

## Implementation of the CRPD - Legislative and Policy Framework

There remains no comprehensive legal framework for the protection of human rights in Australia. The CRPD has still not been fully incorporated into domestic law. Australia's Interpretative Declarations on CRPD Articles 12, 17 and 18 restrict effective implementation of the CRPD, prevent reform and allow for human rights violations including denial of legal capacity, forced treatments, and discrimination against non-Australian people with disability seeking to enter or remain in Australia.<sup>1</sup>

The *Disability Discrimination Act (DDA) 1992* and the *National Disability Strategy 2010-2020* (NDS) remain the primary legislative and policy framework designed to promote and protect the rights of people with disability in Australia.

Whilst the *Disability Discrimination Act 1992* (DDA)<sup>2</sup> and State/Territory based anti-discrimination legislation incorporate some of the rights under the CRPD,<sup>3</sup> the scope of protected rights and grounds of discrimination are much narrower in Australia than under international human rights law.<sup>4</sup> Existing Commonwealth and most State/Territory anti-discrimination legislation does not protect against systemic and intersectional discrimination and disability hate crimes. There are no effective legislative remedies to address intersectional discrimination. DPOs and other groups cannot bring representative complaints under the DDA.

Denial of reasonable adjustment is a form of discrimination under the DDA. However, findings in a recent court case<sup>5</sup> has resulted in a person with disability being required to show that the denial of reasonable accommodation was caused by the person's impairment in order for it to constitute discrimination. This has made the DDA ineffective in addressing the denial of reasonable accommodation.<sup>6</sup>

The *National Disability Strategy 2010-2020* (NDS)<sup>7</sup> is agreed to by all Australian governments and sets out the national policy framework to guide governments to meet their obligations under the CRPD.<sup>8</sup> It sets out goals and objectives under six areas of mainstream and disability-specific public policy. These six areas are: 1) Inclusive and accessible communities; 2) Rights protection, justice and legislation; 3) Economic security; 4) Personal and community support; 5) Learning and skills; and 6) Health and well-being.

The NDS was intended to be delivered through a series of three four-year Implementation Plans.<sup>9</sup> However, the Second Implementation Plan (2015–2018)<sup>10</sup> for the NDS was only released in December 2016, halfway through the implementation period 2015-2018. It prioritised 'Communication activities' as an area for 'increased national effort',<sup>11</sup> however, to date there is no evidence of action on this priority, and an evaluation of the NDS in 2018 found that public awareness could be improved through clarifying agency responsibilities for promoting awareness and a commitment to supporting public awareness campaigns.<sup>12</sup>

The final Implementation Plan '*Measuring Progress (2019-2020)*' for the NDS has not been released. It was intended to identify new and emerging outcomes to be implemented in order to ensure the objectives of the NDS are met. The NDS is now in review in preparation for its ten-year completion, with a view to another ten-year plan.

Despite Australian government's committing to biennial progress reports on the NDS, there have only been two progress reports produced.<sup>13</sup> These reports only describe actions rather than measure and evaluate outcomes for people with disability. The progress reports on NDS implementation provide a clear indication of the need to recast the NDS as an engine for change, rather than a way to simply report on actions already undertaken. Recommendations from UN treaty monitoring reviews regarding the rights of people with disability are not incorporated into concrete actions within legislative and policy frameworks, including the NDS.

The NDS lacks actions and measurable outcomes to address systemic human rights violations, including in health, employment, education, freedom from violence, and forced medical treatment. The NDS lacks resourcing in implementation, monitoring and evaluation across its policy outcome areas and lacks

accountability and implementation mechanisms.<sup>14</sup> Disaggregated data and the collection of information on the situation of women and children with disability are not built into the NDS.<sup>15</sup>

The NDS is siloed within the Australian Government Department of Social Services (DSS) as a disability policy responsibility only. This means there is little authority to leverage change across other Australian Government departments, or across State and Territory jurisdictions. DPOs have consistently urged Australian Governments to establish an executive mechanism within the Department of Prime Minister and Cabinet to secure high level and cross government coordination of the NDS.<sup>16</sup> This recommendation has been echoed by a Senate Inquiry<sup>17</sup> however has been rejected by Government.<sup>18</sup>

There are no nationally consistent measures for the collection and public reporting of disaggregated data across the full range of obligations contained in the CRPD. Despite recommendations from UN treaty monitoring bodies, Australia is yet to commission and fund a comprehensive assessment of the situation of women with disability,<sup>19</sup> the situation of children and young people with disability,<sup>20</sup> and the situation of Indigenous people with disability. The lack of nationally consistent disaggregated data<sup>21</sup> raises serious concerns about the ability of Australia to comply with the CRPD and monitor and evaluate the implementation of the NDS and the Sustainable Development Goals (SDGs).

