Disability Strategy 2010-2020. The National Disability Strategy was developed following a public consultation process led by the Department of Social Services, and adopts the principles set out in article 3 of the Convention and the policy areas align to its articles.

The National Disability Strategy has seven policy outcome areas:

1. Employment and Financial Security;
2. Inclusive Homes and Communities;
3. Safety, Rights and Justice;
4. Personal and Community Support;
5. Education and Learning;

6. Health and Wellbeing;
7. Community Attitudes.

Despite the National Disability Strategy being recognized by Commonwealth, State and Territory governments as the strategy to report against the Convention, recommendations from treaty monitoring bodies, including those of the Committee on the Rights of Persons with Disabilities, have not been explicitly included within the NDS.

Two implementation plans were associated with the National Disability Strategy 2010-2020: *Laying the Groundwork 2011-2014* and *Driving Action 2015-2018*.<sup>150</sup> In 2019, the Committee expressed concerns about the serious delays in releasing the third plan for implementing the National Disability Strategy 2010-2020 and the lack of an effective monitoring mechanism under the NDS.<sup>151</sup>

The National Disability Strategy requires commitment and implementation through State, Territory and Local Government Disabili-

ty Plans. These Plans have not always aligned with the National Disability Strategy, compromising national consistency in implementation, monitoring and evaluation, reporting processes, and consistent data collection.

In 2017, the Australian Government released the *Plan to Improve Outcomes for Aboriginal and Torres Strait Islander People with Disability*,<sup>152</sup> and this was positively noted by the Committee on the Rights of Persons with Disabilities in 2019. However, the First Peoples Disability Network continues to raise concerns that policy initiatives and priority reforms remain siloed and do not adequately respond to the intersectional issues that Aboriginal and Torres Strait Islander persons with disabilities face. It is yet to be seen how the new National Disability Strategy will deliver a new Plan focused on Aboriginal and Torres Strait Islander persons with disabilities. Despite the disproportionate impact of disability on the lives of Aboriginal and Torres Strait Islander communities, the *New National Agreement on Closing the Gap*,<sup>153</sup> which is the principal policy framework for improving the lives of Aboriginal and Torres Strait Islander people, does not identify disability as one of the 16 new targets.

### 2. Implementation, monitoring and evaluation

There is no single database that consolidates resources dedicated to the implementation of the Convention in Australia. Responsibilities for outcomes of the National Disability Strategy (NDS) sit across the Commonwealth and State and Territory governments, and across departments.

A 2017 Senate Standing Committee inquiry into delivery of outcomes under the National Disability Strategy 2010-2020<sup>154</sup> found the Strategy lacked resourcing in implementation, monitoring and evaluation across policy outcome areas, and accountability and implementing mechanisms. The 2019 Concluding observations of the Committee expressed concern in relation to the lack of funding for implementation and effective monitoring of the Strategy and recommended that Australia ensure sufficient resources for implementation. The new National Disability Strategy 2021-2031 states that Governments will work together in 2022 to develop a comprehensive data strategy to inform outcomes measurement.

### 3. Responsibilities under Australia's federated system

The Council of Australian Governments (COAG) *National Disability Agreement (2009)*<sup>155</sup> is the agreed framework for federal financial relations in relation to the provision of disability services. The National Disability Agreement pre-dates both the NDS and the NDIS. A 2019 review conducted by the Productivity Commission<sup>156</sup> found that a new National Disability Agreement between the Australian, State and Territory Governments was needed to "facilitate cooperation, enhance accountability and clarify roles and responsibilities now that the majority of funding for disability service provision has transferred to the Commonwealth."

Whilst the Department of Social Services has policy responsibility for the National Disability Strategy, under the Australian federation responsibilities for implementation of policies

<sup>149</sup> <https://www.disabilitygateway.gov.au/document/3106/>

<sup>150</sup> Department of Social Services, 2015.

<sup>151</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 5(c).

<sup>152</sup> Department of Social Services, 2017.

<sup>153</sup> Council of Australian Government, 2020.

<sup>154</sup> Parliament of Australia, 2017.

<sup>155</sup> Council of Australian Governments, 2009.

<sup>156</sup> Productivity Commission, 2019.



relating to the rights of persons with disabilities, including those relating to criminal law, policing and provision of health and education fall principally to Australian State and Territory governments.

The Disability Reform Council is the forum through which relevant Commonwealth, State and Territory Ministers who are responsible for disability policy reform and implementation meet.<sup>157</sup> The Reform Council was established under the COAG structure (from October 2020, COAG was replaced by the National Federation Reform Council).<sup>158</sup>

Australian civil society organizations have consistently urged Australian governments to establish an executive mechanism within the Department of Prime Minister and Cabinet to secure high-level and cross-government coordination of the National Disability Strategy.<sup>159</sup> This recommendation has been echoed by a Senate Inquiry<sup>160</sup> and, most recently, by the Australian Human Rights Commission in its 2019 report to the Committee on the Rights of Persons with Disabilities.<sup>161</sup> To date, this proposal has been rejected, with the Government maintaining the position that the current structure under the Disability Reform Council serves the purpose.<sup>162</sup>

The Committee on the Rights of Persons with Disabilities, in its 2019 Concluding observations, called on Australia to establish “a formal monitoring mechanism under the National Disability Strategy that includes the Office of Disability Strategy, as recommended by the Senate Standing Committee on Community

Affairs in 2017, ensuring effective coordination between the federal and state levels.” The Committee further recommended that the Australian Parliament amend legislation to ensure that the Australian Human Rights Commission has the power to independently monitor the Convention in accordance with article 33(2).<sup>163</sup>

#### 4. Persons with disabilities in policy-making processes

The National Disability and Carers Advisory Council<sup>164</sup> was formed in 2016 to fulfil an election commitment by the Liberal National Coalition government. The purpose of the Council was to provide advice on areas specific to disability policy, including the National Disability Strategy (NDS), the National Disability Insurance Scheme (NDIS), the Integrated Plan for Carer Support Services, and reforms to disability employment.

The new National Disability Strategy 2021-2031 outlines a governance model, as a visible accountability structure against implementation and decision-making under the strategy. This governance model includes an Advisory Council of persons with disabilities. This Advisory Council is one component of a broader community engagement strategy associated with the new National Disability Strategy, which outlines how the Government will engage with persons with disabilities, and the broader community.

At the State and Territory level, there are similar advisory structures that provide policy advice and input to government, for example the New South Wales Disability Advisory Council, the Victorian Disability Advisory Council, and the Northern Territory Disability Advisory Committee.

Across other areas of disability policy, specific advisory groups of people with disability provide input, such as the Independent Advisory Council for the National Disability Insurance Scheme,<sup>165</sup> and the Advisory Council for the National Disability Data Asset.<sup>166</sup> In its 2019 Concluding observations, the Committee on the Rights of Persons with Disabilities expressed concern over the weakness of the mechanisms and the limited funding available under the National Disability Strategy and the National Disability Agreement for the full and effective engagement of persons with disabilities, through their representative organizations.

As noted previously, all Commonwealth bills and disallowable legislative instruments have to be accompanied by a Statement of Compatibility with Human Rights and be considered by the Parliamentary Joint Committee on Human Rights, including with respect to their compatibility with the Convention. An example of broader policy and legislative reform that incorporates disability issues is the work being done to reform Australian laws in relation to decriminalisation of abortion (largely governed by State and Territory laws).<sup>167</sup> Persons with disabilities and their representative organizations have been involved with these processes, not only from a reproductive rights perspective, but also from a disability rights perspective, to prevent legislative change from incorporating ableist assumptions of disability.

In 2017, the Commonwealth Government provided funding under the Disability Representative Organizations programme to support systemic advocacy and representation for Australians with disability. The funding was awarded to a mixture of Disabled Peoples Organizations (DPOs) and other Disability Representative Organizations (DROs).

The expectation is that these peak bodies provide advice to the Government on legislation and policy across a range of ministers and portfolios. Representatives from these organizations are involved with consultative mechanisms across broad policy development and implementation processes, for example, the Australian Electoral Commission Disability Advisory Committee, the Disability Employment Working Group; the Australian Public Service Commission, the National Disability Strategy Reform Steering Group, and the National Accessible Public Transport Advisory Committee (NAPTAC).<sup>168</sup>

Under the disability legislation of the various states and territories, government departments and public authorities are required to develop Disability Inclusion Plans. For example, under the New South Wales *Disability Inclusion Act 2014 No. 41*<sup>169</sup> all New South Wales Government Departments, some other government agencies, and all local councils were required to develop Disability Inclusion Action Plans (DIAPs). All Government departments and agencies were required to have their plans in place by 1 December 2015, and Local Councils by 1 July 2017, with plans collated in a central register. Under section 17 of the Act, the New South Wales Disability Council had the role of advising on plan development and implementation. The Department of Communities

<sup>157</sup> For more detail of the responsibilities of the Reform Council see: <https://www.dss.gov.au/our-responsibilities/disability-and-carers/programmes-services/government-international/disability-reform-council>

<sup>158</sup> The National Federation Reform Council was established during the onset of the COVID-19 pandemic <https://federation.gov.au/nfrc>.

<sup>159</sup> Disabled People's Organisations Australia, 2017.

<sup>160</sup> Parliament of Australia, 2017.

<sup>161</sup> Australian Human Rights Commission, 2019a.

<sup>162</sup> Commonwealth of Australia, 2018.

<sup>163</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, paras. 62 (a), (b) and (c).

<sup>164</sup> For more details of the responsibilities of the National Disability and Carers Advisory Council, see <https://www.dss.gov.au/disability-and-carers/overview/national-disability-and-carers-advisory-council>

<sup>165</sup> For more information on the Independent Advisory Council for the NDIS, see <https://www.ndis.gov.au/about-us/governance/iac>.

<sup>166</sup> For more information on the Disability Advisory Group to the NDDA, see <https://ndda.gov.au/about/disability-advisory-council/>.

<sup>167</sup> In September 2019 the NSW Parliament passed the *Abortion Law Reform Act 2019* (introduced as the *Reproductive Health Care Reform Bill*). Media report from SBS: <https://www.sbs.com.au/news/abortion-has-been-decriminalised-in-nsw-and-here-s-what-will-actually-change>.

<sup>168</sup> Some, but not all, of these processes include remuneration for the involvement of people with disability.

<sup>169</sup> New South Wales Government, 2014.

and Justice had responsibility for providing a governance framework and monitoring, evaluation and reporting on the actions taken under Disability Inclusion Action Plans.

A report released in June 2019 by the Sax Institute, in collaboration with the Centre for Disability Policy and Research, University of Sydney, that reviewed the NSW Disability Inclusion Plan and the Disability Inclusion Action Plans created across the NSW Government found that the legislation was key to driving “prioritization of inclusion” and that while there were significant activities towards inclusion, lack of resourcing was a challenge for implementation, and a lack of monitoring and data collection made it difficult to demonstrate meaningful outcomes or quantify the tangible impact of Disability Inclusion Action Plans.<sup>170</sup> Whilst the *Disability Inclusion Act 2014* (New South Wales) articulated a shift from service provision to a human rights approach to disability inclusion, and the Australian Human Rights Commission was commissioned to provide disability rights training to government agencies, the Disability Inclusion Action Plans were not explicitly linked to the Convention.

## 5. Participation of persons with disabilities and DPOs in development, implementation and monitoring of international frameworks

In 2013 Australian DPOs received support from ESCAP to participate as panel presenters at the High Level Intergovernmental Meeting on Developing the Sustainable Development Goals. Disabled People’s Organizations Australia (see below for members of DPO Australia) contrib-

uted to the Australian Council for International Development 2016 National Dialogue on the SDGs and participated in the Australian Sustainable Development Goals Summit in March 2018.<sup>171</sup>

Australian DPOs were subsequently involved in Australia’s voluntary SDG review process through the civil society activities led by the Australia Council for International Development. Australian DPOs have also engaged with regional mechanisms in relation to the SDGs and the Incheon Strategy, including the Commonwealth Disabled People’s Forum,<sup>172</sup> and in DPI Asia Pacific and ESCAP forums. However, DPOs in Australia receive no funding to engage in these processes. There is no mechanism for engagement of persons with disability and their representative organisations in the implementation or monitoring of the SDGs in Australia.

# 9

## DISABLED PEOPLES’ ORGANIZATIONS

(articles 4, 29 and 33, Convention on the Rights of Persons with Disabilities)

### 1. Australian Disabled People’s Organizations (DPOs), representative and advocacy bodies

The Australian Government funds organizations under the National Disability Representative Organizations programme “to provide systemic advocacy and representation for Australians with disability.”<sup>173</sup> These organizations are a mix of DPOs and representative and advocacy organizations:

- A. Children and Young People with Disability Australia.
- B. Disability Australia Consortium, which is made up of:
  1. Australian Federation of Disability Or-

ganisations – a peak membership-based organization of disability-specific organizations;

2. Autism Aspergers Advocacy Australia;
3. Blind Citizens Australia;
4. Brain Injury Australia;
5. Deaf Australia;
6. Deafblind Australia;
7. Deafness Forum of Australia;
8. Disability Advocacy Network Australia (DANA) - DANA is the peak body for disability advocacy organizations which are funded through the National Disability Advocacy Program and some State and Territory funding;
9. Down Syndrome Australia;
  - (i) The National Mental Health Consumer and Carer Forum - rep-

<sup>170</sup> Sax Institute, 2019.

<sup>171</sup> The Summit was hosted by Australian Council for International Development (ACFID), Australian Council of Social Service (ACOSS), Global Compact Network Australia (GCNA), SDSN Australia/Pacific and the United Nations Association of Australia (UNAA).

<sup>172</sup> The Forum was re-formed in June 2019 <https://commonwealthdppf.org/>

<sup>173</sup> Australian Government, Department of Social Services <https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/consultation-and-advocacy/national-disability-peak-bodies> (accessed on 31 July 2022).

resents mental health consumers and carers;

10. Physical Disability Australia.

- C. First Peoples Disability Network Australia – a DPO representing First Nations persons with disability and their families.
- D. National Ethnic Disability Alliance – a DPO representing persons with disability from culturally and linguistically diverse backgrounds.
- E. People with Disability Australia - a national peak, cross-disability DPO.
- F. Women with Disabilities Australia<sup>174</sup> - a DPO representing women, girls and feminine identifying and non-binary people with disabilities.

There are also representative and consumer organizations at the State and Territory level, such as People with Disabilities Western Australia, the Council for Intellectual Disability (New South Wales) and the Victorian Mental Illness Awareness Council (VIMIAC), the Victorian mental health consumer organization. Alliances of organizations, including DPOs, representative and advocacy organizations, service provider peak organizations, and academia have been formed to collectively advocate on certain rights issues, for example, the Australian Alliance for Inclusive Education and the Australian Network for Universal Housing Design.<sup>175</sup>

The 2019 civil society shadow report to the Committee on the Rights of Persons with Disabilities raised concerns about the National Disability Representative Organizations funding programme, including the limited funding period (until 30 June 2022), the failure to index funding and unnecessary restrictions on how this funding could be used.

<sup>174</sup> Women with Disabilities Australia, First Peoples Disability Network, National Ethnic Disability Alliance and People with Disability Australia work together as Disabled People's Organisations Australia.

<sup>175</sup> See: <https://allmeansall.org.au/>; <https://anuhd.org>.

<sup>176</sup> Kayess, R and Sands, T, 2020, p. 6.

## 2. Barriers to the participation of DPOs in the implementation of the Convention

A report prepared in 2020 for the Disability Royal Commission reflects on the fact that the

*“...disability rights movement in Australia has driven important policy and legislative reform with the aim of acknowledging the rights of persons with disability, combating discrimination, closing institutions, providing adequate services and supports, and facilitating equal participation in society. While this has facilitated some incremental changes for persons with disability, it has not led to the social transformation required by the CRPD.”*<sup>176</sup>

There are no permanent or effective mechanisms to ensure the active, full and meaningful participation of persons with disabilities, including children with disabilities, in the implementation and monitoring of the Convention. Resourcing for DPOs is competitive and funding under the National Disability Representative Organizations programme cannot be used for participation in international human rights forums. The 2019 civil society shadow report suggested that the important role of DPOs, in line with General comment No. 7 of the Committee on the Rights of Persons with Disabilities, is not well understood by Australia.

lian Governments.<sup>177</sup> Funding was provided by the Federal Government for participation of persons with disability in the periodic review processes under the Convention, providing an important opportunity for persons with disability to advocate to the Committee around systemic issues. Persons with disability and their representative organizations have also been able to apply through a competitive funding process to attend the Conference of States Parties to the Convention.

In 2021, the Australian Treasury proposed changes to governance standards for Australian charities, to restrict participation in “political activities,” which may cover advocacy for changes to law and policy. Whilst these laws were put forward as preventing unlawful activities, there was concern that, if they went ahead, they would have a significant impact on the activities (including the right to protest) of human rights and social justice organizations in Australia, including disability rights organizations. They were adopted in 2021, but a change of government in May 2022 appears likely to lead to a review of the approach embodied in those changes.<sup>178</sup>

## 3. The critical role of DPOs in Australia

DPOs ensure the voices of persons with disabilities are heard in decision-making processes and are critical to accountability for the implementation of the Convention across Government in Australia. Tangible examples are too numerous to list, but some of the most significant recent impact has been achieved through years of sustained advocacy by per-

sons with disabilities and their representative organizations and allies that has led to the establishment of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and the National Disability Insurance Scheme.

