

The Hon Ron Dyer MLC
Committee Chair
Legislative Council Standing Committee on Law and Justice
Parliament House
SYDNEY 2000

Dear Hon Ron Dyer,

Please find attached the Disability Council of NSW submission to the NSW Bill of Rights Inquiry.

In its submission the Council has recommended that a statutory Bill of Rights be enacted in NSW, along with amendments to the NSW Interpretations Act 1987.

The Council would be please to make further submissions on this particular issue, should the Committee consider it appropriate.

I trust the issues raised in Council's submission will be duly noted, and I look forward to hearing about the outcomes of the Committee's deliberations.

Yours sincerely

Leonie Manns
Chairperson

29 March 2000

Submission

Inquiry into a NSW Bill of Rights/Amendments to the NSW Interpretations Act 1987.

About the Disability Council of NSW

The Disability Council of NSW was established in 1984 to advise the NSW Government on issues affecting people with a disability and their associates. Part of the Disability Council's role is to:

- ♦ Monitor the implementation of Government policy in relation to people with a disability, their families and carers;
- ♦ Advise Government on the effect and relevance of services and priorities accorded to them;
- ♦ Promote the integration of people with a disability into the community through community awareness and education;
- ♦ Encourage diversity, flexibility and innovation in the provision of services; and
- ♦ Consult people with a disability, their families and carers.

The Disability Council of NSW wishes to respond to the inquiry on the enactment of a NSW Bill of Rights and the proposal to amend the *NSW Interpretations Act 1987* (the Act) to require courts to take into account rights contained in International Conventions, as it believes that the adoption of these approaches can only further the cause of defending the rights of people with a disability.

The Disability Council of NSW has had a long-standing interest in and commitment to the rights of people with a disability, and was pleased to receive an invitation to respond to the inquiry into a NSW Bill of Rights. In responding to the terms of reference for the inquiry, the Council is seeking to reaffirm the views of people with a disability and their families who, as a matter of course, are called upon to provide advice on matters about which they are concerned.

Layout of this Submission

This submission begins with an outline of the Council's position on the proposal to enact a NSW Bill of Rights and/or amend the NSW Interpretations Act and a brief overview of the various instruments (both local and overseas) that confer rights to people with a disability. It will consider the arguments favouring the adoption of both approaches as a means of protecting the rights of people with a disability. Here the analysis will draw on the vast literature that has dealt with the subject of a Bill of Rights. Finally, this submission will address the terms of reference of the

inquiry so as to enable the Council to expound on its views about this particular issue.

The Disability Council of NSW's Position

The Disability Council believes that New South Wales should have a constitutionally entrenched Bill of Rights. The Council argues that a Bill of Rights would be an essential adjunct to the protection currently afforded by parliamentary democracy and the common law to society's most vulnerable groups.

The Council believes there is great potential for a Bill of Rights having educative and symbolic value. The Bill of Rights would be a general statement, which could be viewed as a benchmark with which to judge law and policy across the board rather than on an ad hoc basis. A Bill of Rights would promote respect for fundamental rights and freedoms within the community.

The Council believes the NSW Interpretations Act should be amended to enable courts to take into account rights contained in International Conventions and to allow for the development of human rights law in NSW. The Council believes that amending this Act would also empower judges to interpret human rights principles when statutory or common law was unclear.

The Development of Disability Legal Rights in NSW, Australia and Internationally

There has been a significant expansion of legal protection for people with a disability, at both a State and Federal level. Each of these laws confer a certain level of rights to people with a disability but are limited in a number of areas, namely their applicability and enforceability. This section of the Council's submission presents a brief overview of the various disability-focused legislation and international treaties that to varying degrees have influenced the protection of rights for people with a disability. This section of the submission will also provide a snapshot of the documented instances in which the rights of people with a disability have been violated.

State

In recent years there have been three major pieces of legislation introduced in NSW, each with a focus on disability and the aim of improving the lives of people with a disability at either a service delivery or legal level. The [Guardianship Act 1987](#)¹ empowers a multidisciplinary tribunal to administer "guardianship laws governing people who are unable to make decisions in relation to their own affairs and property"². Guardianship laws exist in all states of Australia and have been lauded for their ability to be more inclusive, in which attention is given to social context and functioning, and the citizenship rights of people with a

¹ Found at http://www.austlii.edu.au/au/legis/nsw/consol_act/ga1987136/index.html

² Carney, T and Tait, D (1997) *The Adult Guardianship Experiment: Tribunals and Popular Justice*. The Federation Press. Sydney.

disability³ than is the case with the Courts. The Guardianship Tribunal which is established under the Act, operates within an inquisitorial model allowing people with decision-making disabilities to have their voices heard and their rights to fair and equal treatment within a legal system acknowledged.

