

**National Human Rights Consultation Submission**

**Australian Federation of Disability Organisations**

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## **ABOUT THE AUSTRALIAN FEDERATION OF DISABILITY ORGANISATIONS**

The Australian Federation of Disability Organisations (AFDO) has been established as the primary national voice to Government that fully represents the interests of all people with disability across Australia. The mission of AFDO is to champion the rights of people with disability in Australia and help them participate fully in Australian life.

At present, AFDO has nine national members and four State based members. They are:

### **National Members**

Blind Citizens Australia

Brain Injury Australia

Deaf Australia Inc. (formerly Australian Association of the Deaf)

Deafness Forum of Australia

National Association of People Living with HIV/AIDS

National Council on Intellectual Disability

National Ethnic Disability Alliance

Physical Disability Australia

Women with Disabilities Australia

### **State Members**

Access for All Hervey Bay

Disability Australia

Disability Resources Centre

People with Disability Western Australia

Which human rights (including corresponding responsibilities) should be protected and promoted?

The protection and promotion of all human rights – civil, political, economic, social and cultural – within Australian society is critical. For people with disability this is especially true because they often experience significant disadvantage in achieving social participation and even personal safety and self determination. This extends across all types of disability: people with psychosocial

disability are routinely locked up without appeal and sometimes without access to advocates, people who are Deaf are denied interpreters for critical personal and professional interactions, people with physical disability find themselves unable to enter buildings and people who are blind have no legal way to access most of the printed material available to others on an everyday basis. For some, human rights abuses leading to disadvantage are more subtle and less readily recognised within the community. People with intellectual disability often experience powerlessness in their homes and workplaces, while those with HIV/AIDS face significant stigma from the broader community.

Human rights exist in a complex, often interdependent fashion. For example, the right to vote is fundamental in Australian society, but it requires access to other rights before it can be truly said to be met. While Australia can provide democratic elections open to registered voters, those elections are meaningless if people who wish to vote cannot access the education they need to understand our political system, if they do not have access to freedom of speech and association to support political parties and engage in political debate, and if they do not have access to safe, clean places to vote which are near good transport options.

It is possible, however to see the need for a distinction between the absolute promotion and protection of some human rights (like the right to vote and to access justice) and the aspirational, progressive protection of others (such as the right to a certain standard of living). Many civil and political rights can, and should, be protected immediately and as extensively as possible. The adequate protection of economic, cultural and social rights is harder to quantify, and much more likely to change with the times. For example, ten years ago a decent standard of living might not have meant access to a home computer with an internet connection. Today, this is considered an essential way to communicate, do business and promote freedom of expression. For people with disability, access to a computer and an internet connection can be particularly significant in protecting and promoting human rights because it offers access to otherwise inaccessible materials because of barriers to accessing buildings, information and services.

Coverage of all human rights for all people is important for two reasons. Firstly, it upholds the culture of 'a fair go' inherent in

Australian life. At the moment, the egalitarian spirit of Australia is demonstrated time and again in the way our laws and institutions work, and the way in which we live side by side in relative peace in such a diverse culture. In spite of this vast collection of lived experience, there is no one piece of legislation or constitutional law which articulates what is arguably a fundamental part of the Australian identity, and it is left to High Court judges to interpret the implicit and explicit rights laid out in the Constitution<sup>1</sup>.

It is the belief of the Australian Federation of Disability Organisations (AFDO) that human rights protections should be enshrined in our constitution so that they remain permanently protected in the broadest fashion possible, with the backup of legislative instruments for particularly marginalised groups within society.

We believe that the fundamentals of human rights should not be subject to change based on political majority, but should become a part of our legal framework and national psyche in an enduring state. It is easy to believe that governments and populations will only ever progress forward with human rights concerns, but examples of policymakers and populations taking steps backwards abound. For instance, the New South Wales government is currently pushing for the recreation of institutions to house people with disabilities, citing family demand for such services. Disability advocacy groups argue that this denies people with disability the right to freedom of choice and freedom of movement.

**Recommendation One: That the Australian government holds a referendum to enshrine human rights in the Australian constitution.**

Secondly, the promotion and protection of human rights in Australia in a comprehensive fashion is important because Australia already adheres to a number of aspirational and binding covenants and treaties on human rights, including treaties which deal with the rights of particular groups within society such as the UN CRPD, which came into power in 2008, finally addressing a gap in international rights laws which had meant that people with

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<sup>1</sup> Szifcak, Spencer and King, Allison, 2009, *Wrongs, Rights and Remedies: An Australian Charter?*, Australian Collaboration, available online at:

<http://www.australiancollaboration.com.au/booksreports/index.html>

disability were not protected. A lack of protection and promotion at the federal level creates ambiguity both in a practical sense and in signalling Australia's commitment to meeting human rights obligations.

Whatever the model, it is critical that the interpretation of the human rights needs of particular groups – people with disability, women, culturally and linguistically diverse people, people of different ages and religions – should remain protected by specific mechanisms such as the *Disability Discrimination Act 1992* which are currently used effectively at a federal level. International human rights structures recognise the specific needs of these groups and an Australian human rights framework should be no different.

The United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), for instance, does not create any new rights for people with disability but simply articulates the different ways in which the range of rights already in existence might need to be perceived or executed differently for people with disability. Perhaps most critically the UN CRPD expresses the need for accessibility in all areas of life and the need to ensure positive attitudes towards people with disability flourish within the community. The same general functions are inherent in the DDA.

**Recommendation Two: That the Australian government ensures that legislative measures protecting the specific rights of minority groups remain in place regardless of any legal articulation of broad human rights.**

Are these human rights currently sufficiently protected and promoted?

The ambiguity of current Australian human rights laws and the lack of a central law promoting equality – rather than preventing discrimination – is of concern both to Australian citizens and in terms of our international standing as the only Western country without a national law covering rights, as noted recently by the United Nations Human Rights Committee<sup>2</sup>. While some States and Territories have, or are considering, human rights legislation there

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<sup>2</sup> United Nations, 2009, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant – Concluding Observations of the Human Rights Committee: Australia*

is a risk that human rights legislation developed at the State and Territory level will not be consistent.

Objectively measuring whether or not human rights are currently well protected can sometimes be difficult because there are no standard measures of protection, and because 'well protected' means different things to different people. However, there are many clear instances of human rights abuses against people with disability, and these should be monitored and rectified. For example, people receiving Home and Community Care (HACC) services from their local council are denied freedom of movement because they cannot be guaranteed that the specific services they receive in one council area will be available in another without actually moving and then applying for those services. Once a person with disability has secured funding which meets their needs, they can only move out of that council area if their needs decrease or other support becomes available. Ironically, once HACC services have been secured, the chances of getting access to other services become smaller; priority is given to those with no assistance at all. Unmet need in the community is so high that this means anyone already receiving a HACC service is unlikely to be able to switch to a non-government service provider.

AFDO believes that for human rights to be adequately protected there must be no conflict between laws, policies and human rights and that individuals and organisations must not breach human rights. The promotion of human rights means that Australia should not place people in a position of systemic disadvantage because they have particular traits, and that human rights are understood by everyone.

## **1. Laws and policies made by governments.**

In addition to the overall ambiguity and lack of consensus already mentioned, some Australian laws are in conflict with each other if viewed from a human rights perspective. For example, the National Ethnic Disability Alliance (NEDA), has received legal advice that the current exemption of the *Migration Act 1958* from the *Disability Discrimination Act 1992* (DDA) which has led to the assessment of potential migrants on the basis of disability is:

*“...at odds with the equal protection obligation under Article 5 of UN CRPD, leading to unjustifiable indirect discrimination for some refugees and migrants with disability.”<sup>3</sup>*

Policies can also be in conflict with human rights expressed in national and international law. The DDA spells out the right to access goods and services, and the UN CRPD is emphatic about the right to vote. Yet the Joint Standing Committee on Electoral Matters recently handed down a recommendation that a trial of electronic voting which would make an independent vote truly accessible to people who are blind or vision impaired should be scrapped on the basis of cost<sup>4</sup>.

The poor execution of laws and policies can also place individual human rights at risk, and it is especially important that these matters are exposed and explored in a human rights context. In Victoria, the Charter of Human Rights and Responsibilities has helped to uncover some instances, such as the man with psychosocial disability whose rights were found to have been breached when there were significant delays in reviewing his involuntary treatment plan<sup>5</sup>.

Laws and policies can also breach human rights by omission. At present, Australian Sign Language (Auslan) is not recognised as an official language used in Australia. Members of the Deaf community argue that this is one factor preventing culturally Deaf children from gaining adequate support to learn Auslan in schools, leaving them unable to converse in English or Auslan fluently by the time they become adults.

AFDO believes that these examples highlight instances where human rights could, and should, be better upheld by government. At present, only Victoria and the ACT are proactively monitoring

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<sup>3</sup> National Ethnic Disability Alliance, 2008, *Refugees and Migrants with Disability and the United Nations Convention on the Rights of Persons with Disabilities*, p.7 viewed online at [http://www.neda.org.au/files/refugees\\_and\\_migrants\\_with\\_disability\\_and\\_un\\_crpjuly\\_2008\\_final\\_2.pdf](http://www.neda.org.au/files/refugees_and_migrants_with_disability_and_un_crpjuly_2008_final_2.pdf) on April 14<sup>th</sup> 2009

<sup>4</sup> Joint Standing Committee on Electoral Matters, 2009, *Report on the 2007 federal election electronic voting trials :Interim report of the inquiry into the conduct of the 2007 election and matters related thereto*, Australian government, viewed online April 23<sup>rd</sup> 2009 at: <http://www.aph.gov.au/house/committee/em/elect07/report.htm>

<sup>5</sup> The Age Online, 24<sup>th</sup> April 2009, *Mentally Ill Man's Human Rights Breached: Tribunal* viewed online at <http://www.theage.com.au/national/mentally-ill-mans-human-rights-breached-tribunal-20090423-agtb.html> on 24th April 2009

and evaluating the way law and policies protect and promote human rights.

## **2. Attitudes expressed within the community by media, organisations and government**

The human rights impact of public attitudes is not monitored or addressed except on an ad-hoc basis. Measurement and redress for systemic issues of discrimination which breach human rights only occurs if an individual brings about a complaint to an anti-discrimination body at state or federal level. Inquiries into systemic issues can only be undertaken if they are initiated by anti-discrimination bodies, and those bodies have no power to enforce change, only to encourage it.

However, there is strong and consistent evidence of entrenched negative attitudes and behaviours towards people with disability which lead to entrenched disadvantage. People with disability endure higher unemployment rates which have stagnated or decreased over an extended period<sup>6</sup> and are more likely to live in poorer areas if they live in a capital city<sup>7</sup>. They tend to have fewer of what we would consider basic necessities, such as five hundred dollars in savings, a person to turn to for advice or even a landline telephone<sup>8</sup>.

These significant levels of disadvantage demonstrate unequivocally that people with disability face human rights barriers. While the examples given above mostly relate to economic, social and cultural rights they are also intrinsically tied to civil and political rights. Without an education, freedom of speech is limited; with a low income dignity, freedom of movement and even the right to life can be hampered.

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<sup>6</sup> Australian Institute of Health and Welfare, 2008, *Disability in Australia: Trends in prevalence, education, employment and community living*, viewed online April 27<sup>th</sup> 2009 at <http://www.aihw.gov.au/publications/index.cfm/title/10495>

<sup>7</sup> Australian Institute of Health and Welfare, 2009, *The Geography of Disability and Economic Disadvantage in Australian Capital Cities* viewed online April 27<sup>th</sup> 2009 at <http://www.aihw.gov.au/publications/index.cfm/title/10703>

<sup>8</sup> Mission Australia, 2008, *Left Out and Missing Out: disability and disadvantage* viewed online 20<sup>th</sup> April 2009 at: [http://www.missionaustralia.com.au/document-downloads/cat\\_view/34-social-policy-reports](http://www.missionaustralia.com.au/document-downloads/cat_view/34-social-policy-reports)

Again, a lack of standard monitoring procedures across the country means that judging the full extent of the impact of attitudes on human rights is difficult, and leads to less likelihood of well targeted, proactive measures to improve human rights.

### **3. Actions taken by individuals and organisations**

At the moment, complaints based mechanisms – that is, processes which look at breaches of human rights after they have happened – are the only way of judging how human rights are being met by individuals and organisations.

During 2007 and 2008, there were ten communications made to the United Nations committees responsible for treaties to which Australia has signed<sup>9</sup>. These communications mostly concerned matters of nationality and immigration, but confirm that even with internal mechanisms for review and a spirit of non-discrimination, Australia still has a serious case to answer in areas where it has committed internationally to human rights.

Within Australia, the best measures of how well individuals and organisations meet human rights is the complaints brought to anti discrimination bodies by individuals. These are not necessarily representative of the full scale of everyday human rights breaches because of the perceived difficulty in lodging complaints and the intertwined nature of some complaints, such as a complaint about the involuntary sterilisation of a woman with an intellectual disability which could be counted as discrimination on the basis of both gender and disability. Even so, we know that 48% of complaints made to the Australian Human Rights Commission in 2007-08 were lodged under the DDA<sup>10</sup>, which suggests a marked level of day-to-day discrimination in the lives of people with disability.

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

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<sup>9</sup> Attorney General's Department of Australia, 2009, *Human Rights Communications* viewed online at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Human\\_rights\\_and\\_anti-discriminationCommunications](http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationCommunications) on April 17th 2009

<sup>10</sup> Australian Human Rights Commission, 2008, *Annual Report 2007-08*, viewed online at [http://www.humanrights.gov.au/about/publications/annual\\_reports/index.html](http://www.humanrights.gov.au/about/publications/annual_reports/index.html)

## **1. Legislate to protect and promote human rights at a national level**

From the above, we can see that legislation to protect and promote human rights at a broad level has some advantages. It could:

- articulate the cultural values of human rights already in existence across Australia;
- outline practical actions and outcomes for ensuring the protection and promotion of human rights; and
- ensure that human rights issues are monitored and debated across the country.

While there are some concerns that a legislative model of human rights would leave the decisions in the hands of elite, unelected judges, and that a constitutional model would not be feasible, AFDO believes strongly that human rights need to be articulated and protected through domestic remedies. As noted earlier in this submission, the DDA does not protect all of the rights outlined in the UN CRPD, nor does it offer a framework for promoting and measuring the human rights of people with disability.

There is some emerging evidence that in Australia the use of legal frameworks can be successful in changing and strengthening a human rights culture. In its second report on the operation of the Victorian Charter of Human Rights and Responsibilities, the Victorian Equal Opportunity and Human Rights Commission notes that<sup>11</sup>:

*“Victoria’s experiences over the last two years are proof that – at heart – the Charter is a way of ensuring that people are treated with dignity and respect, and have the information and support they need to stand up for their rights.”*

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<sup>11</sup> Victorian Equal Opportunity and Human Rights Commission, 2009, *Operation of the Charter of Human Rights and Responsibilities: 2008 Report* viewed online 20<sup>th</sup> April 2009 at <http://www.humanrightscommission.vic.gov.au/publications/annual%20reports/2008charterreport.asp>

## **2. Change the current national human rights system to decrease liability for complainants and include monitoring and complaints at a systemic level**

A draft recommendation<sup>12</sup> from the review of the Disability Standard on Accessible Public Transport suggests that the powers of the Australian Human Rights Commission need to be expanded to ensure that cases of merit can be referred to the Federal Court. In reviewing the Standard, the consultants also found that a lack of systemic complaints made it difficult both to monitor the levels of compliance with the Standard, and to ensure that issues would be rectified in a timely fashion.

Without systemic complaints, and without the right for organisations to lodge complaints on behalf of complainants, many people with disability remain wary of using the disability discrimination complaints system to resolve issues, especially if they proceed to the Federal Court or beyond, where complainants are liable for costs if the complaint is not upheld.

## **3. Implement structured human rights education for the wider populace with a focus on ensuring accessible education**

Understanding that you have rights is the first hurdle to resolving any human rights issues an individual might face. People with disability can find even this step to be a barrier to accessing human rights. This will be a particularly relevant issue as the population ages and more people acquire disabilities; it is the experience of disability advocates that many older people in this position 'don't want to make a fuss', or feel that the solution to a lack of access is to rely on others to do things for them rather than to ask for their right to independence. The concern is that these attitudes are not informed choices, not that someone with disability might choose, knowing all the options, to remain quiet or rely on others anyway.

For some people with disability, such as those from culturally and linguistically diverse or indigenous backgrounds, even the notion of having a disability has very different connotations because of their

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<sup>12</sup> Allen Consulting Group, 2008, *Draft Report on the Review of the Disability Standards for Accessible Public Transport*, viewed online April 26<sup>th</sup> 2009 at: <http://www.ddatransportreview.com.au/?x=report>

cultural heritage. Hearing voices, for instance, might be interpreted as talking to one's ancestors instead of as a sign of a psychosocial disability.

It is vital that any human rights education program is structured to be accessible to people with disability – by providing Plain English and Braille copies of written materials, for example – and portrays people with disability in a respectful fashion.

#### **4. Offer support for implementing proactive human rights measures across the community, including the production of shadow UN reports.**

Under the Victorian Charter of Human Rights and Responsibilities, the Victorian Equal Opportunity and Human Rights Commission has successfully implemented a number of human rights based activities in the community, including educational workshops for the general community and working with government departments to develop human rights frameworks for their work. It would not be difficult to replicate similar programs at a Federal level.

For people with disability, understanding human rights and acting to preserve them naturally involves using a number of methods to account for a very diverse range of needs. So an internet website and mailing list might be best for some people with disability, while those who struggle with online access would find it more useful to have face-to-face workshops.

In particular, shadow reports offer the community sector a chance to provide a thorough, robust response to the Australian governments' UN treaty reports. Without this robust response, it is arguable that Australians are being denied their right to exercise democracy and freedom of speech because the communities affected by our treaties and conventions are left voiceless. No program to address human rights across Australia would be complete without formulating adequate, ongoing funding for community groups to carry on this work.