

A UN CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITY

Implications for people from a NESB with disability



NATIONAL ETHNIC DISABILITY ALLIANCE

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NEDA

NEDA is the national consumer-based peak body for people from a non-English speaking background (NESB) with disability, their families and carers.

NEDA follows the Australian Department of Immigration and Multicultural Affairs in its definition of NESB. That is, NESB refers to a person who is either:

- born overseas and whose language or cultural is not English or Anglo Celtic / Saxon
- born here in Australia and the first language or culture of at least one parent is not English or Anglo Celtic / Saxon
- born in Australia with a linguistic or cultural background other than English or Anglo Celtic / Saxon who wishes to be identified as such.

This definition encompasses second and possibly third generations of NESB people.

The overarching aim of NEDA is to advocate at a federal level, for the rights and interests of people from a NESB with disability, their families and carers. All activities undertaken by NEDA include strong consumer involvement and are based on the following Objectives:

1. represent the rights and interests of people from a NESB with disability, their families and carers;
2. advocate on issues impacting on people from a NESB with disability, their families and carers;
3. work towards securing equitable outcomes for people from a NESB with disability, their families and carers; and
4. co-ordinate policy advice to the Federal government and relevant peak bodies on the impact of policy and legislation on people from a NESB with disability, their families and carers.

As a result of its unique cross-sector role (disability and multicultural affairs), NEDA aims to collaborate and work with a broad range of organisations to represent the interests of people from a NESB with disability. This includes working with:

- ethnic organizations, its peak body and services
- the disability sector and its peak bodies.

Due to its cross sector position, NEDA's role is to bring a disability perspective into ethnic issues, and an ethnic perspective into disability issues. NEDA works across all areas of disability and across all cultural and linguistic groups.

For more information, please visit NEDA's website: www.neda.org.au.

INTRODUCTION

Approximately 19% (3.6 million people) of Australians have a disability¹. At present, there are no statistics available about the incidence of disability within NESB communities. However, using data from the Australian Bureau of Statistics (ABS) and the Department of Family and Community Services (FaCS), NEDA estimates that 4.6% of Australians (902,082 people) are people from a NESB with disability (see Appendix 1).

Of major concern in Australia, are the numerous documented instances of widespread abuse of people with disability,² the inhuman way in which many people with disability are forced to live³ and the myriad forms of discriminatory practices that occur against people with disability within our society. This situation points to a lack of adequate protection for the rights of people with disability in Australia. Given that Australia does not currently have a Bill of Rights, the question of whether an international convention could potentially provide protection for the rights of people with disability is an important one that will be addressed in this paper.

International Human Rights Conventions

Human rights treaties are at the core of the international system for the promotion and protection of human rights and

...represent what is right and proper in any society, and provides legitimacy to those within any given country to fight for and protect the rights of individuals where state policies, programs and /or conventional behaviour contravene the statements of rights... A UN convention states that certain ideals and values transcend cultural difference and socio-economic or political context⁴.

Whilst this international system is intended to apply to every child, woman and man (over six billion people), the reality is that human rights violations occur at an extraordinary rate. Problems with the current UN treaty system include:

- while there are **high** ratification rates, there are **low** implementation rates;
- **poor** resourcing to monitor the implementation of treaties;
- treaty standards are often aimed at the individual level and do not deal with systemic issues; and
- states' interests continuing to override global human rights interests.

¹ Australian Bureau of Statistics, *Disability, Ageing and Carers*, 1998.

² Community Services Commission, *Young Deaths – Children with Disabilities in Care. A Review of the Deaths of Eight Children and Young People at the Mannix Children's Centre*, 2002; Community Services Commission, *Disability, Death and the Responsibility of Care. A Review of the Characteristics of 211 People with disability who Died in Care Between 1991 and 1998 in NSW*, 2002; Frohmader, C, *Women with Disabilities and Violence. A Report of the National Women with Disabilities Australia (WWDA) Violence Workshop*, 1999; Brady, S, and Grover, S, *The Sterilisation of Girls and Young Women in Australia – A Legal, Medical and Social Context. A Report Commissioned by the Federal Disability Discrimination Commissioner, Human Rights Equal Opportunity Commission*, 1997.