The [NSW Disability Services Act](#)⁴ 1993 (DSA) applies to all services provided or funded by the Minister for Community Services. The DSA requires that all services covered by the Act to conform to the Principles and Applications of Principles contained in the Act. These Principles are statements of human rights of people with a disability. The Applications are statements about what should happen in order to put the Principles into operation. Under the Act, the Minister is not allowed to fund a service that does not conform to the Principles and Application of Principles.

The Community Services Commission was established in 1994 under [NSW Community Services \(Complaints, Reviews and Monitoring\) Act 1993](#)⁵ (CRAMA) with the mandate to monitor and review community services, conduct inquiries into matters affecting consumers and service providers, review the situation of a person with a disability receiving community services, and coordinate the Community Visitors Scheme. One of the principles underpinning the Act contains a reference to legal and human rights. Thus:

...a service provider is to promote and respect the legal and human rights of a person who receives a community service and must respect any need for privacy or confidentiality⁶.

In the past few years, the Commission has undertaken a number of investigations into matters affecting consumers of community services, particularly issues of public interest, safety, significant questions about the treatment of consumers, or unreasonable conduct by a service provider.

Federal

At the Federal level, two significant pieces of legislation were introduced to increase the participation of people with a disability in the community. The [Disability Services Act 1986](#)⁷ (Cth) came into effect as a result of a review of the Handicapped Persons Assistance Act 1974. The DSA 1986 (Cth) was intended to help meet the Commonwealth's obligations to people with a disability by assisting them to "take their place in the community..." and by giving "proper recognition to the rights and dignity of people with a disability..."⁸.

The Commonwealth [Disability Discrimination Act 1992](#) (DDA) came into effect with the aim of eliminating discrimination against people with a disability and promoting community acceptance of the principle that people with a disability have the same rights as all members of the community.

³ Ibid

⁴ Found at http://www.austlii.edu.au/au/legis/nsw/consol_act/dsa1992213/

⁵ Found at http://www.austlii.edu.au/au/legis/nsw/consol_act/csrama1993583/index.html.

⁶ CRAMA Section 4 (c)

⁷ Found at http://www.austlii.edu.au/au/legis/cth/consol_act/dsa1986213/index.html

⁸ A.D Rose (1998) Australian Law Reform Commission's Review of the Disability Services Act 1986 (Cth) in M. Hauritz, C. Sampford, S. Blencowe (Editors) Justice for People with a disabilities. Federation Press. Sydney.

The DDA is administered by the Human Rights and Equal Opportunity Commission (HREOC), which was established under a Commonwealth act of Parliament.

While many of the disability-specific laws (outlined above) have good intentions, there are doubts as to whether these can provide adequate protection of rights for people with a disability. Both the Commonwealth and State Disability Services Acts have been criticized for being unable to give legal effect to the principles and objectives enshrined in those laws⁹. Both operate more as a mechanism for funding services targeting those groups identified in the Act, than a mechanism for developing a national approach to planning for the needs of people with a disability that is open to legal challenge. As a result, sections of the disability community whose needs cannot be met or whose disability is not captured by these laws are excluded.

The NSW CRAMA 1993 also places limits on what the Community Services Commission (CSC) can do to the extent that it cannot determine an issue or make a recommendation in a way that is:

- ◆ Beyond the resources appropriated by the Parliament.
- ◆ Inconsistent with government policy that stipulates how resources should be allocated.

As noted earlier, the DDA 1992 aims to "eliminate discrimination as far as possible, against persons on the ground of disability in the areas of work, accommodation, education, access to premises, clubs and sport, the provision of goods and services, [as well as] the administration of Commonwealth laws and programs"¹⁰. In their assessment of the DDA, Jones and Bassar Marks (1998) questions whether the DDA fully protects the rights of people with a disability. They note, for example, that claims of discrimination (on the grounds of disability) are an individual responsibility, where the onus is on the person to know what their rights are under the Act, and how to access and enforce these rights. They also note that because the DDA is remedial in nature there are doubts as to whether it truly can provide equality and empowerment for people with a disability¹¹.