DPOs in Australia have, on occasion, led, or supported legal action against the Government for rights violations. For example, People with Disability Australia (PWDA), a national cross-disability DPO, was involved with the Wage Justice Campaign over many years. That involvement included challenging the use of the Business Services Wage Assessment Tool (BSWAT) in relation to payment of workers with disability in Australian Disability Enterprises. People with Disability Australia worked with legal services to support a test case on behalf of two workers with intellectual disability that was successfully taken to the Federal Court.<sup>179</sup>

Most recently, during the COVID-19 pandemic, DPOs have played a critical role in raising awareness around the rights of persons with disabilities. On 8 April 2021, a range of organizations, including DPOs, disability representative and advocacy organizations from across Australia, published an open letter<sup>180</sup> to the National Cabinet expressing concern about the lack of specific and targeted measures from Australian Governments to proactively protect and support persons with disabilities, their families, carers and support persons from the impact of COVID-19.

As noted previously, there is no formal engagement mechanism with DPOs or DROs to ensure active participation in national implementation and monitoring of the Convention. In its 2019 Concluding observations, the Committee on

<sup>177</sup> Australian Civil Society Shadow Report Working Group, 2019.

<sup>178</sup> Commonwealth of Australia, 2021. The Labor government elected in May 2022 indicated that it did not intend to impose additional restrictions on charities in particular in their ability to engage in advocacy: Butler, J., 2022.

<sup>179</sup> *Nojin v Commonwealth* [2012] FCAFC 192. For further consideration of the issue, see *4 yearly review of modern awards—Supported Employment Services Award 2010* [2019] FWCFB 8179 (3 December 2019).

<sup>180</sup> The civil society letter can be found at: <https://dpoa.org.au/an-open-letter-to-the-national-cabinet-immediate-actions-required-for-australians-with-disability-in-response-to-coronavirus-covid19/>



the Rights of Persons with Disabilities made a number of recommendations in this regard, specifically that:

“...in line with the Committee’s general comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, establish formal and permanent mechanisms to ensure the full and effective participation of persons with disabilities, including children with disabilities, through their representative organizations, in the development and implementation of legislation and policies to implement the Convention, ensuring adequate resources and the provision of the necessary support. It recommends that the State party involve Aboriginal and Torres Strait Islander persons with disabilities and their representative organizations in particular in all aspects of the design, implementation, monitoring and evaluation of the Australian Government Plan to Improve Outcomes for Aboriginal and Torres Strait Islander People with Disability.”<sup>181</sup>

# 10 ATTITUDES TO DISABILITY AND PERSONS WITH DISABILITIES

(article 8, Convention on the Rights of Persons with Disabilities)

There is no national strategy to raise awareness of the rights of persons with disability. The second implementation plan for the National Disability Strategy prioritized communication activities, but this did not deliver a comprehensive and national approach to awareness raising around disability rights. A review of the National Disability Strategy conducted in 2018, recommended a public awareness campaign, including to engage with the general public through a variety of media, for example, videos, webinars, live streaming and social media. The new National Disability Strategy (2021-2031) identifies community attitudes as an additional priority outcome area “central to achieving an inclusive society and improving all outcomes for people with disability under the strategy.”

The Australian Government promotes the International Day of Persons with Disability (3 December),<sup>182</sup> but in recent years has ceased funding national disability awareness initiatives, such as the National Disability Awards<sup>183</sup> and ABC Ramp Up.<sup>184</sup>

A 2018 survey of community attitudes to disability in Victoria found that, of those interviewed, nearly one in five agreed that children with disability should *only* be educated in special schools, and that employers should be allowed to refuse to hire people with disability.<sup>185</sup>

In 2011 when a review was undertaken by the Productivity Commission before the establishment of the NDIS, it noted that “The biggest challenge for Australia is to provide

<sup>182</sup> <https://www.idpwd.com.au/about/about-us/>

<sup>183</sup> The awards are now coordinated within the disability sector.

<sup>184</sup> ABC Ramp Up was a website and radio show dedicated to contemporary disability issues <https://www.abc.net.au/rampup/>

<sup>185</sup> Victoria Government, 2018.

<sup>181</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 8.



an environment for change which allows for a cultural shift across all parts of our society. Active participation of those with a disability in society generally can only occur with a change in attitude.”<sup>186</sup>

Echoing this, the 2019 Concluding observations of the Committee on the Rights of Persons with Disabilities recommended that Australia develop a national government strategy to promote a positive image and awareness of the rights of all persons with disabilities and ensure the consultation and participation of representative organizations of persons with disabilities. The Committee specifically noted the need to include intersectional perspectives in the development and delivery of all awareness-raising activities.<sup>187</sup>

## 1. Persons with disabilities in the Australian media

The Australian media is largely reluctant to see disability issues as part of mainstream life, politics, or economy. Instead, the media feature individual stories of “inspiration porn,”<sup>188</sup> bludgers/burdens, or as poor, vulnerable people. Persons with disabilities are largely “case studies” to illustrate research or findings from a non-disabled expert. This relegates persons with disabilities to only talking about their individual experiences, and being seen as not having any expertise or knowledge about broader disability issues. Broader issues of discrimination, as well as intersections with

ethnicity, gender, poverty and other characteristics rarely appear. For example, there has been a lack of mainstream media coverage of the Disability Royal Commission.

The Australian Press Council, an industry-sponsored body with representatives of publishers, journalists and the community, is responsible for promoting good standards of media practice, and takes, and responds to complaints about Australian media. For example, in 2014, the Council considered a case of breach of its Standards of Practice in relation to a media article which portrayed persons with disabilities as “slackers.”<sup>189</sup> The DPO sector has provided guidelines to the media,<sup>190</sup> and the Australian Broadcasting Corporation, Australia’s public broadcaster, leads the way in this regard.

The loss of journalism jobs in Australia over the last five years has had a big impact, with a significant reduction in specialist reporters working on social affairs, who used to cover disability. This means that complex stories, such as those about the NDIS, are often only covered by inexperienced reporters who lack the background knowledge of the sector. This can lead to media capture by those with the most resources to devote to media management and public relations, such as disability support providers, rather than DPOs, or persons with disability.

The Attitude Foundation<sup>191</sup> aims to promote the development of media content that is rights-based and in line with the social model of disability. In addition, there are initiatives, such

as Starting with Julius,<sup>192</sup> that focus on the portrayal of children with disabilities in the media, including mainstream advertising.

Prominent Australian academics, including Gerard Goggin,<sup>193</sup> have been involved with notable studies in relation to the portrayal of people with disability in the media and popular culture.<sup>194</sup>

## 2. Disability rights in education

There is no disability rights movement information in history or social studies sections of the secondary school curriculum, although Auslan is now a recognized language under the Australian curriculum. Disability rights is not embedded within professional pathways for teachers, and those in the legal and justice sector.

Data indicates that professional development opportunities available to teachers in relation to students with disability are not being utilized. For example, December 2020 figures from the New South Wales Education Standards Authority showed that fewer than one in five of the State’s 165,000 accredited teachers had taken a course on students with a disability in the past three years. University graduates complete at least one core unit on inclusive education and students with disability. However, the 2018 OECD Teaching and Learning International Survey found only 38 per cent of Australian teachers feel prepared to teach children with special needs when they finish their university study.<sup>195</sup>

Training in disability rights, including the provision of reasonable accommodation, is not consistent across jurisdictions, and disability rights issues are not compulsory for Australian law graduates, despite the over-representation of persons with disability in the justice system.

In its 2019 Concluding observations, the Committee on the Rights of Persons with Disabilities expressed its concern about attitudes and awareness of disability rights issues. It made recommendations in relation to disability rights and training on the Convention for professionals, including police officers, prison officers, lawyers, judicial officers, judges and court staff, and health practitioners.<sup>196</sup>

<sup>186</sup> Productivity Commission, 2011.

<sup>187</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 16.

<sup>188</sup> “These images - there are lots of them out there - they are what we call inspiration porn. And I use the term porn deliberately because they objectify one group of people for the benefit of another group of people. In this case, we’re objectifying disabled people for the benefit of non-disabled people. The purpose of these images is to inspire you, to motivate you, so that we can look at them and think, well, no matter how bad my life is it could be worse - I could be that person. But what if you are that person?” — Stella Young, Australian disability activist, writer and comedian who died aged 32. <https://www.abc.net.au/news/2014-12-08/17-things-stella-young-wanted-you-to-know/5950814>

<sup>189</sup> The Press Council adjudication can be accessed here <https://www.presscouncil.org.au/document/1627-complainant-102>.

<sup>190</sup> People with Disability Australia has provided guidelines for journalists in relation to the Disability Royal Commission. <https://pwd.org.au/resources/library/media/media-guidelines-on-disability-royal-commission/>

<sup>191</sup> The Attitude Foundation is funded by private and corporate sponsorship <https://www.attitude.org.au/>

<sup>192</sup> See: <http://www.startingwithjulius.org.au/1202-2/>.

<sup>193</sup> To access Gerard Goggin’s publications: [https://scholar.google.com.au/citations?hl=en&user=im0BX4cAAAAJ&view\\_op=list\\_works&sort-by=pubdate](https://scholar.google.com.au/citations?hl=en&user=im0BX4cAAAAJ&view_op=list_works&sort-by=pubdate)

<sup>194</sup> Recommended literature includes Ellis, K., and G. Goggin (2015); Ellis, K. et al, 2019; Trevisan, F. (2018).

Other resources of interest include Stewart, K., 2019, and Finlay, C., 2021, the latter a recent anthology that includes stories from persons with disability about their lives growing up, presenting their personal perceptions of disability.

<sup>195</sup> OECD, 2018.

<sup>196</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, paras 26(f), 48(c).

# 11 EQUAL RECOGNITION BEFORE THE LAW/ENJOYMENT OF LEGAL CAPACITY ON THE BASIS OF EQUALITY

(articles 5 and 12, Convention on the Rights of Persons with Disabilities)

As noted earlier in this paper, Australian legislation and associated policy and practice deny or diminish recognition of persons with disability as persons before the law. This includes guardianship, estate management and mental health laws.

## 1. Australia's interpretive declaration to article 12 of the Convention

When depositing its instrument of ratification of the Convention, Australia made the following declaration:

<sup>197</sup> United Nations, 2022 and Commonwealth of Australia (2009a), Schedule 2.

“... Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.”<sup>197</sup>

Australia relies on this interpretive declaration and maintains that legislative and policy frameworks comply with article 12, despite the fact that they breach, are inconsistent with, and/or fail to fulfil Convention obligations as outlined in General comment No. 1.<sup>198</sup>

Legal capacity is instrumental to personhood:

“Personhood and making one's own choices are about the minutiae of daily life – what to wear, what to eat, what time to get up – as well as more significant life decisions – such as deciding who to vote for, deciding who, when and if to marry, choosing where to live, consenting to medical treatment, entering into contracts, deciding whether to have children and how many, and managing personal finances. The denial of legal capacity is a denial of personhood.”<sup>199</sup>

Not only are persons with disabilities less able to exercise their legal capacity, but medical and care interventions which are undertaken by reason of this denial of legal capacity pursuant to guardianship and mental health legislation are legally permissible under criminal law and civil law and thus do not constitute physical assault or false imprisonment. Therefore, persons with disabilities are entitled to lower levels of protection from harm and more limited access to legal redress under criminal and civil law.

<sup>198</sup> Committee on the Rights of Persons with Disabilities, 2014. There is some disagreement among States and the Committee and in the literature about how far article 12 goes, in particular whether there are any circumstances at all in which substitute decision-making is permissible in relation to an adult with disability.

<sup>199</sup> Kayess, R., and Sands, T., 2020, p. 19.

<sup>200</sup> For information on the types of areas covered, see: <https://www.ncat.nsw.gov.au/ncat/how-ncat-works/ncat-divisions-and-appeal-panel/guardianship-division.html>

<sup>201</sup> The Mental Health Review Tribunal is a specialist quasi-judicial body constituted under the Mental Health Act, 2007 (NSW) <https://mhrt.nsw.gov.au/the-tribunal/>

<sup>202</sup> Australian Civil Society Shadow Report Working Group, 2019, p. 72.

<sup>203</sup> See generally, O'Neill, N., and Peisah, C., 2019.

Guardianship, mental health and financial management orders are made by State and Territory governments under different tribunal structures (for example, the Guardianship Division of the New South Wales Civil and Administrative Tribunal (NCAT)<sup>200</sup> and the Mental Health Review Tribunal).<sup>201</sup> There is no nationally consistent legislation that outlines principles and processes for assessing an individual's ability to exercise legal capacity.<sup>202</sup> Orders that restrict an individual's legal capacity can be applied for by that individual, or by a third party (without the individual's consent), such as family, disability service provider, the Public Advocate, or the National Disability Insurance Agency (NDIA). The proceedings of guardianship and mental health tribunals and the Supreme Court sitting in its *parens patriae* jurisdiction are less accessible to the public and media, so there is less public oversight and state accountability than proceedings in other legal matters of similar magnitude (such as criminal justice proceedings which generally occur in open court).

Financial management and guardianship orders can restrict a person's legal capacity in all areas of life, including some of the most personal and intimate choices – where the person lives, choice of what disability supports the person needs, who will provide the support needed and when, how the person will use money and assets, make wills, whom the person can socialize with, whether the person can menstruate, engage in sexual activity, form intimate relationships, and reproduce. The orders also impact broader public and civic participation, such as voting, public office, board participation, access to justice, and providing evidence in court proceedings.<sup>203</sup>

Denial of legal capacity through mental health-based and guardianship legislation can result in significant interventions in people's bodies, which typically require personal consent or are otherwise associated with criminal punishment or torture. These include medical treatment without full and informed consent (including electroconvulsive therapy, sterilization) and detention in an institutional setting or locked medical facility. For example, under Involuntary Treatment Orders (ITOs) people with cognitive and/or psychosocial disability can be detained in psychiatric hospitals or other institutions. According to the Australian Institute of Health and Welfare, in 2018–2019, around 1 in 5 residential mental health care episodes (19.3 per cent) and 1 in 7 community mental health care service contacts (14.0 per cent) were involuntary.<sup>204</sup>

In contrast, while the Community Treatment Order (CTO) applies in the community and does not involve physical detention, it does place limitations on individuals, including requiring them to take certain medications, attend appointments and be subjected to case management. These laws can disproportionately impact Aboriginal and Torres Strait Islander persons with disability because of the lack of culturally appropriate mental health services.<sup>205</sup> Research published in 2019 notes that contemporary rates of use of the Community Treatment Order in Australia range from 40.0 per 100,000 population (Western Australia) to 112.5 per 100,000 (South Australia).<sup>206</sup>

## 2. Supported decision-making

Australian law does not generally provide for supported decision-making in relation to

individuals with cognitive and psychosocial disability. Supported decision making generally occurs outside of legal frameworks, rather than being an enforceable right. It is only as accessible/possible as the resources and relationships available to support it. In such an unregulated context, it is less likely to be available in relation to individuals who are seen as “difficult” or where there are no financial incentives on services.

In its report to the Committee on the Rights of Persons with Disabilities in 2019, the Australian Government reiterated its position that, in line with Australia's interpretative declaration on article 12, the Convention allows for fully supported or substitute decision-making where necessary, as a last resort and subject to safeguards.<sup>207</sup>

There has been considerable exploration of the compliance of Australian law and practice with article 12 of the Convention. In 2014, the Australian Law Reform Commission (ALRC) reviewed federal laws impacting on the legal capacity of persons with disabilities. Its final report, *Equality, Capacity and Disability in Commonwealth Laws*,<sup>208</sup> recommended a shift from substituted to supported decision-making in order to comply with the Convention. The Australian Law Reform Commission recommended the reform of Commonwealth, State and Territory laws for consistency with four “National Decision-Making Principles”: equal right to make decisions and have decisions respected; provision of support persons for decision-making; supported decision-making must be directed by the will, preferences and rights of individuals; and laws and legal frameworks must contain safeguards to prevent abuse and undue influence in decision-making. These recommendations have not been

adopted and to date the Government has not formally responded to the report. The Australian Law Reform Commission review was the most comprehensive review to date, but being limited to Commonwealth legislation, it did not include critical analysis of interaction with financial management, guardianship and mental health laws which are the province of State and Territory laws.

Multiple reviews have been completed of State and Territory guardianship<sup>209</sup> and compulsory treatment laws<sup>210</sup> that set out the legal frameworks regulating restrictive practices.<sup>211</sup> Many of these reviews have considered the Convention and have indicated support for working towards eliminating use of compulsory treatment and restrictive practices and greater involvement of persons with disabilities in substitute decision-making or even the partial adoption of supported or assisted decision-making. However, none has gone so far as to recommend the complete abolition of substitute decision-making and prohibition of compulsory treatment and restrictive practices in compliance with the Convention. The Mental Health National Cabinet Reform Committee was expected to deliver a National Mental Health and Suicide Prevention Agreement by November 2021, and it is anticipated this will continue Government momentum to reduce the use of seclusion and restraint in mental health service and support settings.<sup>212</sup>

<sup>209</sup> For example, Australian Capital Territory Law Reform Advisory Council, 2016, p. 126; New South Wales Parliament Legislative Council Standing Committee on Social Issues, 2010; New South Wales Law Reform Commission, 2018.

<sup>210</sup> For example: Department of Health, *Discussion Paper for the Mental Health and Related Services Act 1998 Review* (Northern Territory Government, 2020).

<sup>211</sup> In New South Wales, whilst there remains no legislative definition of restrictive practices, a new draft bill purporting to do that and introduce a new regulatory framework for the use of restrictive practices (on NDIS participants) in New South Wales, recently completed its public consultation phase <https://www.facs.nsw.gov.au/inclusion/disability/restrictivepracticesbill>.

<sup>212</sup> A new Agreement, the National Mental Health and Suicide Prevention Agreement was concluded in 2022: [https://federalfinancialrelations.gov.au/sites/federalfinancialrelations.gov.au/files/2022-05/nmh\\_suicide\\_prevention\\_agreement.pdf](https://federalfinancialrelations.gov.au/sites/federalfinancialrelations.gov.au/files/2022-05/nmh_suicide_prevention_agreement.pdf).

