



DISABILITY RIGHTS NOW

**CIVIL SOCIETY REPORT TO THE UNITED NATIONS
COMMITTEE ON THE RIGHTS OF PERSONS WITH
DISABILITIES**

Compiled by Disability Representative, Advocacy, Legal and
Human Rights Organisations

AUGUST 2012

About this Report

This Civil Society Report on the Convention on the Rights of Persons with Disabilities (CRPD) presents the perspective of people with disability in relation to Australia's compliance with its obligations under this convention.

The Report has been compiled from consultations with people with disability and their representative and advocacy organisations, evidence from government and community initiated inquiries and various reports and submissions produced by Civil Society involved in the protection and promotion of human rights for people with disability. The issues raised in this report and gaps highlighted in government compliance with the CRPD should be considered in the context of a nation that is relatively wealthy and where most Australians enjoy a high level of freedom, opportunity to gain a good education, find a good job and where there is respect for individual rights.

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- The representatives from rural and remote communities and Aboriginal and Torres Strait Islander communities who were consulted to capture issues specific to their communities for the report.
- All the individuals and organisations who took the time to participate in our online survey and workbook. Over 193 individual submissions were made via the website survey. In addition, 5 submissions were made by organisations that downloaded and completed the workbook. The website also invited representatives from civil society to provide further copies of any relevant material. The authors of this report were fortunate to have received dozens of submissions in the form of information packs, reports, case studies and other documents prepared by DPOs, disability advocacy organisations and civil society groups.
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The Commonwealth, represented by the Department of Families, Housing, Community Services and Indigenous Affairs, accepts no responsibility for the accuracy or completeness of any material contained in this report. Additionally, the Commonwealth disclaims all liability to any person in respect of anything, and of the consequences of anything, done or omitted to be done by any such person in reliance, whether wholly or partially, upon any information presented in this report.



ENDORSEMENTS

The following organisations have endorsed this report in whole or in part:

Aboriginal and Torres Strait Islander Women's
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Aboriginal Disability Network NSW

ACT Disability, Aged and Carer Advocacy
Service (ADACAS)

Action for More Independence & Dignity in
Accommodation (AMIDA)

Advocacy for Inclusion

Advocacy Law Alliance

Advocacy Tasmania

AMPARO Advocacy Inc

Armadale Domestic Violence Intervention
Project

Australian Centre for Disability Law

Australian Disability and Development
Consortium

Australian Federation of Disability
Organisations (AFDO)

Australian Lawyers for Human Rights

Australian Network for Universal Housing
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Employment (ADDE)

Brain Injury Association of NSW

Bunbury Community Legal Centre

Cairns Community Legal Centre

Centre for Rural Regional Law and Justice

Children with Disability Australia

Communication Rights Australia

Community Safeguards Coalition

Darwin Community Legal Service

Disability Advocacy Complaint Service SA

Disability Advocacy Network Australia (DANA)

Disability Advocacy NSW

Disability Advocacy Victoria Inc

Disability Discrimination Legal Service

Disability Resources Centre

Epilepsy Australia

Ethnic Disability Advocacy Centre

Family Advocacy

First Peoples Disability Network (Australia)

Flemington and Kensington Community Legal
Centre

Gippsland Community Legal Service

Graduate Women Victoria

Human Rights Law Centre

Hunter Community Legal Centre

Independent Advocacy Townsville

Intellectual Disability Rights Service

Ipswich Regional Advocacy Service Inc

Multicultural Disability Advocacy Association
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National Association of Community Legal
Centres

National Council on Intellectual Disability

National Mental Health Consumer & Carer
Forum

NSW Consumer Advisory Group - Mental Health

People with Disability Australia

Public Interest Advocacy Centre

Queensland Action for Universal Housing Design

Queensland Advocacy Incorporated

Queensland Association of Independent Legal Services (QAILS)

Queensland Public Interest Law Clearing House Incorporated (QPILCH)

Queensland Shelter

Redfern Legal Centre

Rehabilitation International (Australia)

Rights in Action

SCALES Community Legal Centre

Shoalcoast Community Legal Centre

Sisters Inside

Speaking Up For You Inc

STAR Victoria

Sunshine Coast Citizen Advocacy Program

The Advocacy and Support Centre (TASC)

Top End Women's Legal Service

Victorian Advocacy League for Individuals with a Disability (VALID)

Women With Disabilities Australia (WWDA)

Women's Law Centre Western Australia

Women's Legal Centre

Women's Legal Services NSW

Youth Disability Advocacy Service

BACKGROUND

Introduction to Australian Government and Legal System

- 1 Australia by world standards is a wealthy nation, (ranked 8th in the world²) with a gross domestic product equivalent to \$US37,564.67 per capita. Australia is also one of the world's most developed countries, and is ranked second (behind Norway) in the United Nations Human Development Index.³
- 2 A pluralist democracy, Australia is recognised for its enduring political stability.⁴ It has a federal system with a central Commonwealth government and six states and three territories. Australia's federal system of government is enshrined in the *Australian Constitution* and provides limited powers to the Commonwealth. The *Australian Constitution* contains a series of 'enumerated powers', which circumscribe the limits of Commonwealth legislative competence. The Commonwealth government has legislative responsibility as outlined in section 51⁵ of the Constitution and in particular section 51(xxix) (the 'external affairs' power) which enlivens Australia's obligations under human rights treaties.
- 3 It is under this external affairs power that the Commonwealth government can undertake international obligations and pass domestic legislation to give effect to those obligations. The Constitution does not incorporate a set of codified rights but is the source of six explicit and some implied rights. The explicit rights enshrined in the Constitution include the right to trial by jury, to vote and freedom of religion.⁶ The courts over time have established areas of implied constitutional limitations on government's action. These areas of implied rights — or more correctly freedoms — include freedom of political communication.⁷ The *Australian Constitution* contains no provisions for, and makes no explicit reference to, disability or persons with disability.

² Organisation for Economic Co-operation and Development, *Country Statistical Profiles 2009: Australia* (2009) OECD StatExtracts <<http://stats.oecd.org/Index.aspx?DataSetCode=csp2009>>.

³ United Nations Development Programme, 'Human Development Index 2009' (UNDP Development Reports, 2009) <http://hdrstats.undp.org/en/countries/countr_fact_sheets/cty_fs_AUS.html>.

⁴ International Telecommunication Union, *Australia ICT Data Collection Case Study* (Report, July 2005) <www.itu.int/ITU-D/ict/cs/australia/material/AUS_CS.pdf>.

⁵ *Commonwealth of Australia Constitution Act 1900*.

⁶ The enumerated rights with the *Constitution* are s 51(xxxi) Acquisition property on just terms; s 80 Trial by jury; s 92 Freedom of movement between States; s 116 Freedom of religion; s 117 Protection against discrimination on the basis of State residence; and ss 41 and 24 Voting rights. For further discussion of the nature and application of these rights see N O'Neill, S Rice and R Douglas, *Retreat from Injustice: Human Rights Law in Australia* (Federation Press, 2005) 27.

⁷ Ibid.

- 4 As the *Australian Constitution* does not incorporate a statement of rights the source of human rights in Australia is through the external affairs power and the Federal Government's signing and ratification of seven of the nine core human rights treaties.⁸ Australia does not have a constitutional Bill of Rights or legislative Human Rights Act⁹ and is currently the only common law country without some form of comprehensive legal protection of human rights.¹⁰
- 5 Those powers that are not enumerated in the *Australian Constitution* remain within the legislative competence of the states, which is plenary in nature and are limited only by what is necessary for "peace, order and good government" of the State.¹¹ Australia also has three self-governing territories, each of which also has plenary power. However, the source of their self-government is Commonwealth legislation rather than constitutional power. In the self-governing territories the Commonwealth parliament retains the full power to legislate, and can override laws made by the territorial institutions, which it has done on rare occasions. Under the Federation, the criminal law, policing and the provision of health, education and social services, are principally the responsibility of the Australian State and Territory governments.
- 6 To address issues in relation to federalism the Council of Australian Governments (COAG) was formed as the key intergovernmental forum in Australia. COAG comprises the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association (ALGA). Established in 1992, the role of COAG is to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments.¹²

⁸ *International Covenant on Civil and Political Rights* ('ICCPR'), *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD'), *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW'), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* ('CAT'), *Convention on the Rights of the Child* ('CRC') and *Convention on the Rights of Persons with Disabilities* ('CRPD').

⁹ One state, Victoria, and one territory, the Australian Capital Territory have adopted a statutory Bill of Rights into their legislation. In 2004 the ACT adopted the *Human Rights Act 2004* (ACT) and in 2006 Victoria adopted the *Charter of Human Rights and Responsibilities 2006* (Vic).

¹⁰ The UK and New Zealand do not have a constitutionally entrenched Bill of Rights but have incorporated a Bill of Rights into statute. The UK enacted the *Human Rights Act* in 1998 which incorporates the *European Convention of Human Rights* into the UK legal system and New Zealand adopted the *Bill of Rights Act* in 1990.

¹¹ The courts have drawn on this provision to strike down legislation, most notably in the detention of non-citizens: see *N O'Neill*, *S Rice* and *R Douglas*, above n 6, 193.

¹² Council of Australian Governments <www.coag.org.au>.

METHODOLOGY

Organisation and Participation

- 7 This Civil Society Report on the Convention on the Rights of Persons with Disabilities (CRPD) was drafted by a Project Group comprised of representatives from seven leading disability organisations in Australia, with the aim being to assess Australia's compliance with the CRPD from a Civil Society perspective.
- 8 The Coordinating Committee for the CRPD Civil Society Report project was comprised of the following organisations:
- (a) Australian Centre for Disability Law (formerly the NSW Disability Discrimination Legal Centre representing the National Association of Community Legal Centres);
 - (b) People with Disability Australia; and
 - (c) Queensland Advocacy Incorporated.
- 9 A Project Group was established in order to assist in steering the project. The Project Group consisted of representatives from the following organisations:
- (a) Australian Disability Rights Network and Redfern Legal Centre;
 - (b) People with Disability Australia;
 - (c) Queensland Advocacy Incorporated;
 - (d) Australian Federation of Disability Organisations;
 - (e) Australian Centre for Disability Law (formerly the NSW Disability Discrimination Legal Centre);
 - (f) Disability Advocacy Network Australia;
 - (g) Australian Human Rights Centre; and
 - (h) First Peoples Disability Network Australia.
- 10 The role of the Project Group was to:
- (a) provide advice on the process for developing the Civil Society Report;
 - (b) coordinate consultations at a State/Territory level;
 - (c) assist with seeking funding for the development of the Civil Society Report and sending the NGO delegation to the UN;
 - (d) provide direction to DLA Piper by providing information such as contacts, statistics, reports, etc; and
 - (e) endorse the Civil Society Report.

- 11 The Project Group was supported in this task by the pro bono support of DLA Piper, who assisted in facilitating the consultations in each State and Territory in Australia, in addition to providing an initial draft of the Civil Society Report and ongoing support in finalising the report.
- 12 The specific role of DLA Piper in the project was to:
 - (a) develop the project plan;
 - (b) coordinate project group meetings;
 - (c) develop consultation materials, including background information on the Convention on the Rights of Persons with Disabilities (CRPD), consultation workbook and program;
 - (d) undertake consultations in conjunction with project group members, including organising the logistics and program for State and Territory consultations;
 - (e) provide the initial draft of the Civil Society Report on the CRPD; and
 - (f) provide ongoing support and complete follow-up activities on the Civil Society Report on the CRPD.
- 13 The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) also provided valuable assistance to the Project Group, providing support for the consultations that took place throughout Australia and for a consultant to redraft the report.
- 14 Each Coordinating Committee member contributed much time in developing the project, organising the project group and instructing DLA Piper. Each Project Group member contributed significantly to the preparation of consultation materials, co-facilitation of consultations throughout Australia, to the development of the website and drafting and editing the Civil Society Report.
- 15 The aims of the Civil Society Report were to:
 - (a) reflect the views and lived experience of people with disability in Australia;
 - (b) identify the extent to which people with disability in Australia currently enjoy the fundamental human rights and freedoms provided for in the CRPD;
 - (c) identify the extent of the realisation of each article of the CRPD;
 - (d) identify those matters preventing the full enjoyment by people with disability in Australia of the CRPD rights and freedoms;
 - (e) promote the full realisation of the CRPD rights and freedoms; and
 - (f) make recommendations for government action that will assist in the realisation of the CRPD rights and freedoms.

Considerations

- 16 In analysing Australia's implementation of the CRPD, the Project Group took note of:
- (a) the lived experience of people with disability in Australia;
 - (b) the implementation of new policies;
 - (c) legislation translating political will into a legal framework;
 - (d) program development translating both policies and legislation into practical change;
 - (e) financial resource allocation;
 - (f) the training of government personnel in CRPD rights;
 - (g) the incorporation of persons with all types of disability from all socio-economic, religious and cultural backgrounds in all policy and legislative development; and
 - (h) the inclusion of a gender analysis in the legislative, administrative and policy framework.

Process

- 17 From November to December 2009, community consultations were undertaken in the form of a listening tour. Project Group representatives travelled to capital cities in Australia and consulted with people with disability and their representative and advocacy organisations to discuss the CRPD and the lived experience of people with disability. Consultations were held in Sydney (10 November 2009), Melbourne (16 November 2009), Canberra (20 November 2009), Adelaide (25 November 2009), Perth (30 November 2009), Darwin (7 December 2009), Tasmania (3 December 2009) and Brisbane (12 December 2009).
- 18 In December 2009 a website was created to provide information on the CRPD Civil Society Report for both the disability sector and the general public, with the further intention being that it would encourage submissions, of which over 200 responses were made. The website was regularly updated throughout the project.¹³
- 19 During 2010 the project group invited disability representative, advocacy, and legal organizations to provide information about the lived experience of their members, clients and constituents with disability.
- 20 In April 2010, Project Group representatives met with First Peoples Disability Network (Australia) to discuss the CRPD and the lived experience of Aboriginal and Torres Strait Islander peoples with disability.

¹³ See Disability Rights Now <www.disabilityrightsnow.org.au>.

EXECUTIVE SUMMARY

- 21 This Civil Society Report on the Convention on the Rights of Persons with Disabilities (CRPD) presents the perspective of people with disability in relation to Australia's compliance with its obligations under this convention.
- 22 This Civil Society Report has been compiled from consultations with people with disability and their representative and advocacy organisations, evidence from government and community initiated inquiries and various reports and submissions produced by Civil Society involved in the protection and promotion of human rights for people with disability. The issues raised in this report and gaps highlighted in government compliance with the CRPD should be considered in the context of a nation that is relatively wealthy and where most Australians enjoy a high level of freedom, opportunity to gain a good education, find a good job and where there is respect for individual rights.

Progress on Advancing the Rights of People with Disability in Australia

- 23 The Civil Society organisations involved in producing this report acknowledge that over the last 30 years Australia has made much progress in advancing the civil, political, economic and cultural rights of people with disability. This includes:
- (a) disability discrimination legislation including the development of standards on education, transport and access to premises;
 - (b) access to income security through the Disability Support Pension (DSP) and other income allowances;
 - (c) specific measures and programs to support greater participation of people with disability in education, employment and cultural life;
 - (d) specific measures and programs to ensure people with disability are able to live in the community such as the closure of many congregate care facilities and the introduction of individualised, person centred approaches to support independent living in particular the support for a National Disability Insurance Scheme (NDIS);
 - (e) specific measures and programs to ensure people with disability have greater access to the justice system and are free from violence and abuse;
 - (f) the funding of Disabled Persons Organisations (DPO) and a growing commitment to consulting with them on matters that affect the lives of people with disability;
 - (g) the funding of advocacy organisations and legal centres for people with disability;
 - (h) improved funding for aids and equipment including telecommunications;
 - (i) the introduction of a National Disability Strategy (NDS) to implement the CRPD across all jurisdictions in Australia; and

(j) the development and implementation of a Development for All Strategy to inform Australia's obligations under Article 32.

24 However despite these reforms people with disability remain significantly behind people without disability in Australia as well as people with disability in other comparative countries.

25 The following provides a snap shot of the current situation of people with disability in Australia.

Involvement of People with Disability and their Representative and Advocacy Organisations (Articles 4 & 33)

26 Australia has failed to effectively involve people with disability and their organisations at all stages of planning, implementation and monitoring the implementation of the CRPD. This is a critical and underpinning element of compliance with the CRPD and jeopardises all current efforts to respond to human rights breaches and policy gaps in relation to full inclusion of Australians with disability.

27 Australia must establish a robust mechanism and provide adequate resourcing to enable an effective and representative voice for people with disability and their organisations in planning, monitoring and implementation of the CRPD.

28 All Australian governments — federal, state and territory — must provide adequate resourcing to ensure that individuals with disability have access to the advocacy support they need to assert and be accorded their CRPD rights and fundamental freedoms.

Legislative Framework (Article 5)

29 Australia has failed to establish a comprehensive, judicially enforceable Human Rights Act that incorporates Australia's obligations under the Convention. Existing legislation falls short of complete implementation of Convention obligations. Current anti-discrimination legislation does not effectively protect against systemic and intersectional discrimination. Disability discrimination legislation also sets limitations and exemptions that undermine its effectiveness.

30 Legislation, policy and programs differ between state and territory governments. This restricts the ability of people with disability to move between jurisdictions and obtain equal protection of their rights and freedoms throughout the country.

31 Australia must create a Human Rights Act that provides protection for the broader human rights reflected in the CRPD.

Women with Disability (Article 6)

- 32 The greater levels of discrimination and disadvantage experienced by women with disability have largely gone unaddressed and unacknowledged by ‘gender-neutral’ disability service legislation and policy as well as legislation and policy aimed at women in general. Throughout this report, the issues of concern to women with disability are highlighted, with recommendations for all Australian governments to conduct a comprehensive study of the situation of women with disability in Australia, and to strengthen legislative and policy frameworks to ensure that women with disability are able to exercise their rights.

Children with Disability (Article 7)

- 33 Australia does not have a national Children’s Commissioner to specifically promote, advocate and enquire into the rights of all children, including children with disability in Australia. Children and young people with disability are often excluded from decision-making processes aimed at children and young people in general. Aboriginal and Torres Strait Islander children with disability are often not provided with the early intervention supports they require to ensure their full development and participation in community life. This report highlights concerns for children and young people with disability throughout, and recommends that Australia conducts a comprehensive study of the situation of children with disability in Australia with a view to progressing rights contained CRPD and the Convention on the Rights of the Child (CROC).

Priority Intersectional Issues for Australian Government Action

- 34 The intersectional discrimination experienced by people with disability from non-English speaking backgrounds and Aboriginal and Torres Strait Islander people with disability requires priority focus by all Australian governments. Both of these groups experience greater levels of discrimination and disadvantage, including greater levels of poverty. Failure to collect comprehensive disaggregated data often hides this fact. Current discrimination legislation, policies and programs are insufficient to address this issue.

Disability Awareness (Article 8)

- 35 This report highlights the need for concerted action by governments to address disability awareness across all areas of government administration, business and the community. Particular attention is drawn to the need for education on inclusive practices for professionals in media, education, employment, health and the justice systems.

Accessibility (Article 9)

- 36 While there have been some positive achievements of government in providing anti-discrimination legislation, this report calls for a much more robust effort by all levels of government to make communities fully accessible. Compliance with many of the articles in the CRPD relies heavily on accessible infrastructure, transport and telecommunication.

Protection in Humanitarian Emergencies (Article 11)

- 37 Australians have experienced recent humanitarian disasters caused by floods and bushfires during periods of extreme weather conditions. It is clear from these experiences that disaster planning and preparations need to consider the specific needs of people with different forms of impairment during preparation, planning, implementation and post disaster recovery phases of emergency and disaster management.

Equal Recognition Before the Law (Articles 12)

- 38 A number of laws, policies and practices deny or diminish recognition of people with disability as persons before the law, or deny or diminish a person's ability to exercise legal capacity. Substitute decision-making arrangements vary from jurisdiction to jurisdiction and are a key source for significant and widespread breaches of human rights, especially against those who may need support in decision-making.
- 39 Australia must withdraw its Interpretative Declaration in relation to Article 12.

Access to Justice (Article 13)

- 40 People with disability in Australia do not have full access to participation in the justice system on equal terms to people without disability. Participation in juries; accessibility and adaptability of court processes; access to affordable, independent legal services; and, fair treatment and access to disability support and rehabilitation within correctional facilities continue to allow discrimination on the grounds of disability. Further, the failure to acknowledge the credibility of people with cognitive or psychosocial disability before the law, whether as witnesses or victims, enables perpetrators of abuse and criminal assault, to avoid the normal consequences for such acts.
- 41 Disproportionately high numbers of people with disability in the justice system highlight major failures in the justice system to divert and prevent custodial sentences and provide appropriate post custody supports and rehabilitation.
- 42 Major reforms are required with regard to how people with disability are treated in the justice system.

Liberty and Security of the Person (Article 14)

- 43 In Australia, although legislation does not permit the deprivation of liberty without lawful and proper reason, people with disability face higher rates of deprivation of their liberty than the general population. There is evidence that in practice guardianship laws are moving further away from supporting individual autonomy and towards a more paternalistic and protection orientated approach. Particular concerns are raised about the circumstances of those persons with cognitive and psychosocial disability.

Freedom from Cruel and Inhumane Treatment and from Abuse and Neglect (Articles 15 & 16)

- 44 Our consultations revealed evidence of widespread abuse, inhumane treatment and neglect, particularly in relation to people with cognitive and psychosocial disability and people with dementia. Medical model solutions and approaches, behaviour management regimes and significant levels of human rights ignorance by disability and medical professionals all contribute to the abuse and inhumane treatment experienced by people with disability. Significant concerns are also raised about the poor treatment and neglect of people placed in immigration detention centres who experience psychosocial disability as a result of human rights abuses and mistreatment.
- 45 Access to independent individual and systemic advocacy support and legal assistance in relation to these issues is under resourced and not available or accessible to many people with disability who need assistance to protect and promote their human rights.
- 46 This report calls for a major inquiry and significant reforms in relation to abuse, mistreatment and neglect of people with disability who are placed in institutional settings or under compulsory treatment regimes. It also recommends that governments meet their obligations to protect people made vulnerable by such neglect through improved funding for independent advocacy programs accessible to all people with disability.

Protecting the Integrity of the Person (Article 17)

- 47 Existing mental health legislation, policies and practices, especially in relation to compulsory treatment orders (CTO) and the lack of safeguards and resourcing do not adequately protect the integrity of the individual and in some cases actively harm a person's integrity.
- 48 Australia must withdraw its Interpretative Declaration in relation to Article 17.

Freedom of Movement and Nationality (Article 18)

- 49 Australia's immigration and refugee policies discriminate against people with disability and their family, severely restricting their freedom of movement and ability to choose a nationality.
- 50 Australia must withdraw its Interpretative Declaration in relation to Article 18.

Independent Living in the Community and Self Determination (Articles 19 & 20)

- 51 Despite the introduction of legislation to end institutional models of accommodation and disability support, many people with disability continue to rely on institutional warehoused housing and support arrangements due to the lack of a commitment by governments in each jurisdiction to invest in the necessary reforms. Current funding arrangements are significantly underfunded and the administration of funding broken and inefficient and limit or prevent freedom of movement within Australia due to the nature of regional and state based administration arrangements. Access to aids and equipment that promote mobility and independence is also rationed and not offered as an entitlement. On a positive note, Australian governments have endorsed a Productivity Commission (PC) report calling for a massive reform and funding boost to disability support funding in Australia.
- 52 Australia must close all institutions, forced co-tenancy arrangements and other congregate care facilities for people with disability that provide housing and support. They must introduce reforms that make disability support and the aids and equipment needed to live independently in the community an entitlement for all eligible persons as well as ensure that disability support funding arrangements maximise personal autonomy and self-determination.

Freedom of Expression and Access to Information (Article 21)

- 53 In order for all people to share equal opportunities for communication and expression of opinion, there needs to be a significant effort taken by all levels of government to ensure that information available in various media is accessible in alternative formats. It is also critical for deaf people that Australian sign language (Auslan) is officially recognised by governments.

Respect for Home and the Family (Article 23)

- 54 Many people with disability experience discrimination and neglect in relation to their rights to sexual expression, choice of relationships, having a family and parenting support — all of which are taken for granted by most other Australians. Many of those who rely on disability supports experience paternalistic and moralistic attitudes from support staff and service

providers and their needs for assistance in developing and maintaining relationships and friendships and their decisions to enter into marriage or partnerships receive little or no support at a policy or service delivery level. Widespread discrimination against parents with disability occurs in relation to child protection agencies and their interface with the disability support system leading to much higher rates of children being removed from parents with disability than from parents who do not have a disability.

55 Specific attention is drawn to the ongoing use of non-therapeutic sterilisation of women and girls with disability and the failure of Australia to legislate to prohibit this practice.

56 This report calls for major reforms of legislation, support arrangements and education for both people with disability and the wider community in relation to increasing respect and recognition of this fundamental human right to participate in family life. It also calls for legislation to prohibit non-therapeutic sterilisation for women and girls with disability.

Education (Article 24)

57 Australia's failure to ensure that education in mainstream education systems is fully and equitably available to students with disability undermines the potential for people with disability to make their full contribution to the economic, cultural, social and political life of Australian society. Poorly trained teachers, inadequate funding of disability supports and a lack of moral commitment to inclusive education and a failure of leadership by state education administrations all contribute to significant systemic failure in this area. Failure to provide an effective and inclusive education system sustains a continued demand for segregated special schools that limit potential for inclusion in the other areas of life in both childhood and later adulthood.

58 This report calls for a major effort by all Australian governments to provide strong leadership and resourcing for reform in relation to good practice in inclusive education.

Health, Habilitation and Rehabilitation (Articles 25 & 26)

59 Access to community health, acute care and specialist disability health expertise is limited by pressures on broader community health budgets. Discrimination against people with disability in the health system ranges from poor accessibility of facilities, lower expectations about good health given pre-existing disability and access to sexual and reproductive health screening. Lack of adaption of hospital and health service routines and care arrangements to accommodate different disability support needs in these settings makes any stay in a hospital setting stressful and sometimes counterproductive in terms of health outcomes for individuals with disability.

- 60 Access to health services for Aboriginal and Torres Strait Islander people with disability is even more limited, particularly in remote areas, often leading to additional disabling health conditions.
- 61 The lack of intensive habilitation and rehabilitation programs undermines the potential and capacity for many people with disability to experience independent living and full participation in the life of the community. Many of the current services provide segregated supports that lead to segregated lives for many adults with disability. There is also a need for specialist disability health services related to disability specific health needs and a variety of therapy services designed to maximise independence and participation in the life of the community.
- 62 It is vital that all Australian governments audit the health needs of people with disability within broader preventative and proactive health campaigns and that specialist attention to disability related habilitation and rehabilitation are offered within mainstream community health services.

Work and Employment (Article 27)

- 63 Rates of employment of people with disability in Australia are among the lowest in the OECD countries. While there are various government labour market initiatives in place to support employment of people with disability, rates of job placement are very low and tend to benefit those returning to work from an accident rather than those with congenital or long term disability. Little has been done to address structural and systemic barriers in the workplace that limit employability of many people with disability. Employment rates of people with disability in government public services have declined over the last two decades. Poorly paid positions in sheltered/segregated work settings supported and subsidised by government continue to be the only avenue of employment for a significant number of people with disability. There are even poorer employment opportunities for people with disability from Aboriginal and Torres Strait Islander communities often due to a lack of culturally relevant options. Many people with higher support needs who have the same aspirations to work and be productive have been deemed unemployable with significant implications for self worth and well being that arises from a productive life. More creative and broader approaches to work need to be developed that make the most of their capacity for making a positive contribution.

Income and Social Protection (Article 28)

- 64 While Australia provides income security through the Disability Support Pension (DSP) and other allowances, people with disability are over represented in indicators of financial hardship and poverty. Australians with disability are ranked 27th out of 27 countries in the OECD nation rankings for poverty. Despite this, Australia has introduced punitive measures

to force people with disability who are deemed to have a capacity for work, off the DSP and on to unemployment benefits that are a much lower level of income. New impairment Tables that have been introduced will impact negatively on particular groups of people with disability and are not a fair or useful strategy for promoting employment of people with disability.

- 65 While a significant percentage of people from Aboriginal and Torres Strait Islander communities report some type of impairment or health condition, lack of culturally appropriate employment models and limited support services in more remote communities mean that this population is even more severely disadvantaged.
- 66 Migrants with disability coming to Australia (other than those coming on humanitarian grounds) are forced to wait ten years before they can access a Disability Support Pension.
- 67 This report calls for Australia to reform income security to enable people with disability to have a liveable level of income that takes into account the different needs of people with disability from Aboriginal and Torres Strait Islander communities and that eliminates the qualifying period for access to the DSP for migrants.

Participation in Political and Public Life (Article 29)

- 68 Current legislation relating to electoral processes allow for many people with disability (particularly those with intellectual and cognitive disability) to be automatically exempted from Australia's compulsory voting system rather than assuming capacity unless it can be proven otherwise. Accessibility of secret ballot arrangements makes voting less equal and accessible for people with vision or literacy impairments. Inadequate funding to support representative organisations of people with disability limits their capacity to support active participation by people with disability in the political process including standing for elected office.
- 69 This report calls for amendments to the electoral legislation to promote greater accessibility to voting and provision of means of voting and assistance that maximises the chance for all people with disability to meet their obligations as a citizen. Improved funding to representative organisations of people with disability to promote active engagement in the political sphere should be a key strategy.

Participation in Cultural Life, Recreation, Leisure and Sport (Article 30)

- 70 Programs that facilitate and support involvement in a broad range of community cultural and recreation opportunities receive little attention from government. While governments have invested in elite sporting programs, there has been little in the way of investment in accessible and inclusive grass roots participation in recreation, arts and cultural events and programs or sports clubs and activities. Attention to the needs of people with higher

support needs to facilitate social connections and opportunities for friendship and a sense of belonging have declined over the last three decades.

- 71 There is a need for government action to invest in programs that build social connections and friendships through participation in the arts, leisure and sport.

Statistics and Data Collection (Article 31)

- 72 Whilst Australia collects statistics and data in a variety of ways, this data is largely not disaggregated or available to inform policy.
- 73 Australia must develop consistent approaches to the collection of data disaggregated by disability type and other demographic information including gender, age, geographic location, Indigenous status, ethnicity, and cultural background.

International Cooperation and Development (Article 32)

- 74 Australia has made a positive and significant investment of funding to support integrated international development programs. However, there needs to be more emphasis on encouraging Australian people with disability and their organisations to play a leadership role in this process and resourcing to enable them to establish links and connections with disabled person's organisations (DPOs) in developing nations.
- 75 This report calls on Australia to resource leadership and participation by people with disability to have direct links with people with disability and their organisations in other developing nations.

National Implementation and Monitoring (Article 33)

- 76 Whilst Australia has established implementation and monitoring mechanisms for the CRPD, these have been established largely without the involvement of people with disability. The ongoing monitoring of the CRPD remains problematic with only tokenistic involvement of people with disability in the process.
- 77 Australia must involve and adequately resource people with disability through their representative and advocacy organisations in all aspects of the implementation and monitoring processes of the CRPD.

RECOMMENDATIONS

Article 4

- That Australia implements the recommendations of the Universal Periodic Review and establish a comprehensive, judicially enforceable Human Rights Act that incorporates Australia's obligations under the CRPD and other human rights treaties.
- That Australia, in partnership with people with disability through their representative organisations, establishes robust engagement mechanisms for ensuring the meaningful participation in the development and implementation of legislation and policies to implement the present convention and in other decision making processes concerning issues relating to persons with disabilities.
- That Australia ensures that representative organisations of people with disability are adequately resourced to effectively participate in implementation and monitoring activities.
- That Australia ensures that all people with disability have access to the diversity of independent advocacy supports they need to assert and be accorded their human rights and fundamental freedoms under the CRPD. To establish independence and avoid conflicts of interest, government funded advocacy support should be administered at government level and delivered to people with disabilities by agencies that do not fund, administer or deliver disability services.
- That an individual advocacy program owned and managed by Aboriginal and Torres Strait Islander People with disability be established and resourced.

Article 5

- That Australian anti-discrimination laws are strengthened to:
 - address intersectional discrimination;
 - enable complaints to be heard in a no cost jurisdiction;
 - enable representative complaints by Disabled People's, and Advocacy Organisations; and
 - enable complaints regarding vilification and hate crimes on the basis of disability.

Article 6

- That Australia provides the necessary resources to the various collection and reporting agencies (particularly the Australian Bureau of Statistics) to improve the public availability of data disaggregated by gender, disability, age, ethnicity and Aboriginal and Torres Strait Islander status.

- That Australia commissions and funds a comprehensive assessment of the situation of girls and women with disability, in order to establish a baseline of disaggregated data against which future progress towards the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and CRPD rights can be measured.

Article 7

- That Australia establishes a national children's commissioner and office to specifically promote, advocate and enquire into the rights of all children in Australia, including the rights of children with disability.
- That Australia explicitly incorporates CRPD rights, including the principle of the best interest of the child into legislation, policies and programs and service standards, operational procedures and compliance frameworks that apply to children and young people in general.
- That Australia develops comprehensive strategies and mechanisms to ensure that children and young people with disability can fully and equitably participate in consultations, decision-making processes and policy development that affect the lives of children and young people.
- That Australia works with Aboriginal and Torres Strait Islander communities and representative organisations of Aboriginal and Torres Strait Islander children with disability to establish adequately resourced and culturally appropriate, community owned and located responses and support for Aboriginal and Torres Strait Islander children with disability.
- That Australia commissions and funds a comprehensive assessment of the situation of children with disability, in order to establish a baseline of disaggregated data against which future progress towards the Convention on the Rights of the Child and CRPD rights can be measured.

Article 8

- That, as part of the National Disability Strategy 2010 -2020, a national action plan is developed across all governments to address awareness raising of the rights of people with disability in all their diversity.

Article 9

- That the National Disability Strategy incorporates measures, such as licensing requirements or mandatory codes to address the lack of enforcement of the Disability Standards.
- That the National Disability Strategy incorporates measures to address the full range of accessibility obligations under CRPD Article 9.

Article 10

- That Australia develops a clear national policy and guidelines around right to life, including access to life supports that is consistent with and equivalent to people without disability in Australia.
- That Australia ensures that the training of medical professionals includes education about the human rights of people with disability in respect to right to life and access to proper care and treatment to sustain life.

Article 11

- That Australia establishes nationally consistent emergency management standards in consultation with people with disability through their representative and advocacy organisations that are implemented across all three levels of government; that are inclusive across the diversity of impairments and that cover all phases of emergency management preparation, early warning, evacuation, interim housing and support and recovery and building.
- That Australia establishes policies and guidelines to coordinate the work of emergency and disability support agencies and that ensure a continuity of support systems for people with disability during an emergency and in the recovery phase.

Article 12

- That Australia withdraws the Interpretative Declaration in relation to Article 12.
- That, in consultation with people with disability and their representative, advocacy and legal organisations, Australia conducts a comprehensive audit of laws, policies and administrative arrangements that address legal capacity in order to:
 - modify, repeal or nullify any law or policy, and counteract any practice or custom, which has the purpose or effect of denying or diminishing recognition of any person as a person before the law, or of denying or diminishing any person's ability to exercise legal capacity;
 - enact laws that recognise the right of all people in all situations to recognition before the law; that creates a presumption of legal capacity for all people, and which expressly extends to those circumstances where support may be required for a person to exercise legal capacity;
 - recognise the fact that people with disability will be particularly reliant upon these laws, that provisions will be required to oblige all relevant actors to provide reasonable accommodation to meet the needs of people with disability, and designate a range of positive measures to ensure that people with disability are able to exercise legal capacity on an equal basis with others;

- enshrine the primacy of supported decision-making mechanisms in the exercise of legal capacity;
- establish a comprehensive system focused strongly and positively on promoting and supporting people to effectively assert and exercise legal capacity, and on safeguarding against abuse and exploitation in both informal and formal supported and substituted decision-making arrangements; and
- provide specific criminal offences relating to the exploitation, abuse and neglect of people with disability subject to supported and substitute decision-making arrangements.

Article 13

- That Australia prescribes an effective Protective Costs Order jurisdiction for public interest matters.¹⁴
- That adequate funding is provided to Community Legal Centres to ensure access to justice to people with disability, and a National Disability Rights Centre be established.
- That standard and compulsory modules on working with people with disability are incorporated into training programs for police, prison officers, lawyers, judicial officers and court staff.
- That all people with disability be made eligible for jury service.
- That Australia develops comprehensive, gender and culture specific social support programs and systems to identify and prevent the circumstances that contribute to children and young people with disability coming into contact or entering the juvenile justice system.
- That Australia implements a range of gender and culture specific diversionary programs and mechanisms and community based sentencing options that are integrated with flexible disability support packages and social support programs to prevent adults with disability coming into contact or entering the criminal justice system.

Article 14

- That Australia ensures that legislative, administrative and policy frameworks that deprive people with disability of their liberty and impact on their security are fully consistent with the CRPD.

¹⁴ This is in contrast with the approach in Australia where protective costs orders apply equally to both parties.

- That Australia, as a matter of urgency, ends the unwarranted use of prisons for the management of unconvicted people with disability, with a focus on Aboriginal and Torres Strait Islander people with disability, by establishing legislative, administrative and support frameworks that comply with the CRPD.
- That Australia establishes mandatory guidelines and practice to ensure that people with disability who are deprived of their liberty in the criminal justice system are provided with appropriate supports and accommodation.
- That Australia amends legislation in relation to crime to include the specific (statutory) offence of deprivation of liberty.

Article 15

- That Australia ratifies the Optional Protocol to the Convention against Torture.
- That Australia enacts legislation in all jurisdictions in Australia to comprehensively criminalise cruel, inhuman or degrading treatment or punishment and provides for legal action to be taken to remedy a breach.
- That Australia establishes a nationally, consistent legislative and administrative framework for the protection of people with disability from behaviour modification and restrictive practices that cause harm and punishment, including the prohibition of and criminal sanctions for particular behaviour modification practices.
- That Australia develops an evidence-based national plan that outlines actions for the development of positive behaviour support strategies that acknowledge and respect the physical and mental integrity of the person; and for the elimination of environments and treatment approaches that have been shown to exacerbate behaviour that leads to application of inappropriate levels of restriction and restraint.
- That Australia conducts a national inquiry into the use of restrictive practices on children and young people with disability in mainstream and segregated schools and identifies and implements recommendations for the elimination of these practices.
- That Australia acts on the recommendations of the UN Committee against Torture to ensure immigration detainees are provided with adequate physical and mental health care including routine health checks.¹⁵

¹⁵ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) para 25.

Article 16

- That Australia establishes an independent, statutory, national protection mechanism that has broad functions and powers to protect, investigate and enforce findings related to situations of exploitation, violence and abuse experienced by people with disability, and that addresses the multiple and aggravated forms of violence and abuse that result from the intersection of 'disability' with other characteristics, such as gender, age, indigenous status and racial, cultural or linguistic status.
- That Australia commissions the Australian Human Rights Commission to undertake a comprehensive public inquiry into the incidence, forms and circumstances of exploitation, violence and abuse of people with a disability in the community and within a full range of service settings, including addressing the gender and age-related dimensions of exploitation, violence and abuse and the particular situation of Aboriginal and Torres Strait Islander people with disability and people with disability from non-English speaking backgrounds.
- That Australia, in partnership with disability representative and advocacy organisations, establishes a national coordinated strategic framework for the prevention of exploitation, violence and abuse experienced by men, women, girls and boys with disability, that include measures:
 - to build resilience, self-advocacy skills, protective behaviour skills, knowledge of rights and redress among people with disability;
 - to address the specific circumstances of Aboriginal and Torres Strait Islander people with disability and people with disability from non-English speaking backgrounds;
 - to coordinate and link diverse service systems, including disability, mental health, housing, domestic violence and sexual assault services;
 - to reorient service policy and procedures to reflect human rights obligations; and
 - to raise awareness among the community and various systems, such as judicial, legal, medical, social services, health, educational systems.
- That Australia urgently plans for the closure of residential care and other institutional environments, and develops genuine community living options, including providing individualised funding and self-directed supports to people with disability.
- That Australia ensures that all people with disability are able to access the independent advocacy support they need to assert and be accorded their human rights and fundamental freedoms under the CRPD.
- That an individual advocacy program owned and managed by Aboriginal and Torres Strait Islander people with disability be established and resourced.

Article 17

- That Australia withdraws its Interpretative Declaration in relation to Article 17.
- That, in consultation with people with disability through their representative, advocacy and legal organisations, Australia conducts a comprehensive audit of laws, policies and administrative arrangements underpinning compulsory treatment with a view to:
 - introducing reforms to eliminate laws and practices that relate to compulsory treatment that inherently breach human rights;
 - working with people with disability and their representative and advocacy organisations to develop appropriate mechanisms and supports for any person, regardless of disability, who is at risk of causing harm to themselves or others; and
 - implement administrative arrangements that focus on supported decision making.

Article 18

- That Australia removes the Interpretative Declaration in relation to Article 18.
- That the exemption in the *Disability Discrimination Act 1992* (Cth) as it applies to the *Migration Act 1958* (Cth) be removed.
- That Australia ends the use of mandatory HIV testing for all visa applicants and off-shore humanitarian and refugee applicants.
- That Australia improves consistency, transparency and administrative fairness for migrants and refugees with disability applying for an Australian visa.
- That disability support arrangements for people with disability are administered in a manner that enables people with disability relying on these supports to have the same freedoms as people without disability to choose where they live.

Article 19

- That Australia, as an urgent and immediate priority, develops and implements a national framework for the closure of all residential institutions accommodating people with disability, including those operated by non-government and private sectors, and allocates and provides the resources necessary for people to move to individualised community based housing and support options that will support their inclusion and participation in the general community.
- That Australia gives people with disability control over the resources they require to live with dignity in the community, ensuring that people with disability are able to choose where and with whom they live and which person or agency they will contract to provide them with supports.

- That Australia resources independent vision-building processes that assist people with disability and their families to explore and envision genuine community living options instead of 'contemporary' institutional options.
- That Australia develops, in partnership with people with disability and their representative organisations, comprehensive awareness raising strategies to challenge and overcome attitudes and beliefs that perpetuate segregated housing and support options for people with disability.
- That Australia develops, in partnership with people with disability through their representative and advocacy organisations, housing and support policy guidelines and frameworks that ensure that resources, programs and funding allocations, including individualised funding are provided to implement the rights contained in the CRPD.
- That Australia progressively and significantly increases the availability of social support necessary for people with disability to live in and be a part of the community (such as personal care, domestic assistance, and daily living skills support).
- That Australia significantly increases the range, affordability and accessibility of public and social housing stock to ensure that people with disability can maximise their level of independence and freedom and feel safe and secure in their own home.
- That Australia makes a significant investment in enhancing universal design standards and regulations governing accessibility and affordability of all private and public housing.

Article 20

- That Australia establishes a nationally consistent, adequately funded entitlement program for assistive devices, aids and equipment to enable people with disability, including those in rural and remote areas to participate in all areas of community life.
- That Australia, in partnership with Aboriginal and Torres Strait Islander communities and representative organisations, develops mechanisms to establish locally relevant solutions that ensure equipment is suitably robust and repairs and maintenance can be undertaken locally.

Article 21

- That Australia develops standards for accessibility of all information and communication, including in languages of choice and for consultation processes and public events.
- That Australia provides all information in accessible formats including audio description, Braille, Easy and Plain English as well as captioning.
- That Auslan be recognised as Australia's official sign language, and that Deaf peoples' right to use Auslan be legally recognised.

- That Australia formally recognises the communication requirements of people who are DeafBlind, and establishes and resources nationally consistent accreditation courses for DeafBlind interpreters.
- That Australia recognises augmentative and alternative communication in all official communications and provides adequate funding and support for the acquisition of augmentative and alternative communication devices.

Article 22

- That Australia reviews and strengthens safeguards for the protection of privacy of people with disability including information sharing and management between government agencies.
- That people with disability are provided with accessible information and education programs about their privacy rights.

Article 23

- That, in line with the recommendations from the UN Committee on the Rights of the Child, the UN Committee on the Elimination of Discrimination against Women and the UPR, Australia develops nationally consistent and uniform legislation that explicitly prohibits non-therapeutic sterilisation of all children except in circumstances where there is a serious threat to health or life; and that prohibits non-therapeutic sterilisation of adults without their full and informed consent except in circumstances where there is a serious threat to health or life.
- That Australia conducts an urgent national inquiry into the legal, policy and social support environment that gives rise to the removal and / or threat of removal of babies and children from parents with disability.
- That Australia collects appropriate statistical and research data on the number of parents with disability in contact with the child protection system and the number of children removed from parents with disability, disaggregated by gender, ethnicity, Aboriginal and Torres Strait Islander status and other relevant variables, in order to guide policy, funding, and support development.
- That Australia establishes comprehensive and intensive gender specific parenting and family support measures for parents with disability, to assist with maintaining children with their parents and within their own family homes.
- That Australia audits laws, policy and practice governing adoption, reproductive autonomy and procreative choice against the CRPD and establishes measures to remove inconsistencies.

- That Australia establishes measures to raise awareness in the general community, specifically people with disability, their families, the judiciary and agencies involved in child protection about the right to parent, particularly for people with intellectual and psychosocial disability and promote positive images of parents with disability in the community.
- That Australia resources sexuality, relationship and human rights training and information for people with disability, including providing support for agencies that provide access to sexual services, including in residential facilities.
- That Australia ensures that at the next review of the National Child Protection Framework, specific issues and comprehensive strategies for both children and young people with disability and parents with disability are identified and included for implementation.
- That Australia provides significant investment in supports and measures to ensure that families are able to provide appropriate support to their children with disability without needing to resort to relinquishment. Such measures should include methods for the collection of consistent, cross-jurisdictional data about the relinquishment of children with disability by families.

Article 24

- That Australia conducts major research into the effectiveness of current education inclusion policies and extent to which Disability Standards in Education are being implemented in each state and territory.
- That Australia develops consistent strategies for funding students with disability and resourcing, their teachers and teacher aides and school administrators on good practice in inclusive education and the creation of a culture of welcome and inclusion for all students.
- That all teachers who use Auslan are properly certified, and that all children who use Auslan have access to a teacher certified to use Auslan in primary schools, and a qualified Auslan interpreter at secondary school at all times and for all school activities.
- That all students with disability have access to Individualised, portable funding and supports.

- That the following measures in respect of teacher training be implemented to ensure the mainstream inclusion of students with disability:
 - increased training of teachers and teacher's aides involving an emphasis on improving their knowledge and understanding of disability-related issues and suitable curriculum design, skills assessment, behaviour management and instructional strategies;¹⁶
 - all training courses and professional development programs for teachers and integration aides be subsidised and compulsory, undertaken regularly and incorporated into general education training rather than by way of separate disability-specific sessions;
 - increased resources to support teachers and teacher's aides; and
 - ensuring teaching programs include exposure to direct and structured interaction with students with disability in addition to formal instruction.¹⁷
- That bullying and social exclusion of students with disability at school are addressed through national initiatives that seek to change the culture of discrimination and harassment of students with disabilities.
- That a greater emphasis be placed on a holistic approach to inclusion in education that includes social education and participation in all areas of school life.
- That Australia sets targets to increase participation and completion rates by students with disability in tertiary education.
- That educational institutions focus on current best practice approaches to assisting students with disability who are at risk of suspension or expulsion for unacceptable behaviour.¹⁸

¹⁶ Elizabeth Stamopoulos, 'Empowering Preservice Teachers to Embrace Diversity' (2006) 31 *Australasian Journal of Early Childhood*, 30–9 <www.earlychildhoodaustralia.org.au/australian_journal_of_early_childhood/ajec_index_abstracts/empowering_preservice_teachers_to_embrace_diversity.html> 30–39.

¹⁷ Jennifer Campbell, Linda Gilmore and Monica Cuskelly, 'Changing Student Teachers' Attitudes Towards Disability and Inclusion' (2003) 28 *Journal of Intellectual and Developmental Disability* 370 <<http://eprints.qut.edu.au/4305/1/4305.pdf>>.

¹⁸ People With Disability Australia, Submission No 345 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 19 February 2010, 5 <www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/9686E87C7890FDD3CA2576E20082AD01>.

Article 25

- That Australia conducts a national review of the state of health of men, women, boys and girls with disability to identify the gaps between people with disability and the rest of the community in relation to a broad range of health indicators including nutrition, dental, exercise, physiological and mental health.
- That a Public Health Strategy be developed to promote preventative approaches and early diagnosis of health issues among people with disability who may not access work place health check programs available to those in the mainstream workforce.
- That Australia resources the creation of a national network of intellectual disability health specialists as a resource to enhance the capacity of mainstream services to cater to the specific needs of people with intellectual disability.
- That the National Disability Strategy identify gender specific actions to address the health inequity experienced by women with disability that intersect with actions contained in the National Women's Health Strategy.
- That the National Women's Health Strategy include a commitment to rectifying health inequities between women, particularly through identifying the specific health needs and issues of girls and women with disability with specific attention to women with disability from Aboriginal and Torres Strait Islander communities and those living in rural and remote areas.

Article 26

- That a National Disability Insurance Scheme is implemented to provide disability services and supports to all people with a disability who need assistance to participate and be included in the community on an equal basis with others. Such a Scheme should establish an entitlement to the funding necessary to achieve this purpose and provide for the person with disability to be the decision-maker about the services and supports they receive.
- That Australia establishes a mechanism to assess and properly address the therapeutic and allied health needs of all people with disability that need assistance.

Article 27

- That Australia conducts a comprehensive review of the current employment support arrangements for people with a disability with a view to developing a national plan to significantly increase support for men and women with disability, in particular men and women with intellectual disability to move from school to training to open employment.
- That Australia ceases to fund segregated workplace options.
- That Australia funds employment support for all people with disability that is attached to the individual and is able to be used in mainstream settings.

- That Australia conducts an audit of the current supported employment wage assessment tools and industrial conditions with a view to ensuring that people with disability receive equitable and fair remuneration for their work, and receive the supports they need to move from supported employment to open employment.
- That Australia increases investment in addressing structural barriers to the employment of men and women with disability, in relation to workplace accommodations and adaption, accessibility of workplaces, flexibility of work requirements and accessible and affordable public transport.
- That Australia adopts initiatives to increase employment participation of women with disability by addressing the specific underlying structural barriers to their workforce participation.

Article 28

- That Australia prioritises gender-specific research and disaggregated data collection on the links between disability and poverty, including identifying poverty alleviation and monitoring strategies to address poverty among all people with disability.
- That the Disability Support Pension be regularly raised in addition to indexation in recognition of the extra cost of living with disability to ensure people with disability have access to an adequate standard of living.
- That Australia prioritises steps to safeguard and promote the realisation of the right to an adequate standard of living and social protection for people from Aboriginal and Torres Strait Islander communities, including education about income support arrangements and the appropriate and timely provision of disability supports.
- That the 10 year qualifying period for migrants to access the DSP is abolished.
- That Australia revises the Impairment Table developed as an assessment tool to determine level of benefit entitlements to ensure that it is based on a social model International Classification instrument.
- That unemployment and other benefits, such as Parenting Payment be raised to be equivalent with other pension payments.