Another limitation of the DDA is that HREOC has no power to enforce determinations made under the Act, resulting in people with a disability having to appeal to the Federal Court for a legally enforceable ruling. It should be noted that the Federal Court has seldom upheld decisions of the Commission.

International

At the international level, a number of instruments have been introduced in recognition of the rights to fair and equal treatment of all people. In 1948 the United Nations General Assembly proclaimed the Universal Declaration of Human Rights which recognised:

⁹ Ibid

¹⁰ Disability Discrimination Act 1992. Section 3(a)

¹¹ M. Jones and L.A. Bassar Marks (1998) *The Limitations on the use of Law to Promote Rights: an Assessment of the Disability Discrimination Act 1992 (Cth)* in M. Hauritz, C. Sampford, S. Blencowe (Editors) *Justice for People with disabilities*. Federation Press. Sydney.

...the inherent dignity...and the equal and inalienable rights of all members of the human family...[as]...the foundation of freedom, justice and peace in the world¹².

The International Bill of Rights, comprising the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All forms of Discrimination against Women, as well as the World Programme of Action concerning Disabled Person, constitute the political and moral foundation for the [Standard Rules on the Equalisation of Opportunities for Persons with Disabilities](#)¹³. Although the rules are not legally binding, they can become internationally customary rules when applied by a great number of States with the intention of respecting a rule in international law¹⁴. These laws imply a strong moral and political commitment to take action for the equalization of opportunities for people with a disability. The Rules offer an instrument for policy-making and action to people with a disability and their organisations. They provide a basis for technical and economic cooperation among States and the United Nations¹⁵.

It is true that some of these instruments have been given effect by being included in certain Commonwealth legislation, such as the:

- ♦ Human Rights and Equal Opportunity Act 1986
- ♦ Racial Discrimination Act 1975; and
- ♦ Sex Discrimination Act 1984

However, while these Acts apply equally to people with a disability there are doubts as to whether these can provide adequate protection of rights for people with a disability.

The rights of people with a disability are also expressly covered in certain United Nations Declarations. [The Declaration on the Rights of Disabled Person](#)¹⁶ stipulates that people with a disability have the right to:

- ♦ Respect and dignity
- ♦ Assistance to enable them to become as self-reliant as possible;
- ♦ Education, training and work;
- ♦ Family and social life;
- ♦ Protection from discriminatory treatment.

The [Declaration on the Rights of Mentally Retarded Persons](#)¹⁷ stipulates that people with an intellectual disability have the right to:

¹² Preamble. Universal Declaration of Human Rights. Resolution 217A (111)

¹³ Found at <http://www.independentliving/STANDARDRULES.index.html>. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities have been developed on the basis of the experience gained during the United Nations Decade of Disabled Persons. The purpose of the rules is to ensure people with a disability exercise the same rights and obligations as others.

¹⁴ T. Degener, and Y. Koster-Dreese (1995) Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments. Kluwer Academic Publishers. The Netherlands.

¹⁵ Ibid.

¹⁶ Found at <http://www.unn.edu/humanrts/mstree/t3drmrp.htm>

¹⁷ Found at <http://www.unn.edu/humanrts/mstree/tldmrp.htm>

- ♦ Equal rights;
- ♦ Developmental services
- ♦ Economic Security and work;
- ♦ Home and community life
- ♦ Guardianship
- ♦ Legal protection

Although these Declarations are not enforceable at international law, the United Nations has said that there is a strong expectation that member States will abide by them.¹⁸ The declarations marked an important shift in perspective. Individuals with a disability became the *subject* of action rather than its *object*. In other words, reliance on welfare strategies was replaced at the international level by a recognition that people with a disability must be treated as having the same rights as all other citizens¹⁹.

It should be noted that there is no multilateral treaty or covenant dedicated exclusively to the protection and promotion of the rights of people with a disability. However, the rights of people with a disability are implicitly recognised. The preambles to the Universal Declaration of Human Rights and the two legally binding covenants which grew from the Declaration - the International Covenant on Economic Social and Cultural Rights (ICESCR) and the ICCPR - refer to the inherent dignity and equality of all people as the foundation of freedom, justice, and peace.

Instances of human rights violations among people with a disability

Despite Australia's commitment to international treaties, people with a disability are continually denied the opportunity to realise the basic rights and responsibilities of other Australian citizens. There are numerous documented instances of the widespread abuse of people with a disability ranging from unconscious discrimination (including barriers preventing people with a disability from enjoying full social, economic and political participation in their communities) to deaths in supported living arrangements. Below is a table containing documented instances of recent human rights abuses and violations. It should be noted that the list below is a small fraction of the total number of abusive situations reported by people with a disability in recent times.

VIOLATION	RELEVANT REPORT
Women with disabilities experience abuse and violence at significantly higher rates than their non-disabled counterparts.	Violence against women with disabilities - A report of the National workshop on Women with Disabilities and Violence, prepared for Women with Disabilities Australia (WWDA) Canberra.
People with a disability living in institutions continue to live in appalling conditions and suffer ongoing abuse and degrading	Disability and Human Rights - A paper presented by Helen Meekosha on behalf of the National Caucus of Disability Consumer

¹⁸ Ibid.

¹⁹ Ibid.

treatment.	Organisations to the Attorney General's NGO Forum on Domestic Human Rights.
The sterilisation of women and girls with disabilities.	The Sterilisation of Girls and young Women in Australia - A Legal, Medical and Social Context by Brady, S. and Grover, S. (1997)
Women with disabilities escaping violence are denied access to refuges.	More than Just a Ramp - A guide for Women's Refuges to Develop Disability Discrimination Act Action Plans, prepared by WWDA.
Unmet need in relation to supported accommodation and respite care.	Cram House Review, Lachlan House Review, Review into Respite Care Services, by the NSW Community Services Commission.
People with a disability die in supported living arrangements.	Review conducted by the NSW Community Services Commission's Disability Deaths Review Team.
People with a disability living in boarding houses are overmedicated.	Review undertaken by the Health Care Complaints Commission.
12.6% of the 4000 residents in living institutional facilities were assessed as having severe nutritional depletion.	Nutritional and Mealtime Practices for People with Developmental Disabilities in Residential Care, report prepared by NSW Community Services Commission.
People with a disability continue to be significantly over-represented in prisons and grossly under-represented in secondary and tertiary education and employment.	Burning Issues for People with Disabilities, A keynote address to the WWDA Annual General Meeting by Elizabeth Hastings (former Disability Discrimination Commissioner).
People with psychiatric disabilities were subjected to experimental forms of treatment resulting in irreversible psychological harm, and in some cases, death.	Chelmsford inquiry, Royal Commission.
People with a disability are among the poorest in Australian society, and as a result of the extra costs associated with having a disability, are denied the same range of opportunities to participate in the economic and cultural life of the community.	Submission to the welfare reform inquiry, prepared by the Disability Council of NSW 1999.

What would Enacting a NSW Bill of Rights and Amending the NSW Interpretations Act 1987 achieve?

This section of the Council's submission will briefly outline the arguments favouring the enactment of a NSW Bill of Rights. It should be noted that the question of whether NSW should have a Bill of Rights, and if so, in what form, and with what content, is essentially a political one, and must before enactment, follow a process in which there is broad community debate and consultation.

1. Address the inadequacies associated with Common Law.

There has been growing realisation that the common law is incapable of protecting the rights of citizens against the interests and demands of the state²⁰. It has been argued, for instance, that parliamentary supremacy which in the context of common law protection of rights, holds that parliament may legislate to alter or restrict any protection created by common law. Similarly, it has been argued that rights under the common law approach are "what remains after all the exceptions and limitations to them have been dealt with"²¹. The right to free speech, for example, is that which is left after censorship laws, defamation, criminal libel, blasphemy, radio and television program standards have been taken into account when common law is applied²².

To these limitations, two others can be added. The first is that while the courts are increasingly responding to society's attitude to human rights, the capacity of the common law is limited to the extent that it is opportunistic²³. This means that no general statement of rights can be developed in response to the individual case, and any declaration of rights is restricted to the between the parties before the Courts. The second is that the development of the common law is dependent upon the doctrine of precedent. To the extent that the Courts develop an approach based upon general rights such as the right to a fair trial or the right to freedom of speech or expression, the approach must be reasoned and principled, based on a balancing of the interests involved and with eye to consistency with previous decisions²⁴.

2. Enhance democratic government

It has been argued that a Bill of Rights would entrench limits on government power by judicial review of governmental actions. This view is an extension of the ideal that governments are not the rulers but the servants of the people whose rights cannot be transgressed²⁵.

