

ADACAS

ACT DISABILITY, AGED & CARER ADVOCACY SERVICE
Inc

Submission

National Human Rights Consultation

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About ADACAS

ADACAS is a not-for-profit, community based organisation that provides advocacy to people with disabilities, including psychiatric disability, and frail older people. We assist individuals to speak out in relation to their needs and interests and represent them in circumstances where they are unable to speak for themselves. We are concerned to see that people with disabilities and frail older people are able to exercise their rights and assert their interests to the same extent as other members of the Australian community.

The vast majority of the people we work with need considerable assistance from paid carers or family members to carry out the everyday tasks of living ie washing , dressing, eating, shopping , bill paying etc. Many live in aged care facilities, disability group homes, supported accommodation or hospital.

While ADADAS advocates largely work with individuals one by one we also engage at a systemic level on issues that affect large numbers of those individuals.

Establishing the Need for Human Rights Protection

Our experience as advocates working closely on a daily basis with the very vulnerable people described above is of a service system and a community which views people in need of ongoing care and assistance as somehow less entitled than the rest of society to have access to the things that give life value and meaning and less entitled to assert their basic human rights.

On an everyday basis we see people with disability and frail older people denied their human rights. We see people denied their right to live with their spouse and children because the necessary supports cannot be found for them to live at home. We see people getting less than one meal a day because they do not have enough care hours allocated to ensure that meals are provided to them in a form they can eat or on a regular basis. We see people semi-permanently confined to their beds because insufficient care is provided to assist them to get up and about. We see medication used as a chemical restraint, to make people passive and compliant to the routines of their service providers. We see people, when they complain about the quality of their care being vilified by service providers to others around them. We see people regularly denied the opportunity to take part in community life or to visit their doctor because the necessary support or transport to do so is unavailable. We see children with disabilities excluded from school because

the schools feel unequal to the task of accommodating the disability or delivering an appropriate education having regard to the disability.

As advocates it is always easier to insist that these matters be addressed in circumstances where there is some clearly legislated obligation with a penalty attached for breach. It is also valuable to have a clearly enunciated set of community norms or expectations on which judgements about reasonableness and entitlement can be based. Without this the service system response seems to be that a person receiving care who complains about its quantity or quality is a whinger and should be grateful for what they have. The unspoken but ever present threat is that even this small amount of care or support can be easily removed if someone complains.

It is clear to us as advocates concerned with the rights of people with disabilities and frail older people that the protections existing in Australian law for these people in relation to their rights is woefully inadequate. This is particularly in relation to:

- The right to live free from cruel or inhuman treatment or punishment
- The right to security and liberty of the person
- The right to privacy.
- The right to family life
- The right to equality before the law
- The right to an adequate standard of living, including adequate food, clothing and housing.
- Freedom from hunger
- The right to enjoy high standards of mental and physical healthcare
- The right to education
- The right to participate in cultural life

Australia is a signatory to a wide variety of International Human Rights Instruments. By signing these instruments Australia has agreed to comply with the principles expressed in them. Despite this there are very few mechanisms for enforcing the rights of individuals in Australian law and little community level understanding of how these rights should influence the day to day decision making of government, businesses and service providers.

What is needed?

ADACAS believes a three pronged approach is needed:

- 1. The establishment of a Commonwealth Human Rights Act that**
 - a. Sets out the rights to be protected including the rights enunciated in the international human rights instruments already signed by Australia and in future rights instruments to which Australia becomes a party.**
 - b. Establishes a mechanism for enforcement of the protected rights that includes provision for individuals to take action on their own behalf and for representative or advocacy groups to take action in the public interest on behalf of affected groups.**
 - c. Requires any proposed Commonwealth legislation or regulation to be scrutinised for compliance with the protected rights and results of the scrutiny to be made publically available.**
- 2. A comprehensive community education program**
- 3. Dedicated resourcing for enforcement action including**
 - a. Provision of a forum which is cost free to the complainant to seek enforcement of human rights and remedies for violation**
 - b. Resources for community legal and advocacy agencies to assist in the exercise and enforcement of rights**

1a. Rights to be Protected

Australia has already agreed to be bound at international law by a variety of international human rights instruments. These instruments represent international consensus about the rights that are considered to be universal and that should accrue to people by virtue of their humanity. There can be no valid justification for failing to legislate to implement these at the domestic level.