Article 29

- That Australia preserves the right of people with disability to vote in elections on an equal basis with others by removing section 93(8) of the *Electoral Act 1918* (Cth) ('unsound mind' provision) and/or enacts alternate legislation restoring the presumption of the capacity of people with disability to vote and exercise choice.

- That Australia conducts a thorough, critical review of the legislative and administrative arrangements governing electoral matters to ensure that people with disability can fully and equally participate in electoral processes, including obtaining the right to cast a secret ballot freely and independently.
- That Australia ensures that all aspects of voting in an election are made accessible to all citizens with a disability who are eligible to vote by:
 - enabling people with disability to more easily register for a postal or pre-poll vote;
 - ensuring access to voting places that allow access by public transport and entry to polling stations;
 - providing voting information and forms in alternative formats; and
 - making available electronically assisted forms of voting to those who need it, regardless of cost of providing this facility.
- That Australia ensures that voting materials including 'how to vote' information and the materials involved in recording and lodging votes are provided in alternative formats. This includes the provision of hearing augmentation systems, Auslan interpreters, audio descriptions, Braille versions of documents, materials in easy and plain English and the right to have a person of own choosing to assist with the voting process.
- That Australia ensures voting rights for all Australian citizens held in custody, regardless of the length of their prison sentence.
- That public services in all jurisdictions increase opportunities and support for people with disability to play an active role in public administration.
- That Australia addresses leadership development for people with disability by resourcing people with disability and their representative organisations to develop leadership development initiatives and to promote participation by people with disability in all areas of political and civic life at all tiers of government in Australia.
- That Australia provides adequate resources to representative organisations of people with disability to enable them to participate in the policy process.

Article 30

- That Australia provides sufficient resources to comprehensively implement the National Arts and Disability Strategy.
- That Australia focuses on developing measures to facilitate social connections and friendship for people with disability through provision of disability supports that encourage participation in a wide range of recreation opportunities in line with aspirations and preferences of individuals with disability.
- That Australia adequately supports the participation of people with disability in all aspects of the arts including professional development.

- That Australia adequately supports the participation of people with disability in sports and recreation activities at both grass roots community and elite levels.
- That Australia promotes good practice in accessible tourism.
- That Australia develops comprehensive measures to address barriers to the specific cultural needs and life of Aboriginal and Torres Strait Islander people with disability and people with disability from non-English speaking backgrounds.

Article 31

- That Australia develops nationally consistent measures for the collection and public reporting of disaggregated data across the full range of obligations contained in the CRPD.
- That all data be disaggregated by age, gender, place of residence, type of disability and cultural background.
- That all data collected be available free of charge to people with disability through their representative and advocacy organisations.

Article 32

- That Australia increases its overall aid budget to be commensurate with international standards, and increase its budget commitment to specific disability inclusive initiatives.
- That AusAid employs people with disability in leadership and critical advice roles.
- That Australia actively supports, partners and engages with Australian DPOs in international development.
- That AusAid partners with Australian DPOs to promote the leadership of people with disability in disability inclusive development.

Article 33

- That the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs take urgent action to consult with people with disability through their representative and advocacy organisations about the establishment of an effective and independent monitoring mechanism for progressing both the National Disability Strategy and implementation of the CRPD in Australia.

- That Australia establishes a National Disability Commission and National Disability Research Institute as part of Australia's framework for promoting and monitoring implementation of the CRPD.¹⁹ These institutions should work in cooperation with other elements of Australia's implementation and monitoring framework with all its capacities, powers and duties underpinned by the CRPD.
- That Australia directly incorporates the CRPD into Australian law,²⁰ by the introduction of a Bill of Rights; a provision incorporating CRPD into law; or, specific incorporation or translation of Article 4 obligations into domestic law. (See Article 5)
- That Australia examines its framework to promote, protect and monitor the implementation of the CRPD by ensuring the framework carries out a strategic rather than purely informational role, including monitoring the transformation of major social structures to ensure current and future levels of compliance with the CRPD; and examining the need for any additional measures to ensure compliance with the CRPD in areas that fall outside the direct responsibility of national human rights institutions.²¹
- That Australia adequately resources disability representative, advocacy and legal organisations to participate in the implementation and monitoring of CRPD.

¹⁹ Australian Human Rights Commission, Submission to the Productivity Commission, *Inquiry into Long Term Disability Care and Support*, 2010, 41 <www.hreoc.gov.au/disability_rights/inquiries/NDIS.html>.

²⁰ It is suggested the *Convention on the Rights of Persons with Disabilities* is directly incorporated into Australian law by way of schedule to a national Bill of Rights, provided the Bill of Rights is fully enforceable and supported by monitoring mechanisms surrounding the *Convention on the Rights of Persons with Disabilities*: Phillip French, 'Final Report to the Australian Government Department of Families, Housing and Community Services and Indigenous Affairs, and the Attorney-General: Consultations with Australian Representative Organisations Governed by Persons with Disability, Disability Advisory Councils, and the Disability Legal Services Network on the Impact of Ratification of the *Convention on the Rights of Persons with Disabilities*' (Report, Disability Studies and Research Institute for the Australian Taskforce on CRPD Ratification, June 2009) <www.pwd.org.au/documents/pubs/SB09-National_Human_Rights_Consultation.doc>.

²¹ Australian Human Rights Commission, 'National Human Rights Institutions and National Implementation and Monitoring of the *Convention on the Rights of Persons with Disabilities*' (Paper presented at Asia Pacific Forum of National Human Rights Institutions, Sydney, 2007) <www.hreoc.gov.au/disability_rights/convention/apf07.htm>.

ARTICLE 4 — GENERAL OBLIGATIONS

STATUS IN AUSTRALIA

No Legislation to Enact the CRPD

- 78 While Australia has developed a National Disability Strategy that makes commitments to the implementation of its obligations under the CRPD, it has not enacted legislation that comprehensively protects these rights. (See Article 5)

Disability Discrimination Legislation

- 79 The *Disability Discrimination Act 1992* (Cth) (DDA) makes direct and indirect discrimination on the grounds of disability unlawful in relation to employment, education, access to premises, the provision of goods and services, accommodation, membership of clubs, associations, sports and the administration of Australian Federal laws and programs.

National Disability Strategy

- 80 The National Disability Strategy (NDS) sets out a national policy framework for guiding Australian governments to meet their obligations under the UN CRPD. This framework sets out goals and objectives under six areas of mainstream and disability-specific public policy.

National Disability Insurance Scheme (NDIS)

- 81 The Federal Government commissioned the Productivity Commission to undertake a review of disability support and care arrangements for people with disability and their families. The Commission's report issued in July 2011 proposes a doubling of the level of funding for disability support and significant reforms to the funding and administration arrangements in the form of a national disability insurance scheme. These recommendations are welcome with features of a proposed scheme based on an entitlement to disability supports and a commitment to funding models that promote self-determination. Currently, there is bipartisan support for an NDIS but implementation strategies are unclear and a financial commitment and funding mechanism have not been declared.

Engagement with People with Disability through their Representative Organisations

- 82 While the National Disability Strategy provides a good framework for taking action to implement obligations under the CRPD, civil society organisations of people with disability, advocacy groups and other human rights organisations are dissatisfied with the lack of consultation and meaningful engagement in the process of implementation and monitoring of the strategy. Australia has failed to address its obligations under Article 4.3 to put in place effective and robust mechanisms for consultation, engagement and representation of people with disability in implementation and monitoring of the NDS and NDIS (See also Articles 29 and 33 for further discussion).

- 83 The NDS was developed following comprehensive consultation with people with disability and their representative organisations as well as other key civil society organisations. However, meaningful engagement has not been maintained for the development of the NDS and for the preparation of the NDS implementation plan. The design and implementation process for the NDIS is also being undertaken without effective mechanisms for meaningful engagement of people with disability through their representative organisations.

National and State Disability Advocacy Programs

- 84 Federal and State and Territory Governments provide funding for independent advocacy support to be made available to people with disability to promote and protect their human rights and interests and to support their full participation in the community.²² There is insufficient government funding to respond to the high levels of need for advocacy support so that the advocacy support available across the country is patchy and seriously rationed.²³
- 85 Advocacy programs are currently funded and administered by government agencies that also develop disability policy and fund and administer disability services. This puts advocacy agencies at risk of defunding or other negative action when they criticise government policy or government funded services. Some service providers are also funded to provide advocacy support, which creates a conflict of interest for advocates in advocating against service activities.

RECOMMENDATIONS Article 4

- That Australia implements the recommendations of the Universal Periodic Review and establish a comprehensive, judicially enforceable Human Rights Act that incorporates Australia's obligations under the CRPD and other human rights treaties.
- That Australia, in partnership with people with disability through their representative organisations, establishes robust engagement mechanisms for ensuring the meaningful participation in the development and implementation of legislation and policies to implement the present convention and in other decision making processes concerning issues relating to persons with disabilities.

²² National Disability Advocacy Program, *Program Guidelines Part C*, 5.

²³ Individual advocacy support in some areas is available only by telephone and in other areas it is available only to respond to the most significant rights issues, for example homelessness, abuse, incarceration, removal of children etc. Other forms of advocacy support are simply not available to people living in certain States, Territories or regions, for example multicultural and advocacy support is not available in Tasmania or the ACT, family advocacy support is available only in South Australia and NSW, and there are no Aboriginal and Torres Strait Islander owned and operated independent disability advocacy organisations that are resourced to provide individual advocacy support.

- That Australia ensures that representative organisations of people with disability are adequately resourced to effectively participate in implementation and monitoring activities.
- That Australia ensures that all people with disability have access to the diversity of independent advocacy supports they need to assert and be accorded their human rights and fundamental freedoms under the CRPD. To establish independence and avoid conflicts of interest, government funded advocacy support should be administered at government level and delivered to people with disabilities by agencies that do not fund, administer or deliver disability services.
- That an individual advocacy program owned and managed by Aboriginal and Torres Strait Islander People with disability be established and resourced.

ARTICLE 5 — EQUALITY AND NON-DISCRIMINATION

STATUS IN AUSTRALIA

- 86 In 2009, Australia introduced the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth). This Act amended the *Disability Discrimination Act 1992* (Cth) (DDA). The amendments resulted in the creation of an individual right of complaint in relation to breaches of CRPD by Australia, which can be investigated and conciliated by the Australian Human Rights Commission (AHRC). If not resolved through conciliation, a report can be prepared and tabled in Parliament. However, there is no right to access an Australian court in relation to a breach of the CRPD.
- 87 The scope of protected rights and grounds of discrimination are much narrower in Australia than under international human rights law. No comprehensive legislative, administrative, judicial or other protection of human rights currently exists in Australian domestic law.²⁴ Although ad hoc human rights obligations exist through statute law, common law and the Constitution, human rights protection in Australia remains limited.
- 88 As a result, only part of Australia's CRPD obligations have been implemented into domestic law. This piecemeal statutory framework of discrimination and equal opportunity laws fails to provide comprehensive uniform human rights protections. Although Victoria and the Australian Capital Territory have introduced limited human rights legislation,²⁵ neither of these instruments give courts the powers to strike down laws inconsistent with human rights legislation, nor do they protect economic, social or cultural rights.
- 89 The DDA makes it unlawful to directly or indirectly discriminate against a person, group of people or their associates on the ground of disability, in certain areas of public life. The DDA provides a defence to discrimination, where the avoidance of discrimination would cause an unjustifiable hardship.²⁶ Each of the Australian States and Territories has enacted similar legislation.

²⁴ The UN Committee against Torture has noted its concern that Australia does not have a constitutional or legislative protection of human rights at the Federal level by way of a Federal Bill or Charter of Rights: Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) para 9.

²⁵ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

²⁶ *Disability Discrimination Act 1992* (Cth) s 21B.

- 90 Complaints about breaches of the DDA can be made to the AHRC, the national independent commission administering human rights law, which can conciliate but not adjudicate complaints. If unresolved at the AHRC, the individual complainant must pursue their complaint through the federal courts.²⁷
- 91 The DDA also provides for the creation of Disability Standards which specify rights and responsibilities in relation to any area of unlawful discrimination.²⁸ Currently standards have been passed in relation to Education, Transport and Access to Premises.²⁹ (Refer to Articles 9 and 24)
- 92 As of 2010 the Federal Government has commenced a review of all federal anti-discrimination laws with the intention of consolidating all federal discrimination acts/anti-discrimination laws into one comprehensive Act.

Limitations of the *Disability Discrimination Act 1992* (Cth)

- 93 The rights of people with disability to non-discrimination are limited in six key areas:
- (a) failure to address intersectional discrimination;
 - (b) ineffective complaints process;
 - (c) lack of protection for systemic discrimination;
 - (d) a lack of protection against vilification;
 - (e) exemption clauses that allow discrimination on grounds of disability in migration, insurance and infectious diseases, pensions and allowances and combat and peacekeeping duties (see Articles 18, 25, 27, 28 and 29); and
 - (f) a lack of community legal education outreach regarding individuals' rights and protections under the DDA, in particular the lack of outreach to Aboriginal and Torres Strait Islanders communities and people with disability from non-English speaking backgrounds.
- 94 Some of these limitations are being considered as part of the consolidation process mentioned above.

²⁷ These courts are costs jurisdictions, meaning the individual must bear the costs of doing this. See also art 13 on Access to Justice.

²⁸ *Disability Discrimination Act 1992* (Cth) s 31.

²⁹ See Human Rights and Equal Opportunity Commission <www.hreoc.gov.au/disability_rights/standards/standards.html>.

A Failure to Address Intersectional Discrimination

- 95 Persons who experience double discrimination, for example, persons who are Aboriginal or Torres Strait Islander and who have a disability, have no legal remedy for the interaction of both instances of discrimination.

Case Study

An Aboriginal elder from northern New South Wales was forced to leave his community and move to a large town so that he could access dialysis treatment, which he requires three times a week. Many non-Aboriginal people who live outside his town and who require regular medical treatment are able to use community transport services to take them to the hospital and accordingly are able to remain in their communities. However, the community transport service does not travel to many of the Aboriginal communities, including to the Aboriginal elder's town. Unable to drive, the elder had no choice but to leave his community. The man is not being discriminated against because of his disability, as community transport is provided to others who require dialysis. Nor is he being discriminated against because of his race, as other Aboriginal people can access community transport when they are healthier and able to walk or drive to another town. It is really the intersection between these two attributes that have led to the discrimination.³⁰

- 96 The failure of Australian discrimination laws to address this type of discrimination has meant that discrimination law has not been utilised by the most disadvantaged people in our community — that is, people experiencing complex and multiple forms of discrimination.

Ineffective Complaints Process

- 97 The onus is on people with disability to enforce breaches of discrimination law, through the lodgement of individual complaints through the AHRC or its State and Territory counterparts.
- 98 In AHRC conciliations, there is a power imbalance between the complainant and respondent (usually a company or government agency). This power imbalance is even more prominent when a complainant is without legal representation, a frequent issue. Should the parties reach a settlement agreement at conciliation, any resulting agreement is only binding between the parties to the complaint. Currently, there is no enforcement agency and the complexity of bringing legal proceedings makes it even more difficult for the complainant to enforce an agreement reached through conciliation.

³⁰ National Association of Community Legal Centres, Submission to the Attorney-General, *Areas for Increased Protection in Discrimination Law: Consolidation of Federal Discrimination Legislation*, April 2011.

- 99 If conciliation fails, a complainant can take a matter to the Federal Court or the Federal Magistrates Court for determination. However, the financial and personal costs of pursuing legal action can limit the extent to which individual complainants take this course of action. (See also Article 13)

Case Study

A student with a vision impairment studying for her final high school exams found it very difficult to gain access to texts in an accessible format. Her marks suffered as a result. She was given the option of taking the matter to court and was advised that she had a very strong test case. However, if she lost, she would have to pay the other side's legal costs that could be up to \$20,000. She was also not prepared to spend her final year in school fighting over the issue in court nor deal with the associated stress. She chose not to pursue it any further. Consequently, her case was not tested and students with vision impairments continue to struggle in obtaining access to texts in accessible formats within a reasonable time period.³¹

Lack of Protection for Systemic Discrimination

- 100 There are significant limitations of the individual complaints system for dealing with repeat discriminators, and for entrenched practices and systemic discrimination.³²

Case Study

Over a period of some years, a community legal centre represented a number of people with disability who all complained that the same airline had requested they travel with a companion, and that they pay for that companion ticket. None of these people knew each other or of each others' complaints. Each complaint settled at the conciliation stage of the process, where the complainants received compensation. The community legal centre recognised there were entrenched problems with the airline, but that there was no way to systemically address such problems in the current system.

³¹ NSW Disability Discrimination Legal Centre, Submission No 692 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 5 March 2010, , 11 <[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/10a55136c0cfe885ca2576ee0076efd2/\\$FILE/Submission%20692.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/10a55136c0cfe885ca2576ee0076efd2/$FILE/Submission%20692.pdf)>.

³² Australian Senate, *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2009), <www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/index.htm>; E Gaze, 'The Costs of Equal Opportunity — Will Changes to HREOC Solve the Problem of Anti-Discrimination Law Enforcement?' (2000) 25(3) *Alternative Law Journal* 125–130.

- 101 Organisations are also reluctant to bring representative complaints under the DDA, due to uncertainty as to whether they will have standing.³³
- 102 Attempts to address systemic discrimination through the development of disability standards in relation to transport, education and access to premises have failed to address systemic discrimination. The standards have placed de facto limitations on people's rights as prescribed within the DDA. There is no incorporation of adequate and appropriate enforcement mechanisms outside the individual complaints process.

Lack of Protection against Vilification and Hate Crimes (see also Articles 15 and 16)

- 103 Currently, Tasmania is the only jurisdiction that provides a statutory prohibition of vilification on the basis of disability.³⁴ No jurisdiction has legislation prohibiting hate crimes.
- 104 The failure to provide for adequate measures dealing with vilification and hate crimes on the ground of disability means injurious treatment of people with disability can currently take place without redress.³⁵

Case Studies

A 24 year old intellectually disabled man was tortured, forced to lick the toilet bowl and beaten to death by four people. The judge is reported to have said "the assaults were not serious".

In July, 2011 a man with intellectual disability on the New South Wales Central Coast was bashed by four youths, causing head injuries.

Similarly, a teacher chose not to report an incident where seven boys attacked and sexually assaulted a 13 year old student with disability in her own schoolyard.³⁶

³³ In *Access for All (Hervey Bay) v Hervey Bay City Council* [2007] FCA 615, the Court found that the applicant did not have standing to commence proceedings in the Federal Court because the majority of its members were not directly affected by the relevant conduct.

³⁴ *Anti-Discrimination Act 1998* (Tas).

³⁵ NSW Disability Discrimination Legal Centre, Submission, *National Human Rights Consultation*, June 2009 <[www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/0C448E8DB8D98769CA25761000800839/\\$file/NSW%20Disability%20Discrimination%20Legal%20Centre%20Inc_AGWW-7SX3TY.doc](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/0C448E8DB8D98769CA25761000800839/$file/NSW%20Disability%20Discrimination%20Legal%20Centre%20Inc_AGWW-7SX3TY.doc)>.

³⁶ Dick Sobsey, *Violence and Abuse in the Lives of People with Disability: The End of Silent Acceptance?* (Paul H Brookes Pub Co, 1994).

RECOMMENDATIONS Article 5

- That Australian anti discrimination laws are strengthened to:
 - address intersectional discrimination;
 - enable complaints to be heard in a no cost jurisdiction;
 - enable representative complaints by Disabled People’s and Advocacy Organisations; and
 - enable complaints regarding vilification and hate crimes on the basis of disability.

ARTICLE 6 — WOMEN WITH DISABILITIES

STATUS IN AUSTRALIA

Situation and Data about Girls and Women with Disability in Australia

- 105 Women with disability make up about 20.1 percent of the population of Australian women, equating to about two million people.³⁷ It has been recognised that they face a “double disadvantage” due to the fact that “they are discriminated against on the basis of gender, and as people they are discriminated against on the basis of their disability”.³⁸
- 106 There is little data or research about the specific situation of Aboriginal and Torres Strait Islander girls and women with disability and girls and women with disability from non-English speaking backgrounds, but information reported in consultations strongly suggests that significant discrimination and disadvantage is faced by these groups.
- 107 In the 2006 Concluding Observations made by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), concerns were expressed to Australia about the lack of reporting of data disaggregated by gender, sex and disability which would support effective analysis of legal and policy measures taken towards the practical realisation of equality for women.³⁹ (See also Article 31)
- 108 In the 2010 Concluding Observations made by the CEDAW Committee, a number of concerns were expressed to Australia about the situation of girls and women with disability, particularly in relation to educational and employment disadvantage, lack of participation in leadership and decision-making positions, the high levels of violence and the ongoing practice of non-therapeutic sterilisation.⁴⁰ The CEDAW Committee urged Australia, “in light of its recent ratification of the Convention on the Rights of Persons with Disabilities, to undertake a comprehensive assessment of the situation of women with disabilities in Australia”.⁴¹

³⁷ Carolyn Frohmader, Women with Disabilities Australia, Submission, *National Human Rights Consultation*, May 2009, 7 <www.wwda.org.au/wwdahrsb1.pdf>.

³⁸ Domestic Violence and Incest Resource Centre, *Triple Disadvantage: Out of Sight, Out of Mind — Violence against Women with Disabilities Project* (2nd ed, 2003) <www.wwda.org.au/triple1.pdf>.

³⁹ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, 34th sess, UN Doc CEDAW/C/AUL/CO/5 (3 February 2006).

⁴⁰ CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, 46th sess, UN Doc CEDAW/C/AUL/CO/7 (30 July 2010) para 42.

⁴¹ *Ibid* para 43

Non-Therapeutic Sterilisation against Girls and Women with Disability (see Article 23)

- 109 Non-therapeutic sterilisation of people with disability is a particularly grave form of human rights abuse, and one that impacts particularly on girls and women with disability.⁴² The authorisation of non-therapeutic sterilisation is particularly relevant for breaches of Articles 6, 7, 17 and 23. In this report it is fully discussed under Article 23.

Violence (see Article 16)

- 110 Women with disability are more likely than men with disability and women without disability to be victims of all forms of violence.⁴³ Furthermore, evidence indicates that the violence perpetrated against women with disability is more severe and is committed over an extended period.⁴⁴

Discrimination and Inadequate Access to Healthcare (see Articles 23 and 25)

- 111 Women with disability continue to face significant inequality in regard to access to adequate healthcare. This is particularly the case in respect of sexual and reproductive healthcare. Gender specific health needs are invisible in mental health services and rarely acknowledged. These issues are largely canvassed in Articles 23 and 25.

Discrimination in Employment and Remuneration (see Articles 27 and 28)

- 112 In its 2010 Concluding Observations, the UN CEDAW Committee expressed its concern about “the limited access to job opportunities for women with disabilities”.⁴⁵ Women with disability are significantly disadvantaged in employment in relation to access to jobs, in regard to remuneration for the work they perform and in the types of jobs they gain. These issues are raised in Articles 27 and 28.

Overrepresentation and Treatment in the Prison System (see Articles 13 and 15)

- 113 Women with disability are overrepresented in the prison system in Australia. In particular, the incarceration rates for Aboriginal and Torres Strait Islander women with disability are higher than equivalent figures for men.

⁴² Carolyn Frohmader, Submission, above n 37, 12; People With Disability Australia, Submission, *National Human Rights Consultation*, 2009, 30.

⁴³ YWCA and Women’s Legal Services Australia, *CEDAW NGO Shadow Report* (2009) 37.

⁴⁴ National Council to Reduce Violence against Women and their Children, ‘Background Paper to Time For Action: The National Council’s Plan for Australia to Reduce Violence Against Women and their Children, 2009–2021’ (Background Paper, Department of Families, Housing, Community Services and Indigenous Affairs, March 2009) <http://www.fahcsia.gov.au/sa/women/pubs/violence/np_time_for_action/background/Documents/Background_Paper_to_Time_for_Action.PDF>.

⁴⁵ CEDAW Committee, *Concluding Observations*, above n 40, para 38.

RECOMMENDATIONS Article 6

- That Australia provides the necessary resources to the various collection and reporting agencies (particularly the Australian Bureau of Statistics) to improve the public availability of data disaggregated by gender, disability, age, ethnicity and Aboriginal and Torres Strait Islander status.
- That Australia commissions and funds a comprehensive assessment of the situation of girls and women with disability, in order to establish a baseline of disaggregated data against which future progress towards the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and CRPD rights can be measured.

ARTICLE 7 — CHILDREN WITH DISABILITIES

STATUS IN AUSTRALIA

National Human Rights Protection

- 114 In response to recommendations arising from the Universal Periodic Review, *Australia's National Human Rights Action Plan Exposure Draft* (NHRAP Exposure Draft) includes an action to explore options for establishing a National Children's Commissioner. However, it is unclear whether this action will include recognition of the particular susceptibility of children with disability to human rights violations. As at March 2012, the NHRAP Exposure Draft has not been finalised or endorsed by Australian governments.
- 115 Australia does not have a comprehensive national policy framework for children that articulates how the rights of children, including children with disability should be implemented, monitored and promoted across all jurisdictions. The UN Committee on the Rights of the Child (CRC Committee) commented on this omission in 2005.⁴⁶ The National Framework for Protecting Australia's Children is only focused on child protection against violence, abuse and neglect, not on all human rights issues. (See also Article 16)
- 116 The CRC Committee expressed its concern "about the paucity of information on disabled children, especially when it comes to data on disabled indigenous children, alternative care for children with disabilities and children with disabilities living in remote or rural areas".⁴⁷ The CRC Committee recommended that Australia "adopt a consistent national approach to the collection of data on children with disabilities",⁴⁸ however this has not occurred.
- 117 Disability Services Standards, which exist under disability services legislation in all States and Territories provide guiding principles for quality disability service provision. However, these Standards are adult focussed and do not address principles relating to the 'best interests of the child', the evolving capacity of children to make decisions or age-appropriate services and supports.
- 118 The principle that the best interests of the child be a primary consideration is part of Australian policy and law but is not always effectively applied, or is applied inconsistently to children and young people with disability in different States and Territories across Australia.

⁴⁶ Committee on Rights of the Child, *Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005) paras 11 and 16.

⁴⁷ *Ibid*, para 46.

⁴⁸ *Ibid*, para 46(a).

- 119 Human rights violations and the failure to consistently apply the ‘best interests’ principle based on human rights obligations will be considered further in relation to right to life of newborn children with disability (discussed in Article 10), the over representation and treatment of young people with disability in the juvenile justice system (discussed in Articles 13 and 15); restrictive practices used in schools (discussed in Article 15); violence, exploitation and abuse (discussed in Article 16); forced sterilisation of children with disability (discussed in Article 23); relinquishment of children with disability (discussed in Article 23) and the right to education (discussed in Article 24).

Freedom to Express Views Freely

- 120 Children and young people with disability are not provided with adequate opportunities or accessible information to assist them to express their views freely in matters that affect them. While there are some genuine examples of Australian governments engaging children and young people with disability in consultations and decision-making forums, there is no national, comprehensive approach to seek the views of children and young people with disability.
- 121 A lack of communication aids and support from an early age is a key barrier that prevents young people and children with disability from participating in decision making processes.
- 122 Attitudes that assume that young people with disability do not have the same interests, issues and insights as other young people, and that they belong in a specialist disability sector create a significant barrier to their participation in consultations and decision-making forums.

Aboriginal and Torres Strait Islander Children and Young People with Disability

- 123 There is limited information available about the prevalence of impairment and disability among Aboriginal and Torres Strait Islander children and young people. However, in 2005 the Commonwealth Steering Committee for the Review of Government Service Provision found that 37 percent of the Aboriginal and Torres Strait Islander population had a disability, and that this figure did not include people with psychosocial disability.
- 124 The higher incidence of impairment amongst Aboriginal and Torres Strait Islander communities results from a number of social circumstances including:
- (a) lack of access to appropriate health care;
 - (b) poor nutrition;
 - (c) lack of accessible, habitable and culturally appropriate housing;
 - (d) exposure to violence and psychological trauma, such as that caused through dispossession and forced removal from families and communities; and
 - (e) substance abuse, as well as the breakdown of traditional community structures in some areas.

- 125 A key problem is a lack of accessible and culturally relevant information about ‘disability’ and available community services.
- 126 Consultations conducted by First Peoples Disability Network (Australia) highlighted inadequate culturally appropriate support available to Aboriginal children and young people with disability and their parents. Even where services are available, parents may have to deal with as many as six or seven different government departments during the early years of the life of the child. Many parents are reluctant to seek assistance from the service sector because of lack of trust and the trauma resulting from the well-documented removal of children from Aboriginal families.
- 127 As a result of these barriers very few children receive early intervention and support. In cases where early intervention is received, it is based on the medical model of disability, focussing on a primary health outcome, rather than the broader social consequences of the disability.

Case Study

A young Aboriginal girl who lives in a remote community has Otitis Media (glue ear). The young girl receives medical treatment for Otitis Media. However, as a result of her hearing impairment she has acquired a learning disability which has not been diagnosed. After treatment for the Otitis Media she is able to hear in class, however struggles to keep up because of the learning disability. While a health outcome is achieved, no attention is given to the learning disability.

RECOMMENDATIONS Article 7

- That Australia establishes a national children’s commissioner and office to specifically promote, advocate and enquire into the rights of all children in Australia, including the rights of children with disability.
- That Australia explicitly incorporates CRPD rights, including the principle of the best interest of the child into legislation, policies and programs and service standards, operational procedures and compliance frameworks that apply to children and young people in general.
- That Australia develops comprehensive strategies and mechanisms to ensure that children and young people with disability can fully and equitably participate in consultations, decision-making processes and policy development that affect the lives of children and young people.

- That Australia works with Aboriginal and Torres Strait Islander communities and representative organisations of Aboriginal and Torres Strait Islander children with disability to establish adequately resourced and culturally appropriate, community owned and located responses and support for Aboriginal and Torres Strait Islander children with disability.
- That Australia commissions and funds a comprehensive assessment of the situation of children with disability, in order to establish a baseline of disaggregated data against which future progress towards the Convention on the Rights of the Child and CRPD rights can be measured.

ARTICLE 8 — AWARENESS-RAISING

STATUS IN AUSTRALIA

- 128 There are a number of initiatives that have been taken by Australian governments to provide disability awareness, training and resources. For example, the Federal Government has provided funding for 'Ramp Up', a portal on the ABC website specifically dedicated to disability issues;⁴⁹ and introduced the 'Mindframe National Media Strategy' involving several projects aimed at reducing stigma in the media against people with psychosocial disability.⁵⁰ In New South Wales, media guidelines assist the industry in how to use appropriate language, avoid common stereotypes as well as report on, communicate with and interview people with disability.⁵¹
- 129 Australian governments celebrate International Day of People with Disability through organising or sponsoring a variety of activities and events at the national, State and local level.
- 130 However, there is no national targeted strategy to raise awareness of people with disability in all their diversity. In particular, there has been a lack of focus on awareness raising in the wider community of the specific cultural understanding, meaning and experience of disability in Aboriginal and Torres Strait Islander communities; and a lack of awareness raising within Aboriginal and Torres Strait Islander communities of the rights and entitlements of people with disability.⁵²

⁴⁹ For example, the Department of Education, Employment and Workplace Relations website provides a booklet resource: Anthony Shaddock, Loretta Giorcelli and Sue Smith, 'Students with Disabilities in Mainstream Classrooms: A Resource for Teachers' (Booklet, Department of Education, Employment and Workplace Relations, 2007)

<www.dest.gov.au/sectors/school_education/publications_resources/profiles/documents/learning_outcomes_students_disabilities_resource_pdf.htm>. In NSW, the 'Full Time Special Education Retraining Programs', funded by the NSW Department of Education and Training, are designed to train teachers full-time or part-time to work with students with a range of disabilities including those with vision and hearing impairments. See <www.det.nsw.edu.au/employment/teachnsw/retrain/speduftinfo.htm#introduction>.

⁵⁰ Lorraine Chiroiu, 'Fighting Stigma in the Media' (2003–2004) 1 *The Australian Health Consumer* 6, 8 <www.chf.org.au/ahc-2003-1-fighting-stigma.chf>.

⁵¹ Disability Council of NSW, *Media Guidelines* <www.disabilitycouncil.nsw.gov.au/archive/94/hume.pdf>.

⁵² Consultation with First Peoples Disability Network Australia.

The Media

- 131 Whilst there are some industry codes of practice and guidelines that contain provisions relating to disability, such as the Commercial Television Industry Code of Practice 2010, people with disability are rarely featured in the Australian mass media and if featured, are often portrayed negatively.⁵³ The media negatively portrays people with disability by:⁵⁴
- (a) focusing on the impairment of the individual rather than external disabling barriers;
 - (b) perpetuating stereotypes; and
 - (c) using negative images, language and terminology.
- 132 In particular, the media regularly depicts persons with psychosocial disability as violent and dangerous despite the fact 80 to 90 percent of persons with psychosocial disability never commit a violent offence.⁵⁵ An Australian study⁵⁶ on 12,000 media items relating to psychosocial disability indicated 20 percent of news items used inappropriate language, 14.4 percent were stigmatising, 16.6 percent treated people as similar in personality, nearly one third of headlines were sensationalised and only 6.6 percent of news items contained contact details for readers to get further information on psychosocial disability.
- 133 Another study of a major daily newspaper in South Australia into portrayals of people with disability across 29 articles found 13 were negative in tone, 6 were positive, 4 were neutral and 6 were mixed.⁵⁷ A link between crime and psychosocial disability was also reinforced and there were references to the heroism of particular people with disability.⁵⁸ The reporting did not emphasise the individual but their disability and accentuated stereotypes of victimisation or disempowerment.⁵⁹ Further, the articles tended to use phrases with a negative tone such as 'suffers from' or 'confined to a wheelchair' and the emotive content of disability was regularly highlighted.

⁵³ Catherine Francis et al, *Mental Health and Illness in the Media: a Review of the Literature* (undated) 5 <www.mindframe-media.info/client_images/372859.pdf>.

⁵⁴ Disability Planet, *Media Representation of Disabled People* (2006) <www.disabilityplanet.co.uk/critical-analysis.html>.

⁵⁵ NSW Consumer Advisory Group, *Challenging Stigma and Discrimination* (2008) <www.nswcag.org.au/page/challenging_stigma_discrimination.html>.

⁵⁶ Jane Pirkis et al, *The Media Monitoring Project: A Baseline Description of How the Australian Media Report and Portray Suicide and Mental Health and Illness* (undated) <www.mindframe-media.info/client_images/372856.pdf>.

⁵⁷ Kerry Green and Stephen Tanner, 'Reporting Disability' (2009) *Asia Pacific Media Educator* 46.

⁵⁸ *Ibid* 50.

⁵⁹ *Ibid* 51.

Case Study

A newspaper published sensationalist articles about a Queensland forensic unit with headlines such as 'Gates of Hell' and 'Door prone to unlocking as mentally ill walk past'. The language used included 'criminally insane' and 'asylums'.⁶⁰

Case Study

An Australian television program called 'Domestic Blitz' ran an episode on doing a 'home makeover' for a 'very deserving' woman in a wheelchair. The program's formula portrays the stereotypical view that people with disability are in need of sympathy and charity.

- 134 There is a lack of disability awareness training in the workplace resulting in continuing stigma regarding the work capabilities of people with disability.⁶¹ The skills of mainstream recruitment and employment agency personnel are often insufficient for addressing the needs of people with disability as a result of minimal personal contact with people with disability, limited disability awareness training and little knowledge of anti-discrimination legislation.⁶²
- 135 In Australia, people with disability experience prejudice and discrimination within the justice system due to inadequate knowledge and awareness of disability by judicial and non-judicial staff. (See also Article 13) Police officers receive only minimal disability awareness training and there are only a limited number of specialist online courses containing information on issues concerning, for example, persons with intellectual disability.⁶³
- 136 The negative experiences of parents with disability in relation to child protection matters before the courts demonstrates a lack of awareness training on the human rights of parents with disability and their capacity to be effective parents.⁶⁴

⁶⁰ Sane Australia, *Misleading Reporting* (2009) <www.sane.org/stigmafiles-2009>.

⁶¹ Manpower Services, Submission, *Inquiry into Equal Employment Opportunity and Participation for People with Disability*, 2005, 5 <www.hreoc.gov.au/disability_rights/employment_inquiry/subs1/sub34.manpower.pdf>.

⁶² Physical Disability Council of Australia, Submission, *National Mental Health and Disability Employment Strategy*, 2008, 5 <www.pda.org.au/uploads/published_papers/PDCA%20NMH_Submission.pdf>.

⁶³ NSW Law Reform Commission, 'People with an Intellectual Disability and the Criminal Justice System', (Report No 80, 1996) <www.lawlink.nsw.gov.au/lrc.nsf/pages/R80CHP9>.

⁶⁴ Parents with Disabilities Community Network Victoria, 'Our Forgotten Families: Issues and Challenges Faced by Parents with Disabilities in Victoria' (Report, 2010).

- 137 Disability awareness training is not compulsory in health and medical courses at university or in the workplace, and there is a lack of trained staff to meet the disability-related requirements of people with disability.
- 138 The large numbers of people with disability who are unable to have their support needs met in the disability service system often results in lobbying for additional government funding that is based on strong negative messages and portrayals of people with disability. Rather than portraying people with disability as individuals unable to enjoy full inclusion, participation and independence because of the lack of supports, the focus is on the 'burden' on carers and family members.
- 139 The presentation of people with disability as an unbearable burden of care perpetuates a strong image of disability as being about personal incapacity at the individual level and a social and economic impediment at the societal level.

RECOMMENDATION Article 8

- That, as part of the National Disability Strategy 2010–2020, a national action plan is developed across all governments to address awareness raising of the rights of people with disability in all their diversity.

ARTICLE 9 — ACCESSIBILITY

STATUS IN AUSTRALIA

- 140 In implementing the obligation under Article 9 to take appropriate measures to ensure equality of access for people with disability, Australia has developed the National Disability Strategy 2010-2020 (NDS). *Outcome 1, Inclusive and Accessible Communities* addresses access to the physical environment, transport, digital information and communications technologies, housing and universal design (see discussion in Article 19), arts, recreation, sport and cultural life (see discussion in Article 30).
- 141 Current commitments under the NDS include the Disability Standards developed under the *Disability Discrimination Act 1992* (Cth) (DDA). (See Article 5) These Standards were developed prior to the CRPD and in many respects do not address all barriers to access covered in the CRPD.

Disability Standards for Accessible Public Transport 2002

- 142 The Disability Standards for Accessible Public Transport 2002 (DSAPT)⁶⁵ aim to provide clarity on the obligations for public transport providers under the DDA.⁶⁶ The DSAPT do not provide sufficient guidance and certainty to transport service providers, nor are there any mandatory provisions.⁶⁷
- 143 Breaches of DSAPT rely on individual complaints, and at this stage very few complaints have been tested in a court of law.⁶⁸ The lack of judicial interpretation means that key terms such as ‘accessible information’ that are not specifically defined in the DSAPT are still open to interpretation.⁶⁹

⁶⁵ *Disability Standards for Accessible Transport 2002* (Cth).

⁶⁶ *Disability Standards for Accessible Transport 2002* (Cth) ss 1.2(1) and (2).

⁶⁷ The Allen Consulting Group, ‘Review of the Disability Standards for Accessible Public Transport — Draft Report’ (Draft Report to the Minister for Infrastructure, Transport, Regional Development and Local Government and the Attorney-General, 2008) 120

<www.infrastructure.gov.au/roads/passengers/disabilities/review/files/ACGTransportReviewDraftReport.pdf>. The final report on the review is currently being considered by the Australian Government.

⁶⁸ The enforceability of the *Disability Standards for Accessible Transport 2002* (Cth) under the *Disability Discrimination Act 1992* (Cth) is yet to be judicially considered in Australia.

⁶⁹ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

- 144 There are a number of exclusions from the DSAPT, which have a negative impact on people with disability. For example, dedicated school bus services and small airports and aircraft are excluded from the DSAPT. This means that many children with disability are unable to travel with their classmates to school and have to use more expensive means of travel; and that people with disability in regional and remote areas, where smaller aircraft and airports are a key mode of transport, are unable or limited in their capacity to travel.

Barriers to Public transport

- 145 There are no other current commitments in the NDS to address access to public transport aside from the DSAPT. However, despite the DSAPT being in force for ten years, people with disability continue to experience significant barriers to transport, which affects their ability to live independently and participate fully in society raising issues under Articles 19, 20, 24, 25, 27, 28, 29 and 30.
- 146 Many people with disability report that it is not easy for them to use public transport from where they live.⁷⁰

Case Study

*"I would like to use public transport more, but bus lines are not fully accessible and often don't advertise accessible buses on their schedules. Trains are accessible but the whole train system in Melbourne isn't good. Accessible trams are still rare and are only changing slowly. Taxis are unreliable and often late."*⁷¹

- 147 Accessible transport is particularly an issue in remote communities where large distances, social isolation and being unable to afford or drive a private vehicle only serves to amplify transportation accessibility deficiencies when there are no alternatives for people with disability.⁷²
- 148 Taxi services do not provide access to people with disability on terms that are equal to other members of the public, and accessible taxis do not match the reliability, availability and quality of service offered to the general public.⁷³

⁷⁰ Julia Farr Association, 'Tell Us Survey — Report No. 3: Accessibility', 5.

⁷¹ CRPD Shadow Report Survey, Submission No 10 (26 March 2010).

⁷² Submission by attendee at the CRPD Shadow Report consultation in Perth, Western Australia (30 November 2009).

⁷³ VCOSS, 'The Voices of Taxi Users' (Summary Report, VCOSS Taxi Forum Held in collaboration with the Victorian Taxi Industry Inquiry, 20 July 2011).

- 149 Domestic airlines provide inconsistent access to air services and aircraft. Each domestic airline operator imposes their own independent travel criteria, which can limit the number of people requiring special assistance per flight (such as people who require the use and carriage of a wheelchair); and can require a person with disability to be accompanied by a carer if they require assistance in boarding and de-boarding aircraft.⁷⁴

Case Study

One passenger was allowed to travel independently on one part of their journey and then was refused independent travel for the return journey, requiring the passenger's mother to fly and meet him to travel as his carer. As one person with disability noted about the inconsistent application of airline independent travel criteria "that leaves us in the unacceptable position of having to purchase air tickets — hundreds of dollars — on a lottery basis, with no assurance that we will actually be allowed to board a flight and reach our destinations, or even that the tickets will be refunded if we are denied travel".⁷⁵

The Disability (Access to Premises — Building) Standards 2010

- 150 The *Disability (Access to Premises — Building) Standards 2010* (Premises Standards) only apply to public buildings that are covered by the Building Code of Australia (BCA) and only to new buildings or existing buildings undergoing renovation that require a building approval. This means that the Premises Standards do not cover the broad definition of "premises" contained within the DDA, including existing buildings, fit out features of buildings that do not require building approval, some way of finding features of buildings, public footpaths, parks, and recreation areas.
- 151 The Premises Standards only apply to private residences in the common areas of apartment blocks where apartments are available for rent. Some smaller buildings will not be required to provide ramps and lifts.⁷⁶
- 152 Like the DSAPT, enforcement of the Premises Standards relies on individual complaints. However, as the BCA has been amended to be consistent with the Premises Standards, this may provide a higher level of compliance than has been achieved under DSAPT.

⁷⁴ Submission by attendee at the CRPD Shadow Report consultation in Perth, Western Australia (30 November 2009).

⁷⁵ The Allen Consulting Group, 'Review of the Disability Standards for Accessible Public Transport — Draft Report', above n 67, 81.

⁷⁶ The Building Code of Australia s 2.1.

Accessibility and Australian Regulations and Policy

- 153 The NDS does not currently include a mechanism to identify conflicts in the application of regulations and policies. People with disability encounter barriers to access where seemingly unrelated policies have an adverse impact.
- 154 Taxi drivers at airports are subject to security regulations that prevent them from leaving their vehicles unattended at terminal entrances. This means that taxi drivers are unable to assist people with disability to enter and leave airports.⁷⁷
- 155 Occupational health and safety legislation limits the maximum weight that transport service staff are permitted to lift, which sometimes results in staff being unable to assist people or their mobility aids into and out of transport carriage services.⁷⁸

Digital Communication and Information (see also Article 21)

- 156 For people with disability, digital communication can alleviate social isolation, and in many cases act as a lifeline allowing contact with family, friends and support services. Many phones, mobile devices and other communications equipment do not have features for accessibility and are not continually improved as technology advances. A ‘universal design’ approach, whilst referred to in the NDS is not being implemented.
- 157 People with multiple or complex accessibility needs can require digital communication and information that is specialised or adapted for them. However, the costs associated with such equipment and devices are often prohibitive for people with disability.

RECOMMENDATIONS Article 9

- That the National Disability Strategy incorporates measures, such as licensing requirements or mandatory codes to address the lack of enforcement of the Disability Standards.
- That the National Disability Strategy incorporates measures to address the full range of accessibility obligations under CRPD Article 9.

⁷⁷ The Allen Consulting Group, ‘Review of the Disability Standards for Accessible Public Transport — Draft Report’, above n 67, 120.

⁷⁸ Ibid 67.

ARTICLE 10 — RIGHT TO LIFE

STATUS IN AUSTRALIA

No Legislated Right to Life

158 Australian domestic law does not recognise or guarantee a right to life. Australia has ratified the International Convention on Civil and Political Rights (ICCPR) which guarantees the right to life, and the Convention on the Rights of the Child (CRC) which contains obligations on the right to life and the related right to survival. However, international treaties do not automatically become part of domestic law and as yet there has been no specific legislation enacted to incorporate the right to life into Australian law.

159 Securing conditions under which people can realise their rights to life and survival will, to a large extent, depend on their ability to effectively access goods, services, employment and an adequate standard of living. To this end, the *Disability Discrimination Act 1992* (Cth) (DDA) makes it unlawful to discriminate on the basis of disability in areas including employment, education, the provision of goods and services (including health), access to premises and accommodation.⁷⁹ The right to life does manifest to some degree in criminal law, through the prohibition on intentional or reckless killing. Each State and Territory has its own legislation⁸⁰ making any unlawful killing a criminal act. Theoretically, the law applies to all persons and victims equally.

Lower Life Expectancy

160 While people with disability in Australia are living longer,⁸¹ they still have a life expectancy up to 20 years lower than a person without disability.⁸²

161 Aboriginal and Torres Strait Islander people have a life expectancy about 17 years lower than the general population,⁸³ and the rate of disability is almost twice as high as that among the general population.⁸⁴ This suggests that the lower life expectancy for people

⁷⁹ *Disability Discrimination Act 1992* (Cth) ss 15–24.

⁸⁰ *Criminal Code Act 1995* (Cth); *Criminal Code Act 1899* (Qld); *Criminal Code Act 1924* (Tas); *Crimes Act 1958* (Vic); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code Compilation Act 1913* (WA); *Crimes Act 1900* (NSW); *Criminal Code Act* (NT); *Crimes Act 1900* (ACT).

⁸¹ FaHCSIA, *Developing a National Disability Strategy for Australia*, (October 2008).

⁸² AH Bittles et al, 'The influence of intellectual disability on life expectancy' (2002) *Journals of Gerontology Series A: Biological Science and Medical Science* 57:7, M470–M472.

⁸³ Australian Institute of Health and Welfare <www.aihw.gov.au/indigenous-life-expectancy/>.

⁸⁴ Council of Australian Governments, *National Disability Strategy 2010–2020* (Commonwealth of Australia, 2011) 16.

with disability has a significantly greater impact on Aboriginal and Torres Strait Islander people with disability.

- 162 Reduced life expectancy is a result of a number of factors, including lower levels of education, lack of access to health care, lower socioeconomic status, lack of access to community services and support, lower levels of employment and other factors. (See also Articles 24, 25, 27 and 28)

Deaths in Residential Disability and Aged Care Facilities

- 163 Reviews of deaths of people with disability in residential disability facilities have revealed that there are a number of troubling issues contributing to premature deaths.⁸⁵ The most recent New South Wales report revealed the average age upon death was 54, which is 25 years younger than the life expectancy of the general population. It would appear that the problems faced in New South Wales are similar to those in other states and territories.⁸⁶ The main issues concern:
- (a) problems in meeting complex needs, including identification of nutrition and swallowing risks,⁸⁷ inadequate action to address emerging health concerns, inadequate guidance to staff as to how to meet the needs of some individuals and a lack of effective interagency work to provide coordinated support;
 - (b) first aid not being provided or provided ineffectively and delays in seeking medical assistance; and
 - (c) 'Do not resuscitate' directives placed on files when it was not clear if the person had provided informed consent for such directives.
- 164 There are many younger people with disability living in residential aged-care facilities. (See also Article 19). Although there are mandatory reporting requirements for 'unexpected' and 'accidental' deaths, evidence suggests that most deaths of people under 50 years of age in residential aged care are not reported. For example, in June 2007, there were 210 people with disability under 50 years of age living in residential aged care in Victoria. There were an average of 21 deaths per year in this group, yet very little is known

⁸⁵ NSW Ombudsman, 'Report of Reviewable Deaths in 2007 — Volume 1: Deaths of People with Disability in Care' (Report, 2008) <www.ombo.nsw.gov.au/publication/PDF/annualreport/Report%20of%20Reviewable%20Deaths%20in%202007.pdf>.

⁸⁶ Dieticians Association of Australia, 'Neglect in Dietetic Services for People with disability — Letter to Nicola Roxon, Minister for Health and Ageing' (29 October 2008) 1, 2, 4 <[www.daa.asn.au/files/Info%20for%20Professionals/Disability_submission_FINAL\(2\).pdf](http://www.daa.asn.au/files/Info%20for%20Professionals/Disability_submission_FINAL(2).pdf)>.

⁸⁷ Ibid 1.

about the causes of the deaths, and three “preventable” deaths in this group were not reported to the coroner.⁸⁸

Denial of Life Saving Measures

- 165 While active euthanasia is not legal in Australia, passive euthanasia (the withdrawal of life sustaining treatment, nutrients or medication), is legal,⁸⁹ as is administering pain relief in the knowledge that it may hasten death.⁹⁰ Doctors can withhold or withdraw treatment if there is an Advance Directive or Do Not Resuscitate order in place or if the doctor believes the treatment is futile or the burden of the treatment will outweigh the benefit.⁹¹ In the absence of a definition of futility, doctors often make decisions based on what is considered to be in ‘the best interest’ of the patient.
- 166 The term ‘best interests’ is an incredibly vague and value laden concept, often accompanied by statements regarding quality of life or overwhelming burden of treatment and may reflect certain presumptions, value judgements and narrow medical, rather than holistic, views on life quality. This raises concerns under both Articles 10 and 25.
- 167 There is legitimate concern that the general prejudices held about the quality of life of people with disability have led doctors to more readily consider treatment futile for people with disability.⁹² Reports on deaths of people with disability in residential care suggest that ‘poor quality of life’ as perceived by medical professionals is a key factor driving the decision to limit treatment.⁹³
- 168 Evidence also suggests that lack of training and awareness of disability issues leads to unequal treatment for people with disability and a greater likelihood that doctors will refuse treatment on the basis of futility if the patient has a disability.⁹⁴

⁸⁸ Liz Dearn, ““Permanent Discharge”: Deaths of People with Disability Under the Age of 50 in Residential Aged Care Facilities in Victoria’ (2011) 19 *Journal of Law and Medicine* 53, 53

<http://www.publicadvocate.vic.gov.au/file/file/Research/Articles/permanent_discharge.pdf>.