<sup>204</sup> Australian Institute of Health and Welfare, 2021.

<sup>205</sup> McCallum, R, 2020, 2020, p. 80.

<sup>206</sup> Light, E., 2019.

<sup>207</sup> Attorney-General's Department, 2018.

<sup>208</sup> Australian Law Reform Commission, 2014.



# 12 INTEGRITY OF THE PERSON, FREEDOM FROM TORTURE OR INHUMAN TREATMENT; FREEDOM FROM EXPLOITATION, VIOLENCE AND ABUSE (articles 15, 16 and 17, Convention on the Rights of Persons with Disabilities)

Australia's interpretive declaration on article 17 "recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards."<sup>213</sup>

Australian mental health and guardianship legislation and the *parens patriae* jurisdiction of State and Territory Supreme Court allow for medical treatment in some cases to be administered without free, prior and informed consent. This includes treatments such as psychosurgery, electroconvulsive therapy,<sup>214</sup> forced sterilization, chemical, mechanical and physical restraint and seclusion.<sup>215</sup>

In Australia's report to the Committee on the Rights of Persons with Disabilities prior to the 2019 review, it was reiterated that, in line with the country's interpretative declarations on articles 12 and 17 of the Convention, Australia understands its compliance as allowing "compulsory assistance or treatment where necessary, as a last resort and subject to safeguards."<sup>216</sup>

The Australian civil society shadow report *Disability Rights Now 2019* notes that the policy and practice guidelines, such as the *National Framework for Reducing and Eliminating the Use of Restrictive Practices (2014)*<sup>217</sup> and the *NDIS (Restrictive Practice and Behaviour Support) Rules 2018*<sup>218</sup> have significant limitations and permit the authorization of the use of restrictive practices, focusing on regulation of practices rather than prohibiting their use. The Royal Commission into Aged Care Quality and Safety (the Aged Care Royal Commission) tabled its final report on 1 March 2021. Recommendation 17 focused on the regulation of restraints and the use of restrictive practices. The Aged Care Royal Commission recommended that "Following the conclusion of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, the Australian Government should consider the applicability to aged care of any findings from that Royal Commission about restrictive practices and make further legislative amendments required to ensure that the treatment of people receiving aged care services is consistent with the treatment of other members of the community".<sup>219</sup>

Ultimately, legal frameworks focused on elimination, reduction and minimization do not create enforceable rights against the use of restrictive practices and entrust discretion to professionals and services which are likely to have financial and organizational considerations driving their practices.

In 2013, the Committee on the Rights of Persons with Disabilities recommended that Australia withdraw its interpretive declaration and repeal laws that authorize forced treatment, recommendations that were supported in ICESCR's review of the fifth periodic report of Australia in 2017.<sup>220</sup> In the most recent Concluding observations on Australia in 2019, the Committee recommended the "... establishment of a nationally consistent legislative and administrative framework for the protection of all persons with disabilities, including children, from psychotropic medication, physical restraint and seclusion under the guise of "behaviour modification" and the elimination of restrictive practices, including domestic discipline/corporal punishment, in all settings."<sup>221</sup>

## 1. Violence, abuse, neglect and exploitation of persons with disabilities

Currently, there is no consistent approach to defining or identifying violence, abuse, neglect and exploitation against persons with disabilities in Australia, or mechanisms through which to understand the full nature and extent of this issue.

women are three times more likely than men to be subjected to the practice, across all age cohorts.

<sup>216</sup> Attorney-General's Department, 2018, para. 15.

<sup>217</sup> Council of Australian Governments, 2013.

<sup>218</sup> National Disability Insurance Agency, 2018.

<sup>219</sup> Royal Commission into Aged Care Quality and Safety, 2021, p. 221.

<sup>220</sup> The Committee on Economic, Social and Cultural Rights recommended that Australia: "Repeal all legislation that authorizes medical intervention without the free, prior and informed consent of the persons with disabilities concerned, abolishing the use of restraint and the enforced administration of intrusive and irreversible treatments". Committee on Economic, Social and Cultural Rights, 2017, para. 46(d).

<sup>221</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 30(a).

<sup>213</sup> United Nations, 2022.

<sup>214</sup> Frohmader, C., and Sands, T., 2015.

<sup>215</sup> *Disability Rights Now 2019* notes that the use of forced treatments and restrictive practices on people with psychosocial disability has increased sharply in recent years, with available data about electroconvulsive 'therapy' (ECT) performed on involuntary patients indicating that



In April 2019, after years of advocacy from persons with disability and their allies, recommendations from treaty monitoring bodies, and a Senate inquiry,<sup>222</sup> the Australian Government established the Royal Commission into Violence, Abuse, Exploitation and Neglect of People with Disability (The Disability Royal Commission). The Disability Royal Commission's terms of reference as contained in the Commonwealth Letters Patent refer to Australia's obligations under the Convention. The terms of reference are broad and include exploration of all forms of violence and abuse against persons with disability, and in all settings.

In its 2019 Concluding observations, the Committee on the Rights of Persons with Disabilities noted the establishment of the Disability Royal Commission as a positive development, although it expressed its concern at the lack of resources. The Disability Royal Commission was originally due to report by April 2022. However, due to disruptions to face-to-face activities during the COVID-9 pandemic and the emerging scale of the issues needing to be addressed, the Chair of the Commission requested an extension of the deadline on 30 October 2020. The Government confirmed the extension of the Commission only on 13 May 2021 in response to this request and sustained advocacy by persons with disability and their allies.

The Disability Royal Commission recently commissioned the Centre of Research Excellence in Disability and Health (CRE-DH) to complete a short scoping project to explore data and information on the prevalence and experience of violence against, and abuse, neglect, and exploitation of, people with disability.<sup>223</sup>

The report notes the limitations of available data, with information mostly drawn from data collections that typically ask about forms of violence that are common across the population (for example, physical and sexual violence; domestic and family violence). The report states that "...while these data tell us about the nature, extent and impact of some types of violence for persons with disability in comparison to persons without disability, they fail to capture additional behaviours and manifestations of violence that may be specific to, or even experienced exclusively by, persons with disability."<sup>224</sup>

Data was primarily sourced from the Personal Safety Survey, which collects data on experiences of violence in relation to two time periods – in the last 12 months and since the age of 15 (also described as lifetime exposure).<sup>225</sup> Noting the limitations, the report data<sup>226</sup> shows that since the age of 15, 64 per cent of persons with disability (2,375,997 people) report experiencing physical violence, sexual violence, intimate partner violence, emotional abuse and/or stalking, compared to 45 per cent of persons without disability who have had such experiences. In the previous 12 months, persons with disability were at 1.8 times the risk of all types of violence in comparison to persons without disability.

This experience is seen across different types of violence: 52 per cent of persons with disability (1,913,425 people) report experiencing physical violence since the age of 15, compared to 34 per cent of persons without disability. In the previous 12 months, persons with disability were at 1.8 times the risk of physical violence in comparison to persons without disability and 2.6 times the risk of intimate partner violence.

Thirty-one per cent of persons with disability (1,154,962 people) reported experiencing emotional abuse since the age of 15, compared to 17 per cent of persons without disabilities, and in the previous 12 months, persons with disabilities were at 2.4 times the risk of being stalked, compared with the risk faced by persons without disability. The data do not capture the experiences of children with disabilities, and the report notes that the scarcity of reliable data to estimate the nature, extent and impact of violence and abuse on children and young people 'significantly hampers efforts to prevent and respond to the problem.'<sup>227</sup>

## 2. Women and girls with disabilities: particular risks and experiences of violence

While all women are at higher risk of sexual violence than men, women with disabilities are twice as likely to report an incident of sexual violence over their lifetime as women without disability. However, as noted above, there is no comprehensive data that captures the particular risks and experiences of violence for persons with disabilities, including disaggregated data for women and girls with disabilities. The data in the report by the Centre of Research Excellence in Disability and Health (CRE-DH) shows the increased likelihood of women with disability experiencing all types of violence: women with disability are twice as likely to report an incident of sexual violence over their lifetime (from the age of 15) than women without disabilities; 36 per cent of women with disabilities (693,884 women) report experienc-

ing violence by an intimate partner, compared to 21 per cent of women without disability; one in three women with disabilities report emotional abuse by a current or previous partner; while persons with disabilities experience higher rates of being stalked than persons without disability, women with disabilities are most at risk of being stalked. One in two women (334,076 women) with psychological and/or cognitive impairment has experienced sexual violence in her lifetime.

In its 2013 Concluding observations on Australia, the Committee on the Rights of Persons with Disabilities expressed concern over reports of the high incidence of violence against, and sexual abuse of, women with disabilities, and the high rates of violence perpetrated against women and girls living in institutions and other segregated settings.<sup>228</sup> A report to the Disability Royal Commission in 2020 on Australia's compliance with the Convention notes that anecdotal evidence suggests that women and girls with cognitive, psychosocial and communication disability, especially Aboriginal and Torres Strait Islander women and girls with disability, are particularly vulnerable to and experience violence at unacceptably high levels. But the report points out that there has been very little published research on the issue.<sup>229</sup>

There has been a recent focus in Australia, including a specific inquiry in New South Wales,<sup>230</sup> on criminalizing coercive controlling behaviour. Persons with disabilities may be at specific risk of distinct forms of coercive violence and abuse, including withholding of food, water, medication, or personal care such as toileting; restrictive practices; reproductive control and seclusion; and where persons with

<sup>222</sup> Commonwealth of Australia, 2015.

<sup>223</sup> Centre of Research Excellence in Disability and Health, 2021.

<sup>224</sup> The report notes other forms of violence, abuse, neglect and exploitation not captured, including, violence targeted at people with disability because of their perceived vulnerability (also known as hate, disablist hate or bias crimes); denial of treatment, required medication and/or specific aids; limiting access to social and other support services and exploitation/violation of bodily autonomy, including forced or coerced sterilisation.

<sup>225</sup> Centre of Research Excellence in Disability and Health, 2021, p. 8.

<sup>226</sup> The data are based on people aged 18-64; rates are directly age-standardised to the June 2018 Australian population.

<sup>227</sup> Centre of Research Excellence in Disability and Health, 2021, p. 15.

<sup>228</sup> Committee on the Rights of Persons with Disabilities, 2013c, CRPD/C/AUS/CO/1, para. 16.

<sup>229</sup> McCallum, R., 2020, p. 21.

<sup>230</sup> The New South Wales Joint Select Committee on Coercive Control was established in October 2020 and on 30 June 2021: reported as of the beginning of July 2021: <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=271#tab-reportsandgovernmentresponses>.

disabilities experience violence and abuse, they may have less support to address it.

Research conducted for the Disability Royal Commission by the Australian Institute of Criminology found that Aboriginal and Torres Strait Islander women with disabilities were more likely to experience physical violence, sexual violence and coercive control than non-Indigenous women with disability. The report also showed that First Nations women with disabilities experienced high rates of emotionally abusive, harassing and controlling behaviour.<sup>231</sup> The Disability Royal Commission undertook a focused hearing on the health and safety of women and girls in 2021.<sup>232</sup>

Despite recommendations from the Committee on the Rights of Persons with Disabilities and other treaty bodies and United Nations mechanisms, there continues to be no national legislation on the prevention of all forms of gender-based violence, and State and Territory legislation is fragmented, with a lack of uniformity and effective enforcement. Following Australia's 2019 constructive dialogue, the Committee recommended that Australia "ensure gender- and age-sensitive services to address gender-based violence that are inclusive and accessible to all women and girls with disabilities and ensure that staff are adequately trained."<sup>233</sup>

Numerous recommendations have been made by United Nations human rights treaty bodies and rights monitoring mechanisms calling on Australia to end the practice of forced sterilization, particularly for women and girls with disabilities. These include the 2013 initial review of Australia by the Committee on the Rights

of Persons with Disabilities, the Human Rights Council, and the Committee on the Elimination of Discrimination against Women.<sup>234</sup>

Australia has consistently maintained, including in its 2018 periodic report to the Committee on the Rights of Persons with Disabilities, that sterilization that is "non-therapeutic, invasive and irreversible" can be authorized by the Family Court "in the absence of valid consent" as part of the court's welfare jurisdiction under the *Family Law Act 1975* (Commonwealth).<sup>235</sup> The Australian Human Rights Commission in its report to the 2019 review also raised concerns about the forced administration of contraceptives and abortion procedures.<sup>236</sup> In 2019, the Committee on the Rights of Persons with Disabilities reiterated its serious concerns, and recommended that Australia review and amend laws, including the section of the Family Law Rules 2004 relating to applications for medical procedures in line with the Convention and adopt uniform legislation prohibiting, in the absence of free and informed consent, the sterilization of adults and children, the administration of contraception and the imposition of abortion procedures on women and girls with disabilities.<sup>237</sup>

### 3. National Plan to address violence against persons with disabilities

There is no national plan specifically to address violence against persons with disabilities in Australia.

The National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023 has no specific focus on older Australians with disability, or the dimensions of the violence and abuse particular to their circumstances.<sup>238</sup> The National Plan to Reduce Violence Against Women and their Children 2012-2022 (the National Plan)<sup>239</sup> is the main policy framework designed to prevent violence against women. The Plan has a narrow focus on sexual assault and domestic and family violence in the context of intimate partner violence and does not capture the settings in which women with disabilities experience violence (such as institutional residential settings). It excludes structural and institutional forms of gender based violence, and reproductive rights violations.

The House of Representatives Standing Committee on Social Policy and Legal Affairs conducted an inquiry into family, domestic and sexual violence, and released its report in April 2021.<sup>240</sup> The Committee report was to inform the development of the next National Plan. The Committee made a number of recommendations in relation to women with disabilities, including that the next National Plan specify persons living with disability as a priority cohort. The Australian Government report to the Committee on the Rights of Persons with Disabilities in 2019 noted the programmes implemented through the National Plan that supported women and girls with disability.<sup>241</sup>

In its 2019 Concluding observations, the Committee raised the issue of a lack of explicit reference to women and girls with disabilities in the National Plan and recommended that Australia "ensure the inclusion of women and girls with disabilities in the National Plan to Reduce Violence against Women and their

Children 2010–2022, beyond project-based programmes and activities."<sup>242</sup>

### 4. Legal protections from exploitation, violence and abuse

There are no specific laws that address exploitation, violence and abuse of persons with disabilities in Australia. Avenues for access to justice are through criminal and civil court processes. Whilst the Australian Government funds some legal services specifically for persons with disabilities, these face resource constraints and struggle to meet demand. The justice system has specific initiatives to support persons with disabilities, including courts' disability access schemes, but persons with disabilities face significant barriers to accessing justice through legal avenues.

The National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission was established under the *NDIS Act 2013* (Commonwealth). The Commission just has the responsibility of providing oversight and safeguards to NDIS participants, who make up only approximately 10 per cent of persons with disabilities in Australia. Disability rights advocates have consistently raised concerns that the Quality and Safeguards Commission does not provide the independent, national statutory mechanism that has the robust power and legislated functions that are needed to protect, prevent and respond to the violence, abuse, neglect and exploitation of persons with disability,<sup>243</sup> and that the Commission only has the remit to regulate, and respond to

<sup>231</sup> Boxall, H. et al, 2020, p. 21.

<sup>232</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of Persons with Disability, 2021b.

<sup>233</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 32(e).

<sup>234</sup> Australian Civil Society Shadow Report Working Group, 2019.

<sup>235</sup> Attorney General's Department, 2018.

<sup>236</sup> Australian Human Rights Commission, 2019a, 4.12 75; Royal Commission into Violence, Abuse, Neglect and Exploitation of Persons with Disability, 2021b.

<sup>237</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 34(a).

<sup>238</sup> Attorney General's Department, 2019b.

<sup>239</sup> Department of Social Services, 2012. A new National Plan was still under development as of mid-2022.

<sup>240</sup> Parliament of Australia, 2017.

<sup>241</sup> Attorney-General's Department, 2018.

<sup>242</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 32(d).

<sup>243</sup> Disabled People's Organizations Australia, 2017.

complaints related to, registered NDIS service providers. Unregistered providers are not required to adhere to all of the Commission requirements,<sup>244</sup> and the Commission has no mandate in relation to participant interactions with mainstream service systems.