³ Stewart, DG, "Institutional Culture and People with Intellectual Disabilities: Experiences of an Inquirer", in Hauritz, M, Sampford, C, and Blencowe, S (eds), *Justice for People with disability: Legal and Institutional Issues*, 1998, p. 185; Chenoweth, L, "Closing the Doors: Insights and Reflections on Deinstitutionalisation" (2000) 17 *Law in Context* 77; Community Services Commission, *Unmet Need – Submission to the Standing Committee Inquiry into Residential and Support Services for People with a Disability*, 2002; Community Services Commission, *Food for Thought ... A Report Card on Nutritional and Mealtime Practices in Accommodation Services for People with disability – 1997 to 2002*, 2002.

⁴ Manderson, L. Disability and human rights: political and philosophical issues. Paper delivered at the Disability Studies and Research Institute conference "Towards a comprehensive and integral international convention to promote and protect the rights of persons with disabilities", Sydney, 21 February, 2003, p. 4.

A Disability Convention – is one needed?

What are the human rights of people with disability? Are the claims and set of human rights required by people with disability different in any way to those of people 'without disability'? For a full discussion, see Appendix 2.

NEDA argues that for people with disability the current international framework poses major problems. Firstly, there is an implicit assumption that everyone has access to the opportunity to provide for themselves⁵. Secondly, the framework fails to acknowledge that, for people with disability, social disadvantage has been created by society in the first place (e.g. poor educational opportunities, restricted opportunities for employment, transport and access problems) and that, without the removal of the barriers that have been imposed, it will be difficult to actualise economic, social and cultural rights.

What is required is governmental assistance to live 'with dignity', action to remove barriers, and systemic policy changes to alter future service delivery and community attitudes. NEDA supports the four-dimensional model of rights⁶ proposed by Sampford (which consist of three rights – negative rights, protective rights and positive rights – and a psychological dimension emphasising that the choice to act, or not, must be meaningful and there must be a set of realistic alternatives to choose from)⁷. This multidimensional set of rights creates a right to a 'scheme of social arrangements' that will provide for all individuals within the society and that different societies may have different social arrangements.

In relation to the development of a Disability Convention, there are also a number of specific NESB-disability issues that require specific mention. Whilst ethnicity is captured in current international conventions, disability is not (apart from the Convention on the Rights of the Child) and therefore, the rights for people from NESB with disability are not adequately protected.

Furthermore, as human rights are protected through the principles of equality and non-discrimination, the problem with the current major human rights instruments is that non-discrimination in relation to disability needs to be inferred from the preamble 'all members of the human family' which has only provides a weak mechanism for protection of human rights of people with disability, especially as ethnicity, class, gender, religious background etc are all specifically named.

There is also the issue of how a Convention can cope with the intersection of ethnicity and disability in terms of discrimination that is both disability and racially motivated – for instance, there is a UN convention against all forms of racial discrimination but disability is not mentioned.

However, despite these challenges, a Disability Convention that could cover both ethnicity and disability could provide a good stop-gap to cover people from NESB with disability.

The Convention could also be a useful repository – a single document that safeguards the rights of people with disability and ethnicity in a concrete way without having to infer and extrapolate rights and protection from other instruments.

⁵ Charlesworth, H, "Taking the Gender of Rights Seriously", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 31; Gaze, B, "Some Aspects of Equality Rights: Theory and Practice", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 189.

⁶ Charles Sampford's four dimensions of rights: 1. Negative rights – statement of actions (moral entitlements) that individuals ought to be able to perform without any interference from the state; 2. Protective rights – rights to non-interference from citizens and rights to protection from such interference (positive duty of the state to provide protection and prevent interference); 3. Positive rights – rights to resources in order to have real choices and be able to act upon choices made; 4. Psychological dimension – the choice to act (or not) is meaningful and there are a set of realistic alternatives to choose from. Sampford, C, "The Four Dimensions of Rights", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 50 at 53-54.

⁷ For example, in order to be able to exercise choice, other skills and knowledge are required, demanding rights to education etc. Studies in the United States have found that only a minority of people with disability exercise choice in relation to where and with whom they work. Bellamy, GT, "The Braid of Progress: People with disability and Modern Societies", in Hauritz, M, Sampford, C, and Blencowe, S (eds), *Justice for People with disability: Legal and Institutional Issues*, 1998, p. 2.