⁸⁹ *Airedale NHS Trust v Bland* [1993] 1 All ER 821; *Re BWV; Ex parte Gardner* (2003) 7 VR 487.

⁹⁰ *R v Adams (Bodkin)* [1957] Crim LR 365, 375.

⁹¹ *Airedale NHS Trust v Bland*; [1993] 1 All ER 821.

⁹² Queensland Advocacy Incorporated, Submission: ‘Rethinking Life Sustaining Measures: Questions for Queensland’, 2005 <http://www.qai.org.au/index.php?option=com_content&view=article&id=108:rethinking-life-sustaining-measures-questions-for-queensland&catid=38:submissions&Itemid=52>.

⁹³ NSW Ombudsman, above n 85, 28.

⁹⁴ Queensland Advocacy Incorporated, above n 92.

- 169 The withdrawal or withholding of life prolonging and life-saving treatment is a significant issue for newborn children and infants with disability. It is a common practice to withhold or limit treatment to newborn children with disability with the intention of allowing them to die, on the basis that treatment is not in the child's 'best interests', as perceived by the medical practitioner.⁹⁵

Discriminatory Sentencing in Murder Cases

- 170 Intentional killing in Australia is a criminal offence. Judges have a wide discretion in sentencing to take into account aggravating and mitigating factors in determining the offender's culpability. For example, in New South Wales aggravating factors may include whether the victim had any particular vulnerability, such as a disability, or whether the accused abused a position of trust or authority.⁹⁶
- 171 However, a number of court cases⁹⁷ demonstrate that the tendency of the court is to treat the severe impairment of the victim as an ameliorating, rather than mitigating, factor. The outcomes do not appear to be reflective of the inherent dignity and value of the lives of people with disability or of their equality with others.⁹⁸

Case Study

Both Jason Dawes and Matthew Sutton were intentionally killed by their parents. In both cases the parents were found guilty of the reduced charge of manslaughter. In sentencing, the court took into account the daily emotional burden of full time care of their child, the failure of a system to provide alternative support to the families, portraying the victim's disability as a cause of emotional and relationship breakdown. In each case the parents received a five year good behaviour bond.

⁹⁵ Phillip French and Rosemary Kayess, 'Deadly Currents Beneath Calm Waters: Persons with Disability and the Right to Life in Australia' (2008) *University of New South Wales Law Research Series* 34, 46; James Tibballs, 'The Legal Basis for Ethical Withholding and Withdrawing of Life — Sustaining Medical Treatment in Children' (2006) 14 *Journal of Law and Medicine* 244, 260; Loane Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (LexisNexis, 3rd ed, 2008) ch 11.

⁹⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(k) and 21A(2)(l).

⁹⁷ *Regina v Daniella Dawes* [2004] NSWCCA 363; *R v Raymond Douglas Sutton*; *R v Margaret E Sutton* [2007] NSWSC 295.

⁹⁸ Phillip French and Rosemary Kayess, above n 95, 24.

High Rates of Suicide

- 172 Suicide in Australia is the leading cause of death among men aged 16–44 and among women 16–34 years of age. Every day more than seven people in Australia die as a result of suicide and more than one third of those were discharged too early or without care from hospitals. Over 330 people with serious psychosocial disability are turned away from emergency departments each day and 1,200 people are refused admission to a public or private psychiatric unit.⁹⁹ The lack of available services for people with psychosocial disability is in stark contrast to the universal health care provided for other health care concerns such as cancer. The lack of mental health and suicide prevention services indicates an inequality on the basis of disability in the ability to enjoy the right to life and survival. (See also Articles 25 and 26)

Case Study

“My youngest daughter committed suicide three years ago. She had three young children who she loved. After experiencing post-natal depression, she was not referred to an appropriate service. Before she died she told me ‘Mum, I wish I had cancer, then people would be more understanding and caring’.”¹⁰⁰

RECOMMENDATIONS Article 10

- That Australia develops a clear national policy and guidelines around right to life, including access to life supports that is consistent with and equivalent to people without disability in Australia.
- That Australia ensures that the training of medical professionals includes education about the human rights of people with disability in respect to right to life and access to proper care and treatment to sustain life.

⁹⁹ John Mendoza, ‘Mental Health Lacks Cash’, *The Australian*, 22 June 2010 <www.theaustralian.com.au/news/opinion/mental-health-lacks-cash/story-e6frg6zo-1225882476297>.

¹⁰⁰ John Mendoza, National Advisory Council on Mental Health ‘Letter to Nicola Roxon, Minister for Health and Ageing’ (18 June 2010) <www.theage.com.au/pdf/resignation.pdf>. See also Barbara Hocking, ‘The Government Promises, but our Sons and Daughters Suffer’, *Sydney Morning Herald* (22 June 2010) <www.smh.com.au/opinion/politics/the-government-promises-but-our-sons-and-daughters-suffer-20100621-ys4x.html>.

ARTICLE 11 — SITUATIONS OF RISK AND HUMANITARIAN EMERGENCIES

STATUS IN AUSTRALIA

- 173 Emergency management planning and response in Australia is generally conducted at a state and local level, with the Federal Government providing assistance broadly in developing emergency management capacity.¹⁰¹ Accordingly, emergency response plans vary significantly from locality to locality, with separate agencies responsible for emergency management. Further, emergency response and planning differs depending on the type of emergency involved. For example, bushfire-prone areas and floodplains have unique emergency response plans reflecting the nature of the emergency and the stakeholders involved.
- 174 Despite the publication of various local and state emergency response and mitigation plans, disability needs are often not explicitly factored into disaster response measures. Emergency procedures tend to focus on early warning systems, evacuation plans and building design, but fail to contain express provisions needed to protect the safety of people with different types of physical, intellectual, sensory or communication abilities on an equal basis with others.
- 175 There are as yet no specific measures in the National Disability Strategy to address emergency response strategies for people with disability. (See also Articles 4, 9 and 33)

Case Study

In the Victorian Bushfires in February, 2009, a number of people with disability died in the fires along with many other Victorians. In the case of one man, aged 57, who had used a wheelchair from childhood and lived with his parents, the Royal Commission reports indicate that the age of the parents, the father's poor health, and the son's physical limitations might have contributed to a delay in their evacuation once they had decided to leave.

¹⁰¹ Attorney-General's Department, 'Australian Government Emergency Management Policy Statement' (Policy, Australian Government, undated).

Inaccessible Early Warning Systems (EWS)

176 People get emergency and disaster information from a wide array of information sources. However, EWS are typically relayed via standard radio and television broadcast, word of mouth and direct contact through emergency and community services workers. EWS information is not reliably made available in accessible formats or through multi-sensory platforms.¹⁰² The availability of inclusive information is at best ad hoc, location specific and dependent on the particular emergency service involved.

177 Issues identified include the heavy reliance upon emergency phone numbers, the absence of captioning and verbal descriptions in television updates, the near impossibility of getting emergency information in Auslan, the absence of a text message warning system and the failure to provide emergency service workers with communication aids or message boards.¹⁰³

Inaccessible Emergency Facilities

178 There is an absence of accessible design concepts being incorporated into building codes regarding emergency structures and exits. As such, many people cannot access disaster relief efforts. Factors such as isolation, communication and mobility difficulties often prevent people with disability from reaching emergency rally points, evacuation transport collection locations and emergency shelters and many are prevented from receiving information about emergency facility locations and plans in the first place.

Lack of Inclusive Disaster Preparedness Planning and Consultation

179 Despite high-level government initiatives to include peak disability organisations in devising emergency management plans, many people with disability are still not actively involved or invited to be a part of the process to devise local humanitarian emergency and natural disaster plans.¹⁰⁴

180 Information relating to emergency management consultations, information and procedures is rarely distributed in accessible formats.

¹⁰² Disability Disaster Advocacy Group, 'Overview July 2009 — Key Emergency Management Recommendations' (Recommendations, Disability Disaster Advocacy Group, July 2009) 1.

¹⁰³ See, for example, communication boards and personal information cards: Susan Stork-Finlay, 'Inclusive Emergency Management' (Presentation to the VDAN/DANA Conference, 18 November 2009) slides 39–41.

¹⁰⁴ See, for example, communication boards and personal information cards: Susan Stork-Finlay, *ibid*; Disability Emergency Advocacy Group, Submission, *Victorian Bushfire Royal Commission*, 18 May 2009, 9 <www.royalcommission.vic.gov.au/getdoc/e5699957-cff5-414b-8c5d-bf135cd3cd42/SUBM-002-032-0321_R.pdf>.

Lack of Inclusive Planning in Reconstruction Efforts

- 181 Reconstruction and redevelopment after natural disasters is not used as an opportunity for implementing inclusive planning and design from the ground up. The cost of adapting accessible construction designs is estimated at a mere 0.5-1 percent of the cost of a total project.¹⁰⁵ Accessible buildings, business, transportation and public spaces contribute significantly to community inclusion of people with disability.¹⁰⁶ More specifically, an improved and more accessible built environment will significantly benefit disaster preparedness¹⁰⁷ and help protect the safety of both people with disability and the community generally.¹⁰⁸
- 182 Australia does not explicitly ensure that accessibility considerations are incorporated into building and reconstruction planning initiatives and guidelines. As such, universal planning guidelines that take into account accessibility issues for people with disability are not implemented when providing emergency humanitarian assistance or disaster relief.

Lack of Coordination

- 183 Disability support services are confused about the conflict in their duty of care to their staff and duty of care to their clients with disability in an emergency situation. Under Occupational Health and Safety policies, disability support services may refuse to send support staff to areas that are identified as being a high fire danger area on given days, leaving their clients with disability stranded without support.
- 184 In some contexts, disability support staff are not considered as ‘emergency personnel’ and may not be allowed to attend to their clients with disability in areas where people have been encouraged to evacuate.

¹⁰⁵ Australian Council for International Development, ‘Disability — Tsunami Emergency Response Summary for ACFID, Summary Issues for Consideration’ (Report, 5 February 2006) 1 <www.acfid.asn.au/what-we-do/docs_what-we-do/docs_issues/docs_disability-and-development/tsunami_disability_issues.pdf>.

¹⁰⁶ Disability Disaster Advocacy Group, above n 102.

¹⁰⁷ American Red Cross, ‘Disaster Preparedness for People with Disability’ (Report, undated) <www.redcross.org/www-files/Documents/pdf/Preparedness/Fast%20Facts/Disaster_Preparedness_for_PwD-English.pdf>.

¹⁰⁸ ‘Bonn Declaration’ (Paper presented at the Disasters are Always Inclusive: Persons with Disabilities in Humanitarian Emergency Situations Conference, Bonn, Germany, 7–8 November 2007) 3 <www.acfid.asn.au/what-we-do/docs_what-we-do/docs_issues/docs_disability-and-development/Bonn%20Declaration.pdf>; Disability Emergency Advocacy Group, Submission, above n 104, 33–4.

RECOMMENDATIONS Article 11

- That Australia establishes nationally consistent emergency management standards in consultation with people with disability through their representative and advocacy organisations that are implemented across all three levels of government; that are inclusive across the diversity of impairments and that cover all phases of emergency management preparation, early warning, evacuation, interim housing and support and recovery and building.
- That Australia establishes policies and guidelines to coordinate the work of emergency and disability support agencies and that ensure a continuity of support systems for people with disability during an emergency and in the recovery phase.

ARTICLE 12 — EQUAL RECOGNITION BEFORE THE LAW

STATUS IN AUSTRALIA

Australia's Interpretative Declaration on Article 12

185 Australia made an Interpretative Declaration in respect of Article 12 upon ratifying the CRPD:

Australia declares its understanding that the CRPD 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 ...¹⁰⁹

186 Representative organisations of people with disability and disability advocacy and legal groups in Australia have different views about the role of substitute decision-making in relation to Article 12,¹¹⁰ with some arguing that Article 12 does not allow for substitute decision-making in any circumstances and others arguing that it does, but only in specific restricted circumstances, as a measure of last resort and subject to stringent safeguards, when in the best interests of the person to achieve their human rights and as a means for the person to exercise their legal capacity.¹¹¹

187 Despite these differences, there is agreement among representative organisations of people with disability and disability advocacy and legal groups that Article 12 underpins the ability of people with disability to achieve many of the rights contained in the CRPD and that it requires fundamental reform in the current legal, administrative and service arrangements that regulate legal capacity for people with disability so that supported decision making measures can be recognised, developed and promoted.

188 Issues in Australian legislative and policy frameworks, including estate management, guardianship and mental health laws, mean that people with disability experience serious breaches of their human rights, including widespread abuse, neglect and exploitation both because of the lack of appropriate arrangements to support their capacity to manage their affairs, to give informed consent, to make important decisions,¹¹² and as a result of poorly

¹⁰⁹ *Convention on the Rights of Persons with Disabilities: Declarations and Reservations* (Australia), UN OHCHR. 2008.

¹¹⁰ Phillip French, above n 20.

¹¹¹ People With Disability Australia, 'Everyone Everywhere: Recognition of Persons with Disability as Persons Before the Law' (Position Paper, 2009).

¹¹² Richard Barker and Nick McKenzie, 'Mentally Ill Living Conditions "Third World"' *The Age* 7 September 2011 (Melbourne) <www.theage.com.au/victoria/mentally-ill-living-conditions-third-world-20110906-1jw02.html#ixzz1XhcDCPWd>.

designed, delivered and monitored supported and substitute decision-making arrangements.¹¹³

189 However, Australia has confined discussions of the rights contained in Article 12 to descriptions of current State and Territory substitute decision-making regimes and associated reviews,¹¹⁴ rather than addressing the fundamental requirement to establish alternatives to substitute decision-making. The Interpretative Declaration supports the status quo in Australia.

Discriminatory Laws, Policies and Practice

190 There are many Australian laws, policies and practices that do not provide a presumption of legal capacity for people with disability. A number of law, policies and practice deny or diminish recognition of people with disability as persons before the law, or deny or diminish a person's ability to exercise legal capacity. This is clearly demonstrated in the following areas:¹¹⁵

- (a) Financial services — People with disability may be refused access to a bank account, or if they have a bank account, the financial institution may refuse to allow them to operate it independently. Banks also frequently refuse to recognise informal support people, such as family members from whom a person may wish to receive assistance to operate a bank account.
- (b) Voting — Federal, State and Territory legislation disqualifies a person from voting if they are found to be incapable of understanding the nature and significance of enrolling and voting, due to 'being of unsound mind'. (See also Article 29)
- (c) Public Office — A person can be removed from public office, such as serving as a judge or politician if it is decided that the person cannot, or may not be able to fulfil responsibilities because they have a 'disability', such as psychosocial disability.
- (d) Board participation — Under Australian corporations and associations law, a person with disability, such as a person with psychosocial or intellectual disability can be automatically disqualified from holding the office of a director or committee member.

¹¹³ People With Disability Australia and NSW Mental Health Coordinating Council, Submission to the NSW Legislative Council: 'Substitute Decision-Making: Time for Reform', *Inquiry into Substitute Decision-Making for People Lacking Capacity*, 2009, 19.

¹¹⁴ Australian Government, 'Australia's Initial Report under the *Convention on the Rights of Persons with Disabilities*' (Report, 2010); 'National Human Rights Action Plan Baseline Study — Consultation Draft', (August 2011) 67

¹¹⁵ People With Disability Australia; Consultation Reports; Comments received from non-government organisations on the first draft NGO CRPD Shadow Report.

- (e) Access to Justice — people with disability may be unable to obtain equal benefit and protection of the law because they do not receive supports to enable them to take action to protect their interests and no one else may do so on their behalf. For example, some people with disability cannot obtain a personal violence order unless supported to do so.¹¹⁶ (See also Article 13)
- (f) Will making and disposition — People with disability may require support that is proportional to their needs and that is without undue influence and conflicts of interest to ensure that they can exercise their right to make a will on an equal basis with all other persons.¹¹⁷
- (g) The capacity of people with cognitive impairments to participate as witnesses in court proceedings is not supported and this has led to serious assault, sexual assault and abuse crimes going unprosecuted. (See also Article 13)

Case Study

In 2011, the Judicial Commission of New South Wales recommended to the New South Wales Parliament that a magistrate be removed from his judicial office on the basis that he may in future become incapacitated by his mental health condition. The Judicial Commission of New South Wales made this recommendation following investigation of complaints of inappropriate behaviour by the magistrate, even though it found that the magistrate had sought treatment for a mental health condition which now effectively allowed him to successfully undertake the responsibilities of his position.

Guardianship, Estate Management and Mental Health Laws

- 191 State and territory guardianship, estate management and mental health laws regulate the area of legal capacity, financial management and substitute decision-making. While State and territory laws in this area vary, they all breach, are inconsistent with or fail to fulfil obligations under CRPD.
- 192 Key issues include the following:
 - (a) These laws only apply to people with disability; they are not laws that apply generally to everyone. Under international human rights law, any permissible limitations to human rights must be ‘prescribed by law’ and any law prescribing a limitation to a human right must be of general application. Consequently, to the extent that guardianship, estate management and mental health laws limit the

¹¹⁶ This has been identified by disability advocacy organisations as a particular issue for people with disability who have little or no access to advocacy or other support.

¹¹⁷ *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64.

autonomy-related rights of persons with impairment and disability as a specific population group, they are arbitrary and in violation of the right to equality before the law.

- (b) They provide different and inconsistent tests for assessing a person's ability to exercise legal capacity, which leads to uncertainty, confusion and inappropriate application of legal principles beyond the specific context in which they were formulated — there is no nationally consistent legislation that outlines the principles and provisions for assessing a person's ability to exercise their legal capacity.¹¹⁸
- (c) They focus on a person's capacity to manage their affairs or make decisions, rather than on measures that would enable or support a person to manage their affairs or make decisions.
- (d) They do not mandate or actively promote alternatives to substitute decision-making.

Inadequacy of Administrative Arrangements

- 193 The significant law and policy reform required to meet obligations under CRPD Article 12 needs to be supported by significant changes to current administrative arrangements in terms of their strategic profile, role, functions and powers.¹¹⁹
- 194 Currently, people with disability cannot expect support to effectively assert and exercise legal capacity and to have safeguards against abuse and exploitation in both informal and formal supported decision making arrangements.
- 195 Little or no effort is made to ensure that environmental barriers are addressed and supports and processes tailored to maximise a person's chance to exercise their legal capacity without unnecessary resort to substitute decision-making.
- 196 The lack of formal communication assessments to assess a person's capacity to communicate and inadequate efforts to ensure that alternate communication methods and augmented communication technology are available and supported with appropriate expertise significantly diminishes or denies a person legal capacity.

¹¹⁸ A number of organisations providing information to this CRPD Civil Society Report referenced the *Mental Capacity Act 2005* (UK) as an example of such legislation.

¹¹⁹ People with Disability Australia, *Everyone, Everywhere: Recognition of Persons with Disability as Persons before the Law*, 2009.

RECOMMENDATIONS Article 12

- That Australia withdraws the Interpretative Declaration in relation to Article 12.
- That, in consultation with people with disability and their representative, advocacy and legal organisations, Australia conducts a comprehensive audit of laws, policies and administrative arrangements that address legal capacity in order to:
 - modify, repeal or nullify any law or policy, and counteract any practice or custom, which has the purpose or effect of denying or diminishing recognition of any person as a person before the law, or of denying or diminishing any person's ability to exercise legal capacity;
 - enact laws that recognise the right of all people in all situations to recognition before the law; that creates a presumption of legal capacity for all people, and which expressly extends to those circumstances where support may be required for a person to exercise legal capacity;
 - recognise the fact that people with disability will be particularly reliant upon these laws, that provisions will be required to oblige all relevant actors to provide reasonable accommodation to meet the needs of people with disability, and designate a range of positive measures to ensure that people with disability are able to exercise legal capacity on an equal basis with others;
 - enshrine the primacy of supported decision-making mechanisms in the exercise of legal capacity;
 - establish a comprehensive system focused strongly and positively on promoting and supporting people to effectively assert and exercise legal capacity, and on safeguarding against abuse and exploitation in both informal and formal supported and substituted decision-making arrangements; and
 - provide specific criminal offences relating to the exploitation, abuse and neglect of people with disability subject to supported and substitute decision-making arrangements.

ARTICLE 13 — ACCESS TO JUSTICE

STATUS IN AUSTRALIA

- 197 People with disability are over-represented in the justice system whether as complainants, litigants, defendants, victims or other witnesses. They also encounter significant barriers in undertaking roles as officers of the courts, such as jurors (See also Articles 12 and 29), lawyers, administrators and adjudicators.¹²⁰
- 198 Some of these issues are acknowledged as areas for action in the National Disability Strategy (NDS)¹²¹ and Australia's National Human Rights Action Plan Exposure Draft (NHRAP Exposure Draft).¹²² However, the NDS contains no specific measures to address these issues and the NHRAP Exposure Draft had not at March 2012 been endorsed by Australian governments.
- 199 Australian governments fund some legal services specifically for people with disability and Australian courts are introducing disability access schemes.¹²³ However, people with disability participating in the legal system often experience significant barriers,¹²⁴ with many finding access to justice too difficult, hostile or ineffectual.¹²⁵ As a result, people with disability are often left without legal redress.¹²⁶

¹²⁰ Phillip French, 'Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland' (Report, Queensland Advocacy Incorporated, 22 May 2007); Disability Council of NSW, 'A Question of Justice: Access and Participation for People with Disabilities in Contact with the Justice System' (Report, 2003); Intellectual Disability Rights Service in conjunction with the Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, 'Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System' (Report, May 2008).

¹²¹ Council of Australian Governments, *National Disability Strategy*, above n 84, 36-40

¹²² Attorney-General's Department, 'Australia's National Human Rights Action Plan Exposure Draft' (Draft Report, Australian Government, 2012) 3.

¹²³ See, for example, NSW Attorney General's Department, 'Disability Strategic Plan 2006–2008: Summary' (Report, undated) <[www.lawlink.nsw.gov.au/Lawlink/DiversityServices/II_DiversitySrvces.nsf/vwFiles/Summary%20DSP.pdf/\\$file/Summary%20DSP.pdf](http://www.lawlink.nsw.gov.au/Lawlink/DiversityServices/II_DiversitySrvces.nsf/vwFiles/Summary%20DSP.pdf/$file/Summary%20DSP.pdf)> and Victorian Department of Justice, 'Disability Action Plan 2009–2011' (Report, undated) <www.justice.vic.gov.au/wps/wcm/connect/1fa77b80404a83bf91bdfbf5f2791d4a/DAP2009–2011_word_large_print.doc?MOD=AJPERES>.

¹²⁴ Submission by attendee at the CRPD Shadow Report consultation in Adelaide, SA (25 November 2009).

¹²⁵ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

¹²⁶ Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

- 200 Australian governments fund disability advocacy services to provide support to people with disability to safeguard and exercise their rights.¹²⁷ However, there are some gaps in advocacy funding, such as the lack of funding from the South Australian Government for the provision of advocacy, and the lack of funding for a specific Aboriginal and Torres Strait Islander self-governing disability advocacy program.

Legal Representation

- 201 Access to justice often relies on access to legal representation. Increased living costs and difficulties securing employment often result in people with disability being unable to pay for legal services or bear cost risks of not succeeding.¹²⁸ Underfunding of public legal services has resulted in a significant tightening of eligibility criteria. As a result, legal representation is primarily available only to the very poor and generally only in criminal matters.

Case Study

AG was placed on a Compulsory Treatment Order (CTO) which required involuntary treatment with the anti-psychotic drug Risperdal, and oversight by a psychiatrist appointed by the Mental Health Review Tribunal. AG was not represented at the tribunal hearing when he was placed on a CTO. After some time on the medication, AG formed the view that his mental state was worse and the drug was having substantial detrimental effects. AG sought assistance from Legal Aid New South Wales to appeal the CTO. Legal Aid applied a merit test to his request for assistance and declined to represent him because he had no medical evidence to support his assertion the dosage was incorrect. AG then approached a pro bono legal service that sought to obtain a report from a psychiatrist. The only income received by AG was a disability support payment, and as such AG could not afford to fund the cost of a psychiatrist's report, and there was no funding available to pay for one. Ultimately, a law firm agreed to provide free legal representation and pay for the cost of the medical report. The medical report confirmed that the dosage could be reduced. AG was represented at a further hearing by the pro bono provider, and his CTO was varied.¹²⁹

¹²⁷ Council of Australian Governments, *National Disability Strategy*, above n 84, 40.

¹²⁸ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

¹²⁹ Case study provided by Nicolas Patrick, Pro Bono Partner, DLA Piper.

- 202 Civil and administrative claims for people with disability receive minimal support, even when such claims involve important human rights issues. Funding for community legal centres fell 18 percent between 1998 and 2008.¹³⁰ As a result of this decline, the burden on community legal centres, pro bono services and other community organisations has increased.
- 203 Consequently, many people with disability are continually referred from one service to another whenever services have inadequate resources or expertise to deal with disability legal issues.
- 204 Gaps in the provision of legal services are further magnified in regional and remote parts of Australia.¹³¹ Such shortages particularly affect Aboriginal and Torres Strait Islander people with disability, who also experience gaps in health and education. For example, a lack of funding means the Aboriginal Legal Service in New South Wales and the Australian Capital Territory no longer provides civil and family law services.¹³²

Cost Barriers (See also Article 5)

- 205 If a complaint under the *Disability Discrimination Act 1992* (Cth) (DDA) fails to be conciliated by the Australian Human Rights Commission (AHRC), it can be referred to the Federal Court for adjudication. The Federal Court is a cost jurisdiction, which means people with disability making complaints risk having to pay the other party's costs if their case is unsuccessful. While this provides a safeguard against potentially vexatious litigants and frivolous claims, the current costs regime creates a barrier for people with disability who wish to pursue litigation matters in the public interest.
- 206 The Australian court costs regime in effect acts as a disincentive to the enforcement of disability rights, and hampers access to justice as provided under Article 13(1).

¹³⁰ National Association of Community Legal Centres, 'An Investment Worth Protecting': Funding Submission to the Commonwealth Government 2007–2010, 1 January 2008, Executive Summary, 2

<http://www.nacclc.org.au/resources/NACLC_fund08_CMYK.pdf>.

¹³¹ Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Access to Justice* (2009) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/access_to_justice/report/index.htm>.

¹³² Nicolas Patrick, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into Access to Justice*, 2009 <<https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=fae67931-c2a4-448a-9dc8-0ab803c08780>>.

Case Study

“The DDA is good but the problem is what you have to do to get your rights under it. Because there are [usually] no protective costs orders, [people with disability] won’t go to the Federal Court and risk losing their house and everything they have got just to get their right to ride on a plane. Why would you risk it? Especially when you are dealing with government, the biggest providers of services to persons with disability, their attitude can often be ‘We are not going to budge, come on and sue us’, because they can get away with it.”¹³³

- 207 It is possible to seek a protective cost order in some jurisdictions. Such orders place a limit on costs that the unsuccessful party has to pay. These orders are discretionary and the burden falls on the person with disability making the claim.¹³⁴

Systemic Barriers

- 208 Only some Australian governments have established court diversion programs that provide interventions and supports to people with disability to prevent unnecessary contact with the criminal justice system. Inappropriate and unnecessary contact with the criminal justice system often leads to multiple offences, fines and incarceration.¹³⁵
- 209 A key factor contributing to the higher than average arrest rates for people with disability is insufficient police training. Currently, police training primarily deals with discrete disability issues instead of taking into account the ongoing social supports and needs of people with disability.¹³⁶ Experience and statistics also indicate that Australia has failed to train prison system personnel and police to facilitate access to justice.

¹³³ Submission by attendee at the CRPD Shadow Report consultation in Melbourne, Victoria (16 November 2009).

¹³⁴ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

¹³⁵ Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

¹³⁶ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

- 210 Training in providing accommodations and supports to people with disability is neither compulsory nor consistent across different jurisdictions for judicial officers, legal practitioners and court staff.¹³⁷ A lack of awareness about disability issues leads to discrimination and negative attitudes which create barriers to accessing justice.¹³⁸ (See also Article 8)
- 211 People with disability can face barriers to establishing credibility when interacting with the justice system. Assumptions about the credibility of people with disability, in particular people with cognitive disability are constantly made by police and court officers, such as prosecutors, judges and magistrates.¹³⁹

Case Study

*In a case recently profiled on a national ABC TV investigative report, a bus driver employed by a church operated special school for children with disability was not charged with a series of sexual assault charges against a number of young boys with disability over a period of time as police did not believe that these charges would be upheld in a court due to questions about the competence of witnesses on the grounds of their intellectual disability. Despite action taken to pursue a number of serial rapists and paedophiles who preyed on children without disability in church run schools in recent times, cases involving children with disability, such as this one have not been pursued by authorities.*¹⁴⁰

Reasonable Accommodation

- 212 People with disability are often not provided with the supports they require to engage effectively in all processes of the justice system.¹⁴¹ Many people are unable to access police and court premises or communicate with, police, lawyers or court staff¹⁴² in the method of their choice.

¹³⁷ For different examples of training programs for Court staff see NSW Attorney General's Department, 'Disability Strategic Plan', above n 123 and Victorian Department of Justice, 'Disability Action Plan', above n 123. Disability issues or discrimination law is currently not compulsory for Australian law graduates.

¹³⁸ Louis Schetzer and Judith Henderson, 'Access to Justice and Legal Needs, Stage 1 Public Consultations' (Report, Law and Justice Foundation of NSW, 2003) 216, 225 <www.lawfoundation.net.au/report/consultations>.

¹³⁹ Phillip French, 'Disabled Justice', above n 120.

¹⁴⁰ ABC, 'Four Corners Reveals Story of Abuse at St Ann's Special School', *ABC Four Corners*, 26 September 2011 (Bronwyn Herbert) <www.abc.net.au/pm/content/2011/s3326103.htm>.

¹⁴¹ Legal Aid Queensland, 'Developing a National Disability Strategy', 2008, 4 <www.legalaid.qld.gov.au/about/policy/Policy%20submissions%20and%20research/national-disability-strategy-submission.pdf>.

¹⁴² Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

Case Study

Helen has multiple chemical sensitivity and was retired from her job. During a worker's compensation hearing, the judge said that Helen would be held in contempt if she did not attend court. Unable to obtain information about pesticides used on the premises, Helen became sick upon entering the foyer.

- 213 Initiatives to improve access to courts do not include preliminary and investigative stages of proceedings, while access to such initiatives often involves an element of luck.¹⁴³
- 214 Furthermore, training for judicial officers, legal practitioners and court staff about how to accommodate people with disability is not compulsory or consistent across Australian jurisdictions.¹⁴⁴ (See also Article 8)
- 215 People with cognitive impairment also face significant barriers at all stages of the justice system, often not receiving adequate or appropriate support to:
- (a) communicate instructions to legal representatives;
 - (b) understand the substance and significance of legal issues and documents; or
 - (c) understand formal court processes.¹⁴⁵

Over-Representation in the Prison System

- 216 While data is not uniform or consistent across jurisdictions, available data suggests that almost half to 78 percent of prisoners have experienced a 'psychiatric disorder' compared with 11 percent of the general population; and 20 percent of prisoners have an intellectual disability compared with 2–3 percent of the general population.¹⁴⁶
- 217 As research and data tends to focus on people with intellectual and psychosocial disability, it is suggested that there is a tendency to overlook the significant over-representation of people with acquired brain injury in the criminal justice system, as well as ignore specific issues, and perhaps over-representation of Deaf people.¹⁴⁷

¹⁴³ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

¹⁴⁴ For different examples of training programs for Court staff see NSW Attorney General's Department, 'Disability Strategic Plan', above n 123 and Victorian Department of Justice, 'Disability Action Plan', above n 123. Disability issues or discrimination law is not compulsory for Australian law graduates.

¹⁴⁵ Legal Aid Queensland, 'Developing a National Disability Strategy', above n 141, 2.

¹⁴⁶ NSW Law Reform Commission, 'People with Cognitive and Mental Health Impairments in the Criminal Justice System: An Overview' (Consultation Paper No 5, January 2010) 13–15.

¹⁴⁷ Phillip French, 'Disabled Justice', above n 120, 25

- 218 Women with disability consist of between 30 to 50 percent of the prison population. Research also indicates that the percentage of women with disability in prisons is greater than men with disability and that rates for women with disability from Aboriginal and Torres Strait Islander background is also higher than equivalent figures for men.¹⁴⁸
- 219 Aboriginal and Torres Strait Islander people with disability are almost 14 times more likely to be imprisoned than the rest of the population.¹⁴⁹ Given that it is estimated that the incidence of disability in Aboriginal and Torres Strait Islander communities is twice that of the general community, it can be assumed that there is significant over-representation of Aboriginal and Torres Strait Islander people with disability in Australian prisons.

Over-Representation in the Juvenile Justice System

- 220 In 2005 the UN Committee on the Rights of the Child expressed concern about the over-representation of children with disability in the juvenile justice system in Australia. It recommended that Australia address issues for children and young people in conflict with the law “without resorting to judicial proceedings”.¹⁵⁰ Despite this recognition there has been no coordinated approach to research and implement measures to address this issue.
- 221 Available evidence from 2010 suggests that nearly “half the young people in New South Wales juvenile detention centres have an intellectual or ‘borderline’ intellectual disability”.¹⁵¹ A higher proportion of Aboriginal and Torres Strait Islander young people were represented in this group — 39 percent compared to 26 percent.¹⁵² The majority of young people were found to have a ‘psychological condition’ (85 percent), with two thirds (73 percent) reporting two or more ‘psychological conditions’. There were a significantly higher proportion of young women and Aboriginal and Torres Strait Islander young people in this group.¹⁵³ The study also found that 32 percent of young people in New South Wales juvenile detention centres had a traumatic brain injury or a head injury, and that this incidence had increased significantly for young women since the previous survey in 2003 (from 6 to 33 percent).¹⁵⁴

¹⁴⁸ See <www.sistersinside.com.au>.

¹⁴⁹ Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System* (March 2010) 5.

¹⁵⁰ Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268, (20 October 2005) page 15.

¹⁵¹ Adele Horin, ‘Report Finds Disability and Disadvantage Common in Young Offenders’, *Sydney Morning Herald* (Sydney), 27 February 2010 <www.smh.com.au/nsw/report-finds-disability-and-disadvantage-common-in-young-offenders-20100226-p95r.html>.

¹⁵² Devon Indig et al. ‘2009 NSW Young People in Custody Health Survey: Full Report’. (Report, Justice Health, NSW Health and Human Services Juvenile Justice, NSW Government, 2011) 15.

¹⁵³ *Ibid* 15.

¹⁵⁴ *Ibid* 77.

222 The increased risk of young people with disability entering the juvenile justice system is linked to failures that breach rights contained in Article 13, as well as Articles 14, 15, 16, 23 and 26. These failures include:¹⁵⁵

- (a) lack of support services, appropriate treatment and behaviour intervention programs, family based out of home care services and accommodation options;
- (b) the use of inappropriate and harmful service practices, such as physical restraint and medication;
- (c) the risk or actual occurrence of physical and sexual assault; and
- (d) the reliance on the police to resolve ‘challenging’ behaviour.¹⁵⁶

Case Study

*Jack has an intellectual disability and attention deficit disorder, has been a victim of abuse and is homeless. Much of Jack’s contact and interaction with police has resulted in additional charges, including resisting, assaulting or intimidating police. When being fined for riding a bike without a helmet, Jack was cooperative until the police also searched him for drugs. He became verbally abusive, and continued to swear when walking away. The Police followed and grabbed him and told him he was under arrest for offensive language. The actions of the police escalated the situation and Jack was charged with intimidating police and resisting arrest. Things would have turned out differently if the Police had been less confrontational and more experienced in working with young people with disability.*¹⁵⁷

Trial by Jury

223 People with disability are often ineligible for jury service on the basis of their disability.¹⁵⁸ (See also Articles 12 and 29) The exclusion of people with disability from jury service means that juries are not composed of the full diversity of the Australian community. This means that the experience of disability is not available to the jury for consideration during trials, and defendants with disability cannot face a trial by peers.¹⁵⁹

¹⁵⁵ People With Disability Australia, Submission to the Senate Community Affairs References Committee, *Protecting Vulnerable Children: A National Challenge — Second Report on the Inquiry into Children in Institutional or Out-of-Home Care* (March 2005) 173.

¹⁵⁶ Ibid.

¹⁵⁷ Intellectual Disability Rights Service, ‘Enabling Justice’, above n 120.

¹⁵⁸ *Federal Court of Australia Act 1976* (Cth) ss 23DQ, 23DR (sheriff may excuse juror who is unable to perform duties of a juror, considering the *Disability Discrimination Act 1992* (Cth)); *Juries Act 1967* (ACT) s 10 (mental or physical disability), sch 2 (person who is totally or partially blind or deaf may claim exemption); *Juries Act 1980* (NT) sch 7 (person who is blind, deaf or dumb or otherwise incapacitated by disease or infirmity); *Juries Act*

RECOMMENDATIONS Article 13

- That Australia prescribes an effective Protective Costs Order jurisdiction for public interest matters.¹⁶⁰
- That adequate funding is provided to Community Legal Centres to ensure access to justice to people with disability, and a National Disability Rights Centre be established.
- That standard and compulsory modules on working with people with disability are incorporated into training programs for police, prison officers, lawyers, judicial officers and court staff.
- That all people with disability be made eligible for jury service.
- That Australia develops comprehensive, gender and culture specific social support programs and systems to identify and prevent the circumstances that contribute to children and young people with disability coming into contact or entering the juvenile justice system.
- That Australia implements a range of gender and culture specific diversionary programs and mechanisms and community based sentencing options that are integrated with flexible disability support packages and social support programs to prevent adults with disability coming into contact or entering the criminal justice system.

1977 (NSW) sch 2 (a person who is unable because of 'disability'); *Juries Act 1995* (Qld) s 4(l) (person with a physical or mental disability); *Juries Act 1927* (SA) s 13 (mentally or physically unfit); *Juries Act 2003* (TAS) sch 2 (physical, intellectual or mental disability); *Juries Act 2000* (Vic) sch 2 (persons with a 'physical disability' or 'intellectual disability'); *Juries Act 1957* (WA) s 5 (incapacitated by any disease or infirmity of mind or body, including defective hearing); sch 4 (potential juror to disclose to the summoning officer any incapacity by reason of disease or infirmity of mind or body, including defective hearing).

¹⁵⁹ Submission by attendee at the CRPD Shadow Report consultation in Brisbane, Queensland (12 November 2009).

¹⁶⁰ This is in contrast with the approach in Australia where protective costs orders apply equally to both parties.

ARTICLE 14 — LIBERTY AND SECURITY OF THE PERSON

STATUS IN AUSTRALIA

- 224 In Australia, legislation does not permit people with disability to be deprived of their liberty without lawful and proper reason. However, people with disability face higher rates of deprivation of their liberty than the general population. There are significant issues with the legislative, policy and practice framework, in particular the guardianship and mental health frameworks that result in the arbitrary detention of people with disability. (See also Articles 12 and 17)
- 225 In addition, many forms of deprivation of liberty and security of people with disability are performed without lawful authority. This includes confinement to residential and other facilities (see also Article 19), restriction on movement within residential and other facilities (see also Article 19), as well as practices such as seclusion and exclusionary timeout within these facilities.¹⁶¹ (See also Article 15)

Guardianship Laws

- 226 Specific guardianship legislation exists in each jurisdiction in Australia. However, legislation in some Australian jurisdictions gives minimal guidance to tribunals in making determinations about restrictions to a person's autonomy. In Victoria for example, little guidance is given to guardians or administrators when determining the 'best interests' of the person as the Victorian legislation fails to define the terms 'least restrictive' or 'best interests' and fails to incorporate a well-defined notion of capacity.¹⁶² The Victorian Supreme Court has commented on the need to:

re-examine the exercise of Victoria's guardianship and administration jurisdiction generally to determine whether the balance has swung too far in favour of paternalism or protection as against individual autonomy.¹⁶³

Mental Health Laws and Tribunals

- 227 All jurisdictions in Australia have mental health laws which govern the treatment of persons with psychosocial disability. However, there is no uniformity in mental health legislation across Australia, and in many respects they breach, are inconsistent with or fail to fulfil obligations under CRPD. As a result, mental health laws do not adequately protect the right

¹⁶¹ Phillip French, Julie Dardel and Sonya-Price-Kelly, *Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment*, (People With Disability Australia, 2009) 65.

¹⁶² *Guardianship and Administration Act 1986* (Vic) s 3.

¹⁶³ *XYZ v State Trustees Ltd & Anor* [2006] VSC 444, [66] (Cavanough J).

to liberty and security of people with psychosocial disability. (See also Articles 12, 15 and 17)

228 Mental health tribunals play a vital part in influencing the extent to which people with psychosocial disability are deprived of their liberty and security. Some of the broad issues relating to tribunals include:

- (a) inadequate preparation of reports, documents and professional assessments and advice leading up to a hearing;¹⁶⁴
- (b) resource pressures leading to shortened hearings, use of video link and cramped or stressful settings used for hearings¹⁶⁵ — for example, a study of 25 hearings in Victoria indicated that 36 percent of hearings took less than 10 minutes and 60 percent took less than 15 minutes;¹⁶⁶
- (c) an unreasonably lengthy duration between detainment and the initial review of the detention order;¹⁶⁷
- (d) a lack of knowledge by the person of the right to access information, independent advocacy support and legal representation, and the right to lodge an appeal in respect to involuntary status;¹⁶⁸

¹⁶⁴ Terry Carney and Fleur Beaupert, 'Strengths and Weaknesses of Mental Health Review Process' (Paper presented at the 20th Anniversary Conference 'Learning from the Past, Looking to the Future', Melbourne, 6–7 December 2007) 28 <www.mhrb.vic.gov.au/publications/documents/StrengthsWeaknesses2007.doc>. For example, the 2005 Annual Report of the WA Mental Health Review Board states: 'In some cases no member of the treating team with up-to-date information about the patient's progress and current situation is available at the hearing to provide information needed by Board members in order to make an informed decision about the patient's involuntary status': Mental Health Review Board Western Australia, 'Annual Report 2005'.

¹⁶⁵ Mary Macken, 'Erosion of Patient Rights Due to Proposed Changes to the Function of the *Mental Health Act 2007*: Letter to the Hon, Greg James QC' (Open Letter, Law Society of NSW, 2010) <www.lawsociety.com.au/idc/groups/public/documents/internetpolicysubmissions/066417.pdf>.

¹⁶⁶ Terry Carney and Fleur Beaupert, above n 164, 28.

¹⁶⁷ In Victoria, the MHRB may conduct a review of involuntary orders up to 8 weeks after the initial order for admission has been made, and at least every 12 months thereafter: *Mental Health Act 1986* (Vic) s 30. This is also the case in Western Australia: *Mental Health Act 1996* (WA) ss 138, 139. In the Northern Territory, involuntary patients must be reviewed within 14 days after admission: *Mental Health and Related Services Act* (NT) s 123(1). In NSW, a person subject to continued involuntary detention must have their case reviewed at least once every three months for the first 12 months of detention, and once every six months after that: *Mental Health Act 2007* (NSW) ss 37(1), 37(1)(b). In Queensland, patients must be reviewed within six weeks after admission with subsequent intervals not exceeding six months: *Mental Health Act 2000* (Qld) s 187(1). In Tasmania, the Tribunal must review a continuing care order within 28 days from when the order is made or renewed: *Mental Health Act 1996* (Tas) ss 52(1), 52(2). In South Australia, the review must take place as soon as practicable after a detention order is made if the detention commenced within seven days of the person being discharged from an approved treatment centre pursuant to the expiry or revocation of a previous detention order: *Mental Health Act 1993* (SA) ss 12, 24(1)(b).

- (e) a lack of sufficient discharge planning in place for people who have been subject to a detention order; and
- (f) a failure to strictly and explicitly limit the circumstances under which voluntary treatment can be made involuntary — for example, the voluntary status of a person can be changed to involuntary merely on the basis that the person is refusing a course of treatment or failing to comply with the instructions of a medical practitioner.¹⁶⁹

Case Study

A man voluntarily admitted himself to a hospital's psychiatric inpatient unit. At no time was the man given information regarding his rights as a voluntary patient, and there was a failure to provide him with services for his pre-existing diabetes. The man became concerned that his 'treatment' involved only medication and not a referral to a social worker, psychologist, or community counselling service, despite the psychiatrist recommending this. Although the issue was raised with hospital staff, no action was taken. The man notified staff of his intention to discharge himself (which was within his rights as a voluntary patient), however he was warned his status would be changed to 'involuntary' should he attempt to discharge himself. The man then attempted to leave the ward, and was subsequently reclassified as an involuntary patient and put into seclusion for 6½ hours, and stripped of his clothing. The man was not provided with an explanation of his change of patient status to involuntary or the reason for being placed in seclusion. Due to his experience in involuntary seclusion, the man continues to experience emotional and physical symptoms, including chronic depression.

Arbitrary Detention in Prisons

- 229 People with disability, predominantly those with cognitive impairment, may be found not guilty of a criminal charge or found 'unfit' to be tried due to their impairment. However, people with disability in this situation can still be detained for the duration of the maximum period they would have spent in prison if they were found guilty; or they can be held in prison for an indeterminate sentence that can significantly exceed the maximum period of a custodial sentence for the same offence.¹⁷⁰ A key reason for this situation is the lack of

¹⁶⁸ Victorian Council for Civil Liberties, Submission, *Review of the Mental Health Act*, 27 February 2009, 6–7 <www.health.vic.gov.au/mentalhealth/mhactreview/submissions/sub163.pdf>.

¹⁶⁹ People With Disability Australia, 'NSW Health Review of the Mental Health Act 1990- Exposure Draft Bill: *Mental Health Bill 2006*' (Review, 2006) 8 <www.pwd.org.au/documents/pubs/SB06-MentalHealth.doc>.

¹⁷⁰ NSW Bar Association, 'Does Australia Need A Bill of Rights?' (Lecture, undated) 34 <www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf>.

alternative and appropriate accommodation and support options.¹⁷¹ The practice of indefinite incarceration in prison (or sometimes in psychiatric facilities) occurs across Australia but is most prevalent in Queensland, Western Australia and the Northern Territory, and is particularly experienced by Aboriginal people with disability.¹⁷² Case studies and initial research indicates that significant numbers of Aboriginal people with cognitive impairment are currently being indefinitely incarcerated in maximum security prisons.¹⁷³

Case Study

*Mr N. is an Aboriginal man with intellectual disability. He spent ten years in a Western Australian prison without ever being found guilty of a crime. Mr N. was charged with sexually assaulting two girls in 2001, but has never faced trial after he was deemed 'unfit to plead'. His lawyer estimates that if he had been convicted he would have only served about five years in prison. There appears to be no evidence that the crimes he was charged with ever actually occurred. He was released in January 2012 under stringent conditions that limit his ability to lead a normal life in the community, despite never being convicted of the crime he was charged with.*¹⁷⁴

Arbitrary Arrest and Detention (see also Article 13)

- 230 Reports indicate that people with disability, particularly those with cognitive impairment are more likely to be questioned, arrested and detained by police for minor public order matters. Police are more likely to inappropriately respond to people with cognitive impairment if they are viewed as having 'challenging behaviour'.¹⁷⁵ Arbitrary arrest and detention often arise in these circumstances.

¹⁷¹ Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

¹⁷² Aboriginal Disability Justice Campaign, 'Position Statement on the Inappropriate Incarceration of Aboriginal People with Cognitive Impairment', (Position Paper, People With Disability Australia, October 2008) <www.pwd.org.au/systemic/adjc.html>.

¹⁷³ Ibid.

¹⁷⁴ Michael Brull, 'The sad story of Marlon Noble' on ABC Ramp Up, *Ramp Up* (9 December 2011) <www.abc.net.au/rampup/articles/2011/12/09/3387845.htm>.

¹⁷⁵ Phillip French, 'Disabled Justice', above n 120.

Case Study

Sarah is in her 50s and has a psychosocial disability. Sarah was unlawfully arrested and falsely imprisoned by the New South Wales Police who had mistaken her identity. The arrest proceeded despite Sarah's repeated attempts to identify herself and despite the fact that she was well known to local police and there was no warrant or provision of a reason for arrest. Sarah was forced to change in front of the arresting officer and placed in the police wagon despite pleas that she had a broken arm and was recovering from facial reconstruction (due to abuse by her former partner). All this was done in front of Sarah's seven year old son and no alternative care was arranged for his protection. Once in a holding cell Sarah had a panic attack and requested her asthma puffer and other prescribed medication that was initially refused. Sarah was told she would have to remain in the cell until the next court date in four days time. Sarah was not offered or provided with access to legal counsel and was denied bail. Finally it became apparent to the police that Sarah blatantly didn't fit the description of the wanted individual and was released. She is now terrified of the police.¹⁷⁶ (Sarah's experiences also have ramifications under Articles 13, 15 and 25)

Rights in the Prison System

- 231 Prisoners with disability are often not provided with the necessary supports and safeguards they require to maintain their security and enjoyment of other human rights. Key issues include:¹⁷⁷
- (a) lack of protective supports to address the greater risks of people with disability, particularly people with intellectual disability to sexual assault, abuse and victimisation, and coercion into breaking rules and conducting illegal activities, such as drug dealing;
 - (b) inadequate complaints processes and mechanisms for recording and responding to incidents, to support prisoners to make complaints and to ensure adequate protections against retribution for making complaints, including being placed in protective custody;

¹⁷⁶ Redfern Legal Centre, Submission: 'PWD and the Violation of their Procedural and Substantive Rights — Case Studies', *CRPD Shadow Report*, 2010, 2.

¹⁷⁷ Kathy Ellem, 'The Impact of Imprisonment for People Labelled as Having an Intellectual Disability: A Qualitative Life Story Approach in the Queensland Context' (PhD Research Proposal, School of Social Work and Applied Human Sciences, The University of Queensland, undated) <www.sistersinside.com.au/media/ResearchProposal15KathyEllem.pdf>.

- (c) lack of information about prisoner rights and access to support to exercise their rights;
- (d) lack of identification of people with disability in prison, and consequent measures to provide necessary supports;¹⁷⁸
- (e) inadequate services to provide support to prisoners leading up to their release, or provide assistance from community and forensic mental health workers;¹⁷⁹
- (f) lack of planning with disability, mental health and other social supports to facilitate successful return to the community;¹⁸⁰
- (g) lack of physical access to prison facilities and services;
- (h) lack of access to relevant aids and communication devices, sign language and community language interpreters and lack of personal care and hygiene supports; and
- (i) lack of necessary services and supports, such as mental health and medical services and supports.

Case Study

A man with a mobility disability was sentenced to a maximum security prison in 2009 for up to 10 years, being the first quadriplegic in New South Wales to receive a full-time custodial sentence.¹⁸¹ The man is unable to eat, drink, go to the toilet or wash without assistance, and requires a hoist to lift him from his motorised wheelchair to his bed. The man was being held in the aged care and frail section of the prison complex on a transitional basis as there was no capacity for people to stay permanently in this section.