### The relevance of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Australia ratified in 2017 the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, establishing obligations at federal, State and Territory levels for the designation and/or establishment of independent National Preventive Mechanisms (NPMs) to conduct inspections of all places of detention. Australia designated the Commonwealth Ombudsman as Australia's National Preventive Mechanism, together with similar State and Territory bodies. The Australian Government has chosen to interpret its obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) as referring to "primary places of detention"; however, the Australian OPCAT Network, and the Australian Human Rights Commission have called for the National Preventive Mechanism remit to include both disability-specific and mainstream places and practices of detention.<sup>245</sup> In 2019, the Committee on the Rights of Persons with Disabilities expressed concern about the lack of engagement with persons with disabilities, including through their representative organisations regarding the designation and establishment of a disability-inclusive National Preventive Mechanism, and recommended that Australia ensure

that organizations of persons with disabilities can effectively engage in the establishment and work of the National Preventive Mechanism.<sup>246</sup>

In response to the findings of a Royal Commission into Institutional Responses to Child Sexual Abuse,<sup>247</sup> the Government established a Redress Scheme. Whilst there are concerns with the scope and implementation of the Redress Scheme, it does provide some recourse for justice for people (including persons with disability) who were abused in childhood institutional settings.<sup>248</sup> In contrast, the Terms of Reference of the Disability Royal Commission do not include provision for a redress scheme. In 2019, the Committee on the Rights of Persons with Disabilities recommended that Australia:



*Establish a national accessible oversight, complaint and redress mechanism for persons with disabilities who have experienced violence, abuse, exploitation and neglect in all settings, including all those not eligible for the National Disability Insurance Scheme and, particularly, older women with disabilities; and Ensure adequate resources and a redress mechanism for the Royal Commission into Violence, Abuse, Neglect and Exploitation of Persons with Disabilities.*<sup>249</sup>

# 13 ACCESSIBILITY

(article 9, Convention on the Rights of Persons with Disabilities)

## 1. Steps to ensure accessibility in the community

As noted in section D, the *Disability Discrimination Act 1992* (Commonwealth) provides for a number of accessibility standards. The *federal Disability (Access to Premises – Building) Standards 2010* aim to ensure persons with disability have equal access to public buildings. The standards only apply to buildings covered by the *National Construction Code (NCC)*.<sup>250</sup>

In 2009, a National Dialogue on Universal Housing Design was held, and a strategic plan<sup>251</sup> developed which aimed to promote universal design for broad benefit, including for persons with disabilities. In 2010, members of the National Dialogue published the *Livable Housing*

*Design Guidelines (LDHG)*,<sup>252</sup> and in 2011, *Livable Housing Australia (LHA)*<sup>253</sup> was established as a not-for-profit partnership between community and consumer groups, industry, and government. *Livable Housing Australia* aimed to promote the guidelines, define best practice standards, and provide certification of homes against these guidelines. Progress has been slow, despite the establishment of *Livable Housing Australia*, and amendments to the *National Construction Code* were required in order to make substantial progress. As a result of changes to the Code that came into effect in May 2019, separate accessible adult change facilities are required in new, or redeveloped public buildings, including shopping centres, airports, theatres, galleries, swimming centres and other public assembly buildings over a certain occupancy size.<sup>254</sup>

<sup>250</sup> The Building Code of Australia, in conjunction with the Plumbing Code of Australia, forms the *National Construction Code*.

<sup>251</sup> National Dialogue on Universal Housing Design, 2010.

<sup>252</sup> *Livable Housing Australia*, 2017.

<sup>253</sup> For more information see: <https://livablehousingaustralia.org.au/>

<sup>254</sup> In addition, there is a range of Australian Standards to consider which are technical in nature: AS1428.1 Design for access and mobility: General requirements for access – New building work; AS 1428.2 Enhanced and additional requirements for access – building and facilities; AS 1428.4 Means to assist the orientation of people with vision impairment – Tactile ground surface indicators (TGS); AS 1428.5 Communication

<sup>244</sup> The Commission provides details of the oversight function in terms of unregistered providers <https://www.ndiscommission.gov.au/providers/unregistered-providers#:~:text=Unregistered%20providers%20must%20be%20able,registered%20or%20unregistered%20NDIS%20provider.>

<sup>245</sup> Australian OPCAT Network, 2020; Australian Human Rights Commission, 2020a.

<sup>246</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 30(c).

<sup>247</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, 2017.

<sup>248</sup> Parliament of the Commonwealth of Australia, 2020.

<sup>249</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 32(b).



At a meeting of Building Ministers held in April 2021, agreement was reached on minimum accessibility provisions for residential housing and apartments in the *National Construction Code 2022*, based on the Livable Housing Design Guidelines silver standards.<sup>255</sup> This marks considerable progress for those who have campaigned for changes to the Code over many years.

The *Disability Standards for Accessible Public Transport (2002)* (DSAPT) set out obligations for public transport operators and providers to remove discrimination from public transport services. The standards place requirements on new transport systems, and allow for gradual implementation by existing systems. In both its reviews of Australia, the Committee on the Rights of Persons with Disabilities has expressed concern about the length of time taken to achieve full transport accessibility.

Cases such as *Graeme Innes v Railcorp*<sup>256</sup> and *Julia Haraksin v Murrays Australia Ltd*<sup>257</sup> highlight some of the challenges faced by persons with disabilities using public transport. Mr Innes, who is blind, alleged that Railcorp, the then operator of Sydney's trains, had failed to make audible announcements on 36 train journeys between 28 March 2011 and 9 September 2011 and this amounted to unlawful discrimination. Audible "next stop" announcements are critical for blind or vision-impaired travellers, who rely on them to know where they are in their journey. Mr Innes, the then Disability Discrimination Commissioner, sued RailCorp in his private capacity – following two or three years

of complaints and after three years of unsuccessful representations to the relevant Minister and Department to provide appropriate on-train announcements.<sup>258</sup> The Federal Circuit Court in 2013 found RailCorp in breach of the *Disability Discrimination Act 1992* and the *Disability Standards for Accessible Public Transport 2002*. Following other similar cases that were settled through conciliation in the Australian Human Rights Commission, RailCorp made changes to audible announcements on New South Wales trains.<sup>259</sup>

Persons with disabilities are still affected by exclusions contained in the *Disability Standards for Accessible Public Transport*. For example, school buses are excluded, resulting in children with disabilities often being unable to use the same means of travel as their peers. Small airports and small aircraft are also excluded, limiting travel options for persons with disabilities in the regional and remote areas of Australia.<sup>260</sup>

There are ongoing concerns in relation to these building and transport access standards: there is weak monitoring and accountability; there are gaps and the standards do not acknowledge interactions with other standards and related guidelines; information about the standards is not widely available in accessible formats; they are tailored for those delivering the services, rather ensuring that consumers are aware of their rights and that breaches of compliance with the standards rely on individual complaints under the *Disability Discrimination Act*.

There are also the *National Standards for Disability Services 2014*<sup>261</sup> – six standards that apply to all disability employment and advocacy services funded by the Commonwealth Government. These standards aim to reflect the move towards person-centred approaches to disability service provision and to promote and drive a nationally consistent approach to the quality of disability services. These standards are not covered by the *Disability Discrimination Act 1992*, but third party certification bodies undertake audits of compliance against the standards.

In its 2019 review of Australia, the Committee on the Rights of Persons with Disabilities acknowledged the importance of all standards associated with the *Disability Discrimination Act 1992*, but noted the lack of a national framework for reporting compliance. The Committee recommended that the Australian Government establish a mechanism for mandatory compliance with the transport standards, the premises standards and the national standards for disability services, and that federal law be amended to provide mandatory rules for accessible housing.<sup>262</sup> With the recent changes to the National Construction Code, the Government has directly responded in terms of mandatory rules for accessible housing, although there remains no national framework for reporting compliance.

Under the remit of the Digital Transformation Agency, the Federal Government *Digital Service Standard*<sup>263</sup> is an unenforceable standard that provides "best practice principles" for designing and delivering government services.

However, Australia does not have information and communication standards that require full, mandated accessibility. In research conducted for the 2019 civil society report to the Committee on the Rights of Persons with Disabilities, 67 per cent of persons with disabilities surveyed stated that they found government information inaccessible and/or difficult to understand.<sup>264</sup>

Since the introduction of the NDIS, State government funding for Independent Living Centres (which provide advice and assistance to access assistive products and technology) has decreased as the focus has moved towards individual funding. This limits options for those people who are not eligible for the NDIS and who require access to assistive devices.

The 2019 Concluding observations also recommended that the Government "... implement the full range of accessibility obligations under the Convention,<sup>265</sup> including regarding information and communication technology and systems, and ensuring effective sanction measures for non-compliance."<sup>266</sup>

State and Territory disability legislation places expectations on government agencies, and local councils to develop disability inclusion plans. For example, in New South Wales, the *Disability Inclusion Act 2014* required public authorities to develop, in consultation with persons with disabilities, Disability Inclusion Action Plans focusing on four areas: (1) Developing positive community attitudes towards disability; (2) Creating liveable communities; (3) Increasing access to meaningful employ-

for people who are deaf or hard of hearing; AS 2890.6 Parking Facilities; AS/NZS 2980.6 Off-street parking for people with disabilities; AS 1735.12 Lifts, Escalators and Moving Walkways.

<sup>255</sup> National Reform Council, 2021.

<sup>256</sup> Federal Magistrates Court of Australia, 2013, *Innes v Rail Corporation of NSW (No 2)* [2013] FMCA 36.

<sup>257</sup> Federal Court of Australia, 2013, *Haraksin v Murrays Australia Limited (No 2)* [2013] FCA 217 (failure of bus company offering inter-city services to offer plaintiff, who was a wheelchair user, opportunity to travel because of lack of accessible buses, engaged in disability discrimination).

<sup>258</sup> "Graeme Innes v Railcorp," <https://www.youtube.com/watch?v=3svl4-cPpcc>.

<sup>259</sup> The Public Interest Advocacy Centre represented Mr Innes. A summary of the case can be found <https://piac.asn.au/projects/discrimination/graeme-innes-audible-on-train-announcements/>

<sup>260</sup> Australian Civil Society Shadow Report Working Group, 2019.

<sup>261</sup> The *National Standards for Disability Services 2014* applied from 1 January 2014 for employment service providers, and from 1 July 2014 for advocacy agencies funded under the National Disability Advocacy Programme, see: <https://www.dss.gov.au/our-responsibilities/disability-and-carers/standards-and-quality-assurance/national-standards-for-disability-services>

<sup>262</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, paras. (a) (b) and (c).

<sup>263</sup> The Government states that the standards are a set of best-practice principles for designing and delivering government services, see: <https://www.dta.gov.au/help-and-advice/about-digital-service-standard>.

<sup>264</sup> Australian Civil Society Shadow Report Working Group, 2019, p. 33.

<sup>265</sup> Positive examples of measures taken include the Department of Health National Toilet Map <https://toiletmap.gov.au/#>, which identifies the location of public facilities, including accessible toilets. DSS is currently undertaking a consultation into the issues for people with assistance animals that arises from differences in State and Territory laws and policies, see <https://engage.dss.gov.au/assistance-animals-survey/>.

<sup>266</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 18(c).



ment; and (4) Improving access to mainstream services through improved systems and processes. Under the Act, Departments and Councils have annual reporting requirements against these plans.<sup>267</sup>

## 2. National sign language

Auslan (Australian Sign Language) is not a national language, but was recognized by the Australian Government as a community language in 1987. In 2021, Auslan was included in the Australian Bureau of Statistics census as a language option.

In its report to the review of Australia by the Committee on the Rights of Persons with Disabilities in 2019, the Government stated that Australia does not have a national language, but that a number of languages, including Auslan, are widely recognised.<sup>268</sup> A report to the Disability Royal Commission on Australia's compliance with the Convention noted that, whilst this is true, "recognition of Auslan needs to be elevated to that of an official language so that persons are able to sign when interacting with governments and agencies."<sup>269</sup>

There is a national shortage of Auslan interpreters in Australia. Interpreting services can be included in NDIS and aged care funding packages; however, the supply of interpreters does not meet the demand. The Department of Health funds free sign language interpreting services to aged care providers for clients to engage in aged care services, but not to engage with Government officials.

Following the initial review of Australia in 2013, the Committee on the Rights of Persons with Disabilities recommended that Auslan be made a national language. Despite this not having occurred, the Committee did not repeat this recommendation in the second review of Australia but recommended that Australia "promote and support the use of sign language and take steps to ensure the availability of qualified sign language interpreters."<sup>270</sup>

## 3. Accessibility of government communications

Apart from provisions under the *Disability Discrimination Act 1992* (Commonwealth) and corresponding relevant State and Territory anti-discrimination legislation relating to access to goods and services, there are no mandated minimum standards for Australian Government and public sector organizations to ensure accessible information and services (including online).

Under the *Broadcasting Services Act 1992* (Commonwealth),<sup>271</sup> the provision of captioning is required on free-to-air and subscription channels for all content broadcast from 6 am to midnight, and news and current affairs broadcast at any time. However, recent research has found that live captions on free-to-air programmes are "riddled with errors across all channels making it difficult to comprehend the message."<sup>272</sup> In response to recent disasters in Australia, the Australian Communications Consumer Action Network (ACCAN) has called for legislative amendments to the *Broadcasting Services Act 1992* to place stricter obligations

on all broadcasters to provide captioning and Auslan interpretation of all emergency warnings and broadcasts.

As mentioned above, the Australian Government has developed the Digital Service Standard, which are best practice principles of designing and delivering government services. However, the standard does not apply to State, Territory or local government services, personal ministerial websites, and some services can get full or partial exemption.

## 4. Wayfinding

Standards Australia<sup>273</sup> released a Wayfinding Standard<sup>274</sup> in November 2018, which gives specific guidance on the design and installation of static signage to assist people who are blind or have low vision to navigate the built environment. It is anticipated that this standard is likely to be a compulsory part of the National Construction Code from 2022. There is no similar standard in relation to easy read formats.

At the local level, availability of tactile signage is varied, and some locations, particularly major cities in Australia, are leading this area. For example, more than 2,100 Braille and tactile signs have been installed across Sydney, following extensive community consultation. This is part of the legible Sydney wayfinding system that also includes pedestrian-friendly maps, information pylons, new signs and digital technology, and is one of the most comprehensive tactile sign networks in Australia.<sup>275</sup> There are no requirements to provide signage in an easy-to-read style.

Since its ratification of the Convention, the Australian Government has made efforts to improve information accessibility for persons with disabilities.<sup>276</sup> However, the Committee on the Rights of Persons with Disabilities, in its 2019 Concluding observations, called for Australia to "develop a plain language law requiring government agencies to use clear communication and that it also develop legally binding information and communications standards so that information, particularly all information about significant changes to laws, policies, systems and obligations, is provided in accessible modes, means and formats, including Braille, Easy Read and sign language (Auslan), and that communication supports are routinely available."<sup>277</sup> That has not yet occurred.

<sup>267</sup> For more details on the NSW Disability Inclusion Plans see: <https://www.facs.nsw.gov.au/inclusion/advisory-councils/disability/inclusion-plans>.

<sup>268</sup> Attorney-General's Department, 2018.

<sup>269</sup> McCallum, R. 2020, p. 21.

<sup>270</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 42.

<sup>271</sup> Australian Government, 1992.

<sup>272</sup> Ellis, K., et al., 2019.

<sup>273</sup> Standards Australia is an Australian peak, non-government organization.

<sup>274</sup> Standards Australia, 2018.

<sup>275</sup> <https://www.cityofsydney.nsw.gov.au/public-health-safety-programs/wayfinding-and-signage>

<sup>276</sup> McCallum, R., 2020.

<sup>277</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 42.

# 14 EDUCATION, VOCATIONAL AND OTHER SKILLS TRAINING (article 24, Convention on the Rights of Persons with Disabilities)

## 1. Inclusive education

There is no national legislative or policy framework that fully complies with article 24, and General comment No. 4. The *Disability Standards for Education* (2005) articulate legal requirements in relation to education under paragraph 31 (1) (b) of the *Disability Discrimination Act 1992* (Commonwealth). Whilst the Standards impose obligations in relation to direct and indirect discrimination, including expectations on all education providers to make reasonable adjustments for students with disabilities, there is no external monitoring. Compliance with the standards is not actively enforced, but rather a complaint avenue for breach of obligations needs to be initiated through the *Disability Discrimination Act*. An education provider is not required to provide a

requested adjustment if to do so would impose “unjustifiable hardship” on it. Whilst the standards obligate providers to consult with students in line with the Convention, consultation with parents and/or caregivers is privileged over the input of students.<sup>278</sup>

The Standards are reviewed every five years, with the most recent review report published by the Department of Education, Skills and Employment<sup>279</sup> in March 2021. The review made 13 recommendations and key issues raised included the following:

- the expectation that parents and students understand their rights, understand the system and have the capability to advocate for reasonable adjustments, rather than this being proactively offered by education providers;

- the power imbalance between the education provider and the student, parents and carers, making the latter group reluctant to raise issues for fear of negative consequences;
- many educators are unaware of their obligations under the Standards or lack the resources to implement them;
- there are no compliance requirements, accountability under the standards is lacking, and the individual complaints-based mechanisms under the Disability Discrimination Act does not provide for systemic change in the education system.

Whilst the review of Standards falls under the remit of the Commonwealth Government, it is the States and Territories in Australia that have responsibility for the delivery of education, through specific policies outlining their approach to students with disabilities. For example, the Queensland Department of Education published a new Inclusive Education Policy in 2018,<sup>280</sup> which defines inclusive education consistently with General comment No. 4, with nine guiding principles adapted from the United Nations nine core features for inclusive education. In light of this relatively new policy framework, a recent hearing of the Disability Royal Commission into the experiences of students with disabilities had a specific focus on Queensland. The hearing report referred to ongoing areas of concern across the education system relating to gatekeeping, bullying and harassment, use of restrictive practices, lack of support, lack of adjustment and individual planning, disproportionate impact of suspension and expulsion, low expectation and exclusion, funding complexities and inconsistencies in teacher training and education.<sup>281</sup>

The most recent data from the Australian Institute for Health and Welfare<sup>282</sup> states that one in 10 (10 per cent) school students (aged 5–18) in Australia have disability, and almost one in 18 (5.4 per cent) have severe or profound disability. The majority of children with disabilities (89 per cent) go to primary or secondary school – the same proportion as children without disability. Roughly 89 per cent of school students with disability go to a mainstream school, with 12 per cent going to segregated schooling. Of school students with disability who attend a mainstream school, those with severe or profound disability (21 per cent) are more likely than other students with disability (13 per cent) to go to segregated classes in a mainstream school. The data also notes that 57 per cent of students with disabilities receive support at school, but one in 10 (10 per cent) school students who needs support does not receive it and one in 5 (21 per cent) who receives support needs more. The data are likely to reflect under-reporting, due to the rate of unrecognized and unsupported disability in some children, particularly Aboriginal and Torres Strait Islander children.