This Submission

This paper will examine the current international framework and analyse Australian law, in particular its constitutional law, in order to answer the questions posed to NEDA:

1. To what extent do you consider that the current international framework for the protection of human rights sufficiently provides protection for the rights of people with disability?
2. If you consider that the current international framework does not provide sufficient protection for the rights of people with disability because these are matters not adequately covered in existing international instruments, please specify these.
3. If you consider that there are problems with the reporting and monitoring processes contained in the current international framework for the protection of human rights of people with disability, please specify these.

This paper will canvas our reasons for supporting such a convention and also outline the current problems with the UN treaty system and Australia's current failure to protect the rights of people with disability. An breakdown of related current Australian law with regard to the protection of rights of people with disability will precede our response to these three questions.

This paper will make particular mention of the issues affecting people from a NESB with disability who are at increased risk of having our rights disregarded as we often fall through the gaps of current protection mechanisms aimed at preventing discrimination on the basis of disability or ethnicity.

A Convention Needs to Work for all People with Disability

FACT: People from a NESB with disability experience discrimination based on disability and ethnicity.

FACT: Issues of ethnicity and disability are interdependent and one cannot be valued over the other or even separated out.

FACT: People from a NESB with disability experience multiple layers of discrimination and it is difficult to separate the different forms of discrimination experienced, especially given that discrimination can take on very subtle forms.

FACT: A Disability Convention must reflect the cultural diversity that exists in the world if it is to have any use or impact on people with disability from diverse backgrounds.

FACT: If cultural diversity is not incorporated into this Convention right from the beginning of the process, then people with disability from culturally diverse backgrounds will at best only receive partial protection from the Convention.

AUSTRALIAN LEGISLATION

Discrimination Legislation

For people with disability few statutes exist at either Commonwealth⁸ or State⁹ level to effectively protect human rights. In the absence of complementary express human rights provisions in the Constitution, this absence of statutory protection is of concern. The advantage of statutory law is that it can deal with conduct, and establish rights and obligations, between private individuals¹⁰.

Human Rights & Equal Opportunity Act

The *Human Rights and Equal Opportunity Act* 1986 promotes and protects the anti-discrimination acts and monitors compliance with the *International Covenant of Civil and Political Rights* in accordance with the *Optional Protocol*. It has been described by Sir Anthony Mason as the most comprehensive legislative protection of human rights in Australia¹¹. However, recent findings about the operation of Human Rights and Equal Opportunity Commission (HREOC) either bring this praise into question, or alternatively, it highlights that there is very little else to compare it to, and this is the best that we have to offer.

A recent analysis of the number of applications lodged with HREOC by people with disability indicates that rates have been falling since 1995¹². The same study also revealed that levels of funding to HREOC have also decreased¹³. Barriers that inhibit the lodgment of applications and decreased levels of funding mean that the operations and objectives of HREOC are being compromised and the rights of people with disability will not be protected. Another significant problem with decisions made by the tribunal is that decisions are difficult to enforce¹⁴. Williams suggests that the decision in *Brandy* highlights the difficulties facing the Commonwealth in finding informal, speedy, and cost-effective means of resolving human rights complaints¹⁵.

Disability Services Act

The other major piece of disability rights legislation is the *Disability Services Act* (1986). This Act has been severely criticised for its primary focus on funding mechanisms for service providers rather than the implementation of legal, social justice or human rights policies¹⁶. It has also been criticised for the large disparity between the objectives of the Act and the services the Act delivers¹⁷.

Some commentators have argued that as the established goals and aspirational principles which support a participatory model of people with disability in society are incorporated within this Act, these principles should be used to support a rights-approach to services rather than 'types of

⁸ *Human Rights and Equal Opportunity Act* 1986; *Disability Services Act* 1986; *Disability Discrimination Act* 1992

⁹ As an example, in NSW relevant legislation includes: *Disability Service Act* 1993; *Anti-Discrimination Act* 1977; *Guardianship Act* 1987; *Community Services (Complaints, Reviews and Monitoring) Act* 1993.

¹⁰ Williams, G, *Human Rights Under the Australian Constitution*, 2002, p. 10.