The man was subsequently transferred to a complex where inmates with intellectual disability, developmental issues and acquired brain injury are accommodated. However, these facilities are inappropriately equipped to deal with his complex physical needs. There were a limited number of staff available to assist the man to the extent he requires care each day, resulting in the man receiving insufficient assistance for eating, showering, being assisted into common prisoner areas within the correctional centre. Due to the man's disability and diabetes he must have a special diet, however this was also not being serviced

¹⁷⁸ Forensicare (Victorian Institute of Forensic Mental Health), Submission to the Senate Select Committee on Mental Health, 'Forensic Mental Health — Working with Offenders with a Serious Mental Illness', 2005, 20 <www.aph.gov.au/senate/committee/mentalhealth_ctte/submissions/sub306.pdf>.

¹⁷⁹ Ibid 20–1.

¹⁸⁰ Ibid 19.

¹⁸¹ Marnie O'Neill, 'Quadraplegic Drug Lord Paul Baker Jailed for 10 years' *The Sunday Telegraph* (online) 31 May 2009 <www.news.com.au/national/quadraplegic-drug-lord-paul-baker-jailed-for-10-years/story-e6frfkvr-1225718692294>.

by the correctional centre, resulting in the man being undernourished and having problems with indigestion.

Due to his disability, he was at risk of autonomic dysreflexia due to suffering from common urinary tract infections which may cause his catheter to block and rapidly increase his blood pressure, placing the man at risk of a brain haemorrhage or seizures. Further, no provision had been made for the man to participate in any exercise, resulting in muscle wasting, and he had not been given the opportunity to become involved in educational programs.¹⁸²

RECOMMENDATIONS Article 14

- That Australia ensures that legislative, administrative and policy frameworks that deprive people with disability of their liberty and impact on their security are fully consistent with the CRPD.
- That Australia, as a matter of urgency, ends the unwarranted use of prisons for the management of unconvicted people with disability, with a focus on Aboriginal and Torres Strait Islander people with disability, by establishing legislative, administrative and support frameworks that comply with the CRPD.
- That Australia establishes mandatory guidelines and practice to ensure that people with disability who are deprived of their liberty in the criminal justice system are provided with appropriate supports and accommodation.
- That Australia amends legislation in relation to crime to include the specific (statutory) offence of deprivation of liberty.

¹⁸² Case study provided by Nicolas Patrick, Pro Bono Partner, DLA Piper.

ARTICLE 15 — FREEDOM FROM TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT

STATUS IN AUSTRALIA

232 People with disability are frequently subject to treatment that may constitute torture, or cruel, inhuman or degrading treatment, including persistent and severe violence and abuse (see also Article 16), forced sterilisation (see also Article 23), long-term neglect of basic human needs (see also Articles 14, 16, 23, 26 and 28) and painful and degrading behaviour modification techniques or ‘restrictive practices’.¹⁸³ The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has expressed concern that:

In many cases such practices, when perpetrated against persons with disabilities, remain invisible or are being justified, and are not recognised as torture or other cruel, inhuman or degrading treatment or punishment.¹⁸⁴

233 Australia ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 8 August 1989.¹⁸⁵ In May 2010, Australia signed the United Nations Optional Protocol to the CAT. The Optional Protocol is yet to be ratified by Australia.

234 As part of the process to ratify the Optional Protocol Australia has undertaken an audit of prison facilities but has excluded other places of confinement such as psychiatric facilities.

235 Australia has legislated against torture when committed by a public official or under their direction. Offences under this legislation include conduct that inflicts severe physical or mental pain or suffering on a person and where such conduct is based on discrimination.¹⁸⁶ This means that many practices that occur in disability and mental health services funded or provided by Australian governments could potentially satisfy this definition, given these practices only occur because a person has disability. However, this legislation has not been tested in this regard.

¹⁸³ French, Dardel and Price-Kelly, above n 161, 72

¹⁸⁴ Manfred Nowak, Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63rd sess, UN Doc A/63/175 (28 July 2008) 9.

¹⁸⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, reproduced in *Crimes (Torture) Act 1988* (Cth) Sch. Australia ratified the Convention on 8 August 1989 and it came into force for Australia on 7 September 1989.

¹⁸⁶ *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) s 247.

- 236 The Victorian and the Australian Capital Territory Governments are the only State and Territory that have enacted legislation that provides a general prohibition on torture and other cruel or inhuman treatment or punishment.¹⁸⁷ Both jurisdictions also permit limits on the general prohibition on torture and other cruel or inhuman treatment or punishment.¹⁸⁸
- 237 While some State and Territory legislation explicitly criminalises acts comprising cruel or inhuman treatment by any public official,¹⁸⁹ legislative protection does not extend to acts amounting to degrading treatment.¹⁹⁰ Further, legislation in some jurisdictions only applies in respect of the actions of certain public officials.¹⁹¹
- 238 In addition, criminal law does not sufficiently deal with specific types of harm experienced by people with disability, including unlawful detention (see also Article 14) and harm caused by restrictive practices.¹⁹²
- 239 The National Disability Strategy (NDS) identifies a future action to “review restrictive legislation and practices from a human rights perspective”,¹⁹³ but it is unclear when or how this will occur.

Restrictive Practices

- 240 People with disability are routinely subjected to unregulated and under-regulated behaviour modification or restrictive practices that include chemical, mechanical, social and physical restraint, detention, seclusion and exclusionary time out.¹⁹⁴ These practices can cause physical pain and discomfort, deprivation of liberty, prevent freedom of movement,

¹⁸⁷ *Human Rights Act 2004* (ACT) s 18; *Charter of Human Rights and Responsibilities Act 2006* (Vic). See also National Association of Community Legal Centres and Human Rights Law Resource Centre, ‘Australia’s Third Periodic Report to the UN Committee against Torture: Letter to the UN Committee against Torture’ (Open Letter, 6 July 2007) 2 <www.hrlrc.org.au/files/WS81VOHT6Y/Fax%20to%20CAT%20-%206%20July%202007.pdf>.

¹⁸⁸ See, eg, *Charter of the Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

¹⁸⁹ Amnesty International, ‘Australia: A Briefing for the Committee against Torture’, (Report, October 2007) 8 <[http://asiapacific.amnesty.org/library/pdf/ASA120012007ENGLISH/\\$File/ASA1200107.pdf](http://asiapacific.amnesty.org/library/pdf/ASA120012007ENGLISH/$File/ASA1200107.pdf)>.

¹⁹⁰ Ibid.

¹⁹¹ Human Rights and Equal Opportunity Commission, ‘Comments of the Human Rights and Equal Opportunity Commission on Australia’s Compliance with the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*’ (Comments, 2008) [14] <www.humanrights.gov.au/legal/submissions/2008/080415_torture.html>.

¹⁹² The law relating to false imprisonment involves the intentional or reckless restraint of a person’s freedom of movement from a particular place that may be imposed for behaviour modification, control or treatment purposes: French, Dardel and Price-Kelly, above n 161, 38.

¹⁹³ Council of Australian Governments, *National Disability Strategy*, above n 84, 41.

¹⁹⁴ Women with Disabilities Australia, Submission to the UN, *Analytical Study on Violence against Women and Girls with Disabilities*, December 2011, 25; French, Dardel and Price-Kelly, above n 161, 95

alter thought and thought processes, and deprive persons of their property and access to their children.¹⁹⁵

- 241 Restrictive practices aim to manage behaviour that is ‘challenging’ or that is of danger to the person with disability or others. However, restrictive practices can constitute humiliation and punishment, and can be imposed as a means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support.¹⁹⁶
- 242 Restrictive practices are not limited to the disability and mental health service settings, such as institutions, group homes, boarding houses and mental health facilities. They also occur in schools, hospitals, residential aged care facilities and prisons.¹⁹⁷
- 243 Research and available data on the use of restrictive practices and the impact of these practices on people with disability is very limited in Australia. Further, there is an absence of any definitive, regular and reliable national public reporting of rates of use of restrictive practices, and where reporting is required, there is an under-reporting of the number of people who endure these practices.¹⁹⁸
- 244 Available research indicates that an estimated 44 to 80% percent of people with disability who show ‘behaviours of concern’ are administered a form of chemical restraint,¹⁹⁹ between 50 and 60 percent are subjected to regular physical restraint,²⁰⁰ and those with multiple impairments and complex support needs are subjected to much higher levels of restraint and seclusion.²⁰¹ Research with people with disability about their experiences and views regarding restrictive practices has found that there is a high priority on feeling safe,

¹⁹⁵ People With Disability Australia and Mental Health Coordinating Council, above n 113, 27.

¹⁹⁶ Cited in Women with Disabilities Australia, above n 194, 25 from K McVilly, ‘Physical Restraint in Disability Services: Current Practices, Contemporary Concerns and Future Directions’ (Report, Office of the Senior Practitioner, Department of Human Services Victoria, 2008).

¹⁹⁷ Women with Disabilities Australia, above n 194, 25.

¹⁹⁸ National Mental Health Consumer and Carer Forum, ‘Ending Seclusion and Restraint in Australian Mental Health Services’ (Position Statement, 2009)

<www.nmhccf.org.au/documents/Seclusion%20&%20Restraint.pdf>; Paul Ramcharan et al, ‘Experiences of Restrictive Practices: A View From People with Disability and Family Carers’ (Research Report, Office of the Senior Practitioner, May 2009) <http://www.dhs.vic.gov.au/__data/assets/pdf_file/0008/608588/osp_experiencesofrestrictivepractices_pdf_0509.pdf>.

¹⁹⁹ Lynne Webber, Mandy Donley and Hellen Tzanakis, ‘Chemical Restraint: What Every Disability Support Worker Needs to Know’ (Article, Office of the Senior Practitioner, 2008).

²⁰⁰ Ibid 2.

²⁰¹ Office of the Senior Practitioner, ‘Annual Report 2008–2009’ (Report, Department of Human Services, 2010) 21.

but many feel unsafe in the situations and environments they are faced with.²⁰² People with disability:

- (a) are often unaware of their rights and may have difficulty identifying when their rights have or are being violated; or may be reluctant to lodge a complaint out of fear or resignation, or because of a lack of advocacy support;
- (b) may justifiably feel angry when services are not delivered or are withdrawn, and where restrictive practices are renamed, thereby influencing future behaviour towards staff and heightening the risk of further restrictive practices being imposed;
- (c) find communal settings increase behaviours that make them feel unsafe, and that maintaining private space and safety is more difficult where staff numbers are low, where there is no active engagement, there are locked areas, and where there are too many people;
- (d) often feel a sense of powerlessness in disability and mental health facilities in terms of a lack of personal autonomy which adversely impacts on their behaviour; and
- (e) communicate their views about different environments and situations through their behaviour in those environments and situations.

245 Overall, this research finds that many behaviours that are identified as ‘behaviours of concern’ can be viewed as a form of resistance or protest to maladaptive environments; and that these should be viewed as legitimate responses to problematic environments and situations. Changing services, systems and environments should be the starting point for changing behaviour, rather than changing the person.²⁰³

Disability Service System

246 Only the Queensland and Victorian Governments regulate the use of restrictive practices through their disability service legislation. This legislation establishes the position of senior practitioner, who is responsible for protecting the rights of people who are subject to these practices, and for generally reducing or eliminating the need for restrictive practices.

247 Other Australian governments only rely on policy to guide the use of restrictive practices, with some establishing senior practitioner positions as a discretionary measure to support policy and practice. In these States and Territories, regulation of restrictive practices is often left to guardianship tribunals for those people who are deemed unable to consent to restrictions. However, regulation through guardianship tribunals only deals with the provision of consent for a person to be subject to restrictive practices; it does not deal with

²⁰² Paul Ramcharan et al, above n 198.

²⁰³ Ibid 17.

the broader question of whether restrictive practices should be permissible in the first place, or whether the rights of people with disability are actually protected.²⁰⁴ For example, in Queensland an adult guardian has the authority to make a short term approval for a containment and seclusion order of up to six months.²⁰⁵ In Tasmania, people with disability are “regularly restrained ... when they demonstrate behavioural difficulties. Guardians can often agree to the misuse of personal treatment orders because of tiredness or lack of knowledge.”²⁰⁶

Case Study

*Luke is 21 and has autistic spectrum disorder. He lives in a residential facility in Victoria. Before going into care Luke was well groomed and spoke quite well. Since entering the facility Luke’s condition has deteriorated to the point of self-harm, after spending hours each day locked in a room with little more than a bed and a toilet. He is severely depressed, refuses to wear clothes and often will tear them to shreds. He is completely alone, even his food is passed through a door.*²⁰⁷

Case Study

Mary has Prader-Willi Syndrome, an intellectual disability, learning difficulties, diabetes and emphysema. She has difficulties self-regulating her behaviour and appetite, and has a powerful craving for food. Despite lobbying the government, Mary has not been able to obtain single occupancy housing. Instead Mary has suffered from neglect, increasing levels of restraint and seclusion in institutions or shared accommodation. She has had co-tenants who have physically abused her and she has also been sexually assaulted. Currently Mary is sharing a house and does not like her co-tenant. She has been subjected to physical assaults and is chemically restrained to ensure compliance and to prevent her leaving the house. Mary now faces the prospect of being held in a locked facility for an unspecified period of time, chemically restrained and isolated until the anticipated alteration in her behaviour is achieved before placing her back in shared accommodation. (The treatment of Mary also has ramifications under Articles 15, 16, 17 & 19.)

²⁰⁴ French, Dardel and Price-Kelly, above n 161, 96

²⁰⁵ Department of Communities, ‘Short Term Approvals — Frequently Asked Questions’ (Fact Sheet, Queensland Government, undated) <<http://www.communities.qld.gov.au/resources/disability/publication/positive-futures-short-term-approvals-faqs.pdf>>.

²⁰⁶ Submission by attendee at the CRPD Shadow Report consultation in Hobart, Tasmania (3 December 2009).

²⁰⁷ ABC News, ‘Victoria’s Disabled Housing ‘in Crisis’, *Stateline Victoria*, 4 December 2009.

Mental Health Service System

- 248 Mental health legislation regulates the practice of compulsory treatment, but despite legislative provisions for the ‘least restrictive alternatives’ or for measures of ‘last resort’, seclusion and restraint are frequently used in the mental health system in Australia, “despite a lack of evidence that they offer positive health outcomes” and “are commonly associated with further trauma, risk of violence and potential human rights abuse”²⁰⁸ (See also Articles 12 and 17)
- 249 Research indicates that there are a broad number of factors leading to the incidence of restraint and seclusion:²⁰⁹
- (a) a lack of community based intensive support , which results in transfers to public and private acute inpatient facilities that are not adequately resourced to provide an adequate level of care;
 - (b) the regular turnover of mental health services staff, which contributes to a lack of appropriately trained staff administering care on an ongoing basis;
 - (c) high levels of pressure experienced by mental health services staff;
 - (d) an ingrained culture of acceptance of the use of restraint and seclusion as a preferred ‘behaviour management’ technique; and
 - (e) the failure of some psychiatrists to undertake independent assessments examining the most appropriate and effective care to prevent ‘behavioural issues’ from developing.

Case Study

Bill resides in a large psychiatric facility in Queensland. He has dual-diagnosis including a psychosocial disability. He instructed his solicitor that he did not have a mental illness and he wanted to have his Involuntary Treatment Order (ITO) revoked so he could leave the hospital and return to the community. At the next ITO review hearing Bill had legal representation. The Mental Health Review Team ordered that an independent psychiatrist examine Bill to determine whether he had a mental illness and whether the ITO was the least restrictive approach to take in treating Bill. The independent psychiatrist found that Bill did not have a mental illness and the least restrictive approach would involve revoking the ITO. The MHRT revoked Bill’s ITO. Bill is now working towards transition back to the community where he wants to live with the appropriate supports in place for him.

²⁰⁸ National Mental Health Consumer and Carer Forum, above n 198.

²⁰⁹ Ibid 7.

Restrictive Practices in Schools (see also Article 24)

- 250 Disability representative and advocacy organisations report that many children with disability in both mainstream and special schools are being subjected to chemical and physical restraint and seclusion under the guise of ‘behaviour management’ policies and practice.²¹⁰ There is strong evidence that children with disability are experiencing:
- (a) solitary confinement to small rooms or small fenced areas as punishment for ‘bad’ behaviour;
 - (b) physical force, including being thrown to the ground and being pinned down;
 - (c) chemical restraint by requiring parents to medicate their children, otherwise they cannot attend school; and
 - (d) acceptance of self-harming behaviour without exploring why this is occurring at school.
- 251 There is a lack of action, research and data on the incidence of restrictive practices on children with disability in schools across Australia, despite the fact that these practices are punitive, harmful and in many cases life-threatening.²¹¹

Case Study

*A primary school implemented a ‘behaviour management’ practice that confined children with autism to a fenced area during lunch. The area had one tree, a bench and dirt covering. The practice was defended by the education department as a practice to support supervision of students with autism while they settle into school.*²¹²

In Prisons (see also Articles 13 and 14)

- 252 People with disability are over-represented in the prison population and many are arbitrarily detained in prison due to the unavailability of other appropriate accommodation options. In at least one legal case, the judge noted that this potentially constitutes cruel, inhuman and degrading treatment.²¹³

²¹⁰ Information received from Children with Disability Australia, the Disability Discrimination Legal Service Victoria. See also ABC Television, ‘Hidden Shame’, 7.30, 17 May 2011 (Mary Gearin) <<http://www.abc.net.au/7.30/content/2011/s3219518.htm>>.

²¹¹ ABC, *ibid*.

²¹² Reported in the *Herald Sun* newspaper in 2010.

²¹³ *R v White* [2007] VSC 142 (7 May 2007).

- 253 Prolonged solitary confinement (also known as seclusion or segregation) is used as a management tool for people incarcerated within Australian prisons. Under Australian law, the governor of a correctional centre may direct that an inmate be held in solitary confinement if the inmate poses a threat to the security or good order and discipline of the prison.²¹⁴ The practice is particularly damaging for people with psychosocial disability as it can lead to exacerbating their condition.²¹⁵
- 254 Prisoners with disability are often placed in isolated management and observation cells when displaying ‘behaviours of concern’ because of a lack of other appropriate accommodation and support options.²¹⁶
- 255 Being placed in isolation and seclusion also occurs where a prisoner has not been diagnosed with a health condition or impairment that requires appropriate treatment or support rather than punishment.²¹⁷

Case Study

Mr Simpson was a forensic patient²¹⁸ in a New South Wales prison who committed suicide in 2006 whilst in solitary confinement. Contrary to medical advice, Mr Simpson was placed in solitary confinement in the High Risk Management Unit after murdering his cellmate during a ‘psychotic’ episode. Mr Simpson committed suicide shortly after being found not guilty of his cellmate’s murder on the grounds of ‘mental impairment’. Due to a lack of beds for forensic patients in New South Wales prisons, Mr Simpson was never moved to a mental health facility. The New South Wales Deputy State Coroner strongly criticised the events that led to Mr Simpson’s suicide and recommended persons with psychosocial disability are not subjected to solitary confinement except as a safety intervention of last resort and for limited periods of time.²¹⁹

²¹⁴ Human Rights Law Resource Centre, ‘Australia’s Compliance with the *Convention against Torture*: Report to the UN Committee against Torture’ (Report, April 2008) [50] <www.hrlrc.org.au/files/4M6OEL69DU/HRLRC%20Report%20to%20CAT.pdf>.

²¹⁵ *Inquest into the death of Scott Ashley Simpson* (Unreported, New South Wales Coroner’s Court, Pinch SM, 17 July 2006).

²¹⁶ Forensicare, above n 178, 21.

²¹⁷ Ibid 20.

²¹⁸ A forensic patient is a prisoner who has been found by a Court to be unfit to be tried or has developed a mental illness whilst being incarcerated. Recommendations to the Minister to release patients are made by the Mental Health Review Tribunal where it is satisfied the patient and members of the public will not be placed at risk of danger due to the patient’s release: *Mental Health Act 1990* (NSW) Ch 5.

²¹⁹ *Inquest into the death of Scott Ashley Simpson* above n 215; NSW Council for Civil Liberties, ‘Addendum — Shadow Report Prepared for the United Nations Committee Against Torture on the Occasion of its Review of Australia’s Third Periodic Report under the *Convention Against Torture and other Cruel, Inhuman or Degrading*

- 256 Women with psychosocial disability and intellectual or learning disability are disproportionately classified as high security prisoners and are more likely to be in high security facilities, than other prisoners.²²⁰
- 257 Prisoners can face significant problems having complaints about prison administration investigated properly by Ombudsman due to a lack of resources, and the lack of enforceability of determinations made by Ombudsman.²²¹
- 258 Common law remedies based on a negligence claim against the relevant government department by inmates who have sustained injury, including acquiring a mental health condition whilst in prison are limited.²²² In many cases, prisoners are also unable to bring negligence claims on the grounds of a lack of government resources, for example, supervisory resources, even where limited resources may have contributed to the injury occurring.²²³

Juvenile Justice (see also Article 13)

- 259 Once children and young people with disability are in the juvenile justice system, there is often an emphasis on punishment of the crime and rehabilitation, rather than on appropriate assessment, intervention and support services. As a result, many children and young people with disability are not identified, which means their specific support needs are not addressed. There are also concerns regarding the inappropriateness of the design of facilities and the environment within juvenile detention facilities, which can also contribute to a decreasing emotional and mental health state.²²⁴
- 260 In some Australian States and Territories, there are broad powers that allow for the transfer of juvenile detainees to adult prisons which exposes them to greater risk of physical and mental harm including sexual assault, and limited opportunity for rehabilitation.²²⁵

Treatment or Punishment (Report, NSW Council for Civil Liberties, 16 September 2007) 10–12 <<http://www2.ohchr.org/english/bodies/cat/docs/ngos/NSWCCL.Add.1.pdf>>.

²²⁰ Sisters Inside, Submission: ‘Rights of Women Prisoners’, *National Human Rights Consultation*, June 2009 <www.sistersinside.com.au/media/FINAL%20-%20National%20HR%20Submission%20June%202009.pdf>.

²²¹ The Shopfront Youth Legal Centre, Submission: ‘Sexual Assault of Young Men in Prison Project’, *National Human Rights Consultation*, 15 June 2009, 4 <[www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/DB51D48972D82AFBCA25761500277B6A/\\$file/Jane%20Sanders_AGWW-7T26DXAGWW-7T26DX.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/DB51D48972D82AFBCA25761500277B6A/$file/Jane%20Sanders_AGWW-7T26DXAGWW-7T26DX.pdf)>.

²²² Ibid 3.

²²³ Ibid.

²²⁴ People With Disability Australia, above n 155.

²²⁵ The Shopfront Youth Legal Centre, above n 221, 5.

Instances of assault including sexual assault remain rife in the Australian prison system, particularly among young male inmates.²²⁶

- 261 In its Concluding Observations to Australia in 2008,²²⁷ the UN Committee against Torture recommended that Australia apply measures to reduce overcrowding such as non-custodial forms of detention²²⁸ and ensure detention is used as a measure of last resort, particularly in relation to juveniles.²²⁹ Contrary to the recommendation of the Committee against Torture, mandatory sentencing has not been abolished in Australia.²³⁰

Immigration Detention Centres

- 262 Australia's policy of indefinite mandatory detention of asylum seekers commenced in 1992. The indefinite mandatory detention of an "unlawful non-citizen"²³¹ is prescribed under the *Migration Act 1958* (Cth).²³² Detainees may be indefinitely detained until they are removed from Australia, deported or granted a visa.²³³ Among those who have been detained under this policy are people with disability, including a number of teenagers with intellectual disability who have spent up to 2 years in Australian prisons on people smuggling charges.²³⁴
- 263 The Committee against Torture recommended in its Concluding Observations to Australia that Australia consider abolishing its policy of mandatory immigration detention and advised using detention as a measure of last resort only and setting a reasonable time limit for detention.²³⁵ Australia is yet to respond to the Committee's recommendations.

²²⁶ Ibid 3.

²²⁷ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/1 (22 May 2008) para 23.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ An "unlawful citizen" is a non-citizen who does not hold a valid visa: *Migration Act 1958* (Cth) ss 13, 14.

²³² *Migration Act 1958* (Cth) s 189.

²³³ *Migration Act 1958* (Cth) s 196.

²³⁴ ABC Radio, 'Another Indonesian Teen Freed After People Smuggling Case Dropped', *PM*, 16 November 2011 (Peter Lloyd) <www.abc.net.au/pm/content/2011/s3368277.htm>.

²³⁵ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) para 11.

264 The current conditions facing detainees in detention raise concerns with respect to Australia's obligation to ensure people with disability, particularly those with psychosocial disability, are not subject to cruel, inhuman or degrading conditions.²³⁶ Specifically, the areas of concern in relation to conditions in immigration detention include inadequate physical and mental health care, use of solitary confinement, inadequate access to education, recreation and religious facilities and limited access to legal assistance.²³⁷

Medical or Scientific Experimentation Without Free and Informed Consent

265 In Australia, few measures have been taken to protect people with disability from medical or scientific experimentation where they are unable to give their free and informed consent, including people with disability who require support in exercising their legal capacity, raising concerns under Article 15(1). Only legislation in Victoria and the Australian Capital Territory contains provisions prohibiting medical or scientific experimentation or treatment on persons without their full, free and informed consent.²³⁸ (See also Article 17)

266 Many people with disability are particularly susceptible to being chemically restrained and administered medication in combinations that may pose a risk to their physical and mental health or cause actual bodily harm. There are limited protections from abuse of medication regimes and a lack of criminal offences concerning the maladministration of medications to control and manage behaviour.²³⁹

RECOMMENDATIONS Article 15

- That Australia ratifies the Optional Protocol to the Convention against Torture.
- That Australia enacts legislation in all jurisdictions in Australia to comprehensively criminalise cruel, inhuman or degrading treatment or punishment and provides for legal action to be taken to remedy a breach.
- That Australia establishes a nationally, consistent legislative and administrative framework for the protection of people with disability from behaviour modification and restrictive practices that cause harm and punishment, including the prohibition of and criminal sanctions for particular behaviour modification practices.

²³⁶ See *Keenan v United Kingdom* (2001) 33 EHRR 913. See also *Price v United Kingdom* (2001) 34 EHRR 1285; *McGlinchey v United Kingdom* (2003) 37 EHRR 821; *Holomiov v Moldova* [2006] ECHR 30649/05; *Istratii v Moldova* [2007] ECHR 8721/05.

²³⁷ Human Rights Law Resource Centre, Submission to the Joint Standing Committee on Migration Review of Immigration Detention, *Inquiry into Immigration Detention in Australia*, August 2008, 20 <www.hrlrc.org.au/content/topics/refugees-and-asylum-seekers/refugee-rights-submission-inquiry-immigration-detention/>.

²³⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10(c); *Human Rights Act 2004* (ACT) s 10(2).

²³⁹ French, Dardel and Price-Kelly, above n 161.

- That Australia develops an evidence-based national plan that outlines actions for the development of positive behaviour support strategies that acknowledge and respect the physical and mental integrity of the person; and for the elimination of environments and treatment approaches that have been shown to exacerbate behaviour that leads to application of inappropriate levels of restriction and restraint.
- That Australia conducts a national inquiry into the use of restrictive practices on children and young people with disability in mainstream and segregated schools and identifies and implements recommendations for the elimination of these practices.
- That Australia acts on the recommendations of the UN Committee against Torture to ensure immigration detainees are provided with adequate physical and mental health care including routine health checks.²⁴⁰

²⁴⁰ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) para 25.

ARTICLE 16 — FREEDOM FROM EXPLOITATION, VIOLENCE AND ABUSE

STATUS IN AUSTRALIA

General Legal and Policy Framework

- 267 In Australia, there is no specific legal, administrative or policy framework for the protection, investigation and prosecution of exploitation, violence and abuse of people with disability (see also Articles 12, 13, 14, 15 and 17). The Federal Government has established a National Disability Abuse and Neglect Hotline (the Hotline), which is primarily a notification and referral mechanism for people with disability experiencing exploitation, violence and abuse. However, the Hotline is a relatively weak safeguard for people with disability as it operates without any legislative base and therefore has no statutory functions, powers and immunities.²⁴¹
- 268 The National Disability Strategy (NDS) recognises “that people with disability are more vulnerable to violence, exploitation and neglect”; are “more likely to be victims of crime”; that those living in institutional environments where violence is more common fare worse than others; and women with disability “face increased risk”.²⁴² However, the NDS contains limited measures to address these issues, and it only identifies that there is a need to “develop strategies to reduce violence, abuse and neglect of people with disability”.²⁴³
- 269 The National Disability Agreement (NDA), the disability services funding agreement between the Federal and State and Territory Governments does not contain initiatives associated with exploitation, violence and abuse as part of the ten priority areas for reform.²⁴⁴
- 270 All Australian governments require disability services to comply with Disability Services Standards, which set out principles for the delivery of quality disability services. While protection from abuse and neglect is contained in the Standards, they are concerned primarily with the collection of quantitative data, they are un-gendered and adult focussed,

²⁴¹ French, Dardel and Price-Kelly, above n 161, 84; Sonya Price-Kelly and Maria Attard, ‘Accommodating Violence: The Experience of Domestic Violence and People with Disability Living in Licensed Boarding Houses’ (Report, People With Disability Australia — Disability and Domestic Violence in Residential Settings Project, September 2010).

²⁴² Council of Australian Governments, *National Disability Strategy*, above n 84, 38

²⁴³ Ibid 41.

²⁴⁴ The National Disability Agreement commenced on 1 January 2009 and is in effect for five years.

and they rely on disability service providers to identify and respond to exploitation, violence and abuse.²⁴⁵

- 271 The *National Plan to Reduce Violence against Women and their Children 2010–2022* (the National Plan) contains two initiatives specifically focused on improving access and responses of specialist domestic violence and sexual assault services to women with disability.²⁴⁶ These initiatives are welcome, however the National Plan does not as yet address linkages between domestic violence and sexual assault services and the disability or mental health service systems. It also does not address specific forms of violence experienced by women with disability, such as forced sterilisation and abortions. (See also Article 23)
- 272 Domestic and family violence legislation differs across States and Territories providing different levels of protection and definitions of what constitutes a ‘domestic relationship’. Broader definitions include residential settings, such as group homes and institutions, where people with disability are likely to live and interact domestically with co-residents, support workers and service managers. However, even where there are broader definitions, domestic and family violence legislation is rarely understood as applying to both men and women with disability living in disability service residential settings and is therefore not utilised.²⁴⁷ Where narrower definitions apply, people with disability who live in residential settings are entirely excluded from these protections.
- 273 The *National Framework for Protecting Australia’s Children 2009–2020* includes a very limited number of initiatives that specifically focus on protecting children and young people with disability from abuse and neglect. Only two of the five initiatives have a national focus, and none provide a comprehensive approach to identifying the incidence, prevention or response of violence, abuse and neglect experienced by children with disability. All the initiatives are included under an outcome for addressing “parental risk factors”, including “childhood disability, mental health and / or behavioural problems”.²⁴⁸
- 274 All Australian governments have legislation that prohibits physical and sexual assault. However, there are significant barriers to the justice system that prevent people with disability from reporting crimes and having them successfully prosecuted. One study reported that 40 percent of crimes against people with mild or moderate intellectual disability and 70 percent of crimes against people with severe intellectual disability went

²⁴⁵ Carolyn Frohmader, Women with Disabilities Australia, Submission to the UN Analytical Study on Violence against Women and Girls with Disabilities, December 2011, 30.

²⁴⁶ Council of Australian Governments, *National Plan to Reduce Violence against Women and their Children 2010–2022* (Commonwealth of Australia, 2011) 27.

²⁴⁷ Price-Kelly and Attard, above n 241; Frohmader, Submission to the UN, above n 245.

²⁴⁸ Council of Australian Governments, *Protecting Children is Everyone’s Business: National Framework for Protecting Australia’s Children 2009–2020* (Commonwealth of Australia, 2009) 21.

unreported to police.²⁴⁹ There are significant misconceptions about the reliability of evidence of people with disability resulting in difficulty in securing convictions.²⁵⁰ (See also Article 13)

Case Study

*John, who has an intellectual disability, was badly assaulted in his home town. Symbols were even carved into his head. John was in hospital for five days. Both John's parents and his support worker spent a lot of time convincing John to give a statement to the police. He knew who had assaulted him and was able to provide a statement to the police but nothing has happened since as the police have said John is not a credible witness.*²⁵¹

Case Study

*In 2009, a carer in a Queensland institution was found guilty of assault for tying a young boy with autism, to the toilet with a sheet and hitting him with a flyswatter around the head and back. Just over a year later, Queensland's Civil and Administrative Tribunal gave the carer back her 'blue card' (authority to work with vulnerable people and children) with the tribunal member stating "There is no indication as to what effect these events had on the children, the subject of the offences, or on any other children in the facility", and "it is a credit to her (the carer) that she wishes to continue performing that role."*²⁵²

Incidence Data, Identification and Reporting

- 275 There is no publicly reported, systematic disaggregated data available in Australia in relation to exploitation, violence and abuse against people with disability. Identification is hindered by the uneven and inadequate collection of disaggregated data and a lack of national research and analysis on the issue.²⁵³

²⁴⁹ French, Dardel and Price-Kelly, above n 161, 18.

²⁵⁰ Ibid 68.

²⁵¹ Queensland Advocacy Incorporated, 'Submission to the Shadow Report', email dated 14 July 2010, 'John's Story'.

²⁵² Reported in the *Courier Mail* newspaper in October 2010.

²⁵³ Frohmader, Submission to the UN, above n 245, 7; Phillip French, 'Disabled Justice', above n 120; Lucy Healey et al, 'Building the Evidence: A Report on the Status of Policy and Practice in Responding to Violence Against Women with Disabilities in Victoria' (Report, Victorian Women with Disabilities Network Advocacy Information Service, 2008).

- 276 Available evidence has found that people with disability experience very high levels of violence, exploitation and abuse. For example, 18 percent of people with disability report being victims of physical or threatened violence compared to 10 percent without a disability.²⁵⁴ People with intellectual disability are ten times more likely to have experienced abuse than people without disability.²⁵⁵ More than a quarter of rape cases reported by females are perpetrated against women with disability.²⁵⁶
- 277 Women with disability, regardless of age, ethnicity, sexual orientation or class are subjected to double the rate of exploitation, violence and abuse, including domestic and family violence as experienced by women without disability.²⁵⁷
- 278 Aboriginal and Torres Strait Islander people with disability and people with disability from non-English speaking backgrounds also experience higher rates of exploitation, violence and abuse than the general population.²⁵⁸
- 279 Prevention, reporting and response to violence, exploitation and abuse in disability service systems throughout Australia rely heavily on gender-neutral ‘abuse and neglect’ policies. The predominant use of the term ‘abuse and neglect’ to cover a wide range of behaviour and situations tends to reframe violence, exploitation and abuse as ‘service incidents’, even when an incident is a criminal act. This creates a greater potential for such ‘incidents’ to go undetected, unreported, and not investigated or prosecuted because they are more likely to be dealt with administratively within the service setting. For example, research suggests that disability service providers have wide discretion in determining whether an alleged ‘incident’ of sexual assault against people with disability justifies reporting the ‘incident’ to the police, even if there is a requirement of mandatory reporting.²⁵⁹
- 280 Police often treat reports of exploitation, violence and abuse experienced by people with disability differently to people without disability. This is particularly the case where there is a perception that the person with disability is already being ‘cared’ for in an institution or residential care facility, even when the exploitation, violence and abuse has been reported as occurring in that facility. There is an assumption that the facility deals with people with

²⁵⁴ Quoted in Council of Australian Governments, *National Disability Strategy*, above n 84, 41.

²⁵⁵ *Ibid*, 41

²⁵⁶ Reported from Victorian study in Frohmader, Submission to the UN, above n 245, 13.

²⁵⁷ Leanne Dowse and Annie Parkinson, ‘Forgotten Sisters: Recognising and Responding to Domestic Violence in the Lives of Women with Disabilities’ (Paper presented at the Domestic Violence, Disability and Cultural Safety National Forum, NSW Australia, 8–9 November 2007) 5 <<http://www.wwda.org.au/dowsedv07.pdf>>.

²⁵⁸ Reported by the Aboriginal Disability Network NSW, First People’s Disability Network Australia, the National Ethnic Disability Alliance and the Multicultural Disability Advocacy Association.

²⁵⁹ Suellen Murray and Anastasia Powell, ‘Sexual Assault and Adults with a Disability: Enabling Recognition, Disclosure and a Just Response’ (Issues Paper No 9, Australian Centre for the Study of Sexual Assault, 2008) 9–10 <http://www.aifs.gov.au/acssa/pubs/issue/acssa_issues9.pdf>.

disability and that it is not a police matter. In many cases, people with disability are returned back to these facilities, and these incidences remain ‘hidden’ and unacknowledged.

281 Factors that contribute to the lack of reporting and disclosure by people with disability include:

- (a) a reliance on assistance, support and care in relationships with partners, family members, professional carers and service providers creates a level of dependency and powerlessness, and a fear that disclosure of exploitation, violence and abuse will place these relationships at risk;²⁶⁰
- (b) the greater risks and actual incidences of exploitation, violence and abuse in institutions, residential and mental health facilities means that these experiences are ‘normalised’ and not recognised by people with disability as exploitation, violence and abuse, even when they constitute crimes;
- (c) there are few gender and age specific programs for people with disability aimed at increasing self-esteem and knowledge of rights and what to do if these rights are breached;²⁶¹
- (d) there are few gender and age specific programs for people with disability about sexuality and sexual and intimate relationships, which may stem from commonly held stereotypes and prejudices that people with disability are asexual or should be protected from their sexuality;²⁶² (See also Article 23)
- (e) many people with disability fear retribution in the form of losing support and assistance if they report or disclose exploitation, violence and abuse;²⁶³ and
- (f) many people with disability have difficulties in communicating occurrences of exploitation, violence and abuse due to limitations of specific communication aids. For example, in relation to augmentative communication, symbols or words for the terms ‘genitalia’ or ‘rape’ are rarely included, which limits the ability of people with disability to disclose exploitation, violence and abuse.

²⁶⁰ French, Dardel and Price-Kelly, above n 161; Suellen Murray and Anastasia Powell, *ibid* 7.

²⁶¹ French, Dardel and Price-Kelly, above n 161.

²⁶² NSW Rape Crisis Centre, ‘Working against Sexual Violence — I Have a Disability’ (Information Sheet, undated).

²⁶³ *Ibid*.

Institutions and Residential Care Facilities

- 282 Many people with disability are effectively forced to live in institutions or residential care facilities in order to receive social and personal care supports. (See also Article 19) People in these environments are at a heightened risk of physical and sexual violence and verbal, emotional, psychological or financial abuse as well as neglect and poor care, threatened and actual abuse and institutional violence and harassment perpetrated by co-residents, residential managers and support workers.²⁶⁴ It is extremely difficult to leave or escape violence, exploitation and abuse as often there are no alternative housing and support options.²⁶⁵
- 283 A number of residential care facilities, such as boarding houses may be licensed by the disability service sector but they do not have the protections provided by disability service legislation or policy. These facilities provide accommodation for people with disability who would otherwise be homeless, but they have very limited support services and are consistently found to have high levels of exploitation, violence and abuse. In some cases successive reports have found that boarding house residents have been physically and sexually assaulted by staff and other residents, have died in appalling circumstances, and been denied basic rights, including contact with their families.²⁶⁶
- 284 The segregated and ‘closed’ nature of institutions and residential care facilities, including smaller group home facilities prevents public scrutiny, which creates greater risks for people with disability who are unable to report instances of exploitation, violence and abuse to support workers who may be the perpetrators of abuse, or who fear disclosure will lead to further abuse and mistreatment.
- 285 Many residents may not have family or other support people who could seek advocacy or legal assistance to address issues of abuse, exploitation and neglect.
- 286 Many institutions and residential care facilities are designed for particular residents, such as those with high behavioural support needs. This significantly increases risk factors for incidences of exploitation, violence and abuse, as well as a reliance on restrictive practices within these facilities. It effectively establishes a culture of violence, exploitation and abuse.²⁶⁷ (See also Article 14)

²⁶⁴ Carolyn Frohmader, Submission, above n 37, 22.

²⁶⁵ Ibid.

²⁶⁶ NSW Ombudsman, ‘More than Board and Lodging: The Need for Boarding House Reform (Special Report to Parliament, NSW Ombudsman, August 2011) <<http://www.ombo.nsw.gov.au/publication/PDF/specialreport/SR%20Boarding%20Houses.pdf>>; Adele Horin, ‘Disturbing Tales From Behind Closed Doors, *Sydney Morning Herald* (Sydney), 16 July 2011.

²⁶⁷ French, Dardel and Price-Kelly, above n 161.

- 287 Many institutions and residential care facilities are understaffed or have staff that are improperly screened or have insufficient training to recognise, prevent and respond to exploitation, violence and abuse.²⁶⁸
- 288 The reliance on gender-neutral ‘abuse and neglect’ policies means that gender specific risks, prevention strategies and responses are often not identified or implemented. Not only are women with disability at greater risk of violence, exploitation and abuse in these settings, but they are also unlikely to receive gender-specific responses or support from domestic violence, sexual assault or women’s support services.²⁶⁹
- 289 Gender-neutral disability services standards and ‘abuse and neglect’ policies can contribute to service practices that create significant risks for women with disability. For example, a number of representative and advocacy organisations have reported women with disability being used or ‘rostered’ for sex to address inappropriate male sexual behaviour in institutions and residential care facilities.²⁷⁰
- 290 In 2010, the UN Committee on the Elimination of Discrimination against Women expressed its concern to Australia about “the high levels of violence experienced by women, particularly those living in institutions or supported accommodation” and recommended that Australia “address, as a matter of priority, the abuse and violence experienced by women with disabilities living in institutions or supported accommodation”.²⁷¹

Case Study

A female resident of a licensed boarding house in New South Wales told a support worker that a staff member assaulted her. The staff member approached her whilst she was seated at the dining room table with other residents and from behind, lifted her t-shirt up and over her head, leaving her naked and exposed to everyone present. She said she was humiliated but that she did not want the support worker to do anything about it because the perpetrator could cause further trouble for her and /or kick her out. This boarding house was her home, and she had no other accommodation options.

Case Study

Parents of a young man 20 years of age with severe autism and intellectual disability who was the victim of a violent attack by another resident in a group home contacted the police to request an intervention order to provide a measure of protection for their son. The police

²⁶⁸ Ibid.

²⁶⁹ Price-Kelly and Attard, above n 241; French, Dardel and Price-Kelly, above n 161.

²⁷⁰ Reported by People With Disability Australia, Advocacy for Inclusion, Women with Disabilities Australia.

²⁷¹ CEDAW Committee, above n 40, paras 42, 43

referred the matter back to the state government authority that operated the group home. After refusing to offer a physical separation of the living areas in the group home and a long saga of mismanagement of the issue, pressure was placed on the victim to move to another group home.

Mental Health Services

- 291 The use of involuntary seclusion and restraint in all forms are an everyday occurrence, particularly in Australia's public acute inpatient facilities.²⁷² (See also Article 14). These practices underpin a culture of exploitation, violence and abuse.
- 292 Women with psychosocial disability are exposed to greater risks of exploitation, violence and abuse, particularly sexual violence when there is no provision for female only areas in mental health inpatient units.²⁷³ It is estimated that between 50 percent and 70 percent of women with psychosocial disability have experienced past physical or sexual abuse, including child sexual assault, and many of these women are likely to be re-traumatised by their experience in mixed mental health facilities.²⁷⁴

Case Study

*A mental health service has been accused of covering up sexual assaults, including an incident in which a male nurse allegedly kissed and fondled a patient and tried to pressure her into performing oral sex. Complaints have also come from former patients and their relatives about the handling of sexual assaults that allegedly occurred at the service and other mental health facilities over the past decade. These included an alleged rape of a 21 year old woman by a male patient and another sexual assault of a 15 year old girl. In each instance the women were discouraged from reporting the matter to police.*²⁷⁵

²⁷² National Mental Health Consumer and Carer Forum, above n 198.

²⁷³ Heather Clarke, 'Women at Risk of Abuse in Mixed Sex Psychiatric Wards' (Information Sheet, Victorian Women and Mental Health Network, 29 May 2008) 1 <[www.health.gov.au/internet/nhhrc/publishing.nsf/Content/191-vwmhn/\\$FILE/Submission%20191%20-%20Victorian%20Women%20and%20Mental%20Health%20Network%20Submission.pdf](http://www.health.gov.au/internet/nhhrc/publishing.nsf/Content/191-vwmhn/$FILE/Submission%20191%20-%20Victorian%20Women%20and%20Mental%20Health%20Network%20Submission.pdf)>.

²⁷⁴ Victorian Women and Mental Health Network, 'Nowhere to be Safe: Women's Experiences of Mixed-Sex Psychiatric Wards' (Report, April 2008) 4–5 <<http://www.vicserv.org.au/uploads/documents/general%20docs/Nowhere%20to%20be%20Safe%20Final%20layout.pdf>>.

²⁷⁵ Richard Baker and Nick McKenzie, 'Patient "Silenced" After Sex Abuse', *The Age* (Melbourne), 21 November 2011 <<http://www.theage.com.au/victoria/patient-silenced-after-sex-abuse-20111120-1npeh.html#ixzz1f7vHXdna>>.

In the Education System

- 293 Students with disability continue to be subject to high rates of bullying and harassment in the education system. (See also Article 24) While many schools have anti-bullying policies, they are often inadequate in addressing the specific needs and circumstances of children and young people with disability, raising concerns under Article 16(1).

Case Study

A girl with a visual impairment studying at a high school in a rural area is harassed by other children and bullied on the basis of her disability. When she tells an education department representative about her experience, she is told to “get over it, that’s life sweetie”.²⁷⁶

Case Study

In 2010, a 15 year old student in New South Wales with Asperger’s Syndrome and attention deficit hyperactivity disorder was attacked by fellow students and received severe concussion during the bashing. The student was not accompanied by anybody in the ambulance to hospital and the student’s father was only informed about the assault after contacting the hospital three hours after the attack. Police were not informed of the attack until the following day.²⁷⁷

Social Protection Measures and Support Programs

- 294 There is a lack of comprehensive social protection measures and support programs to assist people with disability who are subject to exploitation, violence and abuse. People with disability have limited knowledge and access to information about social protection measures and programs, and are often reliant on others to facilitate access to these programs.
- 295 There is no overarching framework or partnership between the disability service system and social protection and support programs that are available to others in the community, such as domestic violence services, sexual health and sexual assault services, women’s support services counselling support programs and victims of crime services and supports.

²⁷⁶ NSW Disability Discrimination Legal Centre, Submission, above n 31, 35.

²⁷⁷ Bruce McDougall, ‘Son Knocked Out in Schoolyard Bashing — Dad Not Told for Three Hours’, *The Daily Telegraph* (online) 11 February 2010 <www.dailytelegraph.com.au/news/son-knocked-out-in-schoolyard-bashing-dad-not-told-for-three-hours/story-e6freuy9-1225828959512>.

- 296 Aboriginal and Torres Strait Islander people with disability, particularly in rural and remote areas are unable to access culturally appropriate support services despite the well-documented prevalence of domestic violence in Aboriginal and Torres Strait Islander communities. They are also unable to access transport, or are only offered transport for part of the distance to a support service location, which prevents them from seeking treatment and support from services that may be available to the general community.
- 297 People with disability from non-English speaking backgrounds also experience structural exclusion from both the disability and general community support systems because of the lack of culturally competent services. Stigma relating to ‘disability’ and exploitation, violence and abuse is also not addressed where this exists in some culturally and linguistically diverse communities.

Domestic Violence Services

- 298 Despite the high incidence of exploitation, violence and abuse experienced by women with disability, there is a lack of knowledge and expertise and a range of structural barriers within domestic violence, sexual assault and women’s crisis services that prevent appropriate measures and responses to support women with disability. Key barriers include:
- (a) lack of knowledge about the specific forms of exploitation, violence and abuse experienced by women with disability, and the inter-relationship between gender and disability and exploitation, violence and abuse;²⁷⁸
 - (b) lack of connection and promotion of services to women with disability in the community or within disability service systems;
 - (c) lack of physical access to service locations, including refuges and crisis housing, and a lack of accessible information about services for women with sensory and cognitive impairments;²⁷⁹
 - (d) discriminatory service policies, procedures and practices that exclude women with disability, particularly women with psychosocial and cognitive impairments;
 - (e) inflexible service policies for providing essential medical equipment that is modifiable or portable or to appropriately accommodate assistive animals,²⁸⁰ and

²⁷⁸ Lucy Healey et al, above n 253, 14.

²⁷⁹ Council of Australian Governments, *National Plan*, above n 246, 79. A recent study found that only 38 percent of women’s refuges in NSW are physically accessible for women in wheelchairs: Department of Families, Housing, Community Services and Indigenous Affairs, ‘Women, Domestic and Family Violence and Homelessness: A Synthesis Report’ (Report, Australian Government, August 2008) 4.1.3: Women with disabilities
<www.fahcsia.gov.au/sa/women/pubs/violence/synthesis_report08/Pages/groups_women_need_assist.aspx>.

²⁸⁰ Lucy Healey et al, above n 253, 14.

- (f) service staff are often inadequately trained to communicate with people with hearing, vision, speech and cognitive impairments and those with psychosocial disability.²⁸¹

RECOMMENDATIONS Article 16

- That Australia establishes an independent, statutory, national protection mechanism that has broad functions and powers to protect, investigate and enforce findings related to situations of exploitation, violence and abuse experienced by people with disability, and that addresses the multiple and aggravated forms of violence and abuse that result from the intersection of ‘disability’ with other characteristics, such as gender, age, indigenous status and racial, cultural or linguistic status.
- That Australia commissions the Australian Human Rights Commission to undertake a comprehensive public inquiry into the incidence, forms and circumstances of exploitation, violence and abuse of people with a disability in the community and within a full range of service settings, including addressing the gender and age-related dimensions of exploitation, violence and abuse and the particular situation of Aboriginal and Torres Strait Islander people with disability and people with disability from non-English speaking backgrounds.
- That Australia, in partnership with disability representative and advocacy organisations, establishes a national coordinated strategic framework for the prevention of exploitation, violence and abuse experienced by men, women, girls and boys with disability, that include measures:
 - to build resilience, self-advocacy skills, protective behaviour skills, knowledge of rights and redress among people with disability;
 - to address the specific circumstances of Aboriginal and Torres Strait Islander people with disability and people with disability from non-English speaking backgrounds;
 - to coordinate and link diverse service systems, including disability, mental health, housing, domestic violence and sexual assault services;
 - to reorient service policy and procedures to reflect human rights obligations; and
 - to raise awareness among the community and various systems, such as judicial, legal, medical, social services, health, educational systems.
- That Australia urgently plans for the closure of residential care and other institutional environments, and develops genuine community living options, including providing individualised funding and self-directed supports to people with disability.

²⁸¹ Ibid.