3. Provide an educative role

As noted earlier, a Bill of Rights would have a crucial educative role, alerting people to their rights, the rights of others, and the values underpinning rights, as well as providing a framework for assessing the conduct of government in its law and policy making roles. The enactment

²⁰ N. O'Neill (1987) A Never Ending Story: A History of Human Rights in Australia in Human Rights: An Australian Debate. Redfern Legal Centre Publishing.

²¹ Ibid

²² Ibid

²³ D.K. Malcolm (1998) Does Australia Need a Bill of Rights? E-Law - Murdoch University Electronic Journal of Law Vol 5, No 3 (September 1998). Internet (http://murdoch.edu.au/elaw/issues/v5n3/malcom53_text.html#11)

²⁴ Ibid.

²⁵ Ibid.

of a Bill of Rights would also mean that human rights would become a key part of legal training for those pursuing a career in this area.

4. Provide an additional guide for judicial interpretation

A constitutionally based Bill of Rights would provide a statement of rights which could be used in the interpretation of legislation. As it stands, there is no mechanism allowing judges to interpret legislation so that it can achieve its objectives²⁶. Amending the NSW Interpretations Act 1987 would enable this to occur.

5. A means of meeting treaty agreements

As noted earlier, Australia is party to a number of International Conventions, Declarations, Guidelines and Resolutions emanating from the UN which either directly or indirectly refer to a number of disadvantaged groups, including the rights of people with a disability. To date, Australia has met its obligations to varying degrees, and as revealed earlier, has failed in number of areas where the rights of people with a disability are concerned. Nonetheless, the Council would argue that a constitutionally entrenched Bill of Rights would ensure that Australia's treaty obligations were fulfilled. It should be noted that entries into international treaties have no direct impact on domestic law unless there is legislation to implement such obligations. Given that states that ultimate responsibility for implementing international treaties, the Council would argue in favour of a Bill of Rights and amending the NSW Interpretations Act 1987.

Terms of reference to the inquiry

(a) Whether the rights declared in the International Covenant on Civil and Political Rights should be incorporated into domestic law by such a Bill of Rights.

The Disability Council of NSW believes this should occur.

(b) Whether economic, social and cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights.

The Disability Council of NSW believes this should occur. The Council believes that a non-discrimination clause should be included in the Bill of Rights, and that this should include people with a disability.

(c) Whether individual responsibilities as distinct from rights should be included in a Bill of Rights.

The Disability Council of NSW believes Government and all individuals have a responsibility to uphold the rights as declared in a Bill of Rights.

(f) the circumstances, if any, in which a Bill of Rights should be binding on individuals as distinct from the Legislative, Executive and Judicial arms of Government and persons or bodies performing a public function or exercising a public power under legislation.

The Disability Council of NSW believes a Bill of Rights should be binding on all individuals as well as Legislative, Executive and Judicial arms of

²⁶ Ibid.

Government and persons or bodies performing a public function or exercising a public power under legislation;

(g) the extent and manner in which the rights declared in a Bill of Rights should be enforceable.

The Disability Council of NSW believes for human rights legislation to be effective, it must provide enforcement mechanisms which allow for the scrutiny of the activities and practices of all government institutions. The Council believes an agency with similar powers as the Federal Human Rights and Equal Opportunity Commission should be established to monitor and enforce human rights.

(i) whether there should be a legislative requirement on courts to construe legislation in a manner which is compatible with international human rights instruments.

The Disability Council of NSW believes this should occur by way of amending the NSW Interpretations Act 1987.

Conclusion

There have been a number of attempts to enact a Bill of Rights in Australia at both a State and Federal for the past three decades. They have all been aimed at incorporating the ICCPR into domestic law and were rejected on the grounds of infringing upon state rights and leading to an abuse of external affairs power. The Council sees plausible arguments for NSW and other states enacting a Bill of Rights as ultimate responsibility for implement such a law rests with the states.

The Council hopes that this inquiry will mark the beginning of broad debate on the desirability, scope and content of a Bill of Rights. This submission has noted that common law cannot provide full protection of individual or group rights. It has also noted that a Bill of Rights would be one way of both assisting the courts as well as reasserting the supremacy of Parliament and devolving a framework for educating the legal profession about human rights law throughout the legal system.

As far as the human rights of people with a disability are concerned, the Council sees a Bill of Rights providing people with a disability with another means of realising their basic human rights and offering protection against human rights abuse.

The Council looks forward to making further submissions on this important issue with members of the Standing Committee on law and justice.