## Recommendations

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That Australia:

- Establish a comprehensive, judicially enforceable Human Rights Act that incorporates Australia's obligations under the CRPD and other human rights treaties.
- Withdraw the Interpretative Declarations on CRPD Articles 12, 17 and 18.
- Strengthen anti-discrimination laws to address intersectional discrimination; to enable representative complaints by DPOs and advocacy organisations; and to enable complaints regarding vilification and hate crimes on the basis of disability.
- Amend the DDA to ensure people with disability can effectively make complaints about denial of reasonable accommodation.
- Ensure the new NDS is adequately resourced, developed in an intersectional framework, and contains measurable outcomes, an accountability framework, and measures to ensure disaggregation of data across all policy areas.
- Establish an independent high-level Office of Disability Inclusion to drive the NDS across government and to ensure compliance with the CRPD.
- Undertake a comprehensive assessment of the situation of women with disability, the situation of children and young people with disability, and the situation of Indigenous people with disability.
- Develop nationally consistent measures for the collection and public reporting of disaggregated data across the full range of obligations contained in the CRPD.

## Endnotes

<sup>1</sup> UN General Assembly, Human Rights Council Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru; 24 April 2017, UN Doc No. A/HRC/35/25/Add.3. See also: Australian Government, [Australian Government response to the Senate Community Affairs References Committee Reports](#) (May 2015).

- <sup>2</sup> 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.
- <sup>3</sup> For example: Victoria, Australian Capital Territory (ACT) and Queensland human rights legislation do not protect economic, social and cultural rights.
- <sup>4</sup> There remain many significant gaps, particularly in relation to fundamental human rights, including freedom from torture and ill-treatment, recognition of legal capacity, institutionalisation, indefinite and arbitrary detention and involuntary treatment.
- <sup>5</sup> Federal Court of Australia, Sklavos v Australasian College of Dermatologists [2017] FCAFC 128.
- <sup>6</sup> In late 2018, a number of disability, human rights and community legal centres wrote to the Federal Attorney-General to request an urgent amendment to the DDA to fix the significant problem with the law that stops discrimination in employment, education, transport and more. The response received from the Attorney-General noted that this was not a priority for the Government. See: People With Disability Australia (PWDA) (February 2019) Federal Government Must Fix Gaping Hole In The Disability Discrimination Act.
- <sup>7</sup> Australian Government, National Disability Strategy 2010-2020. Department of Social Services, Canberra.
- <sup>8</sup> See: Australian Government, National Disability Strategy 2010-2020. Department of Social Services, Canberra.
- <sup>9</sup> Eg: 'Laying the Groundwork' (2011-2014) set the foundation for each State and Territory Government to have its own disability plan to improve outcomes through mainstream policies, programs, services and infrastructure. 'Driving Action' (2015-2018) outlined new priority actions as well as ongoing commitments to consolidate actions that are driving improved outcomes and identify where more effort is needed. 'Measuring Progress' (2019-2022) was intended to identify new and emerging outcomes to be implemented in order to ensure the objectives of the NDS are met.
- <sup>10</sup> Department of Social Services, National Disability Strategy, Second Implementation Plan: Driving Action 2015–2018.
- <sup>11</sup> The four 'priority areas' of the National Disability Strategy Second Implementation Plan (2015–2018) were: 1) NDIS transition to full scheme; 2) improving employment outcomes for people with disability 3) improving outcomes for Aboriginal and Torres Strait Islander people with disability; 4) communication activities to promote the intent of the strategy throughout the community. It also prioritised the development of an 'Australian Government Action Plan' to drive implementation of the NDS across Commonwealth portfolios between 2015 and 2018. See: Department of Social Services (DSS) National Disability Strategy, Second Implementation Plan: Driving Action 2015–2018.
- <sup>12</sup> Davy, L., Fisher, K.R., Wehbe, A., Purcal, C., Robinson, S., Kayess, R., Santos, D. (2019). Review of implementation of the National Disability Strategy 2010-2020: Final report. (SPRC Report [4/19]. Sydney: Social Policy Research Centre, UNSW Sydney.
- <sup>13</sup> Department of Social Services, Progress Report to the Council of Australian Governments 2014.
- <sup>14</sup> Commonwealth of Australia (2017) Senate Standing Committee on Community Affairs, Report: Delivery of outcomes under the National Disability Strategy 2010-2020 to build inclusive and accessible communities.
- <sup>15</sup> Women with Disabilities Australia (WWDA), (2014) 'Gender Blind, Gender Neutral': The effectiveness of the National Disability Strategy in improving the lives of women and girls with disabilities. WWDA, Hobart, Tasmania, ISBN: 978-0-9585268-2-1.
- <sup>16</sup> Disabled People's Organisations Australia (DPO Australia) (2017) Submission to the Senate Community Affairs References Committee Inquiry into the delivery of outcomes under the National Disability Strategy 2010-2020 (NDS).
- <sup>17</sup> Commonwealth of Australia (2017) Senate Standing Committee on Community Affairs, Report: Delivery of outcomes under the National Disability Strategy 2010-2020 to build inclusive and accessible communities.
- <sup>18</sup> Commonwealth of Australia (2018) Australian Government Response to the Senate Standing Committee on Community Affairs, Report: Delivery of outcomes under the National Disability Strategy 2010-2020 to build inclusive and accessible communities.
- <sup>19</sup> As recommended in the CRPD/C/AUS/CO/1 [para.54] and also recommended in CEDAW/C/AUL/CO/5; CEDAW/C/AUS/CO/7; E/C.12/AUS/CO/4; CCPR/C/AUS/CO/5; CAT/C/AUS/Q/5.
- <sup>20</sup> As recommended in the CRPD/C/AUS/CO/1 [para.56]
- <sup>21</sup> Including a comprehensive data collection mechanism for children and young people with disability.