- That Australia ensures that all people with disability are able to access the independent advocacy support they need to assert and be accorded their human rights and fundamental freedoms under the CRPD.
- That an individual advocacy program owned and managed by Aboriginal and Torres Strait Islander people with disability be established and resourced.

ARTICLE 17 — PROTECTING THE INTEGRITY OF THE PERSON

STATUS IN AUSTRALIA

299 In Australia, people with disability are subjected to a range of practices that significantly interfere with their physical and mental integrity and breach their rights under Article 17, including chemical, physical and mechanical restraint, seclusion and other restrictive practices (see also Article 15); non-therapeutic sterilisation (see also Article 23); and psychosurgery and forced electro-convulsive treatment (ECT).

Australia's Interpretative Declaration on Article 17

300 Australia made an Interpretative Declaration in respect of Article 17 upon ratifying the CRPD:

Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of psychosocial disability, where such treatment is necessary, as a last resort and subject to safeguards.²⁸²

301 Australia's Interpretative Declaration to Article 17 means that Australia will continue with existing legislative, policy and practice frameworks governing compulsory assistance or treatment. This declaration is largely directed to State and Territory frameworks that underpin the mental health system in Australia, and clarifies that Australia believes the existing mental health framework is in line with Article 17 and will be maintained.

302 Laws, policy and practice for involuntary treatment of people with psychosocial disability purport to 'protect' people who may be of harm to themselves or others by providing compulsory treatment in the community or in mental health facilities. Despite the significant limitations placed on a person's rights to liberty and security (see also Articles 14 and 15) and equal recognition before the law (see also Article 12), there is no consistency across State and Territory mental health laws in:

- (a) assessing, or determining 'risk of harm to self or others'; or
- (b) assessing a person's ability or support needs to provide full and informed consent. (See also Article 12)

303 As a result, many people with psychosocial disability and cognitive impairment experience serious breaches of their human rights and widespread abuse, neglect and exploitation within the current legislative, policy and practice framework that purports to 'protect' them. (See discussion below and Articles 12, 14, 15, 16 and 25)

²⁸² *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, above n 109.

- 304 Since ratification of CRPD, a number of people with disability, their representative organisations, disability advocacy and legal groups in Australia have questioned the validity of separate mental health legislation, given this legislation prescribes limitations to human rights on the basis of disability,²⁸³ and is not legislation that limits human rights for everyone in the community in relation to risk of harm to self and others and the need for compulsory treatment and detention.
- 305 In his report to the UN General Assembly, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (UN Rapporteur on Torture) noted with respect to involuntary commitment to “psychiatric institutions” that “article 14 of CRPD prohibits ... the existence of a disability as a justification for deprivation of liberty”.²⁸⁴
- 306 Instead of addressing mental health laws as an inherent breach of human rights, States and Territories have focused on reviewing and amending mental health legislation in an effort to increase compliance with human rights. Australia’s Interpretative Declaration supports this status quo, and therefore cannot be supported.

Case Studies

- An investigation into the deaths of three men who died in state-run psychiatric wards across Melbourne between 2007 and 2009 highlighted allegations that serious failings by senior mental health staff may have contributed towards their unexpected deaths. Evidence also suggests that the health services involved allegedly covered up or failed to collect important information about the deaths, possibly preventing a proper examination of their cause. These cases are currently the focus of coronial inquests.
- Anthony, who died in September 2008 in a psychiatric hospital in Melbourne, was killed by a combination of powerful anti-psychotic medications given to him by staff, according to a Victorian Government pathologist. Staff and patients aware of the circumstances of his death say the 40-year-old was pleading not to be given more drugs on the night he died. Staff and patients also allege there was an attempt to conceal information about the circumstances of his death from his family.
- Jeffrey died at a Melbourne hospital in December 2009 after he went into a coma following a suspected overdose of illicit drugs supplied by unknown visitors. His family says the hospital’s psychiatric ward kept no visitor log nor did it supervise visits to patients. Police sources say the hospital’s legal department interfered

²⁸³ Department of Human Services, ‘Review of the *Mental Health Act 1986*: Community Consultation Report’ (Report, Victorian Government, July 2009) 14, 19.

²⁸⁴ Manfred Nowak, above n 184, 16.

with their investigation and ordered staff not to speak about the circumstances of his death.

- Adam's 2007 death at a hospital's psychiatric ward during a struggle with security guards was the subject of a recent inquest. A finding has yet to be made, but evidence to the inquest suggests he was asphyxiated while being held face down by security staff. A witness told the inquest that the victim apparently yelled "I give up", but security did not ease off. He died soon after.²⁸⁵

Involuntary Mental Health Treatment

307 People with disability face a deprivation of their mental and physical integrity through involuntary treatment. The UN Rapporteur on Torture has stated that "the more intrusive and irreversible the treatment, the greater the obligation on States to ensure that health professionals provide care to persons with disabilities only on the basis of their free and informed consent".²⁸⁶ This comment was directed to the use of forced psychosurgery and electroconvulsive therapy (ECT), but the Rapporteur also stated that forced interventions, including psychiatric medication "needs to be closely scrutinised" and "warrants greater attention" as they may constitute "a form of torture or ill-treatment".²⁸⁷

308 The compulsory treatment of people with disability in the form of an Involuntary Treatment Order (ITO),²⁸⁸ Supervised Treatment Order (STO)²⁸⁹ or Community Treatment Order (CTO)²⁹⁰ is authorised by mental health laws in all States and Territories in Australia. Individuals who refuse compulsory treatment may be detained. Involuntary detention under Australian mental health laws gives rise to an 'authority to treat', except in Tasmania

²⁸⁵ Richard Baker and Nick McKenzie, 'Deaths in Mental Health Facilities: Unexpected, Unnatural and Violent', *The Age* (Melbourne) 3 September 2011 <www.theage.com.au/victoria/deaths-in-mental-health-facilities-unexpected-unnatural-and-violent-20110902-1jqdg.html#ixzz1bYnkl55H>.

²⁸⁶ Ibid 14.

²⁸⁷ Ibid 16.

²⁸⁸ An involuntary treatment order authorises involuntary treatment for mental illness. An involuntary treatment order can be made if an authorised doctor is satisfied that all the criteria for involuntary treatment apply: Queensland Health, 'Mental Health Act 2000 — Involuntary Treatment' (Fact Sheet No 3, Queensland Government, undated) <www.health.qld.gov.au/mha2000/documents/factsheet3.pdf>.

²⁸⁹ A supervised treatment order is a civil order in relation to a person with an intellectual disability (who is receiving residential services) to prevent the risk of significant harm to others: Department of Human Services, 'Supervised Treatment — Disability Act 2006' (Information Sheet No 15, Victorian Government, 2011) <www.dhs.vic.gov.au/__data/assets/pdf_file/0005/152663/disact_infosheet15supervisedtreatment_pdf_280607.pdf>.

²⁹⁰ A Community Treatment Order allows a person to receive compulsory treatment whilst living in the community.

where the Guardianship Tribunals or the statutory ‘person responsible’ has responsibility for determining an order for treatment.²⁹¹

309 The laws regulating involuntary mental health treatment vary across the States and Territories, but they all have failed to prevent, and in some cases, actively condone unacceptable practices, including invasive and irreversible treatments such as:

- (a) authorisation of psychosurgery on both voluntary and involuntary patients;
- (b) authorisation of ECT on involuntary patients; and
- (c) authorisation of sterilisation on involuntary patients.²⁹²

310 Mental health laws do not protect people with disability from being arbitrarily subjected to detention and involuntary treatment. (See also Articles 14 and 15)

311 The rate of forced community psychiatric treatment in Victoria is higher than anywhere else in the world. Data indicates that in Victoria in 2008, 6,971 patients were detained (with 316 discharges in 2007–2008) and 5,099 involuntary CTOs were made.²⁹³ This compares to a rate of 1,951 CTO orders during 1995–1996.²⁹⁴ In 2006–2007, 66 percent of hearings by the Mental Health Review Board of Victoria related to applications for CTOs.²⁹⁵ Many people are subject to a CTO after their first hospital admission despite any history of treatment refusal. It is estimated that 15–25 percent of people on CTOs fall into this category.²⁹⁶ In Victoria in 2008, 18,322 ECT treatment orders were administered to 1,787 individuals,²⁹⁷ of which 35 percent of people received ECT involuntarily.²⁹⁸ In Queensland, a number of

²⁹¹ Terry Carney and Fleur Beaupert, ‘Mental Health Tribunals: Rights Drowning in Un-Chartered’ Health Waters?’ (2008) 3 *Australian Journal of Human Right* 181.

²⁹² See *Mental Health Act 2006* (NSW); draft *WA Mental Health Act*.

²⁹³ Selma Milovanovic, ‘Mentally Ill Man’s Human Rights Breached: Tribunal’, *The Age* (Melbourne) 24 April 2009 <www.theage.com.au/national/mentally-ill-mans-human-rights-breached-tribunal-20090423-agtb.html>.

²⁹⁴ The figures were obtained in September 2008 by the Mental Health and Drugs Division of Department of Health Services: Vivienne Top, Martin Thomas and Mim Ingvarson, ‘Lacking insight: Involuntary Patient Experience of the Victorian Mental Health Review Board’ (Report, Mental Health Legal Centre, October 2008) 29 <www.communitylaw.org.au/mentalhealth/cb_pages/images/Lacking_Insight.pdf>.

²⁹⁵ Mental Health Review Board of Victoria, Annual Report’ (Report, Department of Human Services, 2007).

²⁹⁶ Vivienne Topp, Martin Thomas and Mim Ingvarson, above n 294, 29.

²⁹⁷ 1,176 people were in public mental health facilities, 611 in private service: see Office of the Chief Psychiatrist, ‘Annual Report 2007–2008’ (Report, Department of Health, Victorian Government, 2009) 8 <http://health.vic.gov.au/chiefpsychiatrist/documents/annual_report0708.pdf>.

²⁹⁸ Mental Health Legal Centre, ‘Fact sheet for the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Mental Health Issues in Victorian Prisons’ (Fact Sheet, 2009).

people with intellectual disability are detained in psychiatric facilities due to the lack of appropriate community housing and supports available.²⁹⁹ (See also Article 19)

312 As well as violating the rights of people with psychosocial disability, Australian mental health laws go beyond their powers for other people with disability who have been involuntarily detained in psychiatric facilities and subject to involuntary mental health treatment.³⁰⁰

313 There are a number of systemic factors contributing to the high incidence of involuntary treatment, which mean that people are unnecessarily subjected to mental health laws and compulsory treatment:

- (a) prejudice, assumptions and sensationalism surrounding the risk people with psychosocial and cognitive disability pose to the community, which is managed by imposing compulsory treatment;³⁰¹
- (b) shortages of qualified staff and limited resources can result in inappropriate resort to medication — chemical restraint — as a means of suppressing and controlling ‘behaviours of concern’;³⁰² (See also Article 15)
- (c) lack of access to government funded legal representation services, lack of access to appeal processes and too great a reliance on pro bono legal support means that many people will not receive a legal service at all;³⁰³ and
- (d) lack of advocacy and social supports to assist with reducing contact with the disability and mental health service system.

²⁹⁹ Submission from Queensland Advocacy Incorporated.

³⁰⁰ Raised in consultations by disability individual advocacy organisations.

³⁰¹ Vivienne Topp, Martin Thomas and Mim Ingvarson, above n 294, 28.

³⁰² Ibid.

³⁰³ In NSW, the Mental Health Advocacy Service recently widened its policy to provide a limited number of grants of legal aid for CTO cases. Legal representation in CTO proceedings in Victoria is minimal, and individuals in the ACT are unable to access any legal representation in CTO proceedings at all: see Terry Carney et al, ‘Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?’ (2008) 26 *Law in Context* 125.

- 314 There are a number of factors contributing to the high incidence of involuntary treatment, which demonstrate failures of mental health laws and practice: (See also Articles 12, 14 and 15)
- (a) people often have limited opportunity to voice their experiences of involuntary treatment, to challenge the treating team as to the most appropriate care they require, to challenge the intervention overall or to appeal to have treatment plans adjusted;³⁰⁴
 - (b) legal reviews take place too infrequently, which means that treatment plans can be excessive and unnecessarily extended;³⁰⁵
 - (c) mental health tribunals rely primarily on consultant psychiatric reports instead of the views of the person with psychosocial disability and their support people or advocates;
 - (d) people do not have legal right to receive the supports they need to make decisions or give consent to treatment, including advance directives; rather the focus is on incapacity to consent and compulsory treatment orders (See also Article 12); and
 - (e) advance directives are not binding and so often disregarded when it is assumed that the person does not have capacity to give authority.

Case Study

A client appeared before the Mental Health Review Board of Victoria in 2009 to reduce or end a CTO that included weekly injections of Depo Provera, an anti-libidinal medication because they were causing severe osteoporosis, a side effect of long term use of this treatment. There was no dispute that he was eight times more likely to suffer a fracture in his lumbar spine than an average person of his age. However, the Board found that the adverse effects of the treatment were not sufficiently severe.³⁰⁶ Despite the Board ordering the authorised psychiatrist to revise the client's treatment, the forcible medication remains virtually unchanged.³⁰⁷

³⁰⁴ Vivienne Topp, Martin Thomas and Mim Ingvarson, above n 294, 27.

³⁰⁵ Ibid 29.

³⁰⁶ *Re review 09–085* [2009] VMHRB 1 (23 February 2009) [130]–[140].

³⁰⁷ See also <http://www.hrlrc.org.au/year/2009/09-085-2009-vmhrb-23-february-2009/>.

RECOMMENDATIONS Article 17

- That Australia withdraws its Interpretative Declaration in relation to Article 17.
- That, in consultation with people with disability through their representative, advocacy and legal organisations, Australia conducts a comprehensive audit of laws, policies and administrative arrangements underpinning compulsory treatment with a view to:
 - introducing reforms to eliminate laws and practices that relate to compulsory treatment that inherently breach human rights;
 - work with people with disability and their representative and advocacy organisations to develop appropriate mechanisms and supports for any person, regardless of disability, who is at risk of causing harm to themselves or others; and
 - implement administrative arrangements that focus on supported decision making.

ARTICLE 18 — LIBERTY OF MOVEMENT AND NATIONALITY

STATUS IN AUSTRALIA

Australia's Interpretative Declaration on Article 18

315 Australia made an Interpretative Declaration in respect of Article 18 when it ratified the CRPD:

Australia recognises the rights of persons with disability to liberty of movement, to freedom to choose their residence and to nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on 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.

316 The Interpretative Declaration preserves Australia's current legislative and administrative approach to processing visa applications. The *Migration Act 1958* (Cth) (Migration Act) and the *Migration Regulations 1994* (Cth) (Migration Regulations) control the entry and stay in Australia, of non-citizens and prescribe the selection criteria and processes for all visa applications. The *Disability Discrimination Act 1992* (Cth) (DDA) provides an exemption for certain provisions within the Migration Act, and subordinate legislation under this Act, and for the actions required by this legislation. This includes the health requirement contained in this legislation.

317 Almost all visa applicants must satisfy the health requirement in order to be granted a visa.³⁰⁸ Although the health requirement does not directly discriminate against people with disability, it is much more likely that people with disability will be unable to meet it. To meet the health requirement the applicant must:

... not have a disease or condition which would be likely to require health care or community services; meet the medical criteria for the provision of a community service, result in significant cost to the Australian community in the areas of health care and community services; or prejudice the access on an Australian citizen or permanent resident to health care or community services, regardless of whether the applicant would use those services.³⁰⁹

³⁰⁸ *Migration Act 1958* (Cth) s 65.

³⁰⁹ *Migration Regulations 1994* (Cth) sch 4, 4006.

- 318 The health requirement is “unable to satisfy the equal protection obligation under Article 5 of the UN CRPD”.³¹⁰ The rationale behind the DDA exemption is that if the Migration Act were not exempt, some of the criteria for assessing visa applications may be discriminatory under the DDA.³¹¹ In particular, without this exemption the stringent health requirements would not be compatible with the DDA.
- 319 The UN High Commissioner for Refugees (UNHCR) has expressed concern about the discriminatory effect the health requirement has on refugee and offshore humanitarian visa applications, commenting that:
- “The present operation of the health requirement is discriminatory in effect and endangers a number of other human rights norms.” To that extent, Australia presently falls short of its international obligations.³¹²
- 320 The Interpretative Declaration and the DDA exemption of aspects of the Migration Act are indicative of Australia’s “awareness of the dissonance between the CRPD and the health rules”,³¹³ and the fact that the health requirement “can no longer be said to be based on ‘legitimate, objective and reasonable’ criteria”.³¹⁴

Failure to Consider the Potential Contribution of People with Disability

- 321 The mandatory health requirement results in many people with disability, particularly children, being unreasonably denied an Australian visa. People with disability are more likely to fail the health requirement given the focus is exclusively on the perceived economic cost of the applicant’s ‘condition’ and the burden this will place on public health and community resources. There is no consideration of the economic and social contributions people with disability make to the Australian economy and community life.³¹⁵

³¹⁰ National Ethnic Disability Alliance, ‘Legal Advice Regarding UN *Convention on the Rights of Persons with Disabilities*’ (Advice, 20 August 2009).

³¹¹ Productivity Commission 2004, ‘Review of the *Disability Discrimination Act 1992*’ (Report No 30, Australian Government, Australian Government, 30 April 2004) 343.

³¹² UN High Commissioner for Refugees, ‘Submission No 82 to the Joint Standing Committee on Migration Inquiry into the Migration Treatment of People with a Disability’ *Inquiry into Migration Treatment of People with a Disability*, 2009, 11.

³¹³ Ron McCallum AO and Mary Crock, Submission to the Joint Standing Committee on Migration, *Inquiry into the Migration Treatment of Disability*, 2009, 1.

³¹⁴ Australian Federation of AIDS Organisations, Submission to the Joint Standing Committee on Migration, *Inquiry into the Migration Treatment of Disability*, 2009, 5.

³¹⁵ *Ibid*; UNHCR, above n 312; National Ethnic Disability Alliance, Submission to the Joint Standing Committee on Migration: ‘No Right to Discriminate’, *Inquiry into Migration Treatment of Disability*, 2009; NSW Disability Discrimination Legal Centre, Submission: *Inquiry into the Migration Treatment of Disability*, 2009.

- 322 The mandatory health requirement has a significant negative impact on families that include children and adults with disability. All members of a family group will be denied visas on the basis that a family member with disability has failed the health requirement. Many families are forced to make a difficult decision to leave behind a family member in order to build a life in Australia. In cases involving humanitarian entrants, family members with disability will remain in extremely vulnerable situations, having also been displaced by war, persecution, or civil unrest, but unable to join their families in Australia.³¹⁶

Case Study

Dr Moeller, a German migrant doctor, had been working in a Victorian country town for nearly three years as a much needed specialist physician. Despite his service and enormous contribution to the town's population, he had twice earlier been refused permanent residency. His applications were refused because his son Lukas, aged 13, has Down syndrome, and was considered too much of a burden on taxpayers.³¹⁷ In 2008, the Department of Immigration again refused the family permanent residency status and their appeal was rejected by the Migration Review Tribunal. However, in November 2008, following significant public pressure, the Minister for Immigration approved Dr Moeller's application for ministerial intervention and granted his family permanent residency status.³¹⁸

Mandatory HIV Testing

- 323 A HIV test is a mandatory part of the final health check for all prospective migrants, and to all off-shore applicants for refugee and humanitarian visas. If the applicant is HIV positive, then the cost assessment will very likely determine that the applicant does not meet the health requirement.³¹⁹ People who are HIV positive represent the highest proportion of migration applicants who fail to meet the migration health requirement.³²⁰

³¹⁶ UNHCR, above n 312; National Ethnic Disability Alliance, above n 316.

³¹⁷ Senator Evans, Minister for Immigration and Citizenship, 'Statement on Dr Bernhard Moeller' (Press Release, 26 November 2008) <www.minister.immi.gov.au/media/media-releases/2008/ce08113.htm>.

³¹⁸ Brandon Ah Tong, 'Time to Lift the Blinders Off Disability and Immigration', *Australian Policy Online* (27 October 2011) <<http://apo.org.au/commentary/time-lift-binders-disability-and-immigration>>.

³¹⁹ Department of Immigration and Citizenship, 'Fact Sheet 22 — The Health Requirement' (Fact Sheet, Australian Government, May 2010) <www.immi.gov.au/media/fact-sheets/22health.htm>

³²⁰ National Association of People Living with HIV/AIDS, Submission to the Joint Standing Committee on Migration, *Inquiry into the Migration Treatment of Disability*, 2009, 7.

324 The mandatory HIV/AIDS testing of offshore refugees prior to resettlement is of particular concern. Unlike on-shore refugees where the health requirement does not apply, an off-shore refugee who is found to have HIV will be unlikely to meet the health requirement and will not be granted a protection visa despite having a well-founded fear of persecution.

325 The policy to impose a mandatory HIV test to all permanent visa applicants and to generally refuse visas to people with HIV “adds a second layer of discrimination”.³²¹ HIV does not represent a public health threat and consequently there is no rationale for mandatory HIV testing.³²² The UN International Guidelines on HIV/AIDS and Human Rights state:

There is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status...Therefore, any restrictions on these rights based on suspected or real HIV status alone, including HIV screening of international travellers, are discriminatory and cannot be justified by public health concerns.³²³

Case Study

Mr X had HIV and became too ill to support his family. He was recognised by UNHCR as a refugee, and his relatives who were all Australian citizens applied to sponsor him to Australia. Mr X had numerous close relatives in Australia, including his parents, siblings and children from a previous marriage. All were willing to provide financial and emotional support to care for him and his young family. Despite his circumstances and family sponsorship, his application was refused due to the health requirement.

UNHCR was required to seek a solution for Mr X in other resettlement countries and succeeded in obtaining urgent medical care and resettlement for him elsewhere. Mr X had to move to a country where he and his family had no other family support and few communal ties. His process of settlement and rebuilding of his life have been made correspondingly more difficult.³²⁴

³²¹ Australian Federation of AIDS Organisations, above n 314, 9.

³²² UNAIDS/WHO, ‘UNAIDS/WHO Policy Statement on HIV Testing’ (Policy, United Nations, June 2004) <http://data.unaids.org/una-docs/hivtestingpolicy_en.pdf>.

³²³ Quoted in Australian Federation of AIDS Organisations, above n 314, 9.

³²⁴ Case study taken from UNHCR, Submission, above n 312.

Lack of Freedom for People with Disability to Move within Australia

- 326 All Australian governments have a role in providing different aspects of support to people with disability. These support systems have been found to be “broken”, fragmented and significantly underfunded.³²⁵ (See also Article 26) People with disability who are fortunate to receive supports may be restricted to the region, State or Territory they currently live in, as supports are often not portable outside the regions, States or Territories from which they are funded. If a person needs or chooses to move to another region, State or Territory, then supports, such as personal care, aids and equipment cannot be taken with the person. For example, in New South Wales, a person is made ineligible for the Attendant Care Program if they intend to move permanently interstate.³²⁶ This restricts or limits many people with disability to move freely within Australia.
- 327 Freedom to move freely within Australia has a significant adverse impact on Aboriginal and Torres Strait Islander people with disability, who may need or want to move within the traditional ‘boundaries’ or lands of different Aboriginal and Torres Strait Islander communities. For example, it is not uncommon for Aboriginal people with disability to be moving or wanting to move between Northern Territory, Western Australia and South Australia to visit community members. However, regional, State or Territory borders are often inconsistent and incompatible with traditional ‘boundaries’, and this imposes an additional barrier to an Aboriginal or Torres Strait Islander with disability to maintain their disability support to move freely as well as participate freely in cultural life.³²⁷ (See also Article 30)

Case Study

Jayne has a physical disability. She had great difficulties attempting to move interstate as her funding for personal care was not portable — her supports could not be transferred from New South Wales to South Australia. The SA disability service system also claimed they did not have the resources to support Jane. Jayne only managed to receive inadequate minimal assistance by taking the problem to the South Australian Minister for Disabilities. She waited ten months for her home to be assessed for modifications and seven months after that they still weren’t done.³²⁸

³²⁵ Productivity Commission, ‘Disability Care and Support’ (Inquiry Report No 54, Australian Government, 31 July 2011).

³²⁶ Department of Aging, Disability and Home Care, ‘Attendant Care Package Guidelines’ (Guidelines Version 2.0, NSW Government, April 2009) 7.

³²⁷ Information provided by First Peoples Disability Network Australia.

³²⁸ CRPD Shadow Report Survey, Submission No 176 (21 April 2010).

RECOMMENDATIONS Article 18

- That Australia removes the Interpretative Declaration in relation to Article 18.
- That the exemption in the Disability Discrimination Act 1992 (Cth) as it applies to the Migration Act 1958 (Cth) be removed.
- That Australia ends the use of mandatory HIV testing for all visa applicants and off-shore humanitarian and refugee applicants.
- That Australia improves consistency, transparency and administrative fairness for migrants and refugees with disability applying for an Australian visa.
- That disability support arrangements for people with disability are administered in a manner that enables people with disability relying on these supports to have the same freedoms as people without disability to choose where they live.

ARTICLE 19 — LIVING INDEPENDENTLY AND BEING INCLUDED IN THE COMMUNITY

STATUS IN AUSTRALIA

General Legal and Policy Framework

- 328 People with disability in Australia are restricted in their right to live independently and be included in the community, including the right to choose freely where and with whom they will live. The inaccessible design of social and private housing options and the lack of appropriate and portable support services are key barriers. (See also Articles 18, 20, 26 and 28) The predominant ‘supported accommodation’ framework used by Australia within the specialist disability service system also plays a key role.
- 329 The ‘supported accommodation’ framework does not separate housing needs from support needs, and results in many people with disability, particularly those with high and complex support needs being compelled to live in residential institutions and other specific purpose arrangements in order to receive the supports they need. Article 19 is derived from the traditional civil and political rights of liberty and security of the person (see also Article 14), and it makes clear that institutional accommodation is an explicit violation of rights to liberty, and that Australia has an immediate responsibility to prevent and remedy this violation.³²⁹
- 330 The National Disability Agreement (NDA) is the funding agreement between the Australian, State and Territory governments for the delivery and regulation of specialist disability services.³³⁰ This includes supported accommodation and care, which is largely provided by State and Territory Governments.
- 331 The Home and Community Care Program (HACC), which is administered jointly by all Australian governments provides basic support and care needs to assist frail aged people and younger people with disability and their carers remain living independently at home rather than being placed into supported accommodation.

³²⁹ See Phillip French, ‘Accommodating Human Rights: A Human Rights Perspective on Housing, and Housing and Support, for Persons with Disability’ (Report, People With Disability Australia, 2009); Shut In, ‘Position Statement on Housing and Support’ (Position Paper, Shut In — Campaign to Close Institutions, August 2011).

³³⁰ Department of Ageing, Disability and Home Care, ‘All National Disability Agreement (formerly CSTDA) Funded Services’ (Statement, NSW Government, undated)
<www.dadhc.nsw.gov.au/dadhc/Doing+business+with+us/national_disability_agreement_funded_services.htm>.

- 332 The National Disability Strategy (NDS) includes an action focused on developing supported accommodation models for people with high and complex needs.³³¹ The draft National Human Rights Action Plan also includes measures for acquiring or building supported accommodation places for people with disability.³³² These measures are contained in sections addressing specialist disability care and supports rather than in sections addressing rights to housing, and many disability representative, advocacy and human rights organisations are sceptical that they can or will comply with Article 19.
- 333 The NDS recognises that barriers to accessible, well designed housing and accommodation need to be addressed to provide more choice for people with disability in where they live.³³³ Six core universal design elements³³⁴ are being incorporated into the construction of new public and social housing through the Social Housing Initiative; and the Liveable Housing Design Initiative provides guidelines and targets for these six universal design elements to be incorporated into the building of all new homes by 2020. Although the Liveable Housing Design targets have been agreed by industry and Australian governments, they are only aspirational.³³⁵
- 334 Australia has committed to introducing a National Disability Insurance Scheme (NDIS). A key aim of the NDIS is to enable people with disability, including those with significant support needs to obtain, choose, control and manage the supports they need to live in the community.

Supported Accommodation, Residential Institutions and Other Specific Purpose Arrangements

- 335 Despite commitments from successive Australian governments since the 1980s and 1990s to close large residential institutions accommodating people with disability, many people with disability, particularly people with high and complex support needs continue to live in large residential institutions funded by Australian governments.³³⁶

³³¹ Council of Australian Governments, *National Disability Strategy*, above n 84, 52.

³³² Attorney-General's Department, above n 122, 39.

³³³ Council of Australian Governments, *National Disability Strategy*, above n 84, 32.

³³⁴ The Australian Network for Universal Housing Design defines 'universal design' as 'the design of products, services and environments to be useable by everyone regardless of age or ability': <www.anuhd.org>.

³³⁵ Council of Australian Governments, *National Disability Strategy*, above n 84, 34.

³³⁶ Self-advocates and representative and advocacy organisations report that there are four large government institutions in Victoria; three redeveloped institutions with more being planned in NSW; people with disability being institutionalised in health facilities in QLD; two government and two non-government institutions in SA; and people with disability being moved into ten bed congregate care facilities supposedly because they are 'ageing' in WA. See also Shut In — Campaign to Close Institutions <www.shutin.org.au>.

- 336 While plans to close large institutions are proceeding in South Australia, the Victorian Government has not allocated funding in its 2011 budget for closure and it is not clear when and how closure will proceed. The Queensland Government has indicated it will continue its reform process after opposition prevented residents of one institution being moved into another, but reform plans are unclear. The New South Wales Government is being more deceptive by claiming it has closed 3 large institutions when it has merely redeveloped them into new ‘contemporary’ institutions, with plans to redevelop more.³³⁷ The Western Australian Government has provided funding for larger congregate residential facilities that purport to address the ageing related needs of people with disability.³³⁸
- 337 The pervasive use of a ‘supported accommodation’ framework to address the housing and support needs of people with disability continues to perpetuate the view that some people with disability require special purpose care facilities and arrangements rather than genuine community living options. This view, combined with the lack of available housing and support for people with disability, and the pressure from families and ageing parents for appropriate housing and support options, has focused Australia on funding and providing additional ‘innovative’ supported accommodation models, instead of focusing on genuine community living options that separate housing needs from support needs.³³⁹
- 338 This has meant that some Australian governments are funding and building new ‘contemporary’ institutions, such as ‘cluster housing’, ‘villas’, ‘special purpose complex health facilities’, special purpose ‘behaviour support’ facilities and ‘special purpose aged care facilities’.³⁴⁰ Despite new labels, these facilities still segregate, congregate and isolate people on the basis of disability and require people with disability to be placed in them in order to receive the supports they need.
- 339 Other governments are forcing people with disability to form ‘supported accommodation’ arrangements in order to share support services.³⁴¹ This practice of forced co-tenancy occurs where a person with disability must live in a ‘group home’ with other people with disability in order to receive supports; where a person must ‘agree’ to another person moving into their home so support can be shared; and where people with disability are

³³⁷ See Shut In — Campaign to Close Institutions E-Bulletin (2011) <www.shutin.org.au>; reported by VALID and Reinforce, National Council for Intellectual Disability, Queensland Advocacy Incorporated and People With Disability Australia.

³³⁸ Information provided by People with Disabilities Western Australia.

³³⁹ Council of Australian Governments, *National Disability Strategy*, above n 84.

³⁴⁰ For example, the NSW Government has redeveloped three large residential institutions into a 100 bed institution for older people with disability, a 60 bed institution for people with ‘challenging behaviour’, a 20 bed ‘complex health need’ institution, and a 20 bed ‘cluster housing’ institution for people with disability.

³⁴¹ For example, Community Safeguards Coalition has expressed concern about forced co-tenancy practices in Queensland.

ineligible for individual funding because they receive supports through a group block funding arrangement.³⁴²

- 340 Forced co-tenancy means that people's individual needs are not met; quality of support is diminished and tenants lose the right to make important lifestyle choices, including who they share their home with. This contrasts significantly with other adults who choose to live in a shared housing arrangement where they are able to interview and check references before accepting someone to share their home. Psychological wellbeing is likely to be compromised in these group environments and this can cause serious behavioural issues.³⁴³
- 341 International and Australian research and evidence demonstrates that poorer life outcomes and higher risks of violence and abuse for people with disability are associated with institutional and other 'supported accommodation' environments, including smaller 'group home supported accommodation' models.³⁴⁴ (See also Article 16)
- 342 Some 'supported accommodation' residential facilities, such as boarding and rooming houses may be licensed by the disability service sector but they do not have the protections provided by disability service legislation or policy. People with disability are often forced to live in these facilities to receive supports and prevent homelessness, or they may be required to live in these facilities as a condition of a compulsory mental health treatment order. These facilities have very limited support services and are consistently found to have high levels of exploitation, violence and abuse.³⁴⁵ (See also Article 16)

Younger People Placed in Nursing Homes

- 343 Over 6,700 people with disability under the age of 65 are forced to live in aged residential care nursing homes due to the under supply of appropriate housing and support options for people with disability with higher and more complex support needs.³⁴⁶ People, some of whom are in their early 20s are forced to live with people who may be four times their age merely because they have similar physical nursing and support needs.

³⁴² Community Safeguards Coalition, 'My Life, My Home, My Solution' (Position Statement, Community Safeguards Coalition, 2009) <www.qdn.org.au>.

³⁴³ Ibid.

³⁴⁴ Information provided during consultations for this report; Family Advocacy, 'Presenting the Evidence — Deinstitutionalisation: A Review of Literature' (Review, Family Advocacy, June 2007); French, Dardel and Price-Kelly, above n 161; French, 'Accommodating Human Rights', above n 329; Community Safeguards Coalition, above n 342.

³⁴⁵ NSW Ombudsman, above n 266; Adele Horin, above n 266.

³⁴⁶ Younger People in Nursing Homes National Alliance <www.ypinh.org.au>.

- 344 Since 2007, Australia has been implementing a national program to address this issue. However, in 2011 an outcomes report noted that the number of younger people with disability in nursing homes had been reduced by only 29 percent, leaving unacceptably high numbers of people with disability still living in nursing homes.³⁴⁷

Unavailable and Inadequate Housing and Supports (see also Articles 18, 20, 26 and 28)

- 345 Access to appropriate housing is a major issue for people with disability in Australia. 32 percent of the submissions to the 2009 national consultations for the National Disability Strategy identified difficulties and concerns with housing and accommodation.³⁴⁸
- 346 In a Federal Government survey, 61 percent of the 3.8 million people with disability living in households reported needing assistance to manage or cope with the activities of everyday life.³⁴⁹ However, it is estimated that only a small percentage receive government funded accommodation or support in any form.³⁵⁰ There is a general acknowledgement that there is a high level of unmet need for supports and accommodation for people with disability.³⁵¹ This forces many people with disability to live with their families throughout their adult life.
- 347 Statistically, 79 percent of people with disability receive support from relatives and friends, mainly partners, parents or children. Formal providers of assistance, such as home-care workers and support workers, were used by just over half of those with a disability (53 percent).³⁵² The availability of this informal care remains an influential factor in the total demand for formal assistance.³⁵³ Currently, the total provision of formal and informal care is insufficient to meet demand.³⁵⁴

³⁴⁷ Meredith Griffiths, 'Younger Disabled Still Stuck in Aged Care' *ABC News* (online) 21 July 2011 <<http://www.abc.net.au/news/2011-07-21/young-disabled-people-in-aged-care/2804118>>.

³⁴⁸ National People with Disabilities and Carer Council, 'SHUT OUT: The Experience of People with Disability and their Families in Australia' (Report. Commonwealth of Australia, 2009) <www.fahcsia.gov.au/sa/disability/pubs/policy/community_consult/Documents/NDS_report.pdf>.

³⁴⁹ Australian Bureau of Statistics, 'Survey of Disability Ageing and Carers: Summary of Findings' (Report No 4430.0, 2003) <www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features12003?OpenDocument>.

³⁵⁰ National People with Disabilities and Carer Council, above n 348, 28.

³⁵¹ Standing Committee on Community Affairs, Commonwealth of Australia, *Funding and Operation of the Commonwealth State/Territory Disability Agreement* (2007) 65 <www.aph.gov.au/Senate/Committee/clac_ctte/completed_inquiries/2004-07/cstda/report/report.pdf>.

³⁵² Australian Bureau of Statistics, above n 349.

³⁵³ Australian Institute of Health and Welfare, 'Australia's Welfare 2009' (Biennial Welfare Report No 9, Australian Government, 2009) 7 <www.aihw.gov.au/publications/aus/aw09/aw09.pdf>.

³⁵⁴ Australian Institute of Health and Welfare, 'Summary of AIHW 1997 Demand Study' (Report, Australian Government, 1997) 238 <www.aihw.gov.au/publications/dis/unds-efrs/unds-efrs-x03.pdf>.

- 348 The increased dependence on informal family care arrangements places pressures on all family members and jeopardises the natural and appropriate informal support that should exist between a person with disability and their family and wider community networks. (See also Article 23) Australia largely responds to this pressure by focusing on providing 'band-aid' respite services for carers rather than on providing the necessary and appropriate supports for the person with disability. This approach leads to poverty, poor physical and mental health and a potential for family breakdown and additional pressure in the vital informal supports for children and adults with disability. (See also Article 23)
- 349 State and Territory Governments are responsible for providing and funding a range of disability support services. The level of service provided varies widely from each State and Territory, which means that people with disability do not receive the same level of supports across Australia and are unable to move to other States or Territories with their supports (see also Article 18), which significantly limits rights to living independently and being included in the community.
- 350 Support services for people with disability are often unavailable, inaccessible, inappropriate or of poor quality.³⁵⁵ Many people with disability have stated that disability support services can often be a barrier rather than a facilitator of being able to live in and participate in the community.³⁵⁶ This stems from a numbers of issues, including:
- (a) significant levels of unmet need for disability support and extensive waiting lists for suitable accommodation and support packages;
 - (b) strict eligibility and assessment criteria and significant rationing of funding that limits many people with disability to share support in group settings with other people with disability;
 - (c) a focus on a block funding based system rather than direct funding to individuals with disability, which means a lack of choice, control and flexibility in the provision of services; and
 - (d) a lack of appropriate independent accreditation, monitoring and complaints mechanisms.
- 351 Often home and community care services, which assist people to live and remain in their own home, are 'means tested' to determine if an individual or family can contribute funds to the cost of services.³⁵⁷ For many people with disability this may mean only having enough additional funds for subsistence living and not a quality of life. It maintains the

³⁵⁵ Productivity Commission, 'Disability Care and Support', above n 325.

³⁵⁶ National People with Disabilities and Carer Council, above n 348.

³⁵⁷ For example, Department of Human Services, 'Victorian Home and Community Care (HACC) Fees Policy' (Policy, Victorian Government, September 2006) 7 <www.health.vic.gov.au/hacc/downloads/pdf/fees_policy.pdf>.

poverty cycle for people with disability. (See also Article 28). Certain means testing and other rules can also increase social isolation and loneliness, as well as force people to live in situations they do not choose. For example, home and community services may be means tested, for each person living under one roof, and may inappropriately require others in the household to provide support. This forces some people with disability to live alone to get the extra home and community assistance they require.

Case Study

*"I had to get rid of my housemates in order to get extra HACC assistance. I had male housemates and I was told they were expected to help care for me, e.g. food, cleaning, shopping, everything! But none of these people were my partner, they were just housemates, and they were male — how could I expect them to help me shower or go to the toilet? So I was forced into sole living because of the HACC guidelines."*³⁵⁸

Case Study

Jack was involved in a car accident approximately 20 years ago and following a lengthy stay in hospital was eventually able to move into his own home in the community with appropriate social support. At that time, public policy supported people with disability to become as independent as possible and resume a life in the community. Jack was provided with 25 hours of support per week to assist him with personal care, cleaning and community access and this was administered through a non-government service provider. Jack felt he had some control over his life as his workers were employed specifically for him. Jack made decisions about who was employed and when they worked. This gave Jack the opportunity to have a private and social life to assume his interests and hobbies.

*As Jack aged and his support needs increased, and there were growing demands from other people with disability for support, the service commenced rationing and cutbacks, placing Jack at risk of institutionalisation when his weekly hours of support were progressively reduced to 20 then 15 hours a week.*³⁵⁹

Lack of Adequate, Accessible Social and Public Housing

352 There are a large number of people with disability who live in public or social housing in Australia. A Western Australian report has found that the proportion of tenants with a disability in public housing doubled (11 to 22 percent) from 1991 to 2008; and that in 2008,

³⁵⁸ National People with Disability and Carer Council, above n 348, 41.

³⁵⁹ Kevin Cocks and Phillip French, 'Towards Human Rights Indicators for Persons with Disability', (Presented at the Implementing and Monitoring the *Convention on the Rights of Persons with Disabilities* in the Australian Social and Legal Context seminar, Queensland, 20 August 2008) 5.

48 percent of public housing tenants were receiving the Aged Pension, Disability Support Pension or Veterans' Allowance.³⁶⁰ While this indicates a significant future need for more housing stock, it also indicates a need for this stock to be accessible.

- 353 The majority of public and social housing is inaccessible to people with disability.³⁶¹ The Social Housing Initiative being implemented by Australian governments only incorporates six minimum universal design elements into the construction of most, but not all new public and social housing, and it does not address the existing inaccessibility of current public and social housing stock.
- 354 State and Territory Governments are responsible for managing public and social housing, which often results in inequities across Australia in terms of eligibility and access. In addition, waiting lists for public and social housing is extremely long. There are currently approximately 200,000 people on waiting lists across the country.³⁶² People with disability can apply for priority housing³⁶³ which means they will have a reduced waiting time. However, waiting times are still extremely long.³⁶⁴ Further, not all people who apply for priority housing, even those with disability, receive approval.
- 355 The lack of adequate, accessible housing also means that many people with disability are forced to live in inappropriate and inaccessible public and social housing with little chance of being moved to housing that suits their needs. Others are forced to live in clusters of accessible public and social housing, which results in further isolation and segregation from the rest of the community.³⁶⁵

Case Study

*A woman with MS has two teenage daughters and has applied for accessible public housing. Due to the only available accessible dwellings being one bedroom units, she is told that she cannot live with her daughters if she wants an accessible unit.*³⁶⁶

³⁶⁰ Social Housing Taskforce, 'More than a Roof and Four Walls' (Final Report, WA Government, 30 June 2009) 18 <www.housing.wa.gov.au/Files/SocialHousingTaskforce_FinalReport.pdf>.

³⁶¹ Submission by attendees at the CRPD Shadow Report consultations in Canberra, ACT (20 November 2009), Darwin, NT (7 December 2009) and Adelaide, SA (25 November 2009).

³⁶² Clarissa Thorp, 'More than 200,000 on Public Housing Waiting List', *ABC News*, 28 January 2009 <www.abc.net.au/news/stories/2009/01/28/2475747.htm>.

³⁶³ Department of Human Services, 'Priority Housing' (Policy, NSW Government, 2010).

³⁶⁴ National People with Disabilities and Carer Council, above n 348, 28.

³⁶⁵ Submission by attendee at the CRPD Shadow Report consultation in Darwin, NT (7 December 2009).

³⁶⁶ Submission by attendee at the CRPD Shadow Report consultation in Hobart, Tasmania (3 December 2009).

Case Study

Jex Truran is 19 years old, Deaf and blind and he wants to move out of home. Jex and his mother apply for Jex to be considered for priority housing as Jex wants to set up in his own place while he still has some level of vision and so he has time to get used to his new home and can live independently.

Jex's request is rejected and instead it is suggested that he find his own rental accommodation independently. He explains that he does not have the support to communicate with real estate agents, drive to viewings or obtain employment to afford private rental. On explaining this, he is referred to Youth Housing, which is short-term crisis accommodation and entirely inappropriate for his needs. Jex's vision deteriorates as he remains on the standard public housing waiting list.³⁶⁷

Private Rental Housing and Home Ownership

356 Most people with disability would prefer to live in their own homes rather than in supported accommodation or public and social housing.³⁶⁸ However, people with disability are less likely to be employed and more likely to rely solely on a government pension such as the Disability Support Pension (DSP) and therefore have a lower average income than people without disability. (See also Article 28) This lower income, combined with the need to purchase costly equipment, aids, other supports,³⁶⁹ health care costs,³⁷⁰ as well as the extra costs for internal and external housing modifications means that many people with disability do not have an adequate standard of living to be able to rent on the private market or to buy their own homes. (See also Article 28)

357 The vast majority of private homes for rent or sale do not incorporate universal design elements and require significant modifications. State and Territory Governments do provide some home modification assistance but there is no guarantee that this assistance will be provided even if the eligibility criteria are met. There are long priority-based waiting lists with expectations that financial contributions will be made by people receiving assistance.³⁷¹

³⁶⁷ Jenny Truran, 'Priority Housing: Don't Know, Don't Care' (2009) <www.linkonline.com.au/free-articles/2009/december/full/priority-housing.pdf>.

³⁶⁸ National People with disability and Carer Council, above n 348, 22.

³⁶⁹ Australian Bureau of Statistics, above n 349.

³⁷⁰ Judyth. Watson, Office of the Shadow Minister for Disability Services, "'... we do without ...' A Report about the Costs of Having a Disability' (Report, W Government, 1995).

³⁷¹ See for example the information on eligibility on the NSW Home Modification and Maintenance Service website <www.swhmms.org.au>.

- 358 36 percent of DSP recipients are homeowners, compared with 69.8 percent of the total population.³⁷² Low income home loans are inadequate as most people with disability will not meet strict eligibility requirements,³⁷³ and they also do not recognise the higher cost of living with disability.

Case Study

*"I now use a wheelchair after becoming disabled by bone cancer. The Queensland Department of Housing has refused to provide a ramp for wheelchair access to my house. The front steps are only just over a metre high. I cannot leave the house and do so only to attend medical appointments and by using an ambulance."*³⁷⁴

Case Study

*"I have a physical disability that makes it difficult to walk and climb stairs. I also have a vision impairment, dyslexia and obsessive compulsive disorder. I can't live independently as it is too expensive to buy a place and put rails in and get a carer, so I rely on my parents. Even renting is difficult as you can't make changes to make the house accessible. There are also no care facilities around where I live for young people, and if I lost my family support I would probably end up in a 'mental institution' or an aged care facility."*³⁷⁵

RECOMMENDATIONS Article 19

- That Australia, as an urgent and immediate priority, develops and implements a national framework for the closure of all residential institutions accommodating people with disability, including those operated by non-government and private sectors, and allocates and provides the resources necessary for people to move to individualised community based housing and support options that will support their inclusion and participation in the general community.
- That Australia gives people with disability control over the resources they require to live with dignity in the community, ensuring that people with disability are able to choose where and with whom they live and which person or agency they will contract to provide them with supports.

³⁷² Australian Institute of Health and Welfare, above n 353, 9.

³⁷³ 100% Home Loan Eligibility Checklist (undated) Mortgage World Australia <www.mortgageworldaustralia.com.au/no_deposit_eligibility_checklist.htm>.

³⁷⁴ CRPD Shadow Report Survey, Submission No 160 (12 April 2010).

³⁷⁵ CRPD Shadow Report Survey, Submission No 149, (8 April 2010).

- That Australia resources independent vision-building processes that assist people with disability and their families to explore and envision genuine community living options instead of ‘contemporary’ institutional options.
- That Australia develops, in partnership with people with disability and their representative organisations, comprehensive awareness raising strategies to challenge and overcome attitudes and beliefs that perpetuate segregated housing and support options for people with disability.
- That Australia develops, in partnership with people with disability through their representative and advocacy organisations, housing and support policy guidelines and frameworks that ensure that resources, programs and funding allocations, including individualised funding are provided to implement the rights contained in the CRPD.
- That Australia progressively and significantly increases the availability of social support necessary for people with disability to live in and be a part of the community (such as personal care, domestic assistance, and daily living skills support).
- That Australia significantly increases the range, affordability and accessibility of public and social housing stock to ensure that people with disability can maximise their level of independence and freedom and feel safe and secure in their own home.
- That Australia makes a significant investment in enhancing universal design standards and regulations governing accessibility and affordability of all private and public housing.

ARTICLE 20 — PERSONAL MOBILITY

STATUS IN AUSTRALIA

Program Funding and Access

- 359 The funding system for assistive devices, aids and equipment comprises a fragmented mix of subsidies, co-payments, part contributions and specific criteria, and differs in each State and Territory.³⁷⁶
- 360 There is little relationship between need and ability to pay for aids and devices, and in fact it is often those in greatest need of personal mobility assistance that have the least capacity to afford them. The limited funding made available for aids and devices programs has resulted in the prioritisation of short term clinical need over facilitation of personal mobility and independence.³⁷⁷
- 361 Funding rules regarding the provision of assistive devices often give rise to discriminatory results. For example, people report that some criteria for receiving assistive devices requires people to be in employment, when it is in fact the lack of access to assistive devices that is directly contributing to being unable to gain employment in the first place.³⁷⁸
- 362 Many assistive devices, such as domestic modifications and appliances are considered outside the scope of assistive devices funding programs forcing many people to purchase expensive alternatives beyond their means.³⁷⁹
- 363 There is inconsistent, uncoordinated access to programs between States and Territories. Depending on their location, people with disability face large discrepancies in accessing a program, and are unable to move with their assistive device, aids or equipment between program locations.³⁸⁰ (See also Article 18)

³⁷⁶ Department of Family, Housing, Community Services and Indigenous Affairs, Submission to the Department of Broadband, Communications and the Digital Economy Feasibility Study into an Independent Disability Equipment Program, *Inquiry into the Provision of Assistive Technology and Equipment for People with Disability*, 2009 <www.archive.dbcde.gov.au/2010/august/independent_disability_equipment_feasibility_study/independent_disability_equipment_program_feasibility_study_submissions/submissions/department_of_families_housing_community_services_and_indigenous_affairs>.

³⁷⁷ Tasmanian Council of Social Service, Submission to the Department of Broadband, Communications and the Digital Economy Feasibility Study into an Independent Disability Equipment Program, *Inquiry into the Provision of Assistive Technology and Equipment for People with Disability*, 2009, 4.

³⁷⁸ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

³⁷⁹ Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

³⁸⁰ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

- 364 People with disability also lose access to their assistive devices, aids and equipment once they reach the age of 65 and are no longer eligible for support through the disability service system. The aged care service system has different eligibility criteria, with the result that people with disability often pay higher costs to obtain the devices, aids and equipment they need as they are unable to obtain them through the aged care system.³⁸¹

Case Study

“As a pensioner, I am totally unable to afford to pay for any and all appropriate mobility aids and other assistive technology. I must rely on the Program of Appliances for Disabled People scheme, which has often been a frustrating process, involving long waiting lists and lack of information.”³⁸²

- 365 Affordability is the ultimate barrier to equitable access to assistive aids and devices to facilitate personal mobility.³⁸³

Case Study

“Aids and devices are a luxury which we have to pay for out of our own pocket and are so expensive we just don’t bother, for example I need a hearing aid [but] because the cost is beyond us poor disabled people I have had to let it go”.³⁸⁴

- 366 People who cannot access appropriate and affordable assistive technologies or devices find it increasingly difficult or impossible to secure employment, seek education and participate in society generally.³⁸⁵

³⁸¹ Submission by attendee at the CRPD Shadow Report consultation in Hobart, Tasmania (3 December 2009); submission by attendee at the CRPD Shadow Report consultation in Darwin, NT (7 December 2009).

³⁸² CRPD Shadow Report Survey, Submission No 46 (26 March 2010).

³⁸³ Consumers’ Telecommunications Network, Submission to the National Disability Discussion Paper, December 2008 <www.ctn.org.au/content.cfm-Live=0&ContentType=Content&ContentID=410>.

³⁸⁴ CRPD Shadow Report Survey, Submission No 84 (26 March 2010).

³⁸⁵ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

- 367 There is a high level of dissatisfaction with assistive device programs in all States and Territories, with problems ranging from severe delivery delays, poor service, inappropriate mobility aids, overly complicated subsidy arrangements and a poor standard of available equipment and programs.³⁸⁶
- 368 There are reports of extensive waiting times under all Australian government-funded and provided aid and equipment programs.³⁸⁷ People often wait months or years for the allocation of their device, many of whom are children and have either outgrown the device by the time they receive them or can only use it for a very short period of time before having to apply for an alternative device.³⁸⁸ The extensive delays force many people to continue using their assistive devices well beyond their official use by date because they are unable to afford a new device.³⁸⁹

Case Study

A student diagnosed with cerebral palsy, hearing impairment, intellectual disability and scoliosis was assessed by their school occupational therapist for a new seating system due to the growth of the child. It was stated in the original application made to the State Government funded program that due to future growth there would need to be continual adjustments to accommodate changes in this child's seating position. Although the seating system has been approved, the item has been placed on a waiting list for an indefinite period.

Development of Assistive Devices, Aids and Equipment

- 369 In Australia, the market for assistance devices, aids and equipment is relatively small, spread out over large areas, and often requires products that need to be highly customised to suit individual needs. In addition, regulatory compliance and testing costs are a significant factor for developers of assistive devices, aids and equipment. Companies

³⁸⁶ Submission by attendee at the CRPD Shadow Report consultation in Darwin, NT (7 December 2009); submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009); submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009); submission by attendee at the CRPD Shadow Report consultation in Adelaide, SA (25 November 2009); submission by attendee at the CRPD Shadow Report consultation in Hobart, Tasmania (3 December 2009).

³⁸⁷ Submission by attendee at the CRPD Shadow Report consultation in Darwin, NT (7 December 2009); submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009); submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009); submission by attendee at the CRPD Shadow Report consultation in Adelaide, SA (25 November 2009); and submission by attendee at the CRPD Shadow Report consultation in Hobart, Tasmania (3 December 2009).

³⁸⁸ Submission by attendee at the CRPD Shadow Report consultation in Darwin, NT (7 December 2009).

³⁸⁹ Submission by attendee at the CRPD Shadow Report consultation in Darwin, NT (7 December 2009).

attempting to import assistance devices, aids and equipment from other countries are often faced with minor non-compliance issues, which lead to further delays for appropriate products.³⁹⁰

- 370 These factors increase development costs considerably, and serve as a serious disincentive for the development of low volume assistance devices, aids and equipment that would otherwise lead to products being more readily available to people with disability.

People with Disability Living in Remote and Rural Areas

- 371 People with disability who live in rural and remote areas of Australia and require the use of a wheelchair as a mobility device have no access to 'all terrain' wheelchairs to traverse uneven terrain, as these remain outside the scope of funding arrangements.

- 372 In particular, Aboriginal and Torres Strait Islander people with disability need access to mobility aids that are adapted to environments that provide specific mobility challenges. Access to maintenance and repair services do not meet the needs of remote communities, such as availability of local equipment supplies, and people in communities trained to undertake basic repairs and greater flexibility of service delivery arrangements.³⁹¹

Case Study

*A number of Aboriginal people with disability living in a remote community location in far western New South Wales are unable to have their wheelchairs repaired because they need to send them away to get them fixed. They will not have a replacement wheelchair during this time, and so they persevere with the unrepaired wheelchairs, mending the chairs as best they can with tape and other means.*³⁹²

³⁹⁰ Trillium Technology Pty Ltd, Submission to the Department of Broadband, Communications and the Digital Economy Feasibility Study into an Independent Disability Equipment Program, *Inquiry into the Provision of Assistive Technology and Equipment for People with Disability*, 2009 available at www.archive.dbcde.gov.au/2010/august/independent_disability_equipment_feasibility_study/independent_disability_equipmen In November 2008 under the new National Disability Agreement between the Commonwealth and State governments

³⁹¹ Aboriginal Disability Network, 'Telling it Like it Is: A Report on Community Consultations with Aboriginal People with Disability and their Associates throughout NSW 2004–2005' (Report, 2007).

³⁹² Ibid.

RECOMMENDATIONS Article 20

- That Australia establishes a nationally consistent, adequately funded entitlement program for assistive devices, aids and equipment to enable people with disability, including those in rural and remote areas to participate in all areas of community life.
- That Australia, in partnership with Aboriginal and Torres Strait Islander communities and representative organisations, develops mechanisms to establish locally relevant solutions that ensure equipment is suitably robust and repairs and maintenance can be undertaken locally.

ARTICLE 21— FREEDOM OF EXPRESSION AND OPINION AND ACCESS TO INFORMATION

STATUS IN AUSTRALIA

Policy Framework

- 373 Many people with disability, including children with disability in Australia are unable to enjoy freedom of expression and opinion. (See also article 7) Some of the broad factors that restrict the ability of people with disability to access information and express their opinion include:
- (a) information not being provided in the format or language of choice, or there being a delay or significant cost involved in attaining information in the appropriate format or language;
 - (b) insufficient government action to lead private business and mass media to adopt accessible formats and languages; and
 - (c) lack of funding, provision or acknowledgement of the need for communication aids and techniques, including augmentative communication aids required by some people with disability to provide their opinions, to access information and to participate in consultations.³⁹³
- 374 The National Disability Strategy (NDS) includes a policy direction focused on accessible, reliable and responsive communication and information systems for people with disability. The key measure to address this is the implementation of the National Broadband Network. Implementation is still in the early stages but there are no clear measures included in the NDS to ensure that accessible design and enabling platforms are incorporated.
- 375 By the end of 2012, Australia is required to ensure that its websites meet the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG) version 2.0 at the minimum level of compliance, and to meet the medium level of conformance, or double A by the end of 2014.³⁹⁴ However, there are 'opt-out' provisions or exemptions for government agencies if they are unable to conform to WCAG 2.0. Reporting on achievements is required but it is not clear if reports have been provided to Australia at this stage.

³⁹³ Communication Rights Australia <www.caus.com.au>.

³⁹⁴ Department of Finance and Deregulation, 'Web Accessibility National Transition Strategy: The Australian Government's Adoption and Implementation of Web Content Accessibility' (Guidelines Version 2.0, Australian Government, 2010).

Government Information

- 376 Information is typically provided in accessible formats only when the information relates to disability itself. It is not usually made available at all in Australian Sign Language (Auslan) even when this is requested. The vast majority of other information intended for the general public remains in an inaccessible format and language.³⁹⁵ Problems are not simply limited to government policy brochures and information documents, but extend to information given at police stations, hospitals, schools and other support services.³⁹⁶

Case Study

"I was 9 before a grandmother told my mother that we could claim a carer's pension from Centrelink. I didn't find out for years that after the age of 16 that I could get a disability pension. Not everyone is an active person in the community to go find out the information. Rotary give funding for vehicle modification but I didn't find out until I had my car modified. I think it is a procedural concept: 'this is how we do it, you don't fit into our box, therefore, go away' ... Who do you go to, who do you talk to?"³⁹⁷

Case Study

John is blind and cannot access the vast majority of information provided by government departments online. There is no standard format between agencies. John has thrice requested a Western Australian Government department to provide him with the 'equity benchmark' in alternative text. He has as yet received no response or acknowledgement of his request.³⁹⁸

- 377 People who are Deaf or have a hearing impairment are not being provided with information in sign language or information that is augmented with written text or equivalent.

³⁹⁵ See, eg, Media Access Australia, *Commercial Broadcasters Fail to Improve Access* (2009) <www.mediaaccess.org.au/index.php?option=com_content&view=Article&id=777:commercial-broadcasters-fail-to-improve-access&catid=2:tv&Itemid=20>.

³⁹⁶ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

³⁹⁷ Submission by attendee at the CRPD Shadow Report consultation in Brisbane, Queensland (12 November 2009.)

³⁹⁸ CRPD Shadow Report Survey, Submission No 172 (18 April 2010).

Case Study

“Many government announcements, advertisements and information on TV is not captioned so deaf and hearing impaired people like me cannot access them. The most blatant one currently is the information about bushfire safety — surely a fundamental issue that ALL the community [needs] to know about.”³⁹⁹

- 378 Many people with vision or hearing impairment cannot view or listen to government information and videos that are provided on various government websites. Few government websites have content interpreted in Auslan, while only some have audio descriptions or equivalent.⁴⁰⁰
- 379 Government information in a format that is easy to understand, or in Easy English remains one of the biggest barriers to people with intellectual disability. Printed and written government information is often not in plain English or Easy English and contains complex, jargonistic language. Websites are too complex to navigate or understand.

Case Study

We live with our daughter in the Torres Strait. Our daughter has cerebral palsy and speaks Creole. Very little information is provided in Torres Strait Creole. Many websites have information brochures that can't be made large enough to see. Almost no information is available in pictorial format (like Boardmaker) for our daughter's access.

- 380 A study assessing the accessibility of 45 Australian university websites found that 98 percent failed to comply with basic W3C standards of web accessibility.⁴⁰¹
- 381 Australia has not taken action to ensure mass media make services and communication technology accessible to people with disability. Beyond the requirements of the *Disability Discrimination Act 1992 (Cth)* (DDA), businesses and organisations are not specifically required to make their information and websites available in alternative formats.

³⁹⁹ CRPD Shadow Report Survey, Submission No 30 (26 March 2010).

⁴⁰⁰ Submission by attendee at the CRPD Shadow Report consultation in Brisbane, Queensland (12 November 2009).

⁴⁰¹ Dey Alexander, *How Accessible are Australian University Websites?* (2003) <<http://ausweb.scu.edu.au/aw03/papers/alexander3/paper.html>>.

Government Consultation Processes

- 382 Access to information and consultation processes underpins informed expression of opinion and seeking and imparting information. However, people with disability, including children with disability are too often provided with limited or no opportunity to express their opinion or seek and impart information through participating in government consultation processes.⁴⁰²
- 383 Meetings and consultations are often conducted in inaccessible venues, and without consideration of the participation supports that may be required for participation, such as accessible parking, personal care attendants, guides or Auslan and DeafBlind interpreters.
- 384 People with intellectual disability are not provided with the support necessary to ensure that they understand the consultation process and can properly express their opinions,⁴⁰³ and are not given consultation documents in Easy English or plain English.⁴⁰⁴

No Official Recognition of Sign Languages

- 385 There is currently no Australian law or policy that recognises Auslan as an official language or ensures that services are provided in Auslan.⁴⁰⁵
- 386 There is no official recognition of the communication requirements of people who are DeafBlind, including requirements for the provision of DeafBlind interpreters. There are no accredited courses specific to DeafBlind interpreting, and so there is significant variation and proficiency in the interpreting available to people who are DeafBlind.⁴⁰⁶

RECOMMENDATIONS Article 21

- That Australia develops standards for accessibility of all information and communication, including in languages of choice and for consultation processes and public events.
- That Australia provides all information in accessible formats including audio description, Braille, Easy and Plain English as well as captioning.
- That Auslan be recognised as Australia's official sign language, and that Deaf peoples' right to use Auslan be legally recognised.

⁴⁰² Submission by attendee at the CRPD Shadow Report consultation in Adelaide, SA (25 November 2009).

⁴⁰³ Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

⁴⁰⁴ Submission by attendee at the CRPD Shadow Report consultation in Hobart, Tasmania (3 December 2009).

⁴⁰⁵ Deaf Australia Inc, 'Auslan as an Official Language' (2008) 17(2) *Outlook* <www.deafau.org.au/upload/Outlook_200803.pdf>.

⁴⁰⁶ Australian DeafBlind Council <www.deafblind.org.au/interpreter-guidelines.asp>.

- That Australia formally recognises the communication requirements of people who are DeafBlind, and establishes and resources nationally consistent accreditation courses for DeafBlind interpreters.
- That Australia recognises augmentative and alternative communication in all official communications and provides adequate funding and support for the acquisition of augmentative and alternative communication devices.

ARTICLE 22 — RESPECT FOR PRIVACY

STATUS IN AUSTRALIA

General Legislative Framework

- 387 In Australia, there is no federally recognised right to privacy.
- 388 The *Privacy Act 1988* (Cth) is the primary legislative instrument that deals with matters relating to information privacy in both the public and private sector, and the *National Health Act 1953* (Cth) gives the Privacy Commissioner the power to issue guidelines with respect to health information privacy.⁴⁰⁷ In 2008, the *Privacy Guidelines for the Medicare Benefits and Pharmaceutical Benefits Programs* were issued.
- 389 All Australian governments have disability services standards that are drawn from the National Disability Services Standards. The National Standards contain Standard 4, *Privacy, Dignity and Confidentiality*.⁴⁰⁸
- 390 Australia has introduced the *Healthcare Identifiers Act 2010* (Cth), which allows for the allocation of a unique 16 digit individual health identifier. This is the basis of the e-health system, which will provide a ‘person-controlled electronic health record’ (PCEHR) for every Australia. There are concerns about how privacy will be managed in the new e-health system.
- 391 The *National Health Act 1953* (Cth) provides that the Minister can issue standards in relation to approved nursing homes.⁴⁰⁹ One such standard is that facilities must “be committed to protecting their resident’s rights”.⁴¹⁰ Within the accreditation standards published by Aged Care Standards and Accreditation Ltd, standard 3.6 provides that “each resident’s right to privacy, dignity and confidentiality is recognised and respected”.⁴¹¹
- 392 Each State and Territory has its own legislation with respect to the privacy of information collected and collated by public authorities.

⁴⁰⁷ *Privacy Act 1988* (Cth) s 135AA.

⁴⁰⁸ National Standards for Disability Services <www.fahcsia.gov.au/sa/disability/standards/Pages/policy-nsds1993.aspx>.

⁴⁰⁹ *National Health Act 1953* (Cth) s 45D.

⁴¹⁰ Department of Health and Ageing, *Improving the Quality of Residential Care: Residential Care Standards and Accreditation* (3 December 2007) Australian Government <www.health.gov.au/internet/main/publishing.nsf/Content/ageing-rescare-standard.htm>.

⁴¹¹ Aged Care Standards and Accreditation Agency Ltd, ‘Accreditation Standards’ (Fact Sheet, undated) <www.accreditation.org.au/site/uploads/Accreditation%20standards%20factsheet.pdf>.

Privacy Concerns arising from the Interaction of Government Agencies and e-health

- 393 Concerns about personal information held by government departments and individuals' privacy are not limited to people with disability and are in fact prevalent throughout the Australian community. The position of people with disability with regard to privacy is not different to the average Australian, except for the fact that people with disability are more likely to be in contact with more government agencies than the average Australian.
- 394 The e-health system will have a significant impact on people with disability who have frequent contact with the health system. The aim of the e-health system is to assist health care providers to share accurate and timely information about treatment histories and medications. While some people with disability will benefit from improved quality of care, some are concerned about privacy provisions and ease of use of the system. This is particularly the case for people with disability, such as people living with HIV and people with psychosocial disability, who are often selective in disclosing health conditions and treatments and are concerned about the stigma such disclosure can attract.⁴¹²

A Lack of Respect for Privacy in Residential Care Facilities and Group Homes

- 395 Evidence indicates that residents in care facilities and group homes are not always afforded respect and recognition of their right to privacy and confidentiality, particularly with regard to physical privacy.⁴¹³ (See also Article 23) Intrusion by staff into a resident's room without consent is not uncommon. Staff within facilities are not properly trained in how to handle the private and confidential information of people with disability they have contact with.

Case Study

In a Queensland care facility, a staff member is alleged to have discussed the disease of a particular resident to parents of another resident to incite prejudice. The parents vehemently complained about the resident being within the same facility as their child. The person was subsequently moved to another facility. It is thought the staff member did not want the additional responsibility of caring for the person, and breached that individual's right to privacy in order to have them moved. This indicates that some staff in residential care facilities do not understand their obligations with respect to privacy.

⁴¹² Australian Federation of AIDS Organisations, 'HIV, Privacy and E-health' (Policy Briefing Paper, 2011).

⁴¹³ Reported by residents and disability advocates.

Disclosure of “Disability” in Employment

- 396 There is no legal requirement for people with disability to disclose their disability status to an employer if it will not affect their ability to meet the inherent requirements of the job.⁴¹⁴ However, this is not widely known and understood by many people with disability who mistakenly believe that they must make this disclosure.

Lack of Privacy Acts as Deterrent to the Making of Complaints

- 397 Service provider complaint mechanisms do not always provide complainants with a means of confidentiality in making the complaint nor do they give individuals a sense that they will not be victimised for complaining. Evidence suggests that many people with disability or their families refrain from making complaints due to a fear they may lose the continuity of their support or that they will become victims of harassment or redress for making a complaint.⁴¹⁵ (See also Article 16)

RECOMMENDATIONS Article 22

- That Australia reviews and strengthens safeguards for the protection of privacy of people with disability including information sharing and management between government agencies.
- That people with disability are provided with accessible information and education programs about their privacy rights.

⁴¹⁴ JobAccess, *Disclosure of Disability and Privacy* (8 September 2010) Australian Government <http://jobaccess.gov.au/Employers/Before_you_start/Frequently_Asked_Questions/Pages/Disclosure_and_privacy.aspx>.

⁴¹⁵ L Schetzer and J Henderson, ‘Public Consultations: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW, Access to Justice and Legal Needs’ (2003) 1 Law and Justice Foundation of NSW <www.lawfoundation.net.au/ljf/app/&id=3EDC7946589431A0CA257060007D4EA9>.

ARTICLE 23 — RESPECT FOR HOME AND THE FAMILY

STATUS IN AUSTRALIA

Legal and Policy Framework

- 398 The National Disability Strategy (NDS) contains limited recognition and no comprehensive actions to address the rights of people with disability to marry, form intimate partner relationships, have a family and be parents.⁴¹⁶ The NDS recognises the need for early intervention and supports for children with disability and their families, but there are few actions to address this comprehensively as a means to prevent family breakdown.
- 399 The National Disability Services Standards that govern the provision of disability services in Australia do not contain a specific standard that addresses the right to home and family. No State and Territory disability services standards address this issue, except for New South Wales, which has a standard concerning family relationships.⁴¹⁷ In addition disability services standards at the national and State and Territory levels are gender neutral and adult focussed. (See also Articles 7 and 16)
- 400 The National Framework for Protecting Australia's Children 2009–2020 does not contain any recognition or actions to address the support required by children or parents with disability to protect their rights to family life. (See also Article 16)
- 401 State and Territory Governments are responsible for the administration and operation of child protection services. However these focus on care and protection of children who have been removed from families due to abuse and neglect. They do contain the same legislative protections to address issues where children with disability are in voluntary out of home care, such as in respite care and residential hospitals, because families have not received appropriate supports to care for their children at home.
- 402 State and Territory guardianship legislation and some other child protection acts⁴¹⁸ regulate and provide a degree of protection from non-therapeutic sterilisation for all children and young people and adults with disability. However there is no law in Australia that explicitly prohibits non-therapeutic sterilisation of children except in circumstances where there is a serious threat to health or life; or that prohibits non-therapeutic sterilisation of adults without their full and informed consent except in circumstances where there is a serious threat to health or life.

⁴¹⁶ Council of Australian Governments, *National Disability Strategy*, above n 84, 8, 18, 40, 42, 51.

⁴¹⁷ Disability Services Standards under the *Disability services Act 1993* (NSW) contains Standard 9, Family relationships: 'Each person with a disability receives a service which recognises the importance of preserving family relationships, informal social networks and is sensitive to their cultural and linguistic environments'.

⁴¹⁸ For example, the *Children and Young Persons (Care and Protection) Act 1998* (NSW)

403 The *Marriage Act 1961* (Cth) contains provisions that disallows marriage where a person is “mentally incapable of understanding the nature and effect of the marriage ceremony”. This provision has the effect of excluding some people with disability, particularly those with cognitive impairments from entering into marriage. There is no national legislative or policy approach to determine a person’s capacity to understand marriage or consent to marriage, nor is there a comprehensive supported-decision making system in Australia (see also Article 12) that would assist people with disability to understand and make decisions about marriage.

404 Under some State and Territory guardianship laws, a guardian of a person with disability cannot consent or refuse to consent to a marriage, but may give an opinion as to whether they think the marriage should proceed. This gives a guardian undue influence over the extent to which a person with disability can realise their right to freely marry. (See also Article 12)

Non-Therapeutic Sterilisation

405 Girls and women with disability are particularly subjected to the practice of non-therapeutic sterilisation in Australia and breaches of their rights under Articles 6, 15, 16, 17 and 23 of the CRPD.

406 The ongoing practice of non-therapeutic sterilisation has been identified as a form of torture by the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment,⁴¹⁹ and as a form of violence by the UN Committee on the Rights of the Child (CRC Committee).⁴²⁰ Both the CRC Committee and the UN Committee on the Elimination of Discrimination against Women have made recommendations to Australia about prohibitions on non-therapeutic sterilisation.⁴²¹ This has been followed by similar recommendations from the Human Rights Council as an outcome of the Universal Periodic Review (UPR) of Australia.⁴²²

407 Australia has partly accepted the UPR recommendation and included the issue in its draft National Human Rights Action Plan. However, the action included in the draft Action Plan is under a section relating to ‘legal capacity’, and emphasises work with State and Territory Governments to improve laws and practices governing sterilisation. This raises concerns

⁴¹⁹ Manfred Nowak, above n 184, 14.

⁴²⁰ Human Rights Committee, *General Comment No 13: The Right of the Child to Freedom from All Forms of Violence*, UN Doc CRC/C/GC/13 (18 April 2011) [16], [21].

⁴²¹ Committee on the Rights of the Child, above n 150 [46]; CEDAW Committee, above n 40 [43].

Committee on the Rights of the Child, *Concluding Observations*, Australia, September 2005, paragraph 46

⁴²² Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review*, Australia, 3 February 2011, recommendation 86.39, 15.

that the substance of the UPR recommendations and the comprehensive law reform required to protect against this human rights violation will not be addressed.

Case Study

In 2010, the Family Court of Australia gave permission for a hysterectomy to be performed on an 11 year old girl who has Retts syndrome and is unable to communicate. The girl started menstruating at the age of 9 and it was argued that her menstruation cycles induced epileptic fits. The decision of the Court grants the girl's parents authority to proceed with the sterilisation procedure on their daughter.⁴²³ The Court did not provide for independent human rights or advocacy advice or evidence on this matter. Evidence provided to the Court included matters relating to the benefit the procedure would have for the caring role of the mother, and for the pain and heaviness of the girl's menstrual period. The presiding justice in this case said the procedure was "urgent and necessary...A. is never going to have a normal teenage and adult life. A fundamental consideration is the risks to Angela's life as well as her general health".⁴²⁴

Removal of Children from Parents with Disability

408 Parents with disability, particularly those with intellectual and psychosocial disability are significantly over represented in the child protection system, and children of people with disability are subject to removal from their parents at a higher rate than the general population.⁴²⁵ In many circumstances children are removed pre-emptively despite there being no evidence of any neglect, abuse and/or parental incompetence.⁴²⁶

⁴²³ Paul Osborne, 'Disabled Girl can be Sterilised: Court', *Sydney Morning Herald* (Sydney), 9 March 2010 <<http://news.smh.com.au/breaking-news-national/disabled-girl-can-be-sterilised-court-20100309-pu6l.html>>.

⁴²⁴ *Case: Re:Angela* [2010] FamCA 98 (16 February 2010 [50]).

⁴²⁵ Standing Committee on Social Issues, Legislative Council, Parliament of New South Wales, *Care and Support — Final Report on Child Protection Services* (2002) 144; Standing Committee on Social Issues, Legislative Council, Parliament of New South Wales, *Making it Happen — Final Report on Disability Services* (2002) 126; G Llewellyn, D McConnell and L Ferronato, 'Prevalence and Outcomes for Parents with Disabilities and their Children in an Australian Court Sample' (2003) 27 *Child Abuse and Neglect* 235; Women with Disabilities Australia, 'Parenting Issues for Women with Disabilities in Australia' (Report, 2009) 19–22.

⁴²⁶ Reported during consultations by social and legal advocacy organisations; D McConnell and G. Llewellyn, 'Stereotypes, Parents with Intellectual Disability and Child Protection' (2002) 24 *Journal of Social Welfare and Family Law* 297.

- 409 Approximately one in six children in out of home care has a parent with disability.⁴²⁷ There is also evidence that there is an increasing incidence of parents with disability experiencing the removal of one or more of their children by government child protection agencies.⁴²⁸
- 410 This raises serious concerns in respect of Article 23. Evidence from consultations, from advocates, support workers and researchers finds a number of reasons for this situation:
- (a) a presumption that removal of children of parents with disability is in the child's best interest;
 - (b) a presumption that parents with disability, particularly those with intellectual and psychosocial disability are intrinsically incapable of being 'good' parents or of developing parenting skills even with support;
 - (c) the limited number of early intervention measures, programs and support that provide individualised support and advocacy assistance to people with intellectual disability in their parenting;⁴²⁹
 - (d) a lack of sufficiently resourced, accessible parenting support programs,⁴³⁰ which encompass both generic and more specialised disability focused support programs;⁴³¹
 - (e) a lack of coordination and collaboration within the parental support system, lengthy assessment processes, impediments to accessing services and stringent eligibility criteria, including the requirement for referrals from child protection departments as well as discrepancies in approaches to parenting by different support agencies;⁴³² and

⁴²⁷ Department of Human Services, 'Care and Support: Final Report on Child Protection Services' (Research Paper No 408, Parliamentary Library, Parliament of NSW, 2002) 126.

⁴²⁸ NSW Disability Discrimination Legal Centre, Submission, above n 35.

⁴²⁹ The 'Support and Family Education' (SAFE) program run by Barkuma Community Support in South Australia is one of the few programs of its kind in Australia offering parenting support to persons with intellectual disability. Another program which provides specialist support services includes the Commonwealth funded program 'Healthy Start' (which commenced in 2005), which was designed to assist persons with intellectual disability in their parenting responsibilities: <www.healthystart.net.au/index.php>.

⁴³⁰ Robyn Mildron, Catherine Wade and Jan Matthews, 'Intellectual Disability and Parenting' (2006) 12 *Every Child* 1.

⁴³¹ David Sykes, 'Confronting the Challenge: The Need for a Different Approach to Families where the Parent has an Intellectual Disability' (Paper presented at the Forum on Supporting Parents Who Have Learning Difficulties, Melbourne, July 2003) 53 <www.publicadvocate.vic.gov.au/file/file/Research/Forums/2003/Strengthening_Every_Family_Forum_Proceedings.pdf>.

⁴³² Sykes, *ibid*, 54.

- (f) a lack of data and statistics concerning parents with disability and the child protection system with the most recent national data on the numbers of parents with intellectual disability over ten years old.⁴³³

411 Women with disability are particularly affected by the removal of their children as removal is often threatened during pregnancy and can occur at birth or a few days after birth. In consultations it was reported that women who have had children removed experience significant trauma and life-long grief as a result.

Case Study

*"I have an intellectual disability. My son was removed from my care when he was born by the department of child safety. They hadn't assessed my abilities as a parent nor did they tell me they were going to take away my son before I gave birth. They didn't trust me and said that they wanted to prevent me from harming my baby, even when I had done nothing wrong. No support has ever been provided to help me be a parent of my son. We got an independent assessment done and it showed that even though I have a mild intellectual impairment, my behavioural functioning is normal. Even now, I only see him every Friday and he stays overnight once a fortnight."*⁴³⁴

Reproductive Freedom, Family Planning and Right to Parent

- 412 While sex, family planning and parenting information and education programs exist for the general community, it is rare to find information and programs that are accessible or targeted to people with disability. Information reported at consultations provides evidence that negative and false presumptions that people with disability are asexual or oversexed, are not capable of parenting or should not be parents because they may 'pass on' their impairment to their children is still strong in Australia.
- 413 Women with disability face a lack of access to information and programs on reproductive health, preconception, reproduction and pregnancy and limited access to birth control, adoption, abortion and assistive reproductive technology. They also face a health system that lacks policy and procedures about the reproductive health, pregnancy, birthing and post-natal needs of women with disability.⁴³⁵

⁴³³ Alister Lamont and Leah Bromfield, 'Parental Intellectual Disability and Child Protection: Key Issues' (Issues Paper No 31, National Child Protection Clearinghouse, 2009) <<http://www.aifs.gov.au/nch/pubs/issues/issues31/issues31.html>>.

⁴³⁴ CRPD Shadow Report Survey, Submission No 99 (1 February 2010).

⁴³⁵ Women with Disabilities Australia Incorporated, 'Parenting Issues for Women with Disabilities in Australia' (Policy Paper, May 2009) <www.wwda.org.au/parentingpolicypaper09.pdf>.

414 Despite the NDS acknowledging that women with disability face discrimination and prejudicial assumptions about their right to experience parenthood, there are no actions identified to address this.⁴³⁶

Coerced Abortions

415 Reports from consultations found that pregnant women with disability are often encouraged to terminate their pregnancies due to misconceptions of parenting capabilities and a presumed risk the child may be born with disability.⁴³⁷ While there is no legislation in Australia that forces women with disability to undergo abortions, practice and prevailing attitudes mean that women, particularly those with cognitive impairment can be coerced into having abortions on the basis of their disability.⁴³⁸

416 It is difficult to accurately estimate the number of abortions performed in Australia as only South Australia and Western Australia collect reliable data (due to terminations being notified by law and reported annually).⁴³⁹ There remains a lack of data surrounding the rate to which women with disability undergo an abortion.

Unequal Access to Adoption

417 Australia's adoption laws do not unequivocally make provision for the rights enshrined in Article 23(2). There are barriers which restrict the ability of people with disability to adopt including anecdotal evidence to suggest people with disability are not recognised as being appropriate candidates to adopt.⁴⁴⁰ In some jurisdictions, there is a specific requirement that prospective parents be of "good repute"⁴⁴¹ and be "fit and proper persons" to adopt a child.⁴⁴² This disproportionately affects people with disability who require greater evidence to demonstrate that they are "fit and proper" persons.

⁴³⁶ Council of Australian Governments, *National Disability Strategy*, above n 84, 49.

⁴³⁷ Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

⁴³⁸ See reports and papers by Women with Disabilities Australia on this issue <www.wwda.org.au>.

⁴³⁹ Jane Ford and Natasha Nassar, 'Reproductive Health Indicators' (2002) 20 *Australian Institute of Health and Welfare National Perinatal Statistics Unit*.

⁴⁴⁰ Queensland Office of the Public Advocate, 'Response to Policy Paper about Future Adoption Laws in Queensland' (Paper, 2008).

⁴⁴¹ *Re T v Director of Youth and Community Services* [1980] 1 NSWLR 392 [399] (Waddell J): 'repute' means reputation in the community. See also *Re A v B* (2000) 26 Fam LR 317 [325], [326] (Bryson J): factors which determine whether a prospective adoptive parent is a fit and proper person to adopt a child; and *Re D v E* (2000) 26 Fam LR 310.

⁴⁴² *Adoption Act 1993* (ACT) s 19(1)(c); *Adoption Act 2000* (NSW) s 27(1)(b) (adoption by one person), 28(1)(b) (adoption by couple); *Adoption of Children Act 1964* (Qld) s 13B(2)(b); *Adoption Act 1994* (WA) s 68(2)(b)(i). For judicial discussion of 'fit and proper persons' to adopt a child see *Re D v E* (2000) 26 Fam LR 310 [325], [326] (Bryson J). In the Northern Territory, adoption applicants must produce evidence of good physical and mental

Right to Sex and Relationships

- 418 There has been no attempt in Australia to document the lived experience of people with disability in respect of their sexual lives⁴⁴³ and a failure by policy makers to take into account the opinions of people with disability in relation to their sexuality.
- 419 The view that people with disability do not ‘require’ sex education means that many people with disability are not informed about safe sex or positive relationships. Consequently, people with disability are placed at a higher risk of abuse and exposure to sexually transmitted diseases.⁴⁴⁴
- 420 Legislation in several jurisdictions makes it an offence to have sexual intercourse with a person who has a cognitive impairment under certain circumstances. The aim is to protect people with cognitive impairment from exploitation but in many cases the legislation is paternalistic and prevents a person with cognitive disability from consenting to sex.⁴⁴⁵
- 421 In Australia, the predominant source of sex education for people with disability lies with a limited number of non-government organisations that conduct sex education projects, develop resources and provide training.⁴⁴⁶ These programs are extremely limited across Australia and usually directed at people with intellectual disability only.⁴⁴⁷ There are considerable barriers for people with disability to have sex and explore and express their sexuality and access supports for this.⁴⁴⁸

health and in the case of any illness, disability or defect, a specialist medical practitioner’s report is required: *Adoption of Children Regulations 1994* (NT) Sch Form 1 (applicant may have to provide a medical report or undergo a medical examination by a medical practitioner of the Minister’s choice); ‘*Eligibility Criteria for Couples Seeking to Adopt a Non-Related Child within the Northern Territory*’, NT Gaz 31 (3 August 1988).

⁴⁴³ Kelley Johnson et al, ‘Living Safer Sexual Lives (Final Report, Australian Research Centre in Sex, Health and Society, 2001) <www.latrobe.edu.au/arcshs/downloads/arcshs-research-publications/people_with_intellectual_disabilities_living_safer_sexual_lives.pdf>.

⁴⁴⁴ Kelley Johnson et al, *ibid*.

⁴⁴⁵ *Criminal Code Act 1899* (Qld) s 216.

⁴⁴⁶ See, for example: Sexuality Education Counselling and Consultancy Agency, Western Australia <www.secca.org.au/home.htm>.

⁴⁴⁷ Office of the Public Advocate, ‘People with Disability: Sexual Health and Relationships, (Discussion Paper, Victorian Government, 2000); Kelley Johnson et al, above n 443.

⁴⁴⁸ There is one organisation in Australia, Touching Base, that is explicitly pursuing the right of people with disability to sexual expression. Touching Base facilitates links between people with disability, their support organisations and the Sex Industry. It aims to assist people with disability to have sex, explore and express their sexuality and to receive the personal and systemic supports required to do this. It is managed by people with disability and sex workers and receives no government funding.

- 422 Many people with disability are consistently denied the right to engage in meaningful relationships and exercise their right to parent as they live in group homes or institutions with restrictive policies and practices that deny or discourage residents from having relationships or consensual sex.⁴⁴⁹
- 423 Although it is a requirement under disability services standards, anecdotal evidence suggests residents in care facilities are not always afforded respect and recognition of their right to privacy and confidentiality, particularly with regard to physical privacy. (See also Article 22) Intrusion by staff into a resident's room without consent is not uncommon. The prevention of sexual conduct and relationships between consenting residents is very common in a number of facilities.⁴⁵⁰
- 424 Information from consultations has found that there are very few adult residential facilities that adequately cater for the needs of couples or those who want to pursue relationships. Key barriers include prejudicial attitudes of support staff, agency policies that prohibit sexual relations and an aggressive risk management culture in many support agencies. There may also be a directive from parents or family members to the residential facility to prohibit this for their adult child regardless of the person's wishes and their adult status.

Case Studies

A woman and a man in their mid-thirties were in love and sought to share a home and a life together. They lived in separate group homes operated by a disability support agency and despite their desire to live together, little or no support was offered by the agency to assist them to find somewhere they could both live with access to disability supports despite the fact that they operated many group homes.

Another man with physical disability organised for a paid sex worker to visit him in his bedroom in a group home. Staff refused to let the sex worker enter the house to visit the man on the ground of 'duty of care' without explaining how this action breached 'duty of care' for the resident.

A gay man who uses a wheelchair and who lives in a residential facility regularly goes out to gay clubs. He is constantly harassed by the support staff because he needs their support to get into bed when he comes home late at night.

⁴⁴⁹ Reported by individuals with disability and advocacy organisations.

⁴⁵⁰ Reported by individuals with disability and advocacy organisations; NSW Council for Intellectual Disability, 'Sexuality' (Standard Fact Sheet, 2009) <www.nswcid.org.au/health/se-health-pages/sexuality.html>.

Right of Children with Disability to Live in a Family

- 425 There is a significant lack of supports for families with children with disability, which leads to family breakdown. Family breakdown leads to families making the heartbreaking decision to relinquish the care of their children with disability to State or Territory child protection agencies.⁴⁵¹
- 426 Children with disability, particularly Aboriginal and Torres Strait Islander children with disability are more often placed in inappropriate, successive out of home care arrangements or remain for extensive periods of time in respite care or hospital facilities, which then places them in situations of risk of harm and deprives them of an appropriate family environment.⁴⁵²

RECOMMENDATIONS Article 23

- That, in line with the recommendations from the UN Committee on the Rights of the Child, the UN Committee on the Elimination of Discrimination against Women and the UPR, Australia develops nationally consistent and uniform legislation that explicitly prohibits non-therapeutic sterilisation of all children except in circumstances where there is a serious threat to health or life; and that prohibits non-therapeutic sterilisation of adults without their full and informed consent except in circumstances where there is a serious threat to health or life.
- That Australia conducts an urgent national inquiry into the legal, policy and social support environment that gives rise to the removal and / or threat of removal of babies and children from parents with disability.
- That Australia collects appropriate statistical and research data on the number of parents with disability in contact with the child protection system and the number of children removed from parents with disability, disaggregated by gender, ethnicity, Aboriginal and Torres Strait Islander status and other relevant variables, in order to guide policy, funding, and support development.
- That Australia establishes comprehensive and intensive gender specific parenting and family support measures for parents with disability, to assist with maintaining children with their parents and within their own family homes.
- That Australia audits laws, policy and practice governing adoption, reproductive autonomy and procreative choice against the CRPD and establish measures to remove inconsistencies.

⁴⁵¹ People with Disability, Submission to Standing Committee on Social Issues, *Inquiry into Services Provided or Funded by the Department of Ageing, Disability and Home Care*, 23 August 2010.

⁴⁵² People with Disability and Children with Disability Australia, Submission to Child Rights Taskforce, 2010.

- That Australia establishes measures to raise awareness in the general community, specifically people with disability, their families, the judiciary and agencies involved in child protection about the right to parent, particularly for people with intellectual and psychosocial disability and promote positive images of parents with disability in the community.
- That Australia resources sexuality, relationship and human rights training and information for people with disability, including providing support for agencies that provide access to sexual services, including in residential facilities.
- That Australia ensures that at the next review of the National Child Protection Framework, specific issues and comprehensive strategies for both children and young people with disability and parents with disability are identified and included for implementation.
- That Australia provides significant investment in supports and measures to ensure that families are able to provide appropriate support to their children with disability without needing to resort to relinquishment. Such measures should include methods for the collection of consistent, cross-jurisdictional data about the relinquishment of children with disability by families.

ARTICLE 24 — EDUCATION

STATUS IN AUSTRALIA

General Legal and Policy Framework

- 427 Anti-discrimination legislation exists at the national, State and Territory levels to protect people with disability from discrimination in the education system. Under this legislation, educational institutions are prohibited from discriminating against persons on the basis of disability.⁴⁵³ Under the *Disability Discrimination Act 1992* (Cth) (DDA), education and training service providers may be required to provide ‘reasonable adjustments’ to accommodate the needs of students with disability.
- 428 The Disability Standards for Education 2005 (the Education Standards), which are established under the DDA outline the minimum requirements for education and training providers to ensure students with disability are able to access and participate in education on the same basis as other students.⁴⁵⁴ Many disability representative, advocacy and legal organisations report that despite implementation of the Education Standards, access, equity and entitlement to an education is still a significant issue for children, young people and adults with disability.⁴⁵⁵
- 429 The Federal Government provides some funding for students with disability, but State and Territory Governments are primarily responsible for education policy, administration and the majority of funding for students with disability. There is a wide variation in compliance with anti-discrimination legislation and the implementation and monitoring of the Education Standards and policy across States and Territories, with the result that the rights of many children, young people and adults with disability are being denied.

⁴⁵³ For example, *Anti-Discrimination Act 1977* (NSW) s 49L and *Disability Discrimination Act 1992* (Cth) s 22.

⁴⁵⁴ Specifically, the Disability Standards for Education 2005 specify the requirements for complying with the *Disability Discrimination Act 1992* (Cth). The Standards set out three main obligations on education providers: to consult with students or their associates, to make reasonable adjustments, and to eliminate harassment and victimisation and processes to avoid discrimination from occurring: Sev Ozdowski OAM, Acting Disability Discrimination Commissioner, ‘Advancing Equality in Education and Beyond’ (Speech delivered at the Eastern Metropolitan Region Student Disability Conference, Melbourne, 1 September 2005) <www.hreoc.gov.au/disability_rights/speeches/2005/eastern.htm>.

⁴⁵⁵ See Children with Disability Australia, Submission to the Department of Education, Employment and Workplace Relations, *Review of Disability Standards for Education 2005*, May 2011, 5; Australian Youth Affairs Coalition and Youth Disability Advocacy Service, Joint submission to the Department of Education, Employment and Workplace Relations, *Review of Disability Standards for Education 2005*, 2011, 6.

- 430 The National Disability Strategy (NDS) recognises the “significant gap between students with disability and those without” and the need for “targeted support” as well as “mainstream education programs...to be designed for people of all abilities”.⁴⁵⁶ While the NDS does identify some broad measures that need to be taken, as at March 2012 the NDS Implementation Plan has not been finalised or endorsed by the Council of Australian Governments.

Incidence of Educational Disadvantage

- 431 There is no consistent definition of ‘disability’ that is used by schools across Australia, which makes it difficult to get accurate information on numbers of students with disability, educational outcomes and improvements over time.⁴⁵⁷
- 432 Available statistics from 2003 indicate that 29.6 percent of persons with a reported disability completed Year 12⁴⁵⁸ or equivalent compared to 49.3 percent of persons with no reported disability.⁴⁵⁹ Further, only 24 percent of persons aged 15-64 years with a ‘profound or severe’ core-activity limitation completed Year 12.⁴⁶⁰
- 433 In 2003, only 12.7 percent of persons aged 15-64 years with a reported disability attained a Bachelor degree or above compared to 19.7 percent of persons with no reported disability.⁴⁶¹ And only 14 percent of persons with a ‘profound or severe’ core-activity limitation had completed a diploma or post-secondary education as compared to 28 percent of persons without disability.⁴⁶²

‘Special’ or Segregated Schools

- 434 Article 24(2) prohibits the exclusion of students with disability from mainstream education on the basis of disability. However, some students with disability continue to be placed in ‘special schools’ throughout Australia despite the fact the educational and economic outcomes for students with disability who attend special schools are lower than the outcomes for students who receive inclusive mainstream education.⁴⁶³

⁴⁵⁶ Council of Australian Governments, *National Disability Strategy*, above n 84, 53

⁴⁵⁷ Ibid, 57; Children with Disability Australia, above n 455 8.

⁴⁵⁸ Year 12 is the final year of secondary school in Australia.

⁴⁵⁹ Australian Bureau of Statistics, above n 349, 22.

⁴⁶⁰ Ibid 5.

⁴⁶¹ Ibid 22.

⁴⁶² Ibid 5.

⁴⁶³ Advocacy for Inclusion, Submission to ACT Government, *Inquiry into the Unmet Needs of Students with Disability*, 2010, 12 <<http://www.legassembly.act.gov.au/downloads/submissions/12%20Advocacy%20for%20Inclusion.pdf>>.

- 435 The segregation of students with disability into special schools is increasingly becoming normalised and the number of students being educated in special schools is rising. For example, in 1992, there were 820 students in New South Wales special schools, but by 2008 this figure had risen to 3,178,⁴⁶⁴ which equates to around 31 percent of all students with disability in New South Wales.⁴⁶⁵ This appears to be driven more by a failure of mainstream schools to provide a welcoming and fully inclusive educational experience than a belief that special schools provide better educational prospects.⁴⁶⁶
- 436 Students attending special schools tend to progress to segregated services in adulthood at a much higher rate than those who attend a mainstream school.⁴⁶⁷
- 437 In rural and remote areas there are significant difficulties in participating in mainstream education due to the lack of accessible transport, school facilities, skilled teachers and resources. While there may be some provision for ‘outreach’ support to teachers in these areas and ‘outreach clinics’, where teachers or support services visit children and young people with disability in these areas, this is not consistent, or equivalent to the mainstream curriculum and it does not address the lack of social interaction with other children.⁴⁶⁸ Aboriginal and Torres Strait Islander people with disability are particularly likely to experience this situation.

Case Study

Children and young people of high school age living on the outer islands of the Thursday Islands will go to school on Thursday Island. They leave their home to board at one of two boarding colleges on Thursday Island. This is not a possibility for children and young people with disability as there are no accessible and inclusive colleges. Children and young people with disability have to stay home with their family and are visited on a rotational basis by a ‘special needs’ teacher. This leaves children and young people with disability in the outer island communities with little or no social interaction with people their own age.

⁴⁶⁴ These were figures released by the Association of Independent Schools, taken from General Purpose Standing Committee No 2, NSW Parliament, *Inquiry into the Provision of Education to Students with a Disability or Special Needs* (2010).

⁴⁶⁵ NSW Parents Council, Submission No 205 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 18 February 2010, 6 <www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/13D1199DAA4CB07ACA2576E2007F7947>.

⁴⁶⁶ This was reported by a number of disability representative and advocacy organisations during consultations.

⁴⁶⁷ Department of Human Services, ‘Review of Futures for Young Adults Program’ (Review, Victorian Government, 2011).

⁴⁶⁸ See, for example, provision for ‘outreach clinics’, Queensland Government, ‘Rural and Remote Education Framework for Action 2003–2005’ (Framework, 2002) 6.

Inclusive Mainstream Primary and Secondary Schools

- 438 Although statistics show many students with disability are enrolled in mainstream schools, this does not reflect the successful inclusion of students with disability. Students with disability and their parents consistently report that inclusive education policies are little more than rhetoric when the education they receive is substandard and compromises their ability to lead independent and productive adult lives.⁴⁶⁹
- 439 There are significant difficulties in obtaining a diagnostic assessment, which is necessary in order to qualify for integration or inclusion support funding.⁴⁷⁰ There is often no specified pathway to achieve a specific and formal diagnosis and support.⁴⁷¹ Many children and young people with disability face lengthy periods out of school while awaiting a diagnosis because their particular impairment or condition is not recognised by funding policy.⁴⁷² There may be long waiting lists to access services and often the costs of accessing expensive diagnostic services is covered by the families of students with disability.
- 440 Under Article 24(2), students with disability are entitled to individualised support measures and adjustments. However, modifications to curriculum delivery methods and modes, as well as an increase in the supply, implementation and maintenance of technologies to accommodate disability are generally not available.⁴⁷³ Whilst there are many resources specifying methods for modifying curriculum and teaching materials for students with diverse functional needs, teachers often do not feel adequately trained to do so.⁴⁷⁴

⁴⁶⁹ See Children with Disability Australia, Submission, above n 455; Australian Youth Affairs Coalition and Youth Disability Advocacy Service, Joint submission, above n 455; People With Disability Australia, Submission No 345, above n 18; Family Advocacy, Submission No 127 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 17 February 2010 <[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/2f78904834492512ca2576e2007ed160/\\$FILE/Submission%20127.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/2f78904834492512ca2576e2007ed160/$FILE/Submission%20127.pdf)>.

⁴⁷⁰ This is not a requirement in all jurisdictions (for example, in NSW).

⁴⁷¹ Macquarie Centre for Cognitive Science, Submission No 74 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 11 February 2010 <[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/e247d1a7a88786caca2576d4001905cc/\\$FILE/Submission%2074.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/e247d1a7a88786caca2576d4001905cc/$FILE/Submission%2074.pdf)>.

⁴⁷² Disability Advocacy NSW Inc, Submission No 216 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 18 February 2010, 4 <[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/2738e2dd565944aaca2576e200807292/\\$FILE/Submission%20216.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/2738e2dd565944aaca2576e200807292/$FILE/Submission%20216.pdf)>.

⁴⁷³ Advocacy for Inclusion, Submission, above n 463, 6–7.

⁴⁷⁴ *Ibid* 6.

- 441 School teaching materials and delivery are often not accessible to students. For example, students with vision impairment rarely have access to Braille or other accessible formats.⁴⁷⁵ Deaf students have limited access to Auslan interpreters, and there is little attention given to individualised ways of working with children with autism spectrum disorders.
- 442 Many students with disability are largely confined to ‘special classes or units’ within mainstream schools. Others are unable to participate in excursions or extra-curricular activities because buses, venues and facilities are inaccessible. Many students with disability wait significant periods of time for the allocation of a support person and either cannot attend school or do attend but without the support they need.⁴⁷⁶

Case Studies

- Australia announced a \$1.2 billion national plan⁴⁷⁷ to provide grants to secondary schools to enable them to access digital equipment and technology. However, laptops being issued as part of the national plan are unable to support the adaptive technology used by students with vision impairment.⁴⁷⁸
- A student with vision impairment attends a school where students are provided with a computer that they may then keep after completing their final year of school under the Commonwealth’s school computer initiative. However, the computer on offer is not accessible to her.⁴⁷⁹
- Liz was expelled from her school due to poor grades after one term. The school failed to accommodate her access requirements throughout the term. They did not provide tests and worksheets in a readable format to cater for her vision impairment, but said they could provide her with access to a photocopier so she could enlarge the font herself. They refused to allow her to retake the tests, nor

⁴⁷⁵ Natasha Robinson, ‘Education initiatives failing blind students’, *The Australian* (Melbourne), 12 April 2010 <www.theaustralian.com.au/politics/education-initiative-failing-blind-students/story-e6frgczf-1225852472078>.

⁴⁷⁶ See Children with Disability Australia, Submission, above n 469; Australian Youth Affairs Coalition and Youth Disability Advocacy Service, Joint submission, above n 469; People With Disability Australia, Submission No 345, above n 18; Family Advocacy, Submission No 127, above n 469.

⁴⁷⁷ The Hon Julia Gillard MP and The Hon Bill Shorten MP, ‘Students with Disability to Benefit from Digital Education Revolution’ (Joint Media Release, 18 September 2008) <www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/Article_081009_162150.aspx>.

⁴⁷⁸ Natasha Robinson, ‘Education Initiatives Failing Blind Students’, *The Australian* (Melbourne), 12 April 2010 <www.theaustralian.com.au/politics/education-initiative-failing-blind-students/story-e6frgczf-1225852472078>.

⁴⁷⁹ NSW Disability Discrimination Legal Centre, Submission, above n 31, 19.

would they look at a medical certificate. Liz is still trying to gain readmission to the school.⁴⁸⁰

Restrictive Practices, Bullying and Inappropriate Discipline

- 443 There is significant concern about the use of restrictive practices in both ‘special’ and mainstream schools, with reports across Australia that children are being tied to chairs, locked in isolation rooms, being physically restrained and penned in outside areas.⁴⁸¹ (See also Articles 15 and 16)
- 444 Students with disability in mainstream schools experience higher levels of bullying than other students. (See also Article 16) There is a lack of support measures to deal with and prevent occurrences of bullying against students with disability, such as the provision of support in the playground and classroom, and teacher training to appropriately manage social interactions and respond to bullying.⁴⁸² Bullying is often a significant factor for decisions made by many parents to send their children to ‘special’ schools.
- 445 Students with disability face disciplinary action at rates disproportionate to other students. Behaviours that may be characteristics of a student’s impairment are viewed as disciplinary issues and dealt with inappropriately. Discipline can exacerbate the behaviour and often leads to students being suspended or expelled.⁴⁸³ There is little attempt to understand specific types of behaviour, communication techniques, or to investigate external factors for ‘challenging behaviour’.⁴⁸⁴

Case Study

Jared is 10 and to date has attended three different primary schools and spent more than half his school career on suspension. One example of the problems faced at school was that Jared was being suspended for swearing at a teacher, often before 9.30am, when he was angry or frustrated. Nothing was done to find out why Jared was behaving in this way or to calm him down when he arrived at school angry and frustrated. It turned out that Jared was having problems with another child in the taxi on the way to school. The school failed to

⁴⁸⁰ CRPD Shadow Report Survey, Submission No 148 (8 April 2010).

⁴⁸¹ For example, Children with Disability Australia, ‘Review of Funding for Schooling’ (Review, Children with Disability Australia, 2011), information received from the Disability Discrimination Legal Service Victoria. See also ABC, ‘Hidden Shame’, above n 210.

⁴⁸² Advocacy for Inclusion, Submission, above n 463, 6-7.

⁴⁸³ Children with Disability Australia, above n 476, 17.

⁴⁸⁴ People With Disability Australia, Submission No 345, above n 18; Family Advocacy, Submission No 127, above n 469.

*recognise his conduct was part of his impairment and communication style. No attempts had been made to understand why Jared was acting the way he was and there was no individualised program with specific targets and strategies. Jared's mother eventually withdrew Jared from the school to home-school him. A new welfare officer was finally allocated to Jared who quickly realised the misconduct was due to lack of individualised management strategies and that suspension was not an appropriate strategy. Jared is now planning to return to school.*⁴⁸⁵

Inadequate Funding and Support Arrangements

446 In Australia, schools receive inadequate funding and resources to meet the needs of students with disability. This undermines the ability of schools to implement measures that would underpin inclusion, including modifying curricula to meet the particular needs of different students; increasing the staff to student ratio; and providing adaptive equipment and technology, accessible transport, universally designed environments and accessible social and extra-curricular activities.⁴⁸⁶

447 There are barriers and inequity in the way funding is allocated to students with disability, including:

- (a) funding for each student with disability is based on the primary disability that most affects the student's quality of life and learning. No additional funding is given to students with multiple support needs, which results in inadequate funding to support the needs of students;⁴⁸⁷
- (b) a significant number of students with disability miss out on funding and support because they don't meet existing eligibility criteria, and because there is a lack of emphasis on the individual support needs of students as opposed to a specific diagnosis or 'label';⁴⁸⁸
- (c) levels of funding and support are insufficient and vary across States and Territories for particular students with disability, such as students with Aspergers Syndrome;⁴⁸⁹ and

⁴⁸⁵ People With Disability Australia, Submission No 345, above n 18.

⁴⁸⁶ Advocacy for Inclusion, Submission, above n 463, 14.

⁴⁸⁷ Figtree High School, Submission No 78 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 11 February 2010 <www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/F798060479A9411ECA2576D400190F52>.

⁴⁸⁸ Children with Disability Australia, above n 476, 17; Family Advocacy, above n 476, 6–7.

⁴⁸⁹ Autism Spectrum Australia, Submission No 45 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 8 February 2010, 6

- (d) a new application for funding must be lodged each time a student with disability moves school. This results in the student having to wait for funding without any support, assistance or access to the curriculum for that period of time.⁴⁹⁰

Tertiary Education

448 Students with disability face a number of barriers in attaining equality in education in the tertiary education sector. These include:

- (a) pathways between secondary and tertiary education are not well-supported or coordinated. Training and preparation for post-secondary education usually commences in the last few years of secondary school and transition supports are not often maintained;⁴⁹¹
- (b) university and higher education courses are limited in accessibility in terms of physical access, the accessibility of the curriculum and teaching materials and the mode of course delivery.⁴⁹² This is particularly the case in rural and remote areas;
- (c) limited supports are funded and provided to assist people with disability to attend university and higher education, including participation in the student social activities resulting in students with disability often having to arrange and fund their own support and feeling socially excluded;⁴⁹³ and
- (d) the cost for people with disability to enter university and higher education is often not recognised. For example, the costs incurred as a result of requiring additional resources or adjustments is not automatically provided by educational institutions and are not funded by the government.⁴⁹⁴

<[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/a7c08f3e1527bbe3ca2576d40018b84a/\\$FILE/Submission%2045.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/a7c08f3e1527bbe3ca2576d40018b84a/$FILE/Submission%2045.pdf)>.

⁴⁹⁰ Deaf Australia NSW, Submission No 196 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 18 February 2010

<www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/3600D11B431AC1BDCA2576E2007F6122>.

⁴⁹¹ Advocacy for Inclusion, Submission, above n 463, 13.

⁴⁹² Queensland Parents for People with Disability Transition Sub-Committee, 'Ensuring a Smooth Transition from School to a Lifestyle of Choice for Young People with Disability' (Issues and Recommendations Paper, 2008).

⁴⁹³ Ibid.

⁴⁹⁴ Advocacy for Inclusion, Submission, above n 463, 17.

Case Study

*Anna has vision impairment and attends university. Unfortunately she has had to repeatedly withdraw from classes at university. On at least five occasions accessible materials arrived too late for her to complete her assignments and she was unable to complete the course.*⁴⁹⁵

Lack of Trained Teachers and Education Professionals

449 A key barrier to providing appropriate, high quality and individualised support to students with disability at primary, secondary and tertiary levels is the lack of trained teachers. Issues include:

- (a) there is minimal disability awareness skills training resulting in an inadequate knowledge of diverse functional needs.⁴⁹⁶ Teaching degrees give insufficient attention to effective strategies for inclusive education with units offered as an elective in some universities. A survey of 2,000 teachers conducted in 2008–2009⁴⁹⁷ found 70 percent felt inadequately trained to teach students with disability;
- (b) education professionals are not trained in using appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support students with disability;⁴⁹⁸
- (c) education professionals are not always aware of the specialist support services that exist to assist students in accessing the services they require, as mandated by the Education Standards;⁴⁹⁹
- (d) the numbers of teachers and support staff trained in Auslan remains inadequate,⁵⁰⁰ with some students provided with a teacher's aide trained in Auslan for only a few hours per week.⁵⁰¹ In 2006 there were only 860 specialist teachers to assist 16,000 hearing impaired students;
- (e) teacher's aides qualified in Braille are often employed in casual positions and are limited in availability; and

⁴⁹⁵ CRPD Shadow Report Survey, Submission No 2 (23 December 2009).

⁴⁹⁶ Disability Advocacy NSW Inc, Submission No 216, above n 472.

⁴⁹⁷ The study was conducted by the Australian Education Union: NSW Parents Council, Submission No 205, above n 465, 16.

⁴⁹⁸ Advocacy for Inclusion, Submission, above n 463, 15.

⁴⁹⁹ *Disability Standards for Education 2005* (Cth) Pt 7.3.

⁵⁰⁰ Deaf Australia NSW, Submission No 196, above n 490.

⁵⁰¹ *Ibid.*

- (f) many teachers have out-dated knowledge in relation to best practice in inclusive education and teacher's aides are often relied upon to teach students with disability regardless of whether they have relevant training and qualifications.⁵⁰²

RECOMMENDATIONS Article 24

- That Australia conducts major research into the effectiveness of current education inclusion policies and extent to which Disability Standards in Education are being implemented in each state and territory.
- That Australia develops consistent strategies for funding students with disability and resourcing, their teachers and teacher aides and school administrators on good practice in inclusive education and the creation of a culture of welcome and inclusion for all students.
- That all teachers who use Auslan are properly certified, and that all children who use Auslan have access to a teacher certified to use Auslan in primary schools, and a qualified Auslan interpreter at secondary school at all times and for all school activities.
- That all students with disability have access to Individualised, portable funding and supports.
- That the following measures in respect of teacher training be implemented to ensure the mainstream inclusion of students with disability:
 - increased training of teachers and teacher's aides involving an emphasis on improving their knowledge and understanding of disability-related issues and suitable curriculum design, skills assessment, behaviour management and instructional strategies;⁵⁰³
 - all training courses and professional development programs for teachers and integration aides be subsidised and compulsory, undertaken regularly and incorporated into general education training rather than by way of separate disability-specific sessions;
 - increased resources to support teachers and teacher's aides; and

⁵⁰² Down Syndrome NSW, Submission No 289 to NSW General Purpose Standing Committee No 2, *Inquiry into the Provision of Education to Students with a Disability or Special Needs*, 19 February 2010, 13 <www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/E893D49EF2E72A2BCA2576E20081EDFA>.

⁵⁰³ Elizabeth Stamopoulos, 'Empowering Preservice Teachers to Embrace Diversity' (2006) 31 *Australasian Journal of Early Childhood*, 30–9 <www.earlychildhoodaustralia.org.au/australian_journal_of_early_childhood/ajec_index_abstracts/empowering_preservice_teachers_to_embrace_diversity.html>.

- ensuring teaching programs include exposure to direct and structured interaction with students with disability in addition to formal instruction.⁵⁰⁴
- That bullying and social exclusion of students with disability at school are addressed through national initiatives that seek to change the culture of discrimination and harassment of students with disabilities.
- That a greater emphasis be placed on a holistic approach to inclusion in education that includes social education and participation in all areas of school life.
- That Australia sets targets to increase participation and completion rates by students with disability in tertiary education.
- That educational institutions focus on current best practice approaches to assisting students with disability who are at risk of suspension or expulsion for unacceptable behaviour.⁵⁰⁵

⁵⁰⁴ Jennifer Campbell, Linda Gilmore and Monica Cuskelly, 'Changing Student Teachers' Attitudes Towards Disability and Inclusion' (2003) 28 *Journal of Intellectual and Developmental Disability* 370 <<http://eprints.qut.edu.au/4305/1/4305.pdf>>.

⁵⁰⁵ People With Disability Australia, Submission No 345, above n 18, 5.

ARTICLE 25 — HEALTH

STATUS IN AUSTRALIA

Affordability of Health Care

- 450 The provision of health care in Australia is primarily the responsibility of state and territory governments, subsidised through federal funding. Access to health care is facilitated through subsidised health insurance and a universal health care scheme, ‘Medicare’. The Pharmaceutical Benefits Scheme subsidises payments for 80 percent of prescription medications⁵⁰⁶ and community based services often provide services for mental health, drug and alcohol use and family planning.
- 451 However, services provided free through the public health system are often underfunded, under resourced and overprescribed, resulting in long waiting lists. People with disability in Australia “carry a huge burden of undiagnosed or poorly managed health problems”.⁵⁰⁷ For people with intellectual disability, 42 percent of medical conditions go undiagnosed and life expectancy is much lower.⁵⁰⁸ The poor health of people with disability is due to a number of factors, such as the cost of health care, barriers to health services, communication difficulties, the complexity of health problems, a lack of multidisciplinary focus and specialist skill in the health care system and a lack of research into the health needs of people with disability.⁵⁰⁹
- 452 Health service providers are prevented from discriminating against someone on the grounds of their disability by refusing to provide a service, altering the terms and conditions of provision of the service or providing the service in a different manner.⁵¹⁰ However, the *Disability Discrimination Act 1992* (Cth) (DDA) has an exemption for insurance companies who may discriminate on the basis of disability so long as the discrimination is

⁵⁰⁶ Productivity Commission, ‘Report on Government Services 2007’ (Report, Australian Government, 31 January 2007) 10.3 <www.pc.gov.au/gsp/reports/rogs/2007>.

⁵⁰⁷ Royal Australian College of General Practitioners, ‘RACGP Calls for Increased Support for Medicare Services for People with Disability’ (Media Release, 4 March 2005).

⁵⁰⁸ New South Wales Council for Intellectual Disability, Submission to the Productivity Commission, *Australia’s Health Workforce*, July 2005 < www.pc.gov.au/__data/assets/pdf_file/0010/10450/sub073.pdf>.

⁵⁰⁹ National and NSW Councils for Intellectual Disability and Australian Association of Developmental Disability Medicine, ‘Proposal for Specialised Services to Enhance the Capacity of the Mainstream Health System to Provide Equitable and Cost Effective Health Care to People with Intellectual Disabilities’ (Proposal, National and NSW Councils for Intellectual Disability and Australian Association of Developmental Disability Medicine, 2008).

⁵¹⁰ *Disability Discrimination Act 1992* (Cth) s 24.

“reasonable”.⁵¹¹ People with disability are often therefore unable to obtain life insurance, income protection or disability protection insurance.⁵¹²

- 453 Consequently, a number of factors result in people with disability being unable to afford the services they need. For example, not all private or allied health services are covered by Medicare. Specifically, dental examinations and treatment, therapy (including occupational, speech, and physiotherapy), psychology and the cost of prosthesis are generally not included.⁵¹³ Dental disease is up to seven times more frequent amongst people with intellectual disability than in the general population and dental care is often unaffordable for people on a disability pension.⁵¹⁴

Access Barriers

- 454 For most people, contact with a health care provider is initially via a local general practitioner. However, a study undertaken in 2009 showed people with disability encounter access barriers that include narrow hallways, doors being difficult to open and inaccessible reception counters, and a lack of adjustable scanning tables. Additionally, 21 percent of respondents found it difficult to use the bathroom at their GPs clinic⁵¹⁵ and over 44 percent of respondents had difficulty accessing a GP examination table.⁵¹⁶
- 455 Lack of accessible information and attitudinal barriers are significant issues for people who use alternative forms of communication contributing to poor treatment and care in hospitals and in other health care settings.

Population–Based Public Health Programs Fail to Include People with Disability

- 456 Australia provides a number of preventative health programs, however, the way information is presented and distributed can be inaccessible to people with disability. The lack of accessible information is of particular concern to Aboriginal and Torres Strait Islander people with disability where language and culture may create additional barriers to accessing mainstream information and programs.

⁵¹¹ *Disability Discrimination Act 1992* (Cth) s 46.

⁵¹² Australian Human Rights Commission, *Conciliated Outcomes: Insurance and Superannuation* (October 2009) Australian Human Rights Commission <www.hreoc.gov.au/disability_rights/decisions/conciliation/insurance_conciliation.html>.

⁵¹³ Medicare Australia, ‘What Medicare Covers’ (Information Sheet, Australian Government, undated).

⁵¹⁴ New South Wales Council for Intellectual Disability, Submission, above n 508.

⁵¹⁵ Alicia Fidock and Robbi Williams, ‘The Experiences of People Living with Disability Accessing Primary Healthcare — Challenges and Considerations’ (Research Report, Julia Farr Association, 2010).

⁵¹⁶ The Royal Australian College of General Practitioners recently asked for submissions on the creation of the fourth edition of the Standards for General Practices and twenty submissions referred to a need for height adjustable beds. The draft fourth edition Standards were recently released <www.racgp.org.au>.

- 457 As the majority of general health information is provided in schools and television and radio campaigns, people with disability who are not able to access these sources adequately are likely to be information poor. For women in particular this could mean they lack information regarding menstruation, contraception and reproductive health.⁵¹⁷
- 458 Workplace Health Check programs have been introduced in some jurisdictions as part of a proactive approach to health promotion. As many people with disability are not active in the mainstream workforce, they are unlikely to benefit from these public health initiatives.

Women

- 459 People with disability are often seen as asexual, sexually inactive and incapable of being parents.⁵¹⁸ These beliefs can lead to lower screening rates for breast and cervical cancer and sexually transmitted diseases and a failure to provide information and education on sexual health or prenatal services appropriate for women with disability.⁵¹⁹
- 460 The National Disability Strategy recognises that “women with disabilities are one of the most under-screened groups in Australia for breast and cervical cancer”, but there are no gender-specific measures identified in the Strategy’s ‘Areas for future action’.⁵²⁰
- 461 Women with disability also experience forced menstrual suppression and contraception, often without regard to the wishes of the individual.⁵²¹ The continued practice of forced sterilisation of children despite international condemnation is also of serious concern.⁵²² (See also Article 23)

⁵¹⁷ Sue Salthouse, ‘The Sick State of Health for Women with Disabilities’, (Paper presented on behalf of Women with Disabilities Australia to the Australian Women’s Health Conference, Melbourne, 20–22 April 2005) 3 <www.wwda.org.au/health1.htm>.

⁵¹⁸ Carolyn Frohmader and Karin Swift, Women with Disabilities Australia, Submission to Inform the Development of the Framework for the National Women’s Health Policy, *National Women’s Health Policy Consultation Discussion Paper*, August 2009, 28 <<http://www.wwda.org.au/wwdaNWHPSubfinal.pdf>>.

⁵¹⁹ Ann Storr, ‘Motherhood, Parenting and Women with Disabilities: A Literature Review’ (Literature Review, Women with Disabilities Australia, 2007) <<http://www.wwda.org.au/motherhdlitrev1.htm>>.

⁵²⁰ Council of Australian Governments, *National Disability Strategy*, above n 84.

⁵²¹ Carolyn Frohmader, Submission, above n 37, 16.

⁵²² Frohmader and Swift, above n 518, 26.

- 462 Women with disability experience difficulty in accessing health information and services.⁵²³ Short appointment times, physical, sensory and communication barriers with health practitioners, misconceptions as to the sexuality of women with disability, limited financial resources, mobility difficulties and lack of adequately trained health professionals limit access to health services.⁵²⁴

Lack of Disability Specific Health Services

- 463 Factors which contribute to the unmet health needs of people with disability, identified by the National and New South Wales Councils for Intellectual Disability (NSWCID) and the Australian Association of Developmental Disability Medicine (AADDM), include high rates of often complex health problems, a lack of specialist skill, assumptions that symptoms flow from disability and not a separate health issue and a lack of multidisciplinary focus between disability services and the health system.⁵²⁵

Case Study

Vivian is 21 and, from an early age had symptoms of instability, loss of mobility and loss of continence that were mistakenly attributed to her disability. At age 14, an ultrasound showed she had no cervix or vagina and a large amount of blood in her uterus. A misdiagnosis of psychosis, epilepsy and dementia (brought on by medication) led to her being heavily medicated to the point that she lost her speech and many skills. Finally, a doctor with expertise in intellectual disability was able to diagnose lupus.

Lack of Services for People with a Psychosocial Disability

- 464 Psychosocial disability is the leading cause of death for Australians under the age of 45 and the leading cause of disability in Australia.⁵²⁶ However, mental health services are significantly under-resourced and there are widespread access problems for people with psychosocial disability.⁵²⁷

⁵²³ Keran Howe and Carolyn Frohmader, 'Going Inclusive: Access to Health Care for Women with Disabilities' (Paper presented to the Australian Women's Health Conference, Adelaide SA, February 2001) <www.wwda.org.au/inclusive.htm>.

⁵²⁴ NSW Cervical Screening Program and the Centre for Developmental Disability Studies, 'Preventative Women's Health Care for Women with Disabilities: Guidelines for General Practitioners Background and Literature Review' (Guidelines, 2004) <www.csp.nsw.gov.au/women/disabilities.html>.

⁵²⁵ National and NSW Councils for Intellectual Disability and Australian Association of Developmental Disability Medicine Inc, Proposal, above n 509.

⁵²⁶ Department of Health and Ageing, 'A Healthier Future for All Australians' (Final Report, National Health and Hospitals Reform Commission, (2009) 98 <www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/nhhrc-report-toc>.

- 465 Approximately 40 percent of persons with intellectual disability also have a psychosocial disability, a situation known as ‘dual disability’. Existing health services are very poor at supporting people with disability who experience more than one type of impairment. Traditional health treatment regimes focus on a diagnosis specific approach rather than a broader health needs based approach.

Aboriginal and Torres Strait Islander Australians: Failure to Prevent Secondary Disabilities

- 466 The disparities in health between Aboriginal and Torres Strait Islander peoples and the mainstream population are well documented in Australia. Many of the health issues, such as diabetes, renal failure, and eye and ear problems have long term disabling effects and many people do not access the health care system until they are in crisis.⁵²⁸
- 467 Access in rural areas is of particular concern to Aboriginal and Torres Strait Islander Australians living in remote communities, particularly for those that require regular interactions with the health service. A lack of transport means that people are unable to maintain regular appointment regimes and are reliant on informal transport networks to reach services.

Quality of Care, Communication and Training

- 468 Lack of satisfactory communication between doctor and patient is often cited as one of the major barriers for people with disability in accessing quality health care. Currently, there is no requirement for medical schools to specifically train students in providing services to people with disability. Resulting misconceptions have, in some cases, led to the denial of health care services. A study in 2005 showed that 76 percent of GPs saw themselves as inadequately trained to treat patients with intellectual disability.⁵²⁹
- 469 People with disability with higher support needs and who use augmented communication devices experience significant levels of unnecessary stress when hospitalised due to poor understanding of disability support by hospital professionals and lack of training in supporting people with disability in this environment.

⁵²⁷ National Association of Community Legal Centres, ‘Fact Sheet: Access to Health — Australia’s compliance with the *ICESCR*’ (Fact Sheet, NALCLC, undated).

⁵²⁸ Australian Institute of Health and Welfare, ‘Aboriginal and Torres Strait Islander Health Performance Framework 2008 Report: Detailed Analyses’ (Report, November 2009) <www.aihw.gov.au/publications/index.cfm/title/10664>.

⁵²⁹ New South Wales Council for Intellectual Disability, ‘Submission to the Productivity Commission on the Health Workforce’ (July 2005) <http://www.pc.gov.au/__data/assets/pdf_file/0010/10450/sub073.pdf>.

Case Study

A patient had severe Cerebral Palsy and communicated with an E tran communication board. While in hospital, staff placed the E tran on the floor and he was unable to communicate his need to use the bathroom. When staff found him, he had wet his pants and because he was flailing his arms, staff drugged him.⁵³⁰

RECOMMENDATIONS Article 25

- That Australia conducts a national review of the state of health of men, women, boys and girls with disability to identify the gaps between people with disability and the rest of the community in relation to a broad range of health indicators including nutrition, dental, exercise, physiological and mental health.
- That a Public Health Strategy be developed to promote preventative approaches and early diagnosis of health issues among people with disability who may not access work place health check programs available to those in the mainstream workforce.
- That Australia resources the creation of a national network of intellectual disability health specialists as a resource to enhance the capacity of mainstream services to cater to the specific needs of people with intellectual disability.
- That the National Disability Strategy identify gender specific actions to address the health inequity experienced by women with disability that intersect with actions contained in the National Women's Health Strategy.
- That the National Women's Health Strategy include a commitment to rectifying health inequities between women, particularly through identifying the specific health needs and issues of girls and women with disability with specific attention to women with disability from Aboriginal and Torres Strait Islander communities and those living in rural and remote areas.

⁵³⁰ Submission by attendee at the CRPD Shadow Report consultation in Adelaide, SA (25 November 2009).

ARTICLE 26 — HABILITATION AND REHABILITATION

STATUS IN AUSTRALIA

- 470 Under the *Disability Services Act 1986* (Cth) (DSA) there is no right to disability services. Rather, the focus has been on funding services which provide disability support. The DSA provides that the Minister may approve eligible organisations and state and territory governments to provide services for people with a disability.
- 471 State and territory governments also fund and implement their own disability services, but the level of service provided varies widely from state to state. This structure prevents all people with disability from accessing the same level of support across Australia. The lack of portability is a barrier to people with disability to be able to freely choose where to live. (See also Article 18)
- 472 The National Disability Agreement (NDA) is the funding agreement between the Federal, State and Territory Governments for the delivery of specialist disability services.⁵³¹ This includes supported accommodation, community support, community access, respite, employment, advocacy, information and print disability.⁵³²

Access to Therapy or Allied Health Services

- 473 The accessibility and affordability of services provided often depends on how a disability is acquired, whether it is covered by an insurance scheme, whether a person has started school, is an employed adult or someone over the age of 65. This lack of coherence has a real effect on the services and therefore quality of life for individuals.
- 474 The fragmented system leads to gaps and overlap between the various sectors and programs meaning that a person can miss out on necessary support. Limitations on health sector funding for appropriate therapy or allied health services can lead to a long term requirement for disability support. Interaction between the Home and Community Care (HACC) program and NDA services can mean that someone accessing services under one Program will be regarded as ineligible to access a service under the other. Budget caps on Programs have led to strict eligibility criteria limiting the capacity of a Program to respond to individual need.

⁵³¹ Department of Ageing, Disability and Home Care, above n 330.

⁵³² Office of Disability Commonwealth Department of Family and Community Services, 'Agreement between the Commonwealth of Australia and the States and Territories of Australia in Relation to Disability Services 2002–2007' (Agreement, Australian Government, 2003) [29] <www.fahcsia.gov.au/sa/disability/progserv/govtint/policy-cstda/Documents/CSTDA3May07.pdf>.

Underfunding of Disability Services

- 475 More than half the submissions to the recent ‘Shut Out’ report noted that aspects of disability services and programs acted as a barrier to, rather than a facilitator of, their participation in society.⁵³³ The service system is seen as chronically underfunded, under resourced and crisis driven with large unmet need. For school children, there have been reports of an inability to access relevant and ongoing support services such as occupational therapy, speech therapy or physiotherapy which has impacted on, among other things, their educational outcomes.⁵³⁴
- 476 This has been verified by the Productivity Commission most recently in its Report on Disability Care and Support where it says “the current disability support system is underfunded, unfair, fragmented and inefficient and gives people with disability little choice and no certainty of access to appropriate supports”.⁵³⁵

Health Services and Rehabilitation Programs

- 477 Many of the shortfalls of rehabilitation programs provided through the health sector are similar to those of the health sector in general and have been addressed in Article 25. Often rehabilitation services will be provided in a separate location to acute care hospitals, causing delays in obtaining rehabilitation assessments and commencing programs. The lack of community based therapy services seriously inhibits the ability of these services to meet the needs of those needing assistance to improve, maintain or minimise deterioration in their level of functioning. Most therapy providers cannot access the Medicare system thus limiting the access of low income people to their services.

Case Study

Erin has Down syndrome. At 25 she was living a full life, attending a day program and had two part time jobs until she suffered a stroke. The emergency department was slow to diagnose the stroke due to Erin’s young age. By the time she was transferred to a ward she was unable to speak, was alert and frightened. Her mother had to deal with questions such as “Before the stroke, could she speak? Was she continent? How well could she walk?” After three days the hospital wished to send her home, while still paralysed, unable to swallow or talk, without memory and in great pain.

Normally, the treatment would be a rehabilitation ward and intensive therapy; however, the doctor said “look, she has Down syndrome, the road ahead will be very difficult, I think you should just take her home. Because really, how hard do you want to try?” Thanks to her

⁵³³ National People with Disabilities and Carer Council, above n 348, 2.3.1.

⁵³⁴ Star Victoria, Submission to the CRPD Shadow Report 2010: ‘Violations’, 3.

⁵³⁵ Productivity Commission, ‘Disability Care and Support’, above n 325, 2.

*family, Erin had six weeks of rehabilitation, after which she could return home. She has returned to her day program and delivers meals on wheels. She has regained her enjoyment of dancing, singing, reading and writing.*⁵³⁶

Rural Areas

- 478 Generally disability is more common in rural and remote areas than in urban areas⁵³⁷ however people with disability living outside major cities are significantly less likely to access disability support services than those living within major cities.⁵³⁸

Aboriginal and Torres Strait Islander Australians

- 479 It has been estimated that in 2002 the proportion of Aboriginal and Torres Strait Islander peoples with a disability was approximately twice that of the general population.⁵³⁹ Aboriginal Australians face significant barriers to accessing disability support services due to insufficient services in metropolitan and regional areas, social marginalisation, cultural attitudes towards disability and culturally inappropriate services.⁵⁴⁰
- 480 For Aboriginal and Torres Strait Islander persons living in remote communities, access issues similar to those outlined under Article 25 exist. There is a lack of culturally and linguistically appropriate information about available community services and aids and appliances. Few disability services are specifically designed for or staffed by Aboriginal Australians⁵⁴¹ and there is a shortage of appropriate aids and equipment.⁵⁴² (See also Article 20)

⁵³⁶ NSW Council for Intellectual Disability, 'Real Stories: Christine and Erin'.

⁵³⁷ Council of Australian Governments Reform Council, 'National Disability Agreement: Baseline Performance Report for 2008–2009' (Report, COAG, 30 April 2010) 32.

⁵³⁸ Australian Institute of Health and Welfare, 'Rural, Regional and Remote Health: Indicators of Health System Performance' (Series Report, Australian Institute of Health and Welfare, September 2010) 3.5.7 <www.aihw.gov.au/publications/phe/rrrh-ihsp/rrrh-ihsp.pdf>.

⁵³⁹ Council of Australian Governments Reform Council, above n 537, 32.

⁵⁴⁰ Productivity Commission, 'Disability Care and Support', above n 325, 9.1.

⁵⁴¹ Aboriginal Disability Network NSW, above n 391, 3.

⁵⁴² Ibid 12.

People from Culturally and Linguistically Diverse Backgrounds

- 481 Only one in twenty people with a disability born in a non-English speaking country access community services, compared with one in five for the general population.⁵⁴³ A lower proportion use community support and access services.⁵⁴⁴ There is a shortage of accessible information regarding available services and a lack of culturally and linguistically appropriate services.⁵⁴⁵

People with Psychosocial Disability

- 482 People with psychosocial disability are significantly overrepresented in areas of disadvantage such as homelessness, unemployment, poverty, substance abuse and incarceration rates.⁵⁴⁶ The focus of current mental health care is on acute hospital based treatment, rather than on providing the support necessary to live a good life in the community. As many as 40 percent of people occupying acute mental health inpatient facilities could be discharged if such support services were available.⁵⁴⁷

Case Study

*"My brother is 40 years old, has schizophrenia and is on a community treatment order. He spends his time in a lonely flat waiting for his regular visits to his sisters. He paces the room or sits throughout the major part of the day, only leaving to buy take-away meals. He has little idea of normal etiquette and hygiene or housekeeping, having been ill for so long without treatment. No psychological or social rehabilitation has been attempted."*⁵⁴⁸

⁵⁴³ Council of Australian Governments Reform Council, above n 537,, 66.

⁵⁴⁴ Productivity Commission, 'Report on Government Services 2010' (Report, Australian Government, 2010) 14.43 <www.pc.gov.au/_data/assets/pdf_file/0003/93963/58-chapter14-chapter.pdf>.

⁵⁴⁵ Multicultural Disability Advocacy Association NSW, *Main Issues Facing People from an NESB with Disability and their Families and Carers* (undated) MDAA <www.mdaa.org.au/faqs/key.issues.html>.

⁵⁴⁶ National Association of Community Legal Centres, the Human Rights Law Resource Centre and Kingsford Legal Centre, 'Freedom, Respect, Equality, Dignity: NGO Submission to the UN Committee on Economic, Social and Cultural Rights, Australia', April 2008 123 <<http://www.hrlrc.org.au/files/MP9JMGYX55/Final.pdf>>.

⁵⁴⁷ Mental Health Council of Australia, 'Time for Service' (Information Sheet, undated) 11 <www.mhca.org.au/documents/publications/Time%20For%20Service.pdf>.

⁵⁴⁸ Anonymous submission to the Senate Select Committee on Mental Health (19 April 2005).

Data Limitations

483 Data collection limitations make it difficult to assess the level of additional need for services. Data collection currently focuses on people with severe and profound limitations rather than on all those people requiring assistance to overcome barriers to community participation and inclusion. Data is not available on whether people are satisfied with the options, quality and quantity of services available. There is no consistency of data collection across the relevant funding Programs.

Aids and Equipment

484 In 2003, 1.74 million Australians with a disability used aids and equipment.⁵⁴⁹ The provision of these is fragmented across a variety of government and non-government providers. More than 20 percent of submissions to the 'Shut Out' report revealed that a lack of aids and equipment created a barrier to community participation.⁵⁵⁰ (See also Article 20)

485 Difficulties encountered include meeting the eligibility requirements, being unable to pay for upgrades or the gap between costs and government support, long waiting times for assistance and limited availability of appropriate equipment.

486 Eligibility criteria can be quite strict. For example, people who require hearing aids are only eligible for services and equipment if they are a concession card holder or receive Centrelink sickness allowance or are referred by Federal Government-funded vocational rehabilitation services.⁵⁵¹ Hearing and visual aids are also excluded from Medicare and people who are vision impaired are not covered by many government equipment schemes.⁵⁵²

Staff Training

487 The 'Shut Out' report highlighted issues of poor quality of staff in disability services.⁵⁵³ Many people working in disability services were poorly trained and resourced and lacked understanding and sensitivity to disability issues. Problems of low pay, lack of training and poor working conditions means it is difficult to attract and retain trained staff, particularly in regional and remote areas.

⁵⁴⁹ Australian Institute of Health and Welfare, 'Disability: The Use of Aids and the Role of the Environment' (Report, August 2003) <<http://www.aihw.gov.au/publications/index.cfm/title/9187>>.

⁵⁵⁰ National People with Disabilities and Carer Council, above n 348, 2.3.3.

⁵⁵¹ Department of Health and Ageing, *The Australian Government Hearing Services Program* (10 April 2012) Australian Government <www.health.gov.au/hear>.

⁵⁵² National Disability Services, 'Aids and Equipment: Improving Quality of Life for People with a Disability' (Fact Sheet, National Disability Services, June 2004) <www.nds.org.au/asset/view_document/979316288>.

⁵⁵³ National People with Disabilities and Carer Council, above n 348, 2.3.2.

RECOMMENDATIONS Article 26

- That a National Disability Insurance Scheme is implemented to provide disability services and supports to all people with a disability who need assistance to participate and be included in the community on an equal basis with others. Such a Scheme should establish an entitlement to the funding necessary to achieve this purpose and provide for the person with disability to be the decision-maker about the services and supports they receive.
- That Australia establishes a mechanism to assess and properly address the therapeutic and allied health needs of all people with disability that need assistance.

ARTICLE 27 — WORK AND EMPLOYMENT

STATUS IN AUSTRALIA

- 488 People with disability in Australia are more likely to be unemployed, or underemployed than those without disability. Since 1992, participation rates for people with disability in the workforce have fallen whilst the participation rate for persons without disability have risen.⁵⁵⁴
- 489 People with disability also face difficulties in retaining employment due to the lack of flexibility offered by some employers⁵⁵⁵ in relation to work times, job conditions and myths and stereotypes associated with their employment.
- 490 Furthermore, the employment rate for people with disability in the Australian public sector is also disproportionately low compared to persons without disability.⁵⁵⁶ More recently, the Australian Public Service Commission found that employees with disability were 60 percent more likely than other staff to be retrenched.⁵⁵⁷

⁵⁵⁴ Department of Families, Housing, Community Services and Indigenous Affairs, 'Evaluation of the Commonwealth Disability Strategy' (Report, Australian Government, 2006) 59 <www.fahcsia.gov.au/sa/disability/pubs/policy/cds_evaluation/Documents/CDS_Evaluation2006.pdf>.

⁵⁵⁵ National Ethnic Disability Alliance, Submission to HREOC, *Inquiry into Employment and Disability*, October 2005 [11] <www.hreoc.gov.au/disability_rights/employment_inquiry/subs2/Sub152.NEDA.doc>.

⁵⁵⁶ Ibid [14]. The proportion of people with disability employed in the Australian public service has steadily declined since 1999 from 4.9 percent to 3.0 percent in 2009: Australian Public Service Commission, 'State of the Service Report: State of the Services 2008–2009' (Report, Australian Government, 2010). This is substantially less than in 1986 where 6.8 percent of people with disability were employed in the public sector: Australian Public Service Commission, 'Employment of People with Disability in the Australian Public Sector' (Report, Australian Government, 2006) <www.apsc.gov.au/mac/disability.pdf>.

⁵⁵⁷ Australian Federation of Disability Organisations, *Campaign Enable Priorities in the Disability Area* (undated) AFDO <www.afdo.org.au/node/194>. The OECD recently criticised Australia in relation to the employment rate for people with disability given the economic growth of Australia in recent years. The OECD also pointed out Australia's falling rate of employment for people with disability as compared to the increasing rate of employment of persons without disability: Organisation for Economic Cooperation and Development, Directorate for Employment Labour and Social Affairs, 'Sickness, Disability and Work (Vol 2): Australia, Luxembourg, Spain and the United Kingdom' (2007) 2 *Breaking the Barriers*.

- 491 In addition, Australian governments do not require companies and organisations to have contracts for the supply of goods and services to have or implement action plans for the employment of people with disability. There is also a lack of research into the reasons for the low engagement rate of people with disability in pre-employment training and ‘on the job’ training programs.⁵⁵⁸
- 492 The employment rate for persons with intellectual disability is substantially less than both people with other disability and persons without disability. This decline flows from the failure of government to provide ongoing and appropriate levels of employment support.
- 493 There is a lack of programs that provide ongoing support which aim to increase the self-esteem and confidence of some persons with psychosocial disability.⁵⁵⁹ Public mental health services are not funded to offer vocational services and often lack up to date knowledge of developments regarding employment for persons with a psychosocial disability.⁵⁶⁰
- 494 People with disability from non-English speaking backgrounds face intersectional discrimination⁵⁶¹ based on their disability and ethnicity, which impacts on the low rates of workplace engagement.
- 495 People from an Aboriginal and Torres Strait Islander background with disability continue to face intersectional discrimination, often due to the failure of employment services to acknowledge the cultural and linguistic diversity of service users. Current Transition to Work or Community participation programs have not been redesigned to ensure they meet the needs of people from an Aboriginal and Torres Strait Islander background in culturally appropriate ways.⁵⁶²

⁵⁵⁸ Dan Kearns, Submission to the National Mental Health and Disability Employment Strategy: ‘Dumbed Down’: Experiences of Disabled People in Vocational Training and Employment in Australia’, 2008, 4.

⁵⁵⁹ Community and Public Sector Union, Submission to the Development of a National Mental Health and Disability Employment Strategy, 2008, 10

⁵⁶⁰ Mental Illness Fellowship of Australia, Submission No 69 to Human Rights and Equal Opportunity Commission, *Inquiry into Employment and Disability*, 14 April 2005
<http://www.hreoc.gov.au/disability_rights/employment_inquiry/subs1/index.htm>.

⁵⁶¹ National Ethnic Disability Alliance, Submission: ‘Wage Determination for People with Disability’, 2001, [5]
<www.neda.org.au/files/wage_determination_-_neda_submission.doc>.

⁵⁶² General Purpose Standing Committee No 2, NSW Parliament, *Inquiry into Changes to Post School Programs for Young Adults with a Disability: Getting a Fair Go* (2005) [40]
<[www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/0bc9f990e07de122ca25706d000fe040/\\$FILE/Report%20on%20Changes%20to%20Post%20School%20Programs%20for%20Young%20Adults%20with%20a%20Disability-%20Getting%20a%20Fair%20Go.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/0bc9f990e07de122ca25706d000fe040/$FILE/Report%20on%20Changes%20to%20Post%20School%20Programs%20for%20Young%20Adults%20with%20a%20Disability-%20Getting%20a%20Fair%20Go.pdf)>.

496 Although transition to Work and Community Participation programs⁵⁶³ assist younger people with disability to develop the skills required to secure paid employment, there is a lack of collaborative pathways to employment across schools and open employment agencies.⁵⁶⁴

497 A Complaint Resolution and Referral Service funded by the Commonwealth to deal with consumer complaints against Commonwealth funded services has a restricted scope of services that it can respond to. It is a mechanism within a service quality strategy, and has no explicit legislative basis for its operation and no explicit functions or powers to provide complainants with substantive or injunctive relief if a service provider fails to act upon its recommendations.

Mainstream or Open Employment Support

498 People with disability are offered little opportunity to lessen their dependence on the Disability Support Pension (DSP). The structure of calculating DSP payments can provide a disincentive for people with disability to seek and retain work. Currently fewer than 10 percent of DSP recipients report earnings from work.⁵⁶⁵ A loss in DSP income is significant for people who pay for their own equipment and repairs and is a deterrent to accepting work with low to mid-range remuneration.

499 In March 2010, Australia introduced the DES program, ending the long-standing limitation on the places available in open employment services for people with disability.⁵⁶⁶ However, the DES program has, to date, resulted in only one in four program participants being

⁵⁶³ The 'Transition to Work' (TTW) and 'Community Participation' (CP) Programs supported by government assist young people with disability to develop skills to increase their independence to assist them to move into paid work or increase their community participation: NSW Government Department of Ageing, Disability and Home Care, *Post School Programs* <www.dadhc.nsw.gov.au/dadhc/People+with+a+disability/Post+School+Programs.htm>. The TTW Program allows young people to enter some type of open employment after a 2 year program period: NSW Government Department of Ageing, Disability and Home Care, *Transition to Work Program Guidelines* (2008) 9 <www.dadhc.nsw.gov.au/dadhc/People+with+a+disability/Transition+to+Work+Program+Guidelines.htm>. The CP Program assists young people with moderate to high disability who require an alternative to paid employment or further education in the medium to long term to develop the skills required for work or their participation in the community: NSW Government Department of Ageing, Disability and Home Care, *Post School Programs* <www.dadhc.nsw.gov.au/NR/rdonlyres/15568C10-AF31-4924-B87E-59FA65468109/5335/EligibilityAssessmentInfoforYPandFamilies.pdf>.

⁵⁶⁴ National Council on Intellectual Disability, *Submission to the Commonwealth Review of the Disability Employment Network and Vocational Rehabilitation Services* (2008) 3.

⁵⁶⁵ Department of Education, Employment and Workplace Relations, 'National Mental Health and Disability Employment Strategy' (Policy Paper, Australian Government, 2009) 6 <www.workplace.gov.au/NR/rdonlyres/6AA4D8AD-B1A6-4EAD-9FD5-BFFFE777B8BF/0/NHMDDES_paper.pdf>.

⁵⁶⁶ Information on DES is at <www.deewr.gov.au/Employment/Programs/DES/SJS/Pages/home.aspx>.

placed in a job and in only 14 per cent of participants sustaining employment or training (required to achieve employment) for 13 weeks after placement.⁵⁶⁷

500 While the “uncapping” of DES services improved access to individually targeted disability employment programs, the tension that exists between the rights-based *Disability Services Act 1986* (Cth) and the punitive aspects of employment participation found in the *Social Security Act 1991* (Cth) undermine the effectiveness of the programs and policies assisting people with disability in securing and retaining employment.⁵⁶⁸

501 Systemic discrimination associated with negative attitudes and stereotypes held by employers in business, government and many not for profit organisations that people with disability are incapable of working efficiently and effectively, adversely impacts on the likelihood of people with disability gaining employment.⁵⁶⁸

502 Employers also hold incorrect assumption of heightened costs incurred by employers and are unaware of government funding to assist employers in this respect.⁵⁶⁹

503 Although the relevant government minister has powers under the *Disability Discrimination Act 1992* (Cth) (DDA)⁵⁷⁰ to develop standards for people with disability that regulate areas including victimisation and harassment at work, no such standards currently exist.

Case Study

*Jenny has Aspergers Syndrome. She has worked hard to achieve a leadership role at work, but often experiences discrimination to the extent that one co-worker publicly stated that they should not have to work with a person who has a condition in the Diagnostic and Statistical Manual of Mental Disorders (DSM).*⁵⁷¹

504 Physical inaccessibility and a lack of available transport services, also affect the ability of people with disability to work.

⁵⁶⁷ Department of Education, Employment and Workplace Relations, above n 565, 23.

⁵⁶⁸ National Ethnic Disability Alliance, Submission to HREOC, above n 555, [17].

⁵⁶⁹ Christina Ricci, ‘Working Towards a National Disability Employment Strategy’ (Paper presented at the ACE Conference, 6 September 2006) 4 <www.hreoc.gov.au/disability_rights/speeches/2006/ace.html>.

⁵⁷⁰ *Disability Discrimination Act 1992* (Cth) s 31.

⁵⁷¹ CRPD Shadow Report Survey, Submission number 64 (20 January 2010).

- 505 A lack of available support on an as-needs basis and time limits on service provision⁵⁷² often result in the ongoing needs of people with disability who are employed or seeking work not being met.

Case Study

*Within six months Sam, an employee, had used up her entire quota of Australian sign language interpreting. This limits her ability to move through the ranks where more meetings are necessary.*⁵⁷³

Segregated Employment

- 506 Australia has progressively moved to reform the provision of vocational and employment opportunities for people with disability who work in segregated employment. However, people with disability who work in Australian Disability Enterprises (ADE)⁵⁷⁴ are still segregated in employment situations that are subject to lower wages and conditions than other people.
- 507 Under the Supported Wage Systems, employers can pay people with disability less than the minimum wage, based on productivity levels.⁵⁷⁵ Wage determination methods used by ADEs are legitimised in registered industrial instruments developed with the assistance of the union movement. They provide a legally acceptable means by which ADEs are able to reduce Award wage rates of pay for people with disability they employ which, in any other circumstance, would constitute a breach of industrial law.⁵⁷⁶

⁵⁷² Ricci, above n 569.

⁵⁷³ Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

⁵⁷⁴ Australian Disability Enterprises (formerly 'Business Services') are commercial enterprises that provide supported employment services to around 20,000 people with moderate to severe disability through a network of organisations contracted by the Government, often in specialist working environments): Centrelink, *Disability Employment Assistance Services* (24 August 2011) Australian Government <www.centrelink.gov.au/internet/internet.nsf/services/disability_emp_services.htm>.

⁵⁷⁵ Australian Fair Pay Commission, 'Wage-setting Decision and Reasons for Decision' (Information Sheet, Australian Government, July 2009) [18]. People with disability receive reduced wages under the 'Supported Wage System', which incorporates a process of productivity-based wage assessment whereby if an employee is assessed as having a productivity level of 70 percent compared to co-workers performing the same duties, the employee may be paid at 70 percent of the normal rate: Centrelink, above n 574.

⁵⁷⁶ The most up-to-date guide to wage assessment practices in Australian Disability Enterprises is found in: Australian Fair Pay Commission, 'Australian Disability Enterprises: Sector Profile' (Report, Australian Government, 2009).

- 508 According to the 2010 Federal Government Discussion Paper canvassing views on the future of ADEs⁵⁷⁷, the mean weekly wage of supported employees is \$88 per week (compared to the average weekly earnings of \$376 of Australians generally), rising from a mean wage in 2000 of between \$41 and \$60 per week.⁵⁷⁸ Despite this apparent improvement, in 2010, according to the Discussion Paper, 33 per cent of ADE employees still received between \$40 and \$60 per week and 57 per cent still earn \$80 or less per week.
- 509 In addition, hours worked by supported employees have declined significantly in the last 10 years. In 2000, 61 per cent of these employees were employed on a full-time basis. In 2010, only 24.7 per cent of ADE supported employees were employed on a full-time basis. The remaining three-quarters are now employed part-time.⁵⁷⁹
- 510 There is also a lack of research and oversight about the wage setting practices of Australian Disability Enterprises.⁵⁸⁰

Women with Disability

- 511 Key issues include low workforce participation, lower remuneration and poorer quality jobs. Data from the Australian Bureau of Statistics show that working-age women with disability who are in the labour force are half as likely to find full-time employment (20 percent) as men with disability (42 percent); twice as likely to be in part-time employment (24 percent) as men with disability (12 percent); and regardless of full-time or part-time status, are likely to be in lower paid jobs than men with disability.⁵⁸¹ A 2004 Senate Inquiry into Poverty and Financial Hardship concluded that women with disability are also affected by the lower wages paid to women relative to men and are more likely to be in casual jobs with little job security.⁵⁸²
- 512 While the National Disability Strategy recognises that women with disability “face poorer economic outcomes than men with disability”, there are no gender-specific measures identified in the ‘Areas for future action’.

⁵⁷⁷ Department of Families, Housing, Community Services and Indigenous Affairs, ‘Inclusion for People with Disability through Sustainable Supported Employment’ (Discussion Paper, Australian Government, 2010).

⁵⁷⁸ KPMG Consulting, ‘A Viable Future: Strategic Imperatives for Business Services’ (Report, 2000) 9.

⁵⁷⁹ KPMG Consulting, *ibid*, 16.

⁵⁸⁰ Australian Fair Pay Commission, above n 575, [68].

⁵⁸¹ Australian Bureau of Statistics, ‘Labour Force Characteristics of People with a Disability’ in *Year Book Australia* (2006); Sue Salthouse, ‘Jumping Through Hoops — Welfare and Industrial Relations Reform Implications for Women with Disabilities’ (Paper presented at the What Women Want Workshop — A Workshop on the Effect of the Federal Government’s Recent Policy Changes on Women of Working Age, Canberra, 12 July 2005) <www.wwda.org.au/w2wjuly05.htm>.

⁵⁸² Cited in Anne Harding, Quoc Ngu Vu and Richard Percival, ‘The Distributional Impact of the Welfare-to-Work Reforms Upon Australians with Disabilities’ (Research Paper, National Centre for Social and Economic Modelling, 13 September 2005) 12 <www.security4women.com/NATSEMwelfareto-work-disabledFINAL.pdf>.

- 513 Australia has announced a raft of measures in an attempt to address pay inequities in remuneration, including changes introduced to the *Fair Work Act 2009* (Cth) to include the right to equal pay for work of equal or comparable value.⁵⁸³ Whilst these and other measures are a welcome move for women in general, there is no specific reference to women with disability in the Australia's planned measures announced in an attempt to address the pay gap.

RECOMMENDATIONS Article 27

- That Australia conducts a comprehensive review of the current employment support arrangements for people with a disability with a view to developing a national plan to significantly increase support for men and women with disability, in particular men and women with intellectual disability to move from school to training to open employment.
- That Australia ceases to fund segregated workplace options.
- That Australia funds employment support for all people with disability that is attached to the individual and is able to be used in mainstream settings.
- That Australia conducts an audit of the current supported employment wage assessment tools and industrial conditions with a view to ensuring that people with disability receive equitable and fair remuneration for their work, and receive the supports they need to move from supported employment to open employment. That Australia increases investment in addressing structural barriers to the employment of men and women with disability, in relation to workplace accommodations and adaption, accessibility of workplaces, flexibility of work requirements and accessible and affordable public transport.
- That Australia adopts initiatives to increase employment participation of women with disability by addressing the specific underlying structural barriers to their workforce participation.

⁵⁸³ Department of Families, Housing, Community Services and Indigenous Affairs, 'Australian Government Response to NATSEM Gender Pay Gap Research' (Statement, Australian Government, 2009) <www.fahcsia.gov.au/sa/women/progserv/research/Pages/gov_response_natsem_genderpaygap.aspx>.

ARTICLE 28 — ADEQUATE STANDARD OF LIVING AND SOCIAL PROTECTION

STATUS IN AUSTRALIA

- 514 Australia does not adequately protect the right to an adequate standard of living and social protection. People with disability are consistently overrepresented in indicators of financial hardship and poverty. Almost one in two people with a disability in Australia live in or near poverty (45 percent). This is more than 2.5 times the rate of poverty experienced by people without disability and more than double the Organisation for Economic Co-operation and Development (OECD) average of 22 percent. Australia is by far the worst performer on this indicator, ranking 27th out of 27 OECD countries.⁵⁸⁴
- 515 A Senate Inquiry into Poverty and Financial Hardship (2004) found widespread poverty among people with disability and recommended that a new welfare allowance be introduced to address the extra costs associated with disability, such as the need for professional carers, special education and employment support.⁵⁸⁵ People with a disability have lower household incomes than those without a disability, with 45 percent having an equivalised gross household income in the lowest quintile in 2008 compared with 35 percent of those without a disability.
- 516 Eligibility criteria to access disability income support are too rigid and are fundamentally based on a system of categorising disabilities rather than assessing needs of individuals. As a result, one in seven recipients of lower allowances such as NewStart Allowance - \$128 a week less than the DSP - has a partial work capacity because of disability.⁵⁸⁶ Many people with disability applying for DSP are automatically placed on NewStart while they prove they are unable to get work, despite significant community concern that this measure is both unfair and will be ineffective in helping people to find work.⁵⁸⁷

⁵⁸⁴ R Williams, R. 'Model of Citizenship Support (Discussion Paper, Julia Farr Association, 2010).

⁵⁸⁵ 2004 Senate Inquiry into Poverty and Financial Hardship (Commonwealth of Australia 2004).

⁵⁸⁶ Australian Council of Social Service, 'Beyond Stereotypes: Myths and Facts about People of Working Age who Receive Social Security' (Paper No 175, May 2011) <http://acoss.org.au/images/uploads/beyond_stereotypes.pdf>.

⁵⁸⁷ Senate Community Affairs Committee, Parliament of Australia, *Family Assistance and Other Legislation Amendment Bill 2011 [Provisions]* (2011) <www.aph.gov.au/senate/committee/clac_ctte/family_assistance_11/report/index.htm>.

Case Study

“Disability support recipients live lives of fear and desperation. Sooner or later every disability support recipient I know has confessed to the concern they feel over the ‘what if’ factor—what if government stops paying social security/disability support?”⁵⁸⁸

- 517 Women with disability disproportionately receive a parenting allowance which is at a lower rate than the Disability Support Pension (DSP). In October 2011, the single rate for parenting allowance was \$641.50 compared with the Disability Support Pension of \$689.00.
- 518 The current Federal Government has said that continuing to introduce measures to shift people with disability onto lower payments are aimed at providing incentives to work,⁵⁸⁹ however data shows that rates of labour force participation for people with disability have not changed significantly between 1993 and 2009.⁵⁹⁰ The shift of people with disability to NewStart began in 2005 under a previous Federal Government; this information suggests that lower payments do not increase employment among people with disability.
- 519 Access to services, devices and aids is based on rigid eligibility criteria rather than need. (See Article 20)

Case Study

“I am almost totally deaf. I have had significant problems dealing with Centrelink. They do not understand my disability and how it affects my ability to work. They suggested employment options that would be ridiculous for someone with a hearing impairment: eg Accounts Payable which is almost all telephone work, Child-minding (how dangerous would that be for the children if I can’t hear what they are saying). They refused my application for DSP and only granted it once I paid for an Independent OT report which was used by the Job Capacity Assessor to write a new assessment. I was finally granted my DSP after going through the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.”⁵⁹¹

⁵⁸⁸ National People with Disabilities and Carer Council, above n 348.

⁵⁸⁹ Wayne Swan MP, Senator Chris Evans, Tanya Plibersek MP and Kate Ellis MP, ‘Budget 2011–12 — Getting Australians Ready to Work’ (Media Release, 10 May 2011) <www.jennymacklin.fahcsia.gov.au/mediareleases/2011/Pages/b01_10052011.aspx>.

⁵⁹⁰ Australian Bureau of Statistics, *Disability, Australia 2009* (2 May 2011) Australian Bureau of Statistics <www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4446.0Main%20Features72009?opendocument&tabname=Summary&prodno=4446.0&issue=2009&num=&view>.

⁵⁹¹ CRPD Shadow Report Survey, Submission No 71 (22 January 2010).

Impairment Ratings Exclude Certain Disability Types

- 520 The Federal Government has introduced changes to legislation that are designed to reduce the number of persons deemed eligible for the DSP and move them to a much lower payment for unemployment benefits. An Impairment table has been developed for this purpose that redefines disability. Impairment ratings are only given to people whose medical condition has been fully documented and diagnosed, and has also been investigated, treated and stabilised for two years. Government commissioned research anticipates that these changes will lead to a significantly lower number of approved DSP applications.⁵⁹²
- 521 There are some key groups of people with disability for whom this process creates the risk of non-compliance:⁵⁹³
- (a) people with psychosocial disability;⁵⁹⁴
 - (b) people who are seriously ill;
 - (c) people with fluctuating or episodic conditions;
 - (d) people who have undiagnosed conditions;
 - (e) people with drug and alcohol dependence; and
 - (f) people with two or more mild conditions which combine to have a serious impact.

Waiting Period for Immigrants

- 522 All migrants that come to Australia (except for those immigrating on humanitarian grounds) have to wait two years before they can access general income support. However migrants with a disability have to wait ten years as specified by the *Social Security Act 1991* (Cth)⁵⁹⁵ in order to access the DSP.
- 523 The ten year qualifying period creates financial difficulties for the estimated 5,000 affected migrants with disability, particularly if they are unable to achieve financial security through employment.⁵⁹⁶

⁵⁹² Taylor Fry Pty Ltd, 'Analysis of Testing of the Draft Impairment Tables' (2011) <www.fahcsia.gov.au/sa/disability/payments/Pages/dsp_impairment_taylor_fry_report.aspx>.

⁵⁹³ Department of Human Services, Job Capacity Assessment, 'Job Capacity Assessment Review' (Summary Paper, Australian Government, 2009) 32 <www.deewr.gov.au/Employment/Programs/JCA/Review/Documents/jca-summary-review-paper.pdf>.

⁵⁹⁴ Submission by attendee at the CRPD Shadow Report consultation in Canberra, ACT (20 November 2009).

⁵⁹⁵ *Social Security Act 1991*(Cth) s 94.

⁵⁹⁶ National Ethnic Disability Alliance, 'Migrants with Disability and the 10 Year Qualifying Period for Disability Support Pension' (Report, May 2009) <www.neda.org.au/page/migrants_with_disability_and_social_security.html>.

Case Study

S. was accepted into New Zealand under the Humanitarian program and then migrated to Australia to be reunited with another family member. She has post-traumatic stress disorder and severe depression as a result of her experience of trauma. Although S. has limited English proficiency, Centrelink has not provided her with a translated explanation for why she was not eligible for the Disability Support Pension and so over the years she has constantly struggled to understand why she has not be eligible: for example, she has thought that the authorities must not believe she has a disability. When Welfare to Work changes were implemented, S. was transferred from a sickness benefit to Newstart Allowance which required her to actively look for work and lodge an application every two weeks to receive the allowance. As a result of advocacy she was assessed and placed on a Personal Support Program which meant she could meet the requirements of this program by attending counselling. However this program is due to finish soon and she will still have another 6 months before her 10 years is up. This is very emotionally and financially stressful for S. every time there is a change and she is faced with new requirements that she will have difficulty meeting.

Ensuring an Adequate Standard of Living

524 The level of income support available to people with disability in Australia is often insufficient to ensure an adequate standard of living. People with disability are more likely to reside in the poorest postcodes of Australia's capital cities,⁵⁹⁷ and often experience a lack of access to things the community considers basic essentials.⁵⁹⁸ This stems from a number of issues, including:

- (a) the rate of the DSP payable being too low and subject to strict eligibility criteria;
- (b) disability allowances are insufficient to cover the extra cost of living with a disability;
- (c) the inadequacy of the DSP is particularly illustrated by the comments of those in supported accommodation settings or aged care facilities, where a large portion of their pension is taken by the care facility;

⁵⁹⁷ Australian Institute of Health and Welfare, 'The Geography of Disability and Economic Disadvantage in Australia's Capital Cities' (Report, Australian Institute of Health and Welfare, 2009) <<http://www.aihw.gov.au/publication-detail/?id=6442468227&tab=2>>.

⁵⁹⁸ Mission Australia, 'Left Out and Missing Out: Disability and Disadvantage' (Snapshot, Mission Australia, 2007) <www.missionaustralia.com.au/downloads/19-social-policy-reports?start=20>.

- (d) some government enforced accommodation options consume almost the entirety of a person's income, leaving limited disposable income leading to an inadequate standard of living;
- (e) means testing and work requirements of social security payments reinforces poverty level living. Means testing and work requirements on concession cards and services and other allowances create a disincentive to work; and
- (f) for people in nursing homes, most of their DSP is taken by the service providers. This leaves little for other things such as outings and haircuts.⁵⁹⁹

525 Section 49 of the *Disability Discrimination Act 1992* (Cth) exempts insurers from full coverage of people with disability.⁶⁰⁰ This means that people with disability and their families are, in some cases, not eligible for the same income protection available to the wider community.

526 In 2002, just over one third of people from an Aboriginal and Torres Strait Islander background aged 15 years or older reported a disability or long term health problem in the National Aboriginal and Torres Strait Islander Survey, spread relatively evenly over remote and non-remote areas.⁶⁰¹ However, people from an Aboriginal and Torres Strait Islander background are underrepresented in Commonwealth services.⁶⁰² The isolation of some Aboriginal and Torres Strait Islander communities, especially in the Northern Territory and north Western Australia, make it difficult for them to get access to services which are predominantly located in the major population areas.

527 A 2008 survey noted that over half of all Aboriginal and Torres Strait Islander people with a disability were receiving a government pension or allowance as their principle source of income.⁶⁰³

528 There is a lack of access to appropriate housing and urban infrastructure (including clean water and sanitation) in many remote settlements where Aboriginal and Torres Strait Islanders with disability live. Many people with disability in these communities are living in families that are also living in poverty and where there are higher rates of disease, substance abuse and domestic violence. Disability support programs and services do not

⁵⁹⁹ Submission by attendee at the CRPD Shadow Report consultation in Canberra, ACT (20 November 2009).

⁶⁰⁰ Australian Human Rights Commission, 'Guidelines for Providers of Insurance and Superannuation' (Guidelines, 2005) <www.humanrights.gov.au/disability_rights/standards/Insurance/insurance_adv.html>.

⁶⁰¹ Australian Bureau of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey', ABS Cat. No. 4714.0, Commonwealth of Australia, 2004, 7–8.

⁶⁰² Australian Law Reform Commission, 'Strategies for Equitable Access' (Report 79, Australian Government, 18 August 1995) <www.austlii.edu.au/au/other/alrc/publications/reports/79/8.html#Heading79>.

⁶⁰³ Australian Bureau of Statistics, above n 601.

effectively reach many people with disability in these remote communities or may not be flexible or compatible with cultural values and traditions.

Lack of Measures Taken to Recognise the Connection between Poverty and Disability

- 529 In Australia, very few studies have measured the connection between disability and poverty. One study that has been published by the Social Policy Research Centre⁶⁰⁴ makes a link between the incidence of disability and the risk of poverty and actual hardship.⁶⁰⁵ Further statistical information in this area is required in order to ensure that government programs are achieving the outcomes envisaged by Article 28.
- 530 There is no recognition of the cost of disability to the individual. This is compounded by the inability to afford disability services.

RECOMMENDATIONS Article 28

- That Australia prioritises gender-specific research and disaggregated data collection on the links between disability and poverty, including identifying poverty alleviation and monitoring strategies to address poverty among all people with disability.
- That the Disability Support Pension be regularly raised in addition to indexation in recognition of the extra cost of living with disability to ensure people with disability have access to an adequate standard of living.
- That Australia prioritises steps to safeguard and promote the realisation of the right to an adequate standard of living and social protection for people from Aboriginal and Torres Strait Islander communities, including education about income support arrangements and the appropriate and timely provision of disability supports.
- That the 10 year qualifying period for migrants to access the DSP is abolished.
- That Australia revises the Impairment Table developed as an assessment tool to determine level of benefit entitlements to ensure that it is based on a social model International Classification instrument.
- That unemployment and other benefits, such as Parenting Payment be raised to be equivalent with other pension payments.

⁶⁰⁴ Social Policy Research Centre, Faculty of Arts and Social Sciences, University of New South Wales <www.sprc.unsw.edu.au>.

⁶⁰⁵ Peter Saunders, 'The Costs of Disability and the Incidence of Poverty' (Discussion Paper No 147, Social Policy Research Centre, August 2006) <www.wvda.org.au/psaunders1.pdf>.

ARTICLE 29 — PARTICIPATION IN POLITICAL AND PUBLIC LIFE**STATUS IN AUSTRALIA**

- 531 People with disability face significant barriers in participating in political and public life. The ability of people with disability to vote independently and in secret in Federal, State and Territory and Local Government elections is still not a reality for many people with disability in Australia. This is despite the fact that voting is compulsory in Australia, and people are fined for not casting a vote if they are on the electoral roll or register.
- 532 The *Disability Discrimination Act 1992* (Cth) (DDA) makes it unlawful to discriminate on the basis of disability with regards to the administration of Australian laws and programs, the provision of goods and services and access to premises. These provisions cover access to the electoral processes including being able to vote.
- 533 The *Electoral Act 1918* (Cth) (Electoral Act) governs various aspects of federal voting registration qualifications and voting procedures that affect the political rights of people with disability. Each State, Territory and Local Government has separate legislation governing their respective election processes.
- 534 The National Disability Strategy (NDS) recognises the need to remove societal barriers that prevent people with disability from being able to vote.⁶⁰⁶ The NDS describes some measures that are being taken by some Australian governments to address this, but there are no actions concerning comprehensive legislative and policy reform in this area.

Exclusion from the Electoral Roll

- 535 Provisions in the Electoral Act, and State, Territory and Local Government electoral legislation prevents a person from being included on the electoral roll if they are incapable of understanding the nature and significance of enrolment and voting by reason of ‘being of unsound mind’. This presumption of incapacity denies some people with disability, particularly people with cognitive impairment and psychosocial disability the right to vote.⁶⁰⁷ (See also Article 12)

⁶⁰⁶ Council of Australian Governments, *National Disability Strategy*, above n 84, 37.

⁶⁰⁷ Similar provisions exist at a state level: *Parliamentary Electorates and Elections Act 1912* (NSW) s 21(a); *Electoral Act 1992* (Qld) s 64; *Electoral Act 1985* (SA) s 29(1)(d); *Electoral Act 2001* (Tas) s 31; *Electoral Act 1907* (WA) ss 18(1)(a), 18(1)(cd). No such provision exists in Victoria.

536 A High Court decision affirmed that the rationale behind the ‘unsound mind’ provision is related to the capacity of the voter to exercise choice,⁶⁰⁸ protections to the integrity of the electoral process and the system of representative government.⁶⁰⁹ However, this ignores the following points:

- (a) there is no definition of ‘unsound mind’ in legislation, which leads to confusion and ambiguity in how it is applied, and who makes decisions concerning ‘unsound mind’;
- (b) many people who are considered of ‘sound mind’ do not necessarily understand the nature and significance of voting, yet they are still allowed to vote and exercise choice in who they vote for; and
- (c) a person with disability is highly likely to be automatically excluded from the electoral roll without any consideration of the support measures that should be provided to assist the person to exercise voter choice and to cast a vote.⁶¹⁰

Lack of Access to Secret Ballots

537 Australia is recognised for being the first country to develop and implement the secret ballot in 1856, which is still commonly referred to as the ‘Australian ballot’.

538 The Electoral Act prescribes the assistance to be given to certain voters with sensory or physical impairment to cast a vote. Such voters must nominate a person of their choosing or a polling official to enter the voting booth with the voter and assist with marking, folding and depositing the voting paper in to the ballot box. This arrangement falls far short of providing people with disability with a secret ballot. There is also no confidentiality in an ‘assisted ballot’.⁶¹¹

539 In the 2007 federal election, Electronically Assisted Voting (EAV) was trialled in 29 locations to enable an independent vote for electors who have vision impairment.⁶¹² This gave over 300,000 Australians with vision impairment the ability to cast a secret and independent ballot for the first time.⁶¹³ Statistically, 850 blind or vision impaired voters successfully used

⁶⁰⁸ *Roach v Electoral Commissioner* [2007] HCA 43 [9] (Gleeson CJ).

⁶⁰⁹ *Roach v Electoral Commissioner* [2007] HCA 43 [88] (Gummow, Kirby and Crennan JJ).

⁶¹⁰ People With Disability Australia and NSW Disability Discrimination Legal Centre Inc, Submission: ‘Electoral Reform Green Paper — Strengthening Australia’s Democracy’, *Inquiry into 2008 Local Government Elections*, 2009, [7.4] <www.ddlcnsw.org.au/wp-content/uploads/2009/Inquiry%20into%202008%20Local%20Government%20Elections%20Submission.pdf>.

⁶¹¹ Submission by attendee at the CRPD Shadow Report consultation in Melbourne, Victoria (16 November 2009).

⁶¹² Australian Electoral Commission, ‘Disability Action Plan 2008–2011’ (Plan, AEC, 2007) Appendix 8.

⁶¹³ Australian Human Rights Commission, *The Right to Vote is Not Equally Enjoyed by all Australians* (February 2010) <www.hreoc.gov.au/human_rights/vote/index.html#fn12a>.

EAV at the 2007 election, and over 97 percent of respondents surveyed were satisfied or very satisfied with the system.⁶¹⁴

Case Study

*“For the first time in my life, I won’t have to tell someone else who I am voting for. I have voted in many federal, state and local elections but I have always had another person marking my ballot paper. Now I can truly exercise my democratic right in the same way as others.”*⁶¹⁵

540 A subsequent Federal Government report recommended discontinuing EAV on the basis that the average cost per vote was too high.⁶¹⁶ However, there was no analysis of the average cost per vote if EAV was available to all voters, as it is in other nations, such as the United States of America and the Netherlands. There was no consideration of the benefit of EAV to other voters, such as those people who have limited ability to use paper ballot forms.⁶¹⁷ There was also no consideration that the additional costs in providing people with disability with equal political rights are a “necessary trade off in allowing one group of electors to exercise the same quality of franchise as most of the community”.⁶¹⁸

541 Ballot papers are also not provided in accessible formats, such as Braille, which means people who are blind or have vision impairment must rely on someone else to cast their vote for them. In *Fittler v NSW Electoral Commission*, the tribunal held that failing to provide a ballot paper in Braille to a blind or vision impaired person was unlawful discrimination. Mr Fittler was subsequently provided with a Braille ballot form in the next local government election, allowing him to vote independently for the first time:

The right to vote in secret is now such a well-established, deep-rooted principle that many view as a necessary ingredient to maintaining democratic integrity.⁶¹⁹

⁶¹⁴ Joint Standing Committee on Electoral Matters, Parliament of Australia, ‘*Report on the 2007 Election Electronic Voting Trials: Interim Report of the Inquiry into the Conduct of the 2007 Election and Matters Related Thereto*’, 2009, 51.

⁶¹⁵ B Mercurio, ‘Discrimination in Electoral Law: Using Technology to Extend the Secret Ballot to Disabled and Illiterate Voters’, (2003) 28 *Alternative Law Journal* 274.

⁶¹⁶ Joint Standing Committee on Electoral Matters, above n 614.

⁶¹⁷ Ibid 61–2.

⁶¹⁸ Ibid 55–6.

⁶¹⁹ *Fittler v NSW Electoral Commission* [2008] NSW ADT 116 [42].

542 A 2010 legislative development allowed for the Electoral Commissioner to determine the method of secret ballot.⁶²⁰ Under these rules, electors who are blind or have vision impairment would have the option of attending an electoral office to be connected to trained call centre operators to complete their ballot papers in private.⁶²¹ This approach does not however assure the voter of anonymity and will require the voter to travel to the divisional office to cast their vote.

Inability to Access Postal Voting

543 The Electoral Act permits an elector to apply for a postal or pre-poll vote if they will not be within eight kilometres of the nearest polling place. However, many polling places are inaccessible for people with disability and the nearest accessible polling place is often much greater than eight kilometres.

544 The inability to apply for a postal vote disproportionately impacts people with disability in remote and rural areas and particularly Aboriginal and Torres Strait Islander people with disability who often do not have accessible transport or sufficient means to attend an accessible polling place on election day.⁶²² The cost of delivering services to people living in remote areas is also a likely factor in limiting access to voting for some Aboriginal and Torres Strait Islander people with disability.⁶²³

Inaccessible Voting Locations and Information

545 During the 2007 federal election, available statistics found that only 15 percent of polling places were accessible.⁶²⁴

⁶²⁰ The Electoral and Referendum Amendment (Close of Rolls and other Amendments) Bill 2010 was tabled in the Australian Senate on 10 March 2010.

⁶²¹ Senate debates, '*Electoral and Referendum Amendment (Close of Rolls and Other Measures) Legislation*' (2010) <www.openaustralia.org/senate/?id=2010-03-09.57.2>.

⁶²² People With Disability Australia and NSW Disability Discrimination Legal Centre, Submission, above n 610, [7.1].

⁶²³ Productivity Commission, 'Disability Care and Support', above n 325, 9.1.

⁶²⁴ Jordana Goodman, Physical Disability Council of NSW, 'Electoral Reform Green Paper, Strengthening Australia's Democracy December 2009' (Report, Department of Prime Minister and Cabinet, December 2009) 7 <www.dpmc.gov.au/consultation/elect_reform/strengthening_democracy/pdfs/92%20-%20Physical%20Disability%20Council%20of%20NSW.pdf>.

- 546 Being able to vote is hampered by a lack of accessible transport options to and from voting venues, as well as a lack of access to the buildings, booths and voting processes themselves. Coupled with restrictions on casting postal votes⁶²⁵ and limited availability of electronically assisted voting,⁶²⁶ access difficulties cause additional cost and inconvenience.

Case Study

“One of our clients stated that her closest accessible polling booth was 45 minutes away by electric wheelchair and would cost around \$20 to \$50 if she caught a taxi. Consequently, our client decided to vote at her closest polling booth, which was ten minutes away by electric wheelchair. However, as the polling booth was not accessible, she was forced to vote outside. She did not have sufficient privacy and felt very undignified. Furthermore, our client was unable to place the ballot in the ballot box herself as the ballot box was inside the building and therefore had to rely on electoral officials to do it for her.”⁶²⁷

- 547 Information on how to vote and the locations of accessible polling venues are not being made available to people with disability in accessible formats or in a timely manner.

Case Study

“One of our clients stated that as his local polling booth there was no easy English information available. The polling booth official was unable to communicate the steps required to fill out the ballot paper. Fortunately he had visited the booth with his father, and his father provided instructions. Our client did feel pressured to vote for a particular candidate, as he was aware that his father had voted for that party all of his life.”⁶²⁸

- 548 These problems are exacerbated for people with disability from non-English speaking backgrounds who face language barriers in addition to issues with information and materials in accessible formats. This often means they need to rely on translators and interpreters to cast their vote.⁶²⁹

⁶²⁵ Commonwealth Electoral Act 1918 (Cth) s 183.

⁶²⁶ Joint Standing Committee on Electoral Matters, above n 614, 61–2.

⁶²⁷ People With Disability Australia and NSW Disability Discrimination Legal Centre, Submission, above n 610, [7.1].

⁶²⁸ Ibid.

⁶²⁹ See further Robert Gruhn, Multicultural Disability Advocacy Association of NSW, Submission regarding the development of the Equal Access to Democracy Plan. 9 June 2006 <www.mdaa.org.au/archive/06/mdaa-election.doc>.

Case Study

“While I am able to cast an electoral vote, I must forego the secrecy of my vote as I require assistance to complete the ballot paper. Access to polling booths is often limited due to inadequate infrastructure and transport. Information, particularly from minor parties, is largely unavailable to me but improving as accessibility of the internet improves. However, those who cannot access the internet and/or have limited English proficiency often miss out on information produced by political parties.”

Disenfranchisement of People with Disability

- 549 The disenfranchisement of some categories of prisoners in Australia has a disproportionate impact upon people with disability, as people with disability are overrepresented in the prison population. (See also Article 13) The Electoral Act provides that prisoners serving a sentence of three or more years cannot vote, even if they are on the electoral roll.⁶³⁰
- 550 Many people with disability who live in residential facilities have limited access to voting.
- 551 Homeless people, many of whom have cognitive impairment or psychosocial disability are often not registered to vote, nor provided with any supports or assistance to register or cast a vote.

Absence of People with Disability in Representative Government Capacity

- 552 Community attitudes are seen as a significant barrier to entry into government.⁶³¹ Whilst there appears to be more opportunities at local government levels, there is an apparent lack of representation of people with disability in major political parties, particularly at state and federal level.⁶³²
- 553 There are very few members of parliament who have a disability or have been elected on a disability platform. Kelly Vincent from the ‘Dignity for Disability’ party was elected in 2010 to the South Australian Legislative Council, and became the first person who uses a wheelchair to be elected into the South Australian Parliament and the first Australian Parliamentarian to be elected on a disability platform. Graham John Edwards, a double

⁶³⁰ Electoral Act 1992 (Cth) s 93(8AA).

⁶³¹ Submission by attendee at the CRPD Shadow Report consultation in Brisbane, Queensland (12 November 2009).

⁶³² Submission by attendee at the CRPD Shadow Report consultation in Brisbane, Queensland (12 November 2009).

amputee, was a member of the Commonwealth House of Representatives from 1998 to 2007.

Insufficient Government Support to Representative Disability Organisations

554 People with disability are one of the most politically disenfranchised groups in Australia.

555 A person can be removed from public office, such as serving as a judge or politician if it is found that they cannot fulfil responsibilities on the grounds of ‘disability’, such as a psychosocial disability. (See also Article 12)

Case Study

In 2011, the Judicial Commission of New South Wales recommended to the New South Wales Parliament that a magistrate be removed from his judicial office on the basis that he may in future become incapacitated by his psychosocial disability. The Judicial Commission of New South Wales made this recommendation following investigation of complaints of inappropriate behaviour by the magistrate, even though it found that the magistrate had sought treatment for a mental health condition which now effectively allowed him to successfully undertake the responsibilities of his position.

556 People with disability are precluded from serving on a jury because the law may disqualify them on the basis of disability, such as psychosocial or sensory disability; or because of barriers that prevent serving on a jury, such as inaccessible locations and information.

557 People with disability are further excluded from engaging in the political process through the inadequate funding of Disabled Persons Organisations.

RECOMMENDATIONS Article 29

- That Australia preserves the right of people with disability to vote in elections on an equal basis with others by removing section 93(8) of the Electoral Act 1918 (Cth) (‘unsound mind’ provision) and/or enacts alternate legislation restoring the presumption of the capacity of people with disability to vote and exercise choice.
- That Australia conducts a thorough, critical review of the legislative and administrative arrangements governing electoral matters to ensure that people with disability can fully and equally participate in electoral processes, including obtaining the right to cast a secret ballot freely and independently.

- That Australia ensures that all aspects of voting in an election are made accessible to all citizens with a disability who are eligible to vote by:
 - enabling people with disability to more easily register for a postal or pre-poll vote;
 - ensuring access to voting places that allow access by public transport and entry to polling stations;
 - providing voting information and forms in alternative formats; and
 - making available electronically assisted forms of voting to those who need it, regardless of cost of providing this facility.
- That Australia ensures that voting materials including ‘how to vote’ information and the materials involved in recording and lodging votes are provided in alternative formats. This includes the provision of hearing augmentation systems, Auslan interpreters, audio descriptions, Braille versions of documents, materials in easy and plain English and the right to have a person of own choosing to assist with the voting process.
- That Australia ensures voting rights for all Australian citizens held in custody, regardless of the length of their prison sentence.
- That public services in all jurisdictions increase opportunities and support for people with disability to play an active role in public administration.
- That Australia addresses leadership development for people with disability by resourcing people with disability and their representative organisations to develop leadership development initiatives and to promote participation by people with disability in all areas of political and civic life at all tiers of government in Australia.
- That Australia provides adequate resources to representative organisations of people with disability to enable them to participate in the policy process.

ARTICLE 30 — PARTICIPATION IN CULTURAL LIFE, RECREATION, LEISURE AND SPORT

STATUS IN AUSTRALIA

- 558 In 2009, Australia launched the National Arts and Disability Strategy.⁶³³ Since then there have been inadequate resources allocated to the Strategy to achieve comprehensive implementation.⁶³⁴
- 559 The National Disability Strategy (NDS) includes a policy direction for increasing participation of people with disability in the “social, cultural, religious, recreational and sporting life of the community”.⁶³⁵ The NDS recognises that barriers to the built environment as well as social and attitudinal barriers prevent or limit people with disability from participation and create a situation of isolation and loneliness. However, aside from the National Arts and Disability Strategy and some measures to address accessibility, there are no comprehensive measures to address these barriers, particularly the circumstances that create isolation and loneliness.
- 560 People with disability in Australia have lower rates of attendance at both sporting and cultural events, and lower rates of participation in sports.⁶³⁶ Nearly 30 percent of people with disability do not leave home as often as they would like, with the majority citing their disability or the cost of going out as the primary reasons.
- 561 With considerable competing priorities for resources in meeting the basic needs of people with disability, there is an attitude that facilitating participation in recreation and cultural opportunities is a ‘luxury’ rather than a right, which can be addressed if funding and other funding factors permit.
- 562 People with disability from Aboriginal and Torres Strait Islander communities face considerable barriers in participating in cultural events and activities.

⁶³³ Cultural Ministers Council, ‘National Arts and Disability Strategy’ (2009) <www.cmc.gov.au/publications/national_arts_and_disability_strategy>.

⁶³⁴ G Wreford, ‘What about the National Arts and Disability Strategy?’, artsHub, April 2011.

⁶³⁵ Council of Australian Governments, *National Disability Strategy*, above n 84, 33

⁶³⁶ Australian Bureau of Statistics, *Social Participation of People with a Disability* (22 June 2011) <www.abs.gov.au/ausstats/abs@.nsf/Lookup/4439.0main+features42011>.

Inaccessible Cultural Events, Performances and Materials

- 563 The formats through which art and culture are expressed or conveyed are not always accessible for some people with disability. Information about upcoming or popular art events and cultural exhibits may be accessible for people generally, but not to some people with disability with sensory or cognitive impairment.
- 564 Compulsory regulation of accessible information is currently limited to captioning on television for news programs and at prime evening times.⁶³⁷
- 565 Many people describe being unable to access places for cultural performances and materials such as galleries, museums, cinemas and concert halls due to a combination of physical inaccessibility of premises, information not being given in alternative formats, material being provided without reasonable adjustments, and staff lacking skills in understanding disability issues and knowing how to assist.
- 566 The relative unavailability of accessible transport to cultural performances is another barrier to cultural participation. Accessible transport to various events typically runs only in daytime hours meaning people with disability do not have access to any of the various night time events.⁶³⁸

Case Study

*"I do not have access to plays, television, movies, tourism and other cultural events in the same way as others because there is no interpreter provided... I cannot attend plays and movies in the same way, because with plays if they provide an interpreter it is only at a specific date/time rather than at a date/time I would just choose to go the same as others. With movies, there [are none with] captions in my area. The closest one is 2 hours away and they are held at specific days/time so I can't just go like others."*⁶³⁹

- 567 People with disability from different cultural backgrounds report that it can be difficult to participate in culturally important activities, such as attending church.⁶⁴⁰

⁶³⁷ Media Access Australia, *Free to Air Television* (2011) <<http://mediaaccess.org.au/research-policy/australian-access-regulation/television/free-to-air-tv>>.

⁶³⁸ Submission by attendee at the CRPD Shadow Report consultation in Adelaide, SA (25 November 2009).

⁶³⁹ CRPD Shadow Report Survey, Submission No 89 (26 March 2010).

⁶⁴⁰ National Ethnic Disability Alliance, 'This is My Home: Belonging, Disability and Diversity' (Report, August 2009) <www.neda.org.au/page/cultural_and_linguistic_inclusion.html>.

Case Study

“Sometimes it is harder to be part of a group if you have a disability and are within a church group. Because I could not physically do things I found it harder to belong in the church group. I felt like if I did not physically contribute and because I was from a culturally diverse background, I had ‘double discrimination’ because of my disability and being from a [non-English speaking background] background.”

- 568 There is little data on the cultural inclusion of people with disability from non-English speaking backgrounds or Aboriginal and Torres Strait Islander people with disability.

Lack of Opportunities to Develop Creative Endeavours

- 569 Artists with disability are not well promoted in the arts community and attitudes to the employment of people with disability in this sector are a constant barrier.⁶⁴¹
- 570 There are insufficient statistics regarding people with disability working in the arts industry to provide comprehensive analysis of current trends.
- 571 People often face discrimination in the audition and training processes for various performing arts, particularly on the basis of ‘visible’ disability.⁶⁴² Further, the lack of reasonable adjustments such as captioning and audio description, prevent people with disability from considering engaging in the arts community.
- 572 People with disability are not encouraged to pursue a passion or career in the arts, nor is it sufficiently considered or promoted as a valid career path.

Inaccessible Tourism Services and Facilities

- 573 Many people with disability face difficulties accessing places for tourism services. The tourism industry in Australia is content with ‘comfortable inaction’ on making buildings and services more accessible.⁶⁴³

⁶⁴¹ Arts Access Australia, Submission to the National Mental Health and Disability Employment Strategy, 2008.

⁶⁴² Ibid 7.

⁶⁴³ Access for All Alliance, ‘A Survey and Report on the Barriers Confronted by People with Disability when they Travel on Holidays and Visit Tourist Venues’ (Report, 2006) 6 <www.australiaforall.com/Survey%20Files/Pages%20from%20Finished%20FINAL%20holiday%20notes%20-%20for%20hard%20copy%202%20Part%201.pdf>.

Case Study

"In February I went to Sydney for a couple of meetings. I had two days to fill in between those meetings and decided to become a tourist and take a ride on my mobility scooter along George Street. I wanted to access an internet cafe, I wanted to buy a book, and I wanted to get a take-away meal from Chinatown. I completed none of these tasks. Why? Because one of the major streets, in one of our major cities, and the destination of many hundreds of thousands of tourists, was lined with shops and facilities which all required my mobility scooter to climb steps into them. Eventually I had to swallow my pride and at the stepped door of a pharmacy shout for an assistant to come serve me. No other people who wanted something from that pharmacy were served at the door — so why is it that tourists with a disability, as I was in Sydney a few weeks ago, have to accept door step service?"⁶⁴⁴

- 574 Many people complain about the lack of information regarding accessible tourism operators, while the information that is available is "fragmented", "generally unreliable" and "inaccurate".⁶⁴⁵ Moreover, people with disability dislike the negative experience of being segregated from the general public and catered for as a separate group.⁶⁴⁶

Low Participation Rates in Sport and Recreation

- 575 Many barriers remain for people with disability to engage fully in sports and physical activity compared to other Australians. Disability support staff are often only available to support people with disability to attend congregate and segregated day programs or segregated sheltered employment programs during normal business hours from Monday to Friday. The institutionalised nature of these activity programs is largely constructed around carer respite needs and disability residential care facilities that allow very little choice and freedom for individuals. Little or no support funding is available for after-hours participation which restricts social inclusion and participation when most of the community is enjoying recreation.

Case Study

"There is no opportunity for people to attend events at night due to restriction of transport and support staff hours at night time."⁶⁴⁷

⁶⁴⁴ Ibid 4.

⁶⁴⁵ Ibid 7.

⁶⁴⁶ Submission by attendee at the CRPD Shadow Report consultation in Melbourne, Victoria (16 November 2009).

⁶⁴⁷ Submission by attendee at the CRPD Shadow Report consultation in Adelaide, SA (25 November 2009).

- 576 Insufficient funding characterises most of the problems faced by people with disability participating in sport. Support for grass roots participation and pathways to elite level competition are lacking due to the largely voluntary nature of the workforce in this area. Disability support costs present a major challenge for sport and recreation clubs and organisations.
- 577 The cost of purchasing specialised sporting equipment such as modified wheelchairs, bats/racquets and access to modified playing areas/surfaces is beyond the means of most people.⁶⁴⁸ For example the cost of specialised equipment and regular repairs posed a significant barrier to entry for most people with disability.⁶⁴⁹
- 578 Integration in sporting and leisure activities is encouraged by Australia, but the means to integrate a person with disability is often not funded. For instance, people with disability from non-English speaking backgrounds may not have the confidence, English proficiency or social skills to join a mainstream activity, and have little means to develop such skills.⁶⁵⁰
- 579 A great deal more attention has been paid to participation in organised sports and physical activity than to the much broader range of leisure and recreation opportunities that include more social, passive and less structured activities and pastimes. Most of the endeavours have focused on the development of sports clubs and organisations, but the failure to properly address the aspirations and needs of people with disability themselves means that much of this work is not of direct benefit to those who need support.⁶⁵¹

Friendship and Social Connections

- 580 Consultations with people with disability concerning unmet needs and aspirations continuously give prominence to a desire and need for friendship and social connection, particularly for those people with disability who are most socially marginalised. There is more emphasis on physical aspects of sports rather than supporting relationship needs through participation in a much wider range of recreation, sport and cultural activities.

⁶⁴⁸ Australian Sports Commission and Department of Health and Ageing, 'Participation in Exercise, Physical Activity and Sport — Annual Report 2008' (Report, Australian Government, 2009) 43.

⁶⁴⁹ Ibid 195.

⁶⁵⁰ CRPD Shadow Report Survey, Submission No 38 (26 March 2010).

⁶⁵¹ Sports Connect — Disability Sector Education Resource Project, 'First Phase Consultation Report' (Report, Australian Sports Commission, 2010).

RECOMMENDATIONS Article 30

- That Australia provides sufficient resources to comprehensively implement the National Arts and Disability Strategy.
- That Australia focuses on developing measures to facilitate social connections and friendship for people with disability through provision of disability supports that encourage participation in a wide range of recreation opportunities in line with aspirations and preferences of individuals with disability.
- That Australia adequately supports the participation of people with disability in all aspects of the arts including professional development.
- That Australia adequately supports the participation of people with disability in sports and recreation activities at both grass roots community and elite levels.
- That Australia promotes good practice in accessible tourism.
- That Australia develops comprehensive measures to address barriers to the specific cultural needs and life of Aboriginal and Torres Strait Islander people with disability and people with disability from non-English speaking backgrounds.

ARTICLE 31 — STATISTICS AND DATA COLLECTION

STATUS IN AUSTRALIA

- 581 Although general information regarding people with disability is collected by the Australian Bureau of Statistics (ABS) more nationally consistent, disaggregated data needs to be collected and publically reported across all areas addressed by the CRPD in order for Article 31 to be properly implemented.
- 582 The lack of nationally consistent disaggregated data raises serious concerns about the ability of Australia to evaluate the implementation of the National Disability Strategy (NDS). The NDS relies heavily on data, primarily from the ABS for evaluating success in achieving outcomes.
- 583 Item A.3.2(h) of the Annex to the ‘Guidelines on treaty-specific documents to be submitted by Parties under Article 35 of the CRPD’⁶⁵² specifies that statistical data regarding the realisation of each CRPD right should be recorded on an annual, comparative basis over the past four years. This has not occurred, or if it has, the data has not been released to the public, raising concerns under Article 31(3) of the CRPD.
- 584 The lack of disaggregated, consistent data was specifically referred to by the UN Committee on the Elimination of Discrimination against Women and the UN Committee on the Rights of the Child in relation to data on women with disability (see also Article 6) and children with disability (see also Article 7).⁶⁵³
- 585 A number of disability representative and advocacy organisations have expressed concerns about data disaggregation, thereby raising issues under Article 31(2) of the CRPD. For example, data about people with disability, or their families, from a non-English speaking background is limited.⁶⁵⁴ Similarly, despite domestic and family violence being an acknowledged problem for people with disability, particularly women with disability, the data collected by the ABS in the ‘Personal Safety Survey’ in 2005 did not include information pertaining to an individual’s disability status.

⁶⁵² United Nations, Committee on the Rights of Persons with Disabilities, ‘Guidelines on Treaty Specific Document to be Submitted by States Parties under Article 35, Paragraph 1, of the *Convention on the Rights of Persons with Disabilities*’, Note by the Secretary-General, 23 October 2009.

⁶⁵³ CEDAW Committee, *Concluding Observations* (3 February 2006), above n 39, para 15; Committee on the Rights of the Child, *Concluding Observations: Australia*, above n 150, para 46.

⁶⁵⁴ Eversely Ruth and Harry Pickett, ‘Carers Research Project Report: Supporting CALD Carers — The Service Needs of Culturally and Linguistically Diverse Carers of People with Disability’ (Report, Ethnic Disability Advocacy Centre, 2003) <www.edac.org.au/carersreport.html>.

- 586 There are a number of areas where there is a complete lack of data. This includes the uptake and accessibility of health services to people with disability. For example, without the data to indicate whether women with disability are accessing health programs that provide mammograms to screen for breast cancer and pap smears to screen for cervical cancer, it is difficult to assess whether health services are being properly implemented to cater for both the general population and people with disability.⁶⁵⁵
- 587 There is no indication that the information gathered by Australia and the ABS is made accessible through Braille or Auslan formats or that the information is published in languages other than English. This raises concerns with regard to Article 31(3) of the CRPD and the commitment of Australia to ensuring accessibility to people with disability and others.
- 588 Copyright restrictions over data and reports generated by data collected by Australia have been used to prevent disability representative and advocacy organisations from making data publically available to people with disability. This also raises concerns with respect to Article 31(3).
- 589 Additionally, the ABS requires payment for disaggregation for particular datasets, which also raises concerns about public accessibility. This is particularly problematic in analysing the situation of specific groups of people with disability, such as women with disability, children with disability, Aboriginal and Torres Strait Islander people with disability and people with disability from non-English speaking backgrounds.

RECOMMENDATIONS Article 31

- That Australia develops nationally consistent measures for the collection and public reporting of disaggregated data across the full range of obligations contained in the CRPD.
- That all data be disaggregated by age, gender, place of residence, type of disability and cultural background.
- That all data collected be available free of charge to people with disability through their representative and advocacy organisations.

⁶⁵⁵ Keran Howe and Sue Salthouse, 'Lack of Data Means Lack of Action — A Clinical Examination of Access to Health Services for Women with Disabilities' (Presentation to the Human Rights and Equal Opportunity Commission, National Summit, Sydney, 28 May 2004) <www.wwda.org.au/hreocsumm.htm>.

ARTICLE 32 — INTERNATIONAL COOPERATION

STATUS IN AUSTRALIA

- 590 Australia's Overseas Development Assistance (ODA) agency is AusAID. The key measures for implementing obligations under Article 32 are outlined in *Development for All: Towards a disability-inclusive Australian aid program 2009-2014*.⁶⁵⁶ *Development for All* aims to change the way that Australian international development assistance addresses disability.
- 591 Improving the lives of people with disability became one of the ten core development objectives of Australia's aid program in 2011, giving recognition to the fact that the Millennium Development Goals (MDGs) will not be achieved without addressing the situation of people with disability.
- 592 Development for All and the inclusion of disability as a core development objective, have been widely welcomed and supported by disability inclusive development advocates and Disabled Peoples Organisations (DPOs) in Australia and recipient countries. However, Australia has only committed to increase its ODA to just 0.5 percent of Gross National Income (GNI) by 2015–16, while other donor countries intend to give 1 percent of GNI in ODA by 2015. Its commitment to provide \$30.2 million over four years to support developing countries improve quality of life for people with disability,⁶⁵⁷ is a mere 0.02 percent of ODA in 2010–11.
- 593 People with disability have been appointed to the Disability Reference Group (DRG) to advise AusAID on the implementation of *Development for All*. This expertise and leadership from people with disability, including from a regional DPO has been significant in raising the profile of disability inclusive development. However, the DRG does not currently include a representative from a national DPO from recipient countries or from Australia.
- 594 *Development for All* has not resulted in people with disability being employed in key leadership and critical advice positions within AusAID.
- 595 *Development for All* outlines the need to partner with DPOs in recipient countries, but has failed to meaningfully engage with Australian DPOs who partner and work closely with DPOs in developing countries. This has an impact on the ability of Australian DPOs to strengthen advocacy to increase the priority on disability inclusive development.

⁶⁵⁶ AusAID, 'Development for All: Towards a Disability-Inclusive Australian Aid Program 2009–2014' (Report, Australian Government, 2008) 13.

⁶⁵⁷ Australian Government, 'New Initiative: Disability — Fair Development Accessible to All, Priorities for Australia's International Development Assistance' (Ministerial Statements, 2010) <www.budget.gov.au/2010-11/content/ministerial_statements/AusAID/html/ms_AusAID-04.htm>.

RECOMMENDATIONS Article 32

- That Australia increases its overall aid budget to be commensurate with international standards, and increase its budget commitment to specific disability inclusive initiatives.
- That AusAid employs people with disability in leadership and critical advice roles.
- That Australia actively supports, partners and engages with Australian DPOs in international development.
- That AusAid partners with Australian DPOs to promote the leadership of people with disability in disability inclusive development.

ARTICLE 33 — NATIONAL IMPLEMENTATION AND MONITORING

STATUS IN AUSTRALIA

- 596 In Australia, the Attorney-General's Department (AGD) and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) have been designated the joint focal point within the Federal Government regarding the implementation of the CRPD. This satisfies, in part, the obligation under Article 33 to establish a coordination mechanism within government facilitating the actions of different government agencies and civil society.
- 597 However, it is not yet clear how adequate and effective AGD and FaHCSIA will be in coordinating all actions across the broad range of government and non-government agencies. It is unclear if there is a coordination strategy between these two Departments and across other agencies. AGD and FaHCSIA have no authority to direct the work of these agencies or civil society. There has also been no consultation with people with disability, their representative and advocacy organisations and civil society about the nature of mechanisms that need to be put in place to ensure that there is appropriate and independent monitoring of implementation of the CRPD including the designation of the focal points.
- 598 The National Disability Strategy (NDS) sets out a very clear position in relation to working collaboratively with people with disability, their representative and advocacy organisations and civil society in implementing the Strategy.⁶⁵⁸ The planning and implementation process for the NDS is already underway with at very best, only tokenistic consultation and involvement of people with disability, their representative and advocacy organisations.
- 599 The NDS does not meet the obligations under Article 33 as the ten year implementation plans are currently under development with a proposed endorsement date of 2012.
- 600 The Attorney-General has also made a declaration under the *Australian Human Rights Commission Act 1986 (Cth)* (AHRC Act) to include the CRPD rights in the definition of human rights. This gives the Australian Human Rights Commission (AHRC)⁶⁵⁹ power to perform certain roles to ensure Australia performs its obligations under the CPRD and allows for realisation of CRPD rights by people with disability. However, this does not constitute comprehensive implementation of Article 33 given AHRC functions are limited to acts or practices of the Commonwealth, and given all elements of Article 4 are not included in the AHRC Act. In addition, the AHRC does not have the necessary level of financial and information resources to effectively monitor CRPD violations.

⁶⁵⁸ Council of Australian Governments, *National Disability Strategy*, above n 84, 67

⁶⁵⁹ The Australian Human Rights Commission comprises Australia's national human rights institution and meets the requirements of the 'Paris Principles'. See <<http://www.hreoc.gov.au/>>.

- 601 Disability representative, advocacy, legal and human rights organisations are concerned that the initial report under CRPD provided by Australia to the CRPD Committee does not provide the necessary data and analysis for a comprehensive assessment and ongoing effective monitoring of CRPD implementation and compliance.
- 602 Whilst the *Disability Discrimination Act 1992* (Cth) and *Disability Services Act 1986* (Cth) and their state and territory counterparts incorporate some elements of the CRPD, it remains the fact that CRPD rights are not comprehensively protected under Australian law. (See also Article 4)

RECOMMENDATIONS Article 33

- That the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs take urgent action to consult with people with disability through their representative and advocacy organisations about the establishment of an effective and independent monitoring mechanism for progressing both the National Disability Strategy and implementation of the CRPD in Australia.
- That Australia establishes a National Disability Commission and National Disability Research Institute as part of Australia's framework for promoting and monitoring implementation of the CRPD.⁶⁶⁰ These institutions should work in cooperation with other elements of Australia's implementation and monitoring framework with all its capacities, powers and duties underpinned by the CRPD.
- That Australia directly incorporates the CRPD into Australian law,⁶⁶¹ by the introduction of a Bill of Rights; a provision incorporating CRPD into law; or, specific incorporation or translation of Article 4 obligations into domestic law. (See Article 5)

⁶⁶⁰ Australian Human Rights Commission, Submission, above n 19, 41.

⁶⁶¹ It is suggested the CRPD is directly incorporated into Australian law by way of schedule to a national Bill of Rights, provided the Bill of Rights is fully enforceable and supported by monitoring mechanisms surrounding the CRPD : Phillip French, 'Final Report to the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, and the Attorney-General: Consultations with Australian Representative Organisations Governed by Persons with Disability, Disability Advisory Councils, and the Disability Legal Services Network on the Impact of Ratification of the *Convention on the Rights of Persons with Disabilities*' (Report, Disability Studies and Research Institute for The Australian Task Force on CRPD Ratification, 2008).

- That Australia examines its framework to promote, protect and monitor the implementation of the CRPD by ensuring the framework carries out a strategic rather than purely informational role, including monitoring the transformation of major social structures to ensure current and future levels of compliance with the CRPD; and examining the need for any additional measures to ensure compliance with the CRPD in areas that fall outside the direct responsibility of national human rights institutions.⁶⁶²
- That Australia adequately resources disability representative, advocacy and legal organisations to participate in the implementation and monitoring of CRPD.

⁶⁶² Australian Human Rights Commission, 'National Human Rights Institutions and National implementation and monitoring of the *Convention on the Rights of Persons with Disabilities*' (Paper, Asia Pacific Forum of National Human Rights Institutions, 2007) <www.hreoc.gov.au/disability_rights/convention/apf07.htm>.

ABBREVIATIONS

ABS	Australian Bureau of Statistics
AHRC	Australian Human Rights Commission
AusAID	Australian Agency for International Development
Auslan	Australian Sign Language
CAT	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment</i>
COAG	Council of Australian Governments
CLCs	Community Legal Centres
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DDA	<i>Disability Discrimination Act 1992 (Cth)</i>
DSA	<i>Disability Services Act 1986 (Cth)</i>
DSP	Disability Support Pension
DPOs	Disabled Persons Organisations
FaHCSIA	Australian Government Department of Families, Housing, Community Services and Indigenous Affairs
ICCPR	International Convention on Civil and Political Rights
ITO	Involuntary Treatment Order
MHRT	Mental Health Review Tribunal
NDIS	National Disability Insurance Scheme
NDS	National Disability Strategy
NGOs	Non-Government Organisations
ODA	Overseas Development Assistance
OECD	Organisation for Economic Co-operation and Development
PC	Productivity Commission
UNICEF	United Nations Children's Fund
UNHCR	UN High Commissioner for Refugees
UPR	Universal Periodic Review