The 2019 civil society shadow report highlighted the fact that students with disabilities report that disability is the main reason they cannot attend school, whilst there is a lack of data on part time attendance of students with disabilities, despite the frequently reported direct experience of many children not being “allowed” to attend school on a full-time basis.<sup>283</sup>

## 2. Segregated education

The proportion of children with disabilities attending segregated schooling has increased in recent years – by 35 per cent between

<sup>278</sup> 3.4 (2) of the *Disability Standards for Education 2005* specifies the factors to be considered when assessing if an adjustment is reasonable. This includes the following: (a) the student’s disability; (b) the views of the student or the student’s associate, given under section 3.5; (c) the effect of the adjustment on the student, including the effect on the student’s: (i) ability to achieve learning outcomes; and (ii) ability to participate in courses or programmes; and (iii) independence; (d) the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students (e) the costs and benefits of making the adjustment.

<sup>279</sup> Department of Education, Skills and Employment, 2020.

<sup>280</sup> Queensland Department of Education, 2020.

<sup>281</sup> Disability Royal Commission, 2020.

<sup>282</sup> Australian Institute of Health and Welfare, 2020.

<sup>283</sup> Australian Civil Society Shadow Report Working Group, 2019.

2003 and 2015. As well as segregated schooling, children with disabilities in mainstream schools are segregated through classes. The Australian Government's view is that States parties meet their obligations under article 24 "through an education system that allows for funding of different education modalities, so that students with disabilities are able to participate in a range of education options, including enrolment in mainstream classes in mainstream schools with additional support, specialist classes or units in mainstream schools and specialist schools".<sup>284</sup>

The Government in its combined second and third reports under the Convention,<sup>285</sup> sought clarification from the Committee in relation to article 24, and General comment No. 4, relating to the Committee's comments urging States Parties to "achieve a transfer of resources from segregated to inclusive environments."<sup>286</sup>

The Australian Government specifically referred to articles 13(3) and (4) of the International Covenant on Economic, Social and Cultural Rights relating to provision for the liberty of parents and guardians to choose schools for their children provided that educational institutions meet certain minimum standards and the educational objectives in article 13(1). The Government reiterated this position in a recent submission to the Disability Royal Commission stating that "The Australian Government's recurrent school funding arrangements reflect the policy position that parents and carers are best placed to choose the most appropriate educational setting that meet the needs of their child."<sup>287</sup>

Following Australia's constructive dialogue in

2017 under the ICESCR, the Committee on Economic, Social and Cultural Rights expressed its concern about the increase in segregated education and recommended that Australia implement measures to ensure that all children with disabilities have access to inclusive education.<sup>288</sup>

The 2019 Concluding observations of the Committee on the Rights of Persons with Disabilities on Australia specifically referred to General comment No. 4, and Targets 4.5 and 4.a. of the Sustainable Development Goals (SDGs)<sup>289</sup> and recommended that Australia conduct a robust review of the disability standards for education, in consultation with persons with disabilities and their organizations, and that Australia develop a national action plan for achieving inclusive education. The Committee also recommended a specific focus on improving data collection. The Committee further recommended that Australia address "the increasing rate of segregation, seclusion and isolation and the lack of age-appropriate settings for students with disabilities at all levels, in particular Aboriginal and Torres Strait Islander students, and redirect adequate resources to a nation-wide inclusive education system for all students."<sup>290</sup>

Educational and vocational and other skills training available for persons with disabilities Vocational education and training (VET) is available for all students (including students with disabilities) to gain industry-recognized national vocational qualifications under the Australian Qualifications Framework (AQF) as part of their schooling. Vocational education and training providers and universities have requirements against the DDA.

Federal, State and Territory governments do undertake measures to support students with post-school transition, including via internships and work experience. Some initiatives include the Commonwealth National Disability Coordination Officer (NDCO) Programme,<sup>291</sup> which provides funding to provider organizations (universities, technical and further education colleges, not-for-profit community organisations and employment and training service providers) to employ a national network of National Disability Coordination Officers that operate within 31 NDCO regions across Australia, and the Transition to Work Programme which is designed to help young people aged 15 to 24 into work (including via apprenticeships and training) or education. National Disability Coordination Officers work with stakeholders at the local level to reduce systemic barriers, facilitate smooth transitions, build links and coordinate services for people with disability between the education, training and employment sectors.

The NDIS-funded School Leaver Employment Services (SLES) programme<sup>292</sup> provides funding for NDIS participants for up to two years after they leave school. Whilst current data<sup>293</sup> indicates that more young persons with disabilities are completing year 12 schooling than in the past (i.e., for those people aged 20 to 24, 68 per cent of persons with disabilities had completed year 12 or equivalent, compared with 38 per cent of people aged 50 to 54 and 15 per cent of people aged 85 or over), those leaving school prior to year 12 do not benefit from this support.

2019 data<sup>294</sup> show that for vocational education and training (VET) graduates,

students with disabilities were less likely (45 per cent) to report "improved employment status after training" than those without disability (68 per cent). However, students with disabilities were less likely to be employed after training (53 per cent) than those without disabilities (79 per cent), despite these students being largely satisfied with the quality of the training (86 per cent).

A number of universities in Australia have initiatives focused on inclusion of persons with disabilities in university life. For example, the University of Sydney Centre for Disability Studies "uni 2 beyond" programme is focused on persons with disabilities participating in university life as enrolled and non-enrolled students.

The Australian Institute of Health and Welfare reports that, in the past decade, the highest level of educational attainment for persons with disabilities has improved, but is still generally lower than for persons without disabilities. While 17 per cent of people aged 20 or over report their highest level of educational attainment as a Bachelor's degree or higher, only 11 per cent of persons with severe or profound disabilities of the same age do so. This is compared with 35 per cent (or 5.0 million) of persons without disabilities.<sup>295</sup>

<sup>284</sup> Commonwealth of Australia, 2020.

<sup>285</sup> Attorney-General's Department, 2018, Issue 26, b, p. 32.

<sup>286</sup> Committee on the Rights of Persons with Disabilities, 2016, para. 70.

<sup>287</sup> Commonwealth of Australia, 2020, para. 28.

<sup>288</sup> Committee on Economic, Social and Cultural Rights, 2017, E/C.12/AUS/CO/5, paras. 55-56.

<sup>289</sup> Specifically, in relation to free, equitable and quality primary and secondary education, and elimination of gender disparities and ensuring equal access to all levels of education and vocational training in 4.1 and 4.5 of the Sustainable Development Goals (SDGs).

<sup>290</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 45(b).

<sup>291</sup> For more information on this Programme see: <https://www.dese.gov.au/access-and-participation/ndco>.

<sup>292</sup> For more information on this Programme see: <https://www.ndis.gov.au/participants/funding-keeping-and-changing-jobs/leaving-school>.

<sup>293</sup> Australian Institute of Health and Welfare, 2020.

<sup>294</sup> In this data collection, disability refers to 'whether the student self-identifies as having a disability, impairment or long-term condition'.

<sup>295</sup> Australian Institute of Health and Welfare, 2020.



# 15 RIGHT TO LIFE (article 10, Convention on the Rights of Disabilities); HEALTH (article 25, Convention on the Rights of Disabilities) AND HABILITATION AND REHABILITATION (article 26, Convention on the Rights of Persons with Disabilities)

## 1. Principal threats to the enjoyment of the right to life faced by persons with disabilities

There is no comprehensive, disaggregated data in Australia in relation to the life expectancy of persons with disabilities. The 2019 CRPD civil

society report notes that persons with disabilities have a life expectancy up to 20 years lower than those without disability, and that this has a greater impact on Aboriginal and Torres Strait Islander persons with disabilities, where the death rate is twice as high as that among the general population, with a gap in life expectancy between Indigenous and non-Indigenous Australians of 10.6 years for men, and 9.5 years for females.<sup>296</sup>

<sup>296</sup> Australian Civil Society Shadow Report Working Group, 2019.

In 2019 the NDIS Quality and Safeguards Commission engaged the Australian Institute of Health and Welfare to provide a report on mortality rates of persons with disabilities and the cause of those deaths.<sup>297</sup> This research focused on those people who had used disability services between 2013 and 2018. Over the five years of the Australian Institute of Health and Welfare study, people aged under 65 using disability services were 4.7 times as likely to die compared to the general population aged under 65 (650 vs 130 deaths per 100,000 people). For people in the study population aged under 20, the three most commonly occurring underlying causes of death were perinatal and congenital conditions (21 per cent), cerebral palsy and other paralytic syndromes (14 per cent) and selected metabolic disorders (9.8 per cent).

Research released in 2019 included data showing that persons with intellectual disabilities who had other health conditions or disability are at increased risk of death. For example, persons with intellectual disabilities who also had cancer were almost eight times more likely to die from the disease in a 10-year period, as compared to those in the group without disability. Having a serious mental illness increased the risk of death by four times, whereas Down syndrome increased the person's risk by three and a half times.<sup>298</sup>

The NDIS Quality and Safeguards Commission collects reportable deaths data, which is only collected where a death has occurred or is alleged to have occurred in connection with the provision of supports or services by a registered NDIS provider, and involve an act or omission defined in section 73Z(4) of the *National Disability Insurance Scheme Act 2013* (Commonwealth). Evidence given to the Disability Royal Commission notes that defin-

<sup>297</sup> National Quality and Safeguards Commission, 2020.

<sup>298</sup> University of New South Wales, 2019.

<sup>299</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disabilities (2020) Exhibit 4-9, "Statement of Professor Julian Troller," 11 February 2020.

<sup>300</sup> Australian Institute of Health and Welfare, 2020.

<sup>301</sup> Avery, S., 2018.

ing reportable deaths in this manner poses significant limitations in collating, analysing and understanding the deaths of persons with disabilities.<sup>299</sup>

## 2. Access to health care services

Persons with disabilities experience barriers to equitable access to health services, such as cost, inaccessibility, a lack of support to access services, long waiting times and discrimination by health professionals. In 2018, 12 per cent of persons with disabilities reported that they had avoided medical facilities because of their disability in the previous 12 months.<sup>300</sup> The data indicate that difficulty of access to health services varied with "extent or severity" of disability. Under Australia's interpretative declarations, persons with disabilities are also subject to rights violations through denial of their legal capacity which results in forced medical treatment, restrictive practices, and substitute decision making around health choices.

Research from First Peoples Disability Network notes that there are multiple dimensions to Aboriginal and Torres Strait Islander health and well-being, with health focusing not just on physical, but also encompassing spiritual, cultural, emotional and social wellbeing. "It is more than absence of sickness; it is the relationship with family and community, providing a sense of belonging and a connectedness with the environment."<sup>301</sup> Aboriginal and Torres Strait Islander people with disabilities face significant discrimination, including in the health system. The First Peoples Disability Network research determines that the likelihood that an Aboriginal and Torres Strait Islander per-



son with severe and profound disability would self-assess health as excellent or very good would be one-fifth as likely as someone in the general population self-assessing the same, and that Aboriginal and Torres Strait Islander persons with disabilities experience difficulty accessing health care services at 2.5 times the rate of Aboriginal and Torres Strait Islander persons without disability.<sup>302</sup>

Evidence given at a Disability Royal Commission hearing in 2020 noted that Australian disability data highlight gaps in the provision of basic health prevention methods, such as influenza and pneumococcal vaccinations, comprehensive annual health examinations and preventative dental care.<sup>303</sup> Women with disabilities do not have equal access to health information and services, particularly sexual and reproductive health and cancer screening.<sup>304</sup>

Australia's interpretative declaration in relation to article 18 states its understanding is that the Convention creates no rights for non-nationals to enter a country not their own nor does it affect "Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria." This refers to the *Migration Act 1958* (Commonwealth) and the *Migration Regulations 1994*<sup>305</sup> which require visa applicants to Australia to undertake health assessments in order to determine eligibility. Assessment against current or future cost implications frequently prevents persons with disability or those families with children with disability from entering

or remaining in Australia. These provisions are exempt from the prohibition of discrimination on the basis of the disability contained in the *Disability Discrimination Act 1992*. A successful individual complaint, *Sherlock v Australia*, was brought against Australia to the Committee on the Rights of Persons with Disabilities in this regard challenging the restrictions on access to visas due to disability,<sup>306</sup> but the provisions remain unamended.

There is significant inequality in the health outcomes for persons with intellectual disabilities, with 2.5 times the health problems compared to the general population, and 42 per cent of medical conditions going undiagnosed. Persons with intellectual disabilities die much earlier, with one large Australian study indicating up to 27 years earlier. Some of the reasons for this inequity are the result of inadequate training of health professionals in communicating and addressing the complex health needs of persons with intellectual disabilities, and diagnostic overlay (assumption that symptoms are part of the intellectual disability rather than a health condition that requires treatment).<sup>307</sup> The Australian Government is currently working with disability stakeholders, including persons with intellectual disabilities, to develop and implement a *National Roadmap for improving the health of Australians with intellectual disability*.<sup>308</sup>

The 2019 civil society shadow report to the Committee on the Rights of Persons with Disabilities noted that an estimated 700,000 people in Australia experience severe mental illness in any one year, but that only approxi-

mately 64,000 persons with psychosocial disabilities are expected to be eligible for individual support packages under the NDIS. Mental health services are under-resourced, but recent data indicate that adults with disability are more likely (32 per cent) to experience high or very high levels of psychological distress than adults without disability (8.0 per cent). This is particularly true for adults with severe or profound disability (40 per cent).<sup>309</sup> In 2017, suicide was the leading cause of death among Aboriginal and Torres Strait Islander children aged 5-17.<sup>310</sup>

The provision of health services is largely a State and Territory responsibility and the *Principles to Determine the Responsibilities of the NDIS and Other Service Systems*<sup>311</sup> provides a delineation of responsibilities between State and Territories and the NDIS. However, a lack of clarity has resulted in service gaps for persons with disabilities, including in relation to health services and equipment.<sup>312</sup>

In its 2019 Concluding observations, the Committee on the Rights of Persons with Disabilities made a number of recommendations in relation to the health and well-being of persons with disabilities. These included specific recommendation around targeted measures in mental health and suicide prevention plans for persons (particularly children) with disabilities and the development, in consultation with Aboriginal and Torres Strait Islander persons with disabilities, culturally appropriate measures to prevent, identify and address the high rate of suicide among those populations. The Committee also made recommendations in relation

to persons with disabilities facing discrimination through the migration system, and that Australia adhere to article 25 of the Convention in its efforts to achieve Targets 3.7 and 3.8 of the Sustainable Development Goals in achieving equitable health services for persons with disabilities in Australia.<sup>313</sup>

### 3. The National Disability Insurance Scheme (NDIS)

The National Disability Insurance Scheme (NDIS) is one of the largest and most significant social reforms to have been introduced in Australia. The Scheme was established after an inquiry by the Productivity Commission "Disability Care and Support."<sup>314</sup> As noted previously, the scheme was established under the *National Disability Insurance Scheme Act 2013* (Cth).<sup>315</sup>

The NDIS is a universal scheme that funds "reasonable and necessary" support for Australians with permanent and significant disabilities. To access the NDIS, a person must be an Australian citizen or permanent resident, be under the age of 65 when seeking to join the Scheme, have disability that is due to an impairment which is likely to be permanent and life-long and which substantially reduces the person's ability to participate effectively in everyday life; and require reasonable and necessary supports to live an ordinary life.<sup>316</sup>

The potential of the NDIS to change the lives of persons with disabilities in Australia is significant. As an entitlement-based scheme, the

<sup>302</sup> Avery, S., 2018

<sup>303</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disabilities (2020) Exhibit 4-9, "Statement of Professor Julian Trollor," 11 February 2020, para. 135.

<sup>304</sup> Australian Civil Society Shadow Report Working Group, 2019.

<sup>305</sup> Commonwealth of Australia, 1994, Schedule 4, Public interest criterion 4005(c) (persons is free from a condition or disease that would require health care or community services and that provision of those would be likely to 'result in significant cost to the Australian community, or prejudice the access of Australian citizens or permanent residents to health care or community services'.

<sup>306</sup> Committee on the Rights of Persons with Disabilities (2021). *Sherlock v Australia, Sherlock v Australia*, Comm No 20/2014, views adopted on 19 March 2021, CRPD/C/24/D/20/2014.

<sup>307</sup> Council of Intellectual Disability (New South Wales), 2019.

<sup>308</sup> More information on the National Roadmap is available from the Department of Health <https://www1.health.gov.au/internet/main/publishing.nsf/Content/national-roadmap-for-improving-the-health-of-Australians-with-intellectual-disability>

<sup>309</sup> Australian Institute of Health and Welfare, 2020.

<sup>310</sup> Australian Civil Society Shadow Report Working Group, 2019.

<sup>311</sup> Council of Australian Governments, 2015.

<sup>312</sup> Parliament of Australia, 2018.

<sup>313</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3 [47].

<sup>314</sup> Productivity Commission, 2011.

<sup>315</sup> The Disability Rights Now 2019 report comments that the NDIS Act is not well drafted and has resulted in contradictory interpretations by the NDIA and the Administrative Appeals Tribunal. There is not yet an established body of case law from the Federal Court to provide authoritative guidance on many issues.

<sup>316</sup> National Disability Insurance Scheme, 2019.

NDIS shifts the provision of disability support from block-funded services to individualized plans, maximizing the potential for participants to exercise choice and control, and to access the support they need to participate on an equal basis in civil, political, economic, social and cultural life. It is important to note that the NDIS does not take on the responsibilities of mainstream services across all levels of government to meet obligations under the Convention. Article 19 (c) of the Convention obliges States parties to ensure that “Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.” Additionally, other articles articulate the responsibility of mainstream providers in the area of education (article 24), health (article 25), habilitation and rehabilitation (article 26), work and employment (article 27) and adequate standard of living and social protection (article 28).

The NDIS allows participants to choose their support from registered services providers who are regulated by the NDIS Quality and Safeguards Commission. Some participants self-manage their plan -- meaning that they manage the use of funds (with this comes obligations as an “employer” of support services, and responsibilities in terms of purchasing, managing and reporting). Participants who self-manage have more flexibility in how their plan money is used.<sup>317</sup>

Those who self-manage (or have their plans managed by an independent third party) can choose to receive support from unregistered

providers. Whilst being required to have an Australian Business Number, and still having obligations under the NDIS Quality and Safeguards Commission (including adhering to the NDIS Code of Conduct), unregistered providers are not bound by some of the regulations of registered providers, including in relation to the hourly rates they can charge.

By providing a means of payment for unregistered providers of support (some may be family members or friends), this provision under the NDIS recognizes roles in support provision beyond traditional disability support services, including in communities where support (disability and otherwise) is more likely to be provided by community and family members.

Unfortunately, not all eligible participants are benefiting equally from the NDIS. Persons with psychosocial disabilities, Indigenous persons with disabilities, culturally and linguistically diverse (CALD) persons with disabilities, women, and children with disabilities, LGBTIQ+ persons with disabilities, persons with intellectual disabilities, and those in remote areas and in prison<sup>318</sup> are not only experiencing difficulty accessing the scheme, but are also most at risk of experiencing poor outcomes. According to the Australian Institute of Health and Welfare (2018),<sup>319</sup> 24 per cent of Aboriginal people (139,700) had some form of disability. As of 30 June 2019, there were 16,417 Indigenous participants in the NDIS, making up only 5.7 per cent of all active participants.<sup>320</sup>

People over the age of 65 do not have access to the NDIS and are supported through the

aged care system (although persons who join the NDIS before they turn 65 continue to be supported after they turn 65). There are fears amongst persons with disabilities that, to cut costs, the Government may be taking steps to reduce access and eligibility to the scheme.<sup>321</sup>

Under the NDIS, State and Territory funding for disability support provision was redirected to the federal government. This funding transfer to the NDIS has seen a risk to independent individual advocacy funding, which primarily supported persons with disabilities in relation to access to and discrimination in mainstream services.

The NDIS is a market-driven model, where persons with disabilities are meant to have choice and control over their service provision, therefore driving quality and competition. However, a Senate inquiry in 2018 found that there were significant challenges in this model, including the lack of readiness of some participants to confidently engage in a disability service market, a significant shortfall in the required workforce, and a lack of services in many areas, as well as difficulties for service providers in transitioning from state-based funding to the NDIS.<sup>322</sup>

Whilst the *NDIS Act* identifies as one of its objectives the implementation of obligations under the Convention, aspects of the scheme are undermining the rights of persons with disabilities, for example:

- The *NDIS Act* incorporates elements of supported and substitute decision-making (through nominee provisions). The Australian Law Reform Commission, in its report *Equality, Capacity and Disability*

in *Commonwealth laws*, recommended<sup>323</sup> that the NDIS nominee scheme be replaced by a proposed Commonwealth decision-making model to encourage the implementation of supported decision-making. To date these changes have not been made.

- The NDIS Quality and Safeguards Commission, which regulates NDIS-registered service providers, has the responsibility to provide oversight and safeguards to NDIS participants. The Commission’s remit in terms of regulation and authorization means that it does not challenge or move to eliminate the systemic drivers of significant human rights breaches. Of the total reportable incidents for the period July-December 2019, 65,398 were unauthorized use of restricted practices – practices which can constitute torture, cruel, inhuman or degrading treatment or punishment.<sup>324</sup> The Commission’s role is to monitor compliance of restrictive practices, with state and territories continuing to authorize these practices under each jurisdiction’s legislation and policy, despite consistent international calls for these practices to be eliminated.<sup>325</sup>

The Committee on the Rights of Persons with Disabilities, in its 2019 Concluding observations, made a number of recommendations in relation to the NDIS, including aligning assessment criteria for the NDIS with the human rights model of disability, and ensuring equitable access in support for older persons, Aboriginal and Torres Strait Islander people with disability, persons from culturally and

<sup>317</sup> More information on self-management under the NDIS can be found on the NDIS website <https://www.ndis.gov.au/participants/using-your-plan/self-management>.

<sup>318</sup> The CRPD factsheet for the 2019 review notes that although the *Principles* allow for the provision of disability supports to people with disability in prisons and forensic detention, there is still uncertainty about how, or whether, this provision will be supported. Access to the NDIS represents an opportunity to decrease incarceration rates for people with a cognitive and/or psychosocial impairment, particularly for Indigenous people with disability who are overrepresented in prison. However, the NDIS is stopped when an individual is in custody, which denies habilitation or rehabilitation support to assist reintegration into the community.

<sup>319</sup> Australian Institute of Health and Welfare, 2020.

<sup>320</sup> National Disability Insurance Scheme, 2019.

<sup>321</sup> A coalition of more than 20 disability organizations released a statement setting out significant concerns over the federal government’s plans to introduce independent assessments to the National Disability Insurance Scheme (NDIS). See: <https://everyaustraliancounts.com.au/ndis-sector-statement/>

<sup>322</sup> Australian Parliament, 2018.

<sup>323</sup> Australian Law Reform Commission, 2014.

<sup>324</sup> Mendez, J.E., 2013.

<sup>325</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 30(a).

linguistically diverse backgrounds, and persons with intellectual and psychosocial disability; to simplify and make NDIS procedures more transparent; and to ensure access to continuous, sustainable and adequate independent individual advocacy.<sup>326</sup>

# 16 WORK AND EMPLOYMENT (article 27, Convention on the Rights of Persons with Disabilities)

## 1. Employment of persons with disabilities

The 2020 Australian Institute of Health and Welfare data showed that:

- 48 per cent of persons with disabilities of working age (15-64) were employed (compared with 80 per cent of persons without disability);
- 41 per cent of working age persons with disabilities worked part-time (compared with 32 per cent of persons without disabilities);
- Of those persons with disabilities who were employed, 23 per cent worked as professionals, 15 per cent as technicians or trade workers, 13 per cent as clerical and administrative workers and 12 per cent as labourers;
- Males were more likely to work as labourers (15 per cent) and females were more likely to work as professionals (28 per cent).<sup>327</sup>

The unemployment rate of working age (15-64) persons with disabilities is double (10 per cent or 113,000) that of the general population (4.6 per cent or 544,000). Ten per cent of persons with disabilities were under-employed,<sup>328</sup> compared to 6.9 per cent of persons without disabilities. Young persons (aged 15-24) with disabilities (25 per cent or 37,500) were more likely than those aged 25-64 (7.9 per cent or 74,900) to be unemployed.

## 2. Barriers to persons with disabilities finding employment in the regular labour market

The most comprehensive inquiry into the barriers to work for persons with disabilities was the *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*<sup>329</sup> conducted by the Australian Human Rights Commission. The inquiry identified key systemic barriers to employment for persons with

<sup>327</sup> Australian Institute of Health and Welfare, 2020.

<sup>328</sup> Under-employed refers to people who are employed but wish to work more hours.

<sup>329</sup> Australian Human Rights Commission, 2016a.

<sup>326</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 5(e).



disabilities, including the lack of practical assistance for employers; negative employer and community attitudes; poor transition to work initiatives for young persons with disabilities leaving school; poor outcomes from disability employment services; segregation of persons with disabilities in Australian Disability Enterprises, and the costs of entering the workforce such as increased accessible transport. The civil society report to the Committee on the Rights of Persons with Disabilities in 2019 raised its concerns that the report's recommendations had not been implemented.

The review of the National Disability Employment Framework narrowly focused on Disability Employment Services, which have been found to deliver poor outcomes for persons with disabilities. In its report to the Committee in 2019, the Australian Human Rights Commission noted that the status of the National Disability Employment Framework was unclear, "and the Commission is concerned that the development of the Framework has halted."<sup>330</sup>

Segregated employment continues in Australia through Australian Disability Enterprises. Historically, persons with disability could be paid less in Australian Disability Enterprises under the *Business Services Wage Assessment Tool* (BSWAT). Whilst this tool has been discontinued, the *Supported Wage System* (SWS),<sup>331</sup> allowed under the *Fair Work Act (2009)*, still provides for persons with disabilities to be paid a pro-rata percentage of the minimum wage for their industry according to their assessed capacity.

Treaty bodies have raised concerns in relation to segregated employment and wage assess-

ment tools in Australia.<sup>332</sup> In its 2019 Concluding observations, the Committee on the Rights of Person with Disabilities made a number of recommendations in relation to employment, including that the Australian Government develop a national employment strategy that incorporates the *Willing to Work* recommendations; that the Government undertake a review of Australian Disability Enterprises to ensure compliance with article 27, and transition persons with disabilities to "open, inclusive and accessible forms of employment, ensuring equal remuneration for work for equal value," and that the Government implement measures to address intersectional systemic and structural barriers experienced by persons with disabilities.<sup>333</sup>

The Australian Government has never prescribed quotas for employment in the private sector, although it has diversity employment targets for the public service. Disability Employment Services (DES) are Government-funded employment agencies for persons with disability. Wage subsidies are available for employers who take on Disability Employment Services (DES) jobseekers. The subsidy is negotiated and the employment must continue for the period required by the relevant wage subsidy criteria.

JobAccess is a Federal Government initiative that provides information and resources for persons with disabilities, employers and service providers. Funding is provided through the Employment Assistance Fund (EAF)<sup>334</sup> to meet the costs of reasonable adjustments, such as equipment and modifications.

### 3. Protection from employment discrimination

Workplace discrimination, including expectations for reasonable adjustments is covered by the *Disability Discrimination Act 1992*, as well as provisions under the *Fair Work Act 2009*.<sup>335</sup>

Remedies can be sought through the Australian Human Rights Commission under the *Disability Discrimination Act*, as well as civil remedies through the Fair Work Commission. For example, in *Stephens v Australian Postal Corporation*,<sup>336</sup> a person with disabilities was dismissed from his job, due to a "missed pick up." A work-related lumbar spinal injury, together with its symptoms and functional impairment, was held by the court to constitute a physical disability for the purpose of section 351 (10) of the *Fair Work Act 2009*. The court could not find that the real reasons for the dismissal were not associated with the applicant's disability. The Australian Postal Corporation was ordered to pay \$25,000 as damages.<sup>337</sup>

<sup>330</sup> Australian Human Rights Commission, 2019a, p. 31, para. 106.

<sup>331</sup> The *Supported Wage System* is a process that allows employers to pay a productivity-based wage for people with disability that matches an independently assessed productivity rate: <https://www.jobaccess.gov.au/supported-wage-system-sws>

<sup>332</sup> The Committee on Economic, Social and Cultural Rights has specifically addressed segregated employment of people with disability and clarified that segregated employment and wage discrimination is in contravention of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>333</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, paras. 50 (a), (b) and (c).

<sup>334</sup> For more information on the Job Access Scheme, see: <https://www.jobaccess.gov.au/employment-assistance-fund-eaf>

<sup>335</sup> For examples under the Fair Work Act 2009, see 'Physical and mental disability', Fair Work Commission <https://www.fwc.gov.au/general-protections-benchbook/other-protections/discrimination/physical-or-mental-disability>.

<sup>336</sup> Federal Magistrates Court of Australia, 2011, *Stephens v Australian Postal Corporation* [2011] FMCA 448.

<sup>337</sup> [2011] FMCA 448. On available remedies under Australian anti-discrimination laws, see Rees, N., Rice, S. and Allen, D., 2018, pp. 892-951.

# 17

## ADEQUATE STANDARD OF LIVING AND SOCIAL PROTECTION

(article 28, Convention on  
the Rights of Persons with  
Disabilities)

### Social support for persons with disabilities

There are a number of Australian social security payments and allowances that are relevant to persons with disabilities. The Disability Support Pension (DSP) provides financial support to eligible individuals, who are unable to work. Eligibility is determined on a number of criteria, which includes assessment against impairment tables which are medically-based and specialist medical proof of disability is required.<sup>338</sup> Some persons with disabilities will also be eligible for other allowances, including the Mobility Allowance, Pension Education Sup-

plement, Youth Allowance, and Youth Disability Supplement, and support for medical needs, such as Essential Medical Equipment Payment and Continence Aids Payment Scheme. Some persons with disabilities may also be eligible for broader social support, such as Rent Assistance and Energy Supplement and concession cards (such as the Pensioner Concession Card and Health Care Card).

In 2019, around 746,000 people aged 16 and over received the Disability Support Pension (3.7 per cent of the Australian population in this age group). The vast majority (90 per cent) were aged 16–64.<sup>339</sup> Eligibility criteria for the Disability Support Pension have been tight-

ened over recent years, forcing many persons with disabilities onto the JobSeeker payment (previously Newstart payment, the general unemployment support payment scheme) – for example, a change to the Disability Support Pension eligibility criteria from being unable to work 30 hours per week, decreased to being unable to work for 15 hours per week from 2006.<sup>340</sup> A new category for the JobSeeker payment was created for those with work capacity of less than 30 hours per week. In 2012, significantly revised impairment tables were introduced, which had greater requirements for proof of impairment. The Jobseeker Allowance is widely recognized as being insufficient for supporting an adequate standard of living.<sup>341</sup>

Data from the Australian Council of Social Services reports that in 2017-2018 the rate of poverty amongst adults with disabilities in Australia was 17.2 per cent, using the 50 per cent median income poverty line and 28.4 per cent using the 60 per cent median income poverty line.<sup>342</sup>

A recent report for the Disability Royal Commission highlights that Australia ranks poorly on Organisation for Economic Co-operation and Development (OECD) employment and poverty indicators. Persons with disabilities are only half as likely to be employed as persons without disabilities, while around 45 per cent of persons with disabilities live near or below the poverty line – more than double the OECD average.<sup>343</sup>

<sup>338</sup> Eligibility criteria for the Disability Support Pension include age and residence, income and asset tests, and medical rules. More information can be found on the Services Australia website: <https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension>.

<sup>339</sup> Australian Institute of Health and Welfare, 2020.

<sup>340</sup> Australian Government, Australian Institute of Health and Welfare, see: <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/income-and-finance/income-support>

<sup>341</sup> Media report from the Guardian online: <https://www.theguardian.com/australia-news/2021/feb/22/disabled-young-people-living-on-poverty-level-benefits-rises-300>

<sup>342</sup> Australian Council of Social Services, 2020.

<sup>343</sup> Kayess, R., and T. Sands, 2020, p. 5.

# 18 LIBERTY AND SECURITY OF THE PERSON (article 14, Convention on the Rights of Persons with Disabilities); LIVING INDEPENDENTLY AND BEING INCLUDED IN THE COMMUNITY (article 19, CRPD); RIGHT TO RESPECT FOR PRIVACY, HOME AND FAMILY (articles 22 and 23, Convention on the Rights of Persons with Disabilities)

## 1. Disability-based detention

Australian laws allow for the involuntary and indefinite detention of persons with disabilities. All Australian jurisdictions have in place “unfitness to stand trial” legislation, which may arise as an issue before or during a trial process. There is no publicly available disaggregated data on people detained under unfit to plea provisions, but what is available indicates that there are approximately 100 people detained in prisons, psychiatric units and forensic detention under mental health legislation. This disproportionately affects Aboriginal and Torres Strait Islander persons with cognitive and/or psychosocial impairment, cultural communication barriers and/or hearing loss.<sup>344</sup>

In its 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*, the Australian Law Reform Commission recommended reform of the “unfitness” test, the provision of appropriate support and limits and reviews on detention.<sup>345</sup> A 2016 Australian Senate inquiry report into the *Indefinite Detention of People with Cognitive and Psychiatric Impairment*<sup>346</sup> made recommendations for comprehensive law, policy and programme reform to address indefinite detention of people with cognitive and psychiatric impairment.

The Government has not responded to either of these reports directly, but at Australia’s 2016 Universal Periodic Review, the Government made a voluntary commitment to improve the way the criminal justice system treats people with cognitive disability who are unfit to plead or found not guilty by reason of mental impair-

ment. In Australia’s 2021 Universal Periodic Review report, the Government stated that this was an area of ongoing review and reform.<sup>347</sup>

In 2016, the Australian Government proposed to the Council of Australian Governments<sup>348</sup> tabled the *Draft National Statement of Principles relating to Persons Unfit to Plead or Found Not Guilty by Reason of Cognitive or Mental Health Impairment*.<sup>349</sup> A recent report for the Disability Royal Commission observes that the National Principles do not seek to abolish the doctrine of unfitness to plead; “instead they seek the establishment of processes to *treat* persons with cognitive or intellectual disabilities and to move them from prisons or psychiatric institutions back into the community.” The report also notes that, as at August 2019, all states and territories aside from South Australia had endorsed the National Principles,<sup>350</sup> but that each jurisdiction after consultation, needs to “amend or implement legislation, policies and procedures to realise the principles.” The report concludes that it is clear that, after appropriate consultations, the National Principles should be implemented to assist persons who are unfit to plead (in compliance with article 14) but that “more research is needed to determine how Australia can abolish the unfitness to plead rule, and yet at one and the same time proceed with criminal trials where persons with disabilities either have supports or advocacy assistance.”<sup>351</sup>

The prevalence of forensic mental health orders is higher in the Northern Territory than in other jurisdictions, and a *Review of Forensic Mental Health and Disability Services within the Northern Territory*, commissioned by the North-

<sup>344</sup> Australian Civil Society Shadow Report Working Group, 2019.

<sup>345</sup> Australian Law Reform Commission, 2014.

<sup>346</sup> Parliament of Australia Senate Standing Committee on Community Affairs (2020). See also Australian Human Rights Commission, 2016b.

<sup>347</sup> Attorney-General’s Department, 2020.

<sup>348</sup> The Council of Australian Governments is the peak intergovernmental forum in Australia. Members include the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association.

<sup>349</sup> Council of Australian Governments, 2015.

<sup>350</sup> Attorney-General’s Department, 2019a.

<sup>351</sup> McCallum, R, 2020, 2020.



ern Territory Department of Health in 2019,<sup>352</sup> noted the inadequacy of existing facilities. Part IIA of the Northern Territory Criminal Code specifies that people found “not fit to plead” should be accommodated in an “appropriate place,” namely a therapeutic facility other than a correctional facility. There are no secure therapeutic residential facilities for people found “not guilty due to mental impairment” in the Northern Territory, resulting in people being held indefinitely in adult correctional facilities (prisons), until a judge determines that they are no longer a risk to the community.

In January 2020, the Australian Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) Network submitted a report<sup>353</sup> to the United Nations Subcommittee on Prevention of Torture (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD) in advance of scheduled visits to Australia in 2020 (these were deferred due to the pandemic). The report highlighted that the risk of harm for persons with disabilities in detention settings is significantly increased by the traditionally “closed off” nature of many detention settings which are unique to persons with disabilities, and that many of these places of detention do not have any, or sufficiently rigorous, inspection regimes.

These Australian laws have been consistently challenged by treaty bodies. The Committee on Economic, Social and Cultural Rights, in its review of Australia in 2017, recommended that Australia “Introduce the necessary legislative and policy changes to end indefinite detention of people with disabilities without

conviction.”<sup>354</sup> The Committee on the Rights of Persons with Disabilities in 2013, and again in 2019, recommended that Australia abolish unfitness to plead provisions, and end all forms of detention on the grounds of disability.<sup>355</sup> The Committee specifically referred to the disproportionate impact on Aboriginal and Torres Strait Islander people with disability. In addition, as already noted in this study, a number of notable individual cases have been taken to the Committee, which has found breaches of the human rights of persons with disability.

## 2. Persons with disabilities in the criminal justice system

There are no nationally-consistent disaggregated data on the numbers of persons with disabilities in the criminal justice system. Available data indicate that 29 per cent of prison entrants have a long-term health condition or disability,<sup>356</sup> with significant over-representation of people with psychosocial disabilities (50 per cent). Human Rights Watch reports that almost 50 per cent of prisoners in Australia have cognitive or psychosocial disability.<sup>357</sup>

The age of criminal responsibility in Australian jurisdictions is 10. This obtains, despite consistent calls for the age to be raised to 14, and for children under the age of 16 not to be imprisoned.<sup>358</sup> The Council of Attorneys-General Age of Criminal Responsibility Working Group conducted a review in March 2020,<sup>359</sup> however, the review submissions have not been made public. As of mid-2021, the Australian Capital Territory was the only jurisdiction that had

committed to changing legislation to this effect and other Australian jurisdictions had yet to commit to changes in legislation and policy.

It is estimated that 59 per cent of young people in detention nationwide are Aboriginal, and that two-thirds of those young people in juvenile detention have disabilities.<sup>360</sup> Data from New South Wales demonstrate that prevalence of complex disability and multi-faceted disadvantage is higher amongst Aboriginal and Torres Strait Islander young people compared to other young people in juvenile detention.<sup>361</sup> Indigenous children are excluded from school at three times the rate of non-Indigenous children,<sup>362</sup> in large part due to unrecognized and unsupported disability. These young people are criminalized due to the interaction of their Aboriginality and disability – failed by every stage of the service system.

Given the disproportionate impact of youth detention on children and young persons with disability, it is worth noting that in 2019, a young Indigenous boy appeared before the Human Rights Council in relation to the age of criminal responsibility in Australia. During Australia’s Universal Periodic Review held in January 2021, concerns were raised by Member States in relation to this issue.

## 3. Homelessness amongst persons with disabilities in Australia

Available data show that, from 2018 to 2019, approximately 290,300 clients used Specialist Homelessness Services,<sup>363</sup> with 8.3 per cent of those clients (or 22,100) having disability, and with around 1 in 3 (33 per cent or 7,200) of

those clients having severe or profound disability (or 2.7 per cent of all Specialist Homeless Services clients with known disability status). Disability was more common amongst men than among women clients using the Services.

Approximately 2,000 clients with disability were aged 65 and over, and 1 in 5 (21 per cent or 4,500) clients with disability were Aboriginal and/or Torres Strait Islander people. Indigenous clients with disability were more likely to have severe or profound disability (36 per cent) than non-Indigenous clients with disability (31 per cent).

Data show housing crisis, and domestic and family violence were the top reasons for people with “severe or profound disability” to seek assistance in 2018-2019. However, the data only capture those people who access Specialist Homeless Services. Data are not available on the percentage of homeless persons with disabilities who do not access the Services, or those in boarding houses, staying with friends or in other insecure housing. In addition, the Specialist Homeless Services data only include those people with known disability status, with the disability status of 24,600 (or 8.5 per cent) of their clients recorded as “missing” or “don’t know.”<sup>364</sup>

## 4. Housing options for persons with disabilities

There are no comprehensive data that identify the number of persons with disabilities in institutional settings. The 2019 civil society shadow report notes that more than 5.2 per cent of persons with disabilities in Australia live in shared accommodation, such as group

<sup>352</sup> Northern Territory Government, 2019.

<sup>353</sup> Australian OPCAT Network, 2020.

<sup>354</sup> Committee on Economic, Social and Cultural Rights, 2017, E/C.12/AUS/CO/5, para. 46(b).

<sup>355</sup> Committee on the Rights of Persons with Disabilities, 2013c, CRPD/C/AUS/CO/1, paras. 31-32; Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2, paras. 28(c) and (d).

<sup>356</sup> Australian Institute of Health and Welfare, 2019.

<sup>357</sup> Human Rights Watch, 2018.

<sup>358</sup> See recent ABC media: <https://www.abc.net.au/news/2020-07-27/raise-the-age-of-child-criminal-responsibility-in-australia/12483178>.

<sup>359</sup> Australian Human Rights Commission, 2020b.

<sup>360</sup> Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, 2015.

<sup>361</sup> Avery, S., 2018.

<sup>362</sup> Department of Prime Minister and Cabinet, 2018.

<sup>363</sup> Specialist Homeless Services (SHS) are a range of services providing support to people experiencing or at risk of homelessness, funded under the National Housing and Homelessness Agreement (NHHA).

<sup>364</sup> Australian Institute for Health and Welfare, 2019.

homes, with a further 2.8 per cent living in supported accommodation facilities. The Disability Royal Commission reports that about 17,000 persons with disabilities live in group homes in Australia and around 30 per cent of those residents have mild intellectual disability.<sup>365</sup> Data from the Australian Institute of Health and Welfare show that, as of 1 July 2018, there were around 6,000 people under 65 years of age living in aged care facilities in Australia. The Australian Institute of Health and Welfare also reported that the number of younger people entering aged care has remained relatively stable over some years. On 22 March 2019, the Government announced it had developed a national action plan<sup>366</sup> (to be managed by the Department of Social Services and the National Disability Insurance Scheme) to reduce the number of younger people living in aged care and to help them access more age-appropriate housing and supported living options.

The 2019 Australian Convention on the Rights of Persons with Disabilities shadow report notes many persons with disabilities continue to live in congregate, institutional residential settings because of a lack of appropriate, available, accessible and affordable housing, and that this is becoming more evident with the roll out of the NDIS. The NDIS has enabled persons with disabilities to choose their disability service provision untied from accommodation – in other words their service provision and where they live can be different providers (possibly a number of different providers). This maximizes choice, autonomy and safety of persons with disabilities. Unfortunately, there is a lack of accessible housing stock in Australia, so people are still restricted in their choice of where, and with whom, they can live. Many persons with disabilities do not have an adequate standard of living to be able to rent privately or buy their own home.

<sup>365</sup> Disability Royal Commission, 2021c.

<sup>366</sup> Australian Government Department of Social Services, 2019.

<sup>367</sup> Australian Institute of Health and Family Welfare, 2020.

Mainstream housing assistance can be through subsidized housing assistance (social housing), and financial payments, for example, rent assistance. In addition, some initiatives are aimed specifically at persons with disabilities, such as some community housing, and Specialist Disability Accommodation (SDA) provided through the National Disability Insurance Scheme (NDIS). SDA is meant to provide specialist housing solutions for individuals with significant functional impairment or very high support needs, but where accessible housing options are extremely limited.

In 2019, there were 148,500 households on the waiting list for public housing. More than 146,000 social housing households have at least one person with disability (as of June 2019); this is approximately 41 per cent of all social housing households. Sixty-two per cent of those households with at least one person with disability are single-person – meaning the person with disability lives alone.<sup>367</sup>

# 19 PARTICIPATION IN POLITICAL AND PUBLIC LIFE, AND IN CULTURAL LIFE, RECREATION, LEISURE AND SPORT

(articles 29 and 30, Convention on the Rights of Persons with Disabilities)

## 1. Voting

Under the *Commonwealth Electoral Act 1918 (the Electoral Act)*, voting is compulsory for every Australian citizen over the age of 18. To vote in local, jurisdictional or federal elections, people must be registered on the relevant electoral roll, and citizens are fined if they do not vote. Whilst the *Electoral Act* governs the federal voting system, each state and territory has separate legislation governing its own election process. Section 93 of the *Electoral Act*

provides that persons of “unsound mind” are not entitled to have their names on the Commonwealth electoral roll or to vote in elections, and may be removed from the electoral roll following objection.

The Australian Law Reform Commission (ALRC) in its 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*, recommended that the “unsound mind” provisions in the *Electoral Act* be repealed, but that section 245 of the *Electoral Act* be amended to provide that:

“ [I]t is a “valid and sufficient reason” for not voting if a person cannot: (a) understand information relevant to voting at the particular election; (b) retain that information for a sufficient period to make a voting decision; (c) use or weigh that information as part of the process of voting; or (d) communicate the vote in some way.”<sup>368</sup>

The Australian Law Reform Commission recommended that similar amendments be made to those state statutes which contain unsound mind provisions.

The Australian Electoral Commission (AEC) is responsible for the provision of accessible, inclusive electoral processes. The Australian Electoral Commission has disability policy in relation to the inclusion of persons with disabilities, most recently the Disability Inclusion Strategy 2012-2020<sup>369</sup> (a new strategy is yet to be published, pending the finalization of the next stage of the National Disability Strategy). The *Disability Discrimination Act 1992 (Commonwealth)* makes it unlawful to discriminate with regard to the administration of Australian laws and programmes, provision of goods and services, and access to premises. These provisions cover political rights, including the right to vote and stand for election. In reality, however, the right to vote independently and in secret is not a reality for many persons with disabilities in Australia, due to a lack of consistency in access and support for people,

particularly those in institutional settings. As indicated previously, cases of discrimination against persons with disabilities in relation to their participation in political life have been taken to the Committee on the Rights of Persons with Disabilities.<sup>370</sup>

## 2. Members of legislature, and public servants

There are no data available regarding the number of persons with disabilities in parliament, or law-making bodies.

In 2019, just 3.6 per cent of Australian Public Service (APS) employees identified as having a disability.<sup>371</sup> This percentage may involve underreporting due to employees not declaring their disability. An evaluation of the Australian Public Service Commission Disability Employment Strategy 2016-2019 found little evidence of an expansion in the range of employment opportunities for persons with disabilities.<sup>372</sup>

The Federal Government is aiming to improve this representation to 7 per cent by 2025, under the *Australian Public Service Disability Employment Strategy 2020–2025*,<sup>373</sup> as are states and territories. For example, Queensland has set a target of 8 per cent by 2022, the New South Wales target is 5.6 per cent representation by 2027.<sup>374</sup>

# 20 PRIVATE SECTOR

The Australian Network on Disability (AND)<sup>375</sup> is a membership-based, not-for-profit organization that supports businesses in Australia to be more inclusive of persons with disabilities. The Australian Network on Disability provides initiatives such as mentoring and internship programmes,<sup>376</sup> education and information for the private sector, an Access and Inclusion Index which is a benchmarking tool for inclusion of persons with disabilities, and an accredited Disability Confident Recruiter programme. Over 300 organizations from the private, public and not-for-profit sectors are members.

The NDIS is a market-driven model of care and has, therefore, promoted a growth in related commercial entities. This not only includes private disability service providers, and housing providers (as specialist disability housing providers), but also organizations that facilitate the functioning of the scheme, such as technology.<sup>377</sup> However, there has been criticism that the private sector is profiting from the NDIS through activities that undermine the rights of individual participants.<sup>378</sup>

<sup>368</sup> Australian Law Reform Commission, 2014.

<sup>369</sup> Australian Electoral Commission Disability Inclusion Strategy, 2012.

<sup>370</sup> Committee on the Rights of Persons with Disabilities, 2018a, *Given v Australia*, CRPD/C/19/D/19/2014.

<sup>371</sup> Australian Public Service Commission, 2019, p. 49.

<sup>372</sup> Australian Public Service Commission, 2019, p. 2.

<sup>373</sup> Australian Public Service Commission, 2020.

<sup>374</sup> See media on this from ProBono Australia <https://probonoaustralia.com.au/news/2018/03/government-called-employ-people-disability-public-service/>

<sup>375</sup> Australian Network on Disability <https://www.and.org.au/pages/disability-statistics.html>

<sup>376</sup> The Australian Network on Disability Stepping into Program is a paid internship scheme that matches talented university students with disability with roles in leading Australian businesses.

<sup>377</sup> This has been noted by the Committee for Economic Development Australia.

<sup>378</sup> See media from the ABC:

<https://www.abc.net.au/news/2021-03-25/david-bowen-raises-concerns-on-ndis-independent-assessments/13271354>



# 21 INTERSECTING FORMS OF DISCRIMINATION

(articles 5, 6 and 7, Convention on the Rights of Persons with Disabilities)

Aboriginal and Torres Strait Islander communities face intersectional discrimination, and social inequity occurring as a result of the interaction between disability and Aboriginality. Disability in Aboriginal and Torres Strait Islander communities is twice as prevalent, and more complex. An Aboriginal and Torres Strait Islander person is 2.1 times more likely to have disability than a person who is not Aboriginal and Torres Strait Islander. Data from the NATSISS show that 45 per cent of Aboriginal and Torres Strait Islander have disability or long-term health conditions.<sup>379</sup> Aboriginal and Torres Strait Islander people with disability are disproportionately impacted by poverty, poor health, poor educational outcomes, and increased interactions with the justice system.

In his book *Culture is Inclusion*, Scott Avery identifies the catastrophic shock that European colonization inflicted on Australia's First Nations communities, which includes the

“construct of a social order completely at odds with Aboriginal cultural values of diversity and inclusion.” He writes: “Colonization had a particular impact upon Aboriginal and Torres Strait Islander persons with disabilities, centring them at the convergence of armed aggression dispossessing them from their land as Aboriginal people, alongside their social ‘othering’ as persons with disabilities.”<sup>380</sup>

Colonialism brought with it both the institutionalization, social isolation and “othering” of persons with disabilities, including assimilation policies that led to the removal of First Nations children from their families and paternalistic policy approaches grounded in racism and ableism, the legacies of which remain today. The sixteen new Closing the Gap targets from 2020 do not mention disability, despite its centrality to progress across all areas, including education, health and justice.<sup>381</sup>

A parent with disability is up to 10 times more likely than other parents to have the child removed from that parent's care. This likelihood is greater for Aboriginal and Torres Strait Islander parents with disability, due to intersectional discrimination. First Nations children are vastly over-represented in the child protection and out-of-home care system.<sup>382</sup> This issue has been investigated through numerous inquiries,<sup>383</sup> and is recognised in the new Closing the Gap (2020) target to reduce by 45 per cent the number of Indigenous children in out-of-home care by 2031, although the target does not specifically refer to children with disabilities.<sup>384</sup>

There is no national conceptual framework for the “best interests of the child” with the result that the standard is inconsistently applied across jurisdictions. Where guardianship arrangements are made which exclude parents and carers from decisions relating to their child with disability, including through NDIS nominee provision,<sup>385</sup> Aboriginal and Torres Strait Islander children are not receiving culturally appropriate and responsive support, including consideration of communication support in their first language, despite the acknowledgement of the importance of language in the NDIS Aboriginal and Torres Strait Islander Strategy.<sup>386</sup> Whilst the Convention provides protections for children with disability to live in family settings, in reality, the opposite continues to occur in Australia. Where child protection concerns result in a child with disability being removed from the family, children are routinely placed in “family-like” residences or group homes.

In 2015, 7.4 per cent of children aged between 0 and 14 had some level of disability. Disability was more common among boys (9.4 per cent) than girls (5.4 per cent).<sup>387</sup> There is a lack of data to understand the experiences of children with disabilities, including their exposure to violence.<sup>388</sup> Children with disabilities are afforded minimal focus in the *National Framework for Protecting Australia's Children 2009-2020*.<sup>389</sup> The successor to the Framework is currently being developed and the Committee on the Rights of Person with Disabilities, in its 2019 Concluding observations on Australia, “called for a focus on the rights of children with disabilities in any national plan of action for the realization of the rights of the child.” In 2019, the Committee on the Rights of the Child in its Concluding observations on Australia made a number of recommendations in relation to the rights of children with disabilities. The Committee explicitly recommended that Australia, among others, “Address the increasing rate of segregation, seclusion and isolation and the lack of age-appropriate settings for students with disabilities at all levels, in particular Aboriginal and Torres Strait Islander students, and redirect adequate resources to a nationwide inclusive education system for all students.”<sup>390</sup>

The Royal Commission into Aged Care Quality and Safety handed down its Final Report in March 2021.<sup>391</sup> The Commission has revealed how the rights of older persons, including those with disabilities, are routinely undermined. Specific bodies, such as the New South Wales Ageing and Disability Commission

<sup>382</sup> Australian Institute of Health and Welfare, 2020.

<sup>383</sup> Australian Human Rights Commission, 1997; Parliament of the Commonwealth of Australia, 2015.

<sup>384</sup> Council of Australian Governments, 2020 Outcome 12.

<sup>385</sup> National Disability Insurance Agency, 2019.

<sup>386</sup> National Disability Insurance Agency, 2017 p. 14, 4.5.

<sup>387</sup> Australian Institute of Health and Family Welfare, 2020.

<sup>388</sup> The Longitudinal Study of Australian Children (LSAC) follows the health, wellbeing and development of over 10,000 young children and families. However, its data on both disability and violence are limited. In Victoria, there is a newly established cohort study - GenV (Generation Victoria). All babies born in Victoria between 2020 and 2022 will be invited to take part; the main aim of which is to link primary data with key secondary administrative agency and service data, for example, to child protection. Although the utility of these data for understanding the nature and extent of violence for children with disability won't be realised for many years, there is value in understanding its future potential.

<sup>389</sup> Department of Social Services, 2009.

<sup>390</sup> Committee on the Rights of the Child, 2019, para. 46(b).

<sup>391</sup> Royal Commission into Aged Care Quality and Safety, 2021.

<sup>379</sup> Australian Bureau of Statistics, 2016.

<sup>380</sup> Avery, S., 2018.

<sup>381</sup> See RN Breakfast interview with Damian Griffis, CEO FPDN <https://fpdn.org.au/disability-not-included-in-the-16-new-closing-the-gap-targets/>

have been established to respond to issues of abuse, neglect or exploitation, and it is likely that the Government will take steps over the coming years to address the recommendations made in the report. In response to the findings of the Aged Care Royal Commission, the Australian Government in 2021 committed an additional \$17.7 billion investment over five years towards aged care reform.<sup>392</sup>

Women and girls with disabilities in Australia face multiple disadvantages, including inequitable access to disability services through the NDIS and lack of access to rights-based health services, enjoy fewer employment opportunities; and are at greater risk of experiencing violence, abuse, neglect and exploitation, including restrictive practices and forced treatments. The Disability Royal Commission held a hearing in late 2021 that focused on the health and safety of women and girls with disability.<sup>393</sup> In its 2019 Concluding observations, the Committee on the Rights of Person with Disabilities made specific reference to General comment No. 3 (2016) on women and girls with disabilities, and SDG Targets 5.1, 5.2 and 5.5 and recommended that Australia strengthen measures to address multiple and intersectional forms of discrimination against women and girls with disabilities. This should include support for organizations and networks of women and disabilities (particularly those representing Aboriginal and Torres Strait Islander women and girls with disability) to “engage in all initiatives to promote gender equality and ensure their effective participation in the development of policies for gender equality and the advancement of women and girls.”<sup>394</sup>

The Disability Royal Commission has highlighted that persons with disabilities may be at greater risk of discrimination and abuse due to sexuality, gender, relationships, or sex characteristics.<sup>395</sup> The 2019 shadow report to the Committee on the Rights of Persons with Disabilities highlights the fact that infants and children with intersex variations are subject to often irreversible and invasive surgeries<sup>396</sup> and other medical interventions without their informed consent or evidence of necessity. The Committee made specific recommendations in this regard in its 2019 Concluding observations, including that Australia “explicitly prohibit the performance of unnecessary, invasive and irreversible medical interventions, including surgical, hormonal or other medical procedures on intersex children before they reach the legal age of consent...”<sup>397</sup>

Australian DPOs, in their input to the Committee’s Draft General comment No. 7 on articles 4.3 and 33.3 of the Convention, raised concerns about a lack of reference to LGBTQI+ persons with disabilities in General comment No. 4, General comment No. 5, and General comment No. 6.<sup>398</sup>

<sup>392</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of Persons with Disability, 2021b.

<sup>393</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of Persons with Disability, 2021b.

<sup>394</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 11(b).

<sup>395</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of Persons with Disability, 2021.

<sup>396</sup> Darlington Statement, 2017, para. 7.

<sup>397</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 34(b).

<sup>398</sup> People with Disability Australia, 2018.

# 22 SITUATIONS OF RISK AND HUMANITARIAN EMERGENCIES

(article 11, Convention on the Rights of Persons with Disabilities)

## 1. National emergency and disaster recovery plans

The 2013 Concluding observations on Australia expressed concern about the lack of specific measures in national plans to address emergency intervention strategies for persons with disabilities, and recommended that Australia establish, in consultation with persons with disabilities, nationally-consistent emergency management standards.

In March 2015, Australia endorsed the Sendai Framework for Disaster Risk Reduction 2015–2030, and established a National Resilience Taskforce of government, business and the community, which developed, in 2018, the

National Disaster Risk Reduction Framework (NDRRF).<sup>399</sup> The Framework sets out a roadmap of actions (2019-2023), and along with the Australian Disaster Preparedness Framework (ADPF)<sup>400</sup> is designed to respond to the Sendai Framework priorities. The National Disaster Risk Reduction Framework does not mention disability, and the Australian Disaster Preparedness Framework, which was developed by the Commonwealth Government in consultation with state and territory governments, makes limited mention of disability: only in the context of provision of care.

The 2019 civil society shadow report notes that there has been insufficient attention to engaging with persons with disabilities about

<sup>399</sup> Department of Home Affairs, 2018.

<sup>400</sup> Department of Home Affairs, 2018.

their functional capabilities and support needs in emergency situations. While the Australian Accessible Emergency Response System ensures emergency messages issued during an emergency are accompanied by messages in Auslan for people who are deaf or hearing-impaired, they do not include messages with audio description for people who are vision-impaired.

In 2019, the Committee on the Rights of Persons with Disabilities reiterated its concern about the lack of nationally-consistent emergency management standards that “ensure access to disability-specific and disability-responsive support during emergencies.” The Committee recommended that Australia, “in close consultation with representative organizations of persons with disabilities, establish a fully accessible and inclusive mechanism to engage with persons with disabilities in the implementation and monitoring of the Sendai Framework.”<sup>401</sup>

In February 2020, a Royal Commission into National Natural Disaster Arrangements<sup>402</sup> was established in response to a devastating bush-fire season in Australia. The report from this Royal Commission specifically noted the need for new technologies to improve communication of disaster warnings, including to people with disability, an emergency alert system that can better account for people with disability, as well as public education on the new system, symbols, terminology and recommended action that targets people with disabilities, Indigenous community and culturally and linguistically diverse Australians.

## 2. COVID-19

In August 2020, the Disability Royal Commission held a public hearing to investigate the experiences of persons with disabilities during the COVID pandemic, taking evidence from persons with disabilities, advocates, experts and government representatives. The Disability Royal Commission heard that persons with disabilities in Australia had faced significant issues, including in relation to continuity of service provision, uncertainty and fear around management of health risk. It also heard that intersectional issues, such as for Aboriginal and Torres Strait Islander persons with disabilities, had not been considered, and that the existing funding for organizations providing individual and systemic advocacy had been insufficient to respond to demand.<sup>403</sup> Notably, the Aboriginal Community Controlled sector led the COVID-19 response in the concerned communities, preventing serious risk to those people more vulnerable to the disease.

The report of the hearing directly referred to Australia’s international obligations under the Convention and noted “significant failings” by the Australian Government from the outset of the pandemic in January 2020, including the lack of consultation with persons with disabilities and their representative organizations when planning how to respond to the emerging crisis, until the establishment of the Advisory Committee for the COVID-19 Response for People with Disability on 2 April 2020.<sup>404</sup> There is no publicly-available national data on the rates of infection or deaths of persons with disabilities, or of any sub-group of persons with disabilities. The Disability Royal Commission also notes, in its report, that data were not publicly available to enable the Australian

community to assess the impact of COVID-19 on persons with disabilities.

On 26 March 2020, the Disability Royal Commission released a Statement of Concern about the impact of COVID-19 on persons with disabilities.<sup>405</sup> The Royal Commission called on Governments to take all necessary measures to protect persons with disabilities during this pandemic. Ms Catalina Devandas-Aguilar, the Special Rapporteur on the rights of persons with disabilities, responded with a letter to the Royal Commission.<sup>406</sup>

On 14 April 2020, a group of internationally-recognized independent experts in the area of human rights, bioethics and disability released *COVID-19: Human rights, disability and ethical decision-making*,<sup>407</sup> in response to health directives and medical decision-making protocols that were being proposed or implemented in other countries that undermined the rights of persons with disabilities.

The Disability Royal Commission noted during the COVID-19 hearing that, prior to the pandemic, the Australian Government Department of Health had formulated emergency, pandemic and communicable disease plans and none of those plans specifically referred to the need to address the difficulties likely to be experienced by persons with disabilities, or to the provisions of the Convention. The Disability Royal Commission made 22 recommendations in the hearing report, including that the Australian Government Department of Health “ensure that an appropriately resourced unit or team has specific responsibility for developing plans and programmes to protect the health and wellbeing of persons with disabilities, including

during emergencies such as the COVID-19 pandemic” and that explicitly commit to ensuring that all agencies responsible for planning and implementing responses to the COVID-19 pandemic and any future emergencies establish and implement formal mechanisms for consulting with and involving persons with disabilities and disability representative organizations in planning and giving effect to the responses. The report also recommended that the Commission review the NDIS Practice Standards and NDIS Quality Indicators to ensure that those were appropriate for pandemics and emergencies.<sup>408</sup> The Australian Government responded to the recommendations in a generally positive manner and undertook to take steps to give effect to many of them.<sup>409</sup>

The Department of Social Services (DSS) Disability Support Services Committee and the Department of Health (DoH) COVID-19 Disability Roundtable have now been amalgamated into one consultative forum – named the Disability and Health Sector Consultation Committee (DHSCC). The Department of Social Services states that the Disability and Health Sector Consultation Committee will provide a forum for health and disability sector representatives, health professionals, academic experts, people with lived experience, and relevant Commonwealth and state and territory government agencies, to discuss policy matters relating to disability support and health services for persons with disabilities. The Disability and Health Sector Consultation Committee will be co-chaired by the Department of Social Services and the Department of Health, with governance responsibility shared between the two Departments.

<sup>405</sup> Disability Royal Commission, 2020c.

<sup>406</sup> United Nations Office of the High Commissioner for Human Rights, 2020.

<sup>407</sup> The Statement of Concern was commissioned by People with Disability Australia (PWDA); Women with Disabilities Australia (WWDA); National Ethnic Disability Alliance (NEDA); Australian Federation of Disability Organisations (AFDO); First Peoples Disability Network (FPDN); ACT Council of Social Service Inc. (ACTCOSS). [https://dpoa.org.au/wp-content/uploads/2020/04/Statement-of-Concern-COVID-19-Human-rights-disability-and-ethical-decision-making\\_Final.pdf](https://dpoa.org.au/wp-content/uploads/2020/04/Statement-of-Concern-COVID-19-Human-rights-disability-and-ethical-decision-making_Final.pdf)

<sup>408</sup> Disability Royal Commission, 2020.

<sup>409</sup> Australian Government, 2021a.

<sup>401</sup> Committee on the Rights of Persons with Disabilities, 2019b, CRPD/C/AUS/CO/2-3, para. 22.

<sup>402</sup> Royal Commission into National Natural Disaster Arrangements, 2020.

<sup>403</sup> Disability Royal Commission, 2020a.

<sup>404</sup> Disability Royal Commission, 2020b.



# 23 GOOD PRACTICE AND FUTURE PROSPECTS

Central to human rights gains for persons with disabilities in Australia has been the leadership of persons with disabilities through the domestic disability rights movement, and the formation of Disabled People's Organizations that have challenged ableism and discrimination, and continue to represent the voices of persons with disabilities in law reform, policy and development, and across the broader civil society agenda.<sup>410</sup> Rosemary Kayess, a leader in the Australian disability rights movement, has served on the Committee on the Rights of Persons with Disabilities since 2019, including as its Chairperson and Vice-Chairperson.<sup>411</sup>

As detailed throughout this case study, there are consultative processes and advisory structures at all levels of government (local government, state, federal and across government agencies, as well as across the private sector) that formally engage with persons with disabilities, and their representative organizations in relation to policy and programming. These forums have different levels of influence and effectiveness, but are an important avenue through which persons with disabilities can advocate for rights-based change. There remains, however, no formal, ongoing engagement mechanism with DPOs and DROs at the federal level to ensure the active participation of persons with disabilities in the implementation and monitoring of the Convention (and other human rights treaties) in Australia.

DPOs, disability representatives and advocacy organizations face ongoing issues with funding (competitive and short-term) and the role of DPOs, in line with General comment No. 7, is not well understood by Australian Governments. Philanthropy in Australia does not support DPOs, apart from providing some funding for distinct projects.

As noted throughout this case study, the major barriers to the realization of human rights for persons with disabilities in Australia include the ongoing segregation of persons with disabilities across all aspects of life; and the continuing barriers to law reform, policy and practice change due to Australia's interpretative declarations to articles 12, 17 and 18 of the Convention. The human rights violations that occur due to a denial of legal capacity in Australia remain one of the most critical issues, with the potential for the greatest impact in the realization of individuals' human rights.

Some significant achievements in forwarding the rights of persons with disabilities in Australia have been the deinstitutionalization of large residential centres (although persons with disabilities are still housed in smaller institutions, including group homes, where their rights are routinely violated); and the shift to a rights-based model of disability service provision under the NDIS (although perverse outcomes of the implementation of the scheme threaten the realization of the potential it holds). Most

recently, the Disability Royal Commission into Violence, Abuse, Neglect and Exploitation of Persons with Disability has the potential to tackle the disproportionate impact on persons with disabilities, but only if it interrogates and challenges the systemic, structural and attitudinal issues that underpin this violence.

<sup>410</sup> For example, within national advocacy campaigns around social security reform, housing and homelessness.

<sup>411</sup> Professor Ron McCallum AO had also served on the Committee from 2009 to 2014, including terms as its Chairperson and Vice-Chairperson.

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# Annex

## Data sources and definitions:

### 2020 People with Disability in Australia Report by the Australian Institute of Health and Welfare

DATA SOURCE	YEAR	DATA CUSTODIAN	DISABILITY DEFINITION	
			DISABILITY	SEVERE OR PROFOUND DISABILITY
Survey of Disability, Ageing and Carers	2018	Australian Bureau of Statistics (ABS)	At least 1 limitation, restriction or impairment to everyday activities, for at least 6 months	Always or sometimes need help with 1 or more of 3 core activities
National Health Survey	2017–2018	Australian Bureau of Statistics	At least 1 condition restricts everyday activities, for at least 6 months (disability or restrictive long-term health condition)	Always or sometimes need help with 1 or more of 3 core activities
Disability Services National Minimum Data Set	2019	Australian Institute of Health and Welfare (AIHW)	Ongoing need for help or supervision with at least 1 life area, for at least six months	
National Disability Insurance Scheme	2019	National Disability Insurance Agency	Permanent loss or reduction in functional capacity to undertake 1 or more of 6 core activities	
Personal Safety Survey	2016	Australian Bureau of Statistics	At least 1 condition restricts everyday activities, for at least 6 months (disability or restrictive long-term health condition)	Always or sometimes need help with 1 or more of 3 core activities
National Education Survey	2019	Children and Young People with Disability Australia	Self-identified	
Rental Affordability Snapshot	2020	Anglicare	Recipients of Disability Support Pension	
Household Income and Labour Dynamics in Australia Survey	2011–2016	Melbourne Institute	Impairment, long-term health condition or disability restricts everyday activities, for at least six months (disability or restrictive long-term health condition)	

National Social Housing Survey	2018	Australian Institute of Health and Welfare	Always or sometimes need help with 1 or more of 3 core activities due to long-term health condition (for at least 6 months) or disability	
Australian Government Housing Data Set	2019	Department of Social Services (DSS)	Recipients of Disability Support Pension (DSP) - Permanent impairments restricting ability to work	
National Housing Assistance Data Repository	2019	Australian Institute of Health and Welfare	An impairment of body structure or function, a limitation in activities, or a restriction in participation	
Specialist Homelessness Services Collection	2019	Australian Institute of Health and Welfare	At least 1 condition restricts core activities (disability or restrictive long-term health condition)	Always or sometimes need help with 1 or more of 3 core activities
Nationally Consistent Collection of Data on School Students with Disability	2019	Australian Curriculum Assessment and Reporting Authority	Whether receive educational adjustments	
Youth Survey	2019	Mission Australia	Self-reported disability	
Total Vocational Education and Training (TVET) Students and Courses Collection	2018	National Centre for Vocational Education Research (NCVER)	Self-identified disability, impairment or long-term condition	
Higher Education Student Data Collection	2019	Department of Education, Skills and Employment	Self-identified disability, impairment or long-term medical condition which may affect studies	
TVET Student Outcomes Collection	2019	National Centre for Vocational Education Research	Self-identified disability, impairment or long-term condition	
Student Experience Survey	2019	Quality Indicators for Learning and Teaching (QILT)	Self-identified disability, impairment or long-term medical condition which may affect studies	
Graduate Outcomes Survey	2019	Quality Indicators for Learning and Teaching	Self-identified disability, impairment or long-term medical condition which may affect studies	
Payment Demographic Data	2019	Department of Social Services	Recipients of DSP - Permanent impairments restricting ability to work	
Administrative income support data	2019	Department of Social Services	Recipients of DSP - Permanent impairments restricting ability to work	

Source: <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/data?page=2Tt>  
This table has been amended from Australian Institute of Health and Welfare data tables







# **Harmonization of National Laws with the Convention on the Rights of Persons with Disabilities**

## **COUNTRY CASE STUDY, AUSTRALIA**

This publication emanates from an ESCAP research project to study the trends of Asian and Pacific countries in harmonizing national laws with the Convention on the Rights of Persons with Disabilities. It examines the extent to which reporting obligations have been fulfilled in a timely and substantive manner and the ways in which national human rights institutions and civil society organizations, in particular organizations of persons with disabilities, have been involved in that process. It further analyses good practices in harmonization, and challenges which have arisen in relation to the implementation of the Convention in Australia. This analytical country case study was prepared under the above mentioned ESCAP project and draws from reliable sources. It is issued for the attention of members and associate members in the ESCAP region towards further enhancement of the effective harmonization of national legislation with the Convention and the implementation of the Convention.