¹¹ Mason, A, "The Role of the Judiciary in the Development of Human Rights in Australian Law", in Kinley, D (ed) *Human Rights in Australian Law*, 1998, p. 26; cf Handley, P, "'Caught Between a Rock and a Hard Place': Anti-discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act", (2002) 36 *Australian Journal of Political Science* 515.

¹² Handley, above.

¹³ *Ibid.*

¹⁴ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹⁵ Williams, G, *Human Rights Under the Australian Constitution*, 2002, p. 204.

¹⁶ Rose, AD, "Australian Law Reform Commission Review of the Disability Services Act 1986 (Cth)", in Hauritz, M, Sampford, C, and Blencowe, S (eds), *Justice for People with disability: Legal and Institutional Issues*, 1998, p. 85.

¹⁷ *Ibid.*

funded services' to be provided¹⁸. This could also lead to improved definitions of reasonable expectations for assistance available to service providers (both public and private)¹⁹.

Disability Discrimination Act

The most significant of the rights-oriented legislation for people with disability is the *Disability Discrimination Act 1992 (DDA)*²⁰. This Act has been widely criticised for its complaints driven framework and its focus on remedies to individuals rather than systemic solutions²¹. Furthermore, it has been criticised for its inability to achieve change and its inaccessibility for many people with disability: people with disability are often unaware of the Act and what it means for them; people with disability may not have the financial or social support resources to follow this course of action; there is a failure to accommodate persons that may be in a position of dependency on the discriminator; and, the emphasis on conciliation ignores the inequality of bargaining powers on the part of people with disability²².

This Act has been criticised for its failure to deliver any significant protection to rights beyond the provision of a legal remedy for people who have been discriminated against because of their disability, either directly or indirectly. Recent activation of other powers within the Act (the development of Disability Standards which have the force of law)²³ indicates, however, that processes to implement systemic change, and removal of some barriers within society, are finally being realised, albeit slowly²⁴.

Racial Discrimination Act

The *Racial Discrimination Act 1975 (RDA)* was the first piece of anti-discrimination legislation enacted by the Commonwealth government. The RDA makes racial discrimination unlawful in all areas of public life and it gives rights to equality before the law to people of all races, national and ethnic origins – this includes people with disability.

The RDA is a very complex piece of legislation. Consultations conducted by HEREOC indicate that many people do not have a good grasp of the contents of the Act and anecdotal evidence suggests that people from a NESB with disability have not made use of the RDA.

Much like the DDA, the RDA also encompasses an individual complaints based model, though there are allowances for representative complaints. This means that the act has little capacity to deal with systemic racial and disability discrimination.

Unfortunately, legislation such as the DDA and RDA, like many other forms of Australian legislation, are unable to cope with the disability-ethnicity intersection.

¹⁸ Bellamy, GT, "The Braid of Progress: People with disability and Modern Societies", Hauritz, M, Sampford, C, and Blencowe, S (eds), *Justice for People with disability: Legal and Institutional Issues*, 1998, p. 2; Rose, AD, "Australian Law Reform Commission Review of the Disability Services Act 1986 (Cth)", in Hauritz, M, Sampford, C, and Blencowe, S (eds), *Justice for People with disability: Legal and Institutional Issues*, 1998, p. 85.

¹⁹ Bellamy, above, p. 2.

²⁰ For an excellent overview of antidiscrimination laws in Australia see Bailey, P, and Devereux, A, "The Operation of Anti-discrimination Laws in Australia", in Kinley, D (ed) *Human Rights in Australian Law*, 1998, p. 292.

²¹ Jones, M, and Basser Marks, LA, "The Limitations on the Use of Law to Promote Rights: An Assessment of the Disability Discrimination Act 1992 (Cth)", in Hauritz, M, Sampford, C, and Blencowe, S (eds), *Justice for People with disability: Legal and Institutional Issues*, 1998, p. 60; Handley, P, "Caught Between a Rock and a Hard Place: Anti-discrimination Legislation in the Liberal State and the Fate of the Australian Disability Discrimination Act", (2002) 36 *Australian Journal of Political Science* 515.

²² Jones and Basser Marks, above, p. 60.

²³ s31 *Disability Discrimination Act 1992 (Cth)* - Disability Standards can be made by the Commonwealth Attorney General in relation to employment, education, accommodation, public transport and the administration of Commonwealth laws and programs.

²⁴ Disability Standards for Accessible Public Transport were approved by Parliament on 23 October, 2002. Education and Premises Standards are still in the process of development.

RESPONSE TO QUESTIONS

Question 1:

To what extent do you consider that the current international framework for the protection of human rights sufficiently provides protection for the rights of people with disability?

An international convention is able to offer protection for the human rights of individuals in the following ways:

1. by implementation of a convention which has been ratified by the creation of statute law
2. by providing access to international complaints and monitoring processes if such processes are associated with the convention (e.g. opportunity to make a complaint to the Human Rights Committee if rights under the International Covenant of Civil and Political Rights (ICCPR) have been abrogated)
3. if the State is a signatory to that convention, then that convention can have an indirect impact on administrative law by the creation of a legitimate expectation that principles expounded in that convention will be upheld
4. if the State is a signatory to that convention, then that convention can shape the common law and principles of statutory interpretation.

Although the Commonwealth Parliament does not have specific legislative powers with respect to human rights under the Constitution, it does have power to make laws with respect to external affairs (section 51 (xxix)) which includes implementing treaties and international conventions ratified by Australia²⁵.

While the High Court has stated that treaties do not have force of law unless given effect by statute,²⁶ international treaties are increasingly being given informal status in Australian Courts by three mechanisms²⁷. These include:

1. the opportunity to make a complaint to the Human Rights Committee if rights under the International Covenant on Civil and Political Rights have been abrogated²⁸;
2. the indirect impact on administrative law by the creation of a legitimate expectation that principles expounded in treaties will be upheld; and
3. the shaping of the common law and principles of statutory and constitutional interpretation.

All three mechanisms have important implications for the protection of the human rights of people with disability.

Current International Treaties

There is currently no binding international human rights instrument that explicitly protects the human rights of people with disability²⁹. Apart from the Convention on the Rights of the Child that contains an article on the rights of disabled children (Article 23), none specifically mention

²⁵ *Tasmanian Dam Case* (1983) 158 CLR 1

²⁶ *Kioa v West* (1985) 159 CLR 550; *Dietrich v the Queen* (1992) 177 CLR 292.

²⁷ Williams, G, *Human Rights Under the Australian Constitution*, 2002; p. 18.

²⁸ Article 5(2)(b) of the *Optional Protocol to the International Covenant of Civil and Political Rights*.

²⁹ *Ibid.*

disability. Interestingly, although people with disability are the largest minority group in the world, they are not covered by the United Nations concept of minority³⁰.

Additionally, although people with disability are not specifically mentioned in the ICCPR, it is accepted that they are covered by reference in the Preamble to “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family...” and the references in Articles 2 and 26 that no distinction or discrimination shall be made on any ground such as “birth or other status” (emphasis added). Equivalent reference in International Covenant of Economic, Social and Cultural Rights (ICESCR) is Article 2(1).

A current alternative is the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*³¹. While these Rules do not have legal effect,³² they do imply a strong moral and political commitment for States to take action, and, if applied by a sufficient number of States with the intention of respecting a rule in international law, they can attain binding character and become international customary rules³³.

Concern has been expressed that the 22 rules articulated in this instrument have a strong bias towards the economic, social and cultural rights and neglect political and civil rights that are needed to address serious human rights violations such as sterilisation and cruel and degrading treatment of people with disability³⁴.

Notwithstanding that there is currently no binding international human rights instrument that explicitly protects the human rights of people with disability,³⁵ the main human rights treaties have generally been underused as a means to assist with the protection and advancement of the rights of people with disability³⁶.

Recourse to the Human Rights Committee, once all domestic remedies have been exhausted, as a means to apply pressure on the Government to act, is a viable option and one which has already had a positive result³⁷. Although a finding of the Human Rights Committee is not enforceable, it can provide guidance to both the Parliament and the judiciary. Specifically, with regard to some of the forms of abuse being reported by people with disability, breach of the following articles of the *International Covenant of Civil and Political Rights* could lead to an application to the Human Rights Committee:

- breach of Article 6³⁸ – practice of letting children with disabilities die at birