

Disability Rights

CASE STUDY

Abuse and neglect of people with disability

Neil has an autism-related disability. While attending a public school in Perth that specifically caters for children with disability, he was repeatedly locked up in an outside caged enclosure for bad behaviour. The cage was enclosed by a 3.5 metre-high wire fence, backing onto a demountable building, and had no toilet or access to water. It had been purpose-built for Neil, and he was put in the enclosure almost every day, sometimes several times a day, for periods of up to one hour and 20 minutes, over several months.¹

The Western Australian Education Department agreed to remove the enclosure, but refused to provide assurance that outdoor enclosures would not be used again.

People with disability in Australia

In 1998, there were 3.6 million people with disability in Australia (19% of the population).² This number includes people with intellectual, psychiatric, physical, sensory, and acquired disability. The majority of these (87%) experienced restrictions in activities such as mobility or communication, or in their ability to take part in schooling or employment.³

Disability rights in international conventions

People with disability are entitled to the full range of rights in both the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the

International Covenant on Civil and Political Rights (ICCPR).⁴ Both covenants prohibit discrimination of any kind. The Committee on ICESCR requires governments to protect against disability discrimination and to take positive action to reduce disadvantages. Positive action means giving preferential treatment to people with disability to help them achieve full participation and equality in society.⁵ The rights of children with disabilities are also recognised in the *Convention on the Rights of the Child* (CROC).⁶

Numerous barriers to the use of ICCPR and ICESCR by people with disability have been identified.⁷ As a result a separate UN Convention focusing on people with disability is currently being drafted.⁸

Current Australian disability policy

The Australian Government has tried to improve the rights of people with disability through the *Disability Discrimination Act 1992* (DDA) and the *Disability Services Act 1986* (DSA). Federal, state and territory governments share responsibility for funding services for people with disability.⁹

The DDA makes it unlawful to treat someone less favourably because of their disability – directly or indirectly. Direct discrimination is when someone with a disability is clearly treated less favourably than someone who does not have that disability. Indirect discrimination occurs when a policy or practice that applies to everyone, and appears to be neutral, is actually more difficult for a person with disability to comply with. For example, stairs at the front of a building can prevent access by people in wheelchairs.

The DDA prohibits discrimination against someone with a disability in:

- employment
- education

- access to premises
- provision of goods, services and facilities
- accommodation
- clubs and sport
- land use; and
- administration of federal laws and programs.

The DDA also makes it unlawful to harass someone with a disability in:

- employment
- education; and
- the provision of goods and services.

All states and territories have similar legislation, making it unlawful to discriminate against someone because of their disability.

The DSA establishes the provision of support services for people with physical, psychiatric, intellectual and sensory impairment in the areas of accommodation, employment and community participation.

Disability rights not protected in Australia

Australian disability services and discrimination laws do not guarantee that positive measures will be taken to ensure that people with disability can participate equally in society.¹⁰ For example, many buildings, forms of public transport and workplaces remain physically inaccessible for people with disability. If an obligation to take positive measures existed in law, this would not be the case.

Discrimination legislation is focused on individual complaints rather than on addressing systemic discrimination.

Systemic discrimination happens when legislation, policies, practices, organisational structures or workplace cultures treat people with disability less favourably.

Australia has a long history of putting people with disability into

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79-year-old Catherine has a mobility impairment and lived in a nursing home in Sydney. Often when she asked for help to go to the toilet, staff members said they were too busy and placed a folded sheet between Catherine's legs and told her that she'd have to make do with that. Ashamed and embarrassed, Catherine was forced to urinate in her bed.¹¹

Darren was 9 years old and was living in a state institution for people with disability in regional Queensland. He was under-nourished, became ill and was transferred to a large hospital in Brisbane. On admission, the state authority and the hospital arranged for a "Not for Resuscitation" ("NFR") order to be placed on Darren's medical file. This authorised the hospital to take no active measures to resuscitate Darren, if resuscitation was needed to keep him alive. Concerned staff at the institution notified a government-funded advocacy organisation, which intervened and demanded that the NFR order be lifted. Darren eventually gained weight, recovered from his illness, and returned to the institution.¹²

institutions. Since the 1970s, though, there has been a policy of integrating people with disability into the community. However, many people with disability continue to require assistance to live in the community, which is often not provided. Living in the community is a basic human right often denied many people with disability in Australia.

There are serious systemic problems in how people with disability are treated. We can see this in the continuing abuse, neglect and preventable deaths of people with disability in a range of settings.

Improving disability rights in Australia

While Australia has a relatively good record in promoting and protecting the rights of people with disability, we have failed to implement the full range and scope of rights in the international conventions. Improvements that have been made in protecting the rights of people with disability could still be subject to change by future governments.

When the Federal Court found that addiction to a prohibited drug could be regarded as a disability, the Federal Government introduced the Disability Discrimination Amendment Bill 2003. The proposed amendment seeks to make it lawful to discriminate against a person because of their addiction to a prohibited drug. Although the bill has not yet been passed, the proposed amendments illustrate how easy it is for a government to reduce human rights protections.

Protection of the rights of people with disability in line with international standards, including positive measures, is essential. For disability rights to improve in Australia, the Federal Government should support and implement the proposed new United Nations Convention on the rights of people with disability.

“What form should the protection of human rights take?”

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**



REFERENCES

- ¹ *The Australian*, 9/2/2004, p 3; and 10/2/2004, p 5.
- ² ABS, Disability, Ageing and Carers: Summary of Findings, cat. no. 4430.0, Canberra (1999), p 13.
- ³ The Productivity Commission, Review of the Disability Discrimination Act 1992 (2003), p 34.
- ⁴ ICESCR Article 2 and ICCPR Articles 2 and 26.
- ⁵ CESCR General Comment 5 – Persons with Disabilities, eleventh session (1994), UN Doc E/1995/22 (paras 5 and 9); also recognised in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993 (para 17).
- ⁶ CROC Article 23 (1989) UN Doc A/RES/44/25.
- ⁷ Gerard Quinn and Theresia Degener, “Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability”, UN Doc HR/PUB/02/1 (2002).
- ⁸ People with Disability Australia Incorporated, www.pwd.org.au (accessed on 31/3/2004).
- ⁹ Australian Government, Third Periodic Report on ICCPR: Australia, UN Doc CCPR/AUS/98/3, 22 July 1999, pp 13–15.
- ¹⁰ The Standard Rules and CESCR General Comment 5 are not incorporated into the DDA or the *Human Rights and Equal Opportunity Act 198* (Cth).
- ¹¹ Case study provided by People with Disability Australia Incorporated.
- ¹² Case study provided by Queensland Advocacy Inc.