Many Australians already believe that their human rights are legislatively protected and only discover that this is not true when they seek to enforce their rights.

The recognition and elaboration of human rights at the international level is a continuing process. If Australia, in the future, agrees to sign additional human rights instruments it would be preferable for a mechanism to be included in the Commonwealth Act that allows for Australia to meet its international obligations under these instruments without further legislative change.

We recognise that while certain rights are absolute and cannot be limited most rights are limited because they come into conflict either with another

right or with some other legitimate State interest. In such circumstances we believe it to be appropriate for the internationally recognised human rights principle of ‘proportionality’ to be invoked in line with established international jurisprudence.

1b. Enforcement Mechanisms

Without appropriate enforcement mechanisms a Human Rights Act will have no more practical impact on the day to day living of vulnerable individuals than has already been achieved by the signing of the international instruments.

Individuals and representatives of groups of individuals need to have the opportunity to go before an appropriate Tribunal or Court to say that rights are being infringed and to obtain a remedy which acknowledges past infringements and prevents future recurrence.

Courts must also be given the power to interpret legislation as far as possible in keeping with human rights principles and to make statements of incompatibility where legislation cannot be interpreted as being human rights compatible.

1c. Compatibility Statements

An important mechanism for developing a culture of human rights is to require that a statement of compatibility with human rights is tabled in Parliament alongside any new legislation or regulation. Such a statement should at a minimum address whether the legislation/regulation is human rights compatible and provide reasons for this view.

The requirement to provide such a statement will influence policy makers and drafters from the outset to ensure that legislation/regulation is human rights compliant. Where compatibility is difficult to achieve or in doubt the publication of reasons serves to create an environment for a more public debate about how rights should be balanced against competing interests. It also establishes a greater degree of accountability for the government.

2. Community Education

A comprehensive community education program dedicated to raising awareness of human rights should operate on a range of levels:

- To raise general community awareness of the protected rights, how they are balanced and the available enforcement mechanisms

- To raise the awareness of government , business and community service decision-makers about compliance responsibilities
- To educate children and young people about rights so that the next generations automatically think about issues from a rights perspective
- To educate specific population groups about how the human rights framework can operate to assist them to assert their interests and have their needs met.

The overarching aim of the program should be to embed an understanding and appreciation of human rights into the Australian culture.

3. Enforcement Resourcing

In human rights matters involving people with disabilities and frail older people, service providers and governments engage on a daily basis in decision-making based on political harm minimisation and resource balancing. They do not start from a premise that all people are entitled to a level of human dignity and have inalienable human rights.

To challenge government or a service provider about their decision-making takes physical, emotional, intellectual and financial resources which are not readily available to people with disabilities and frail older people. Their position is even more difficult when they rely for their everyday basic needs on these same people.

Those most likely to have their rights infringed are those who are the most vulnerable members of our community. It is therefore vital that they have sufficient partisan and well-qualified assistance at their disposal to assert their rights. This assistance needs to be cost free for the individual who in most cases will not be able to afford to risk action where costs might be awarded against them. It is vital that the assertion of rights does not create any additional losses for a person who has already experienced the losses associated with the failure to be accorded their human rights.

The assistance also needs at times to be able to be in the form of representative action by an advocacy organisation on behalf of a group of affected people. This avoids the need for one very vulnerable person to alone take on the might of a large service provider or government agency. It also protects them from any potential retribution.

The availability of well qualified legal and advocacy support is even more important in the establishment phase of a human rights culture. At such a time service providers, governments and business are being required to change their behaviour from established ways of working to ways that are unfamiliar. On occasion they will need the existence of a legal precedent to convince them of the necessity for change. Once a precedent is established however resistance is no longer a viable option and the work of acceptance and compliance begins.

Conclusion:

Australia is the only liberal democracy without a national human rights instrument.

It is the most vulnerable members of our community who bear the cost of this failure in public policy.

We urge the Government to redress this failure and take the necessary steps to establish an Australian human rights culture.

For further information please contact:

Andrea Simmons
Manager

Phone: 02 62425060
Email: andrea@adacas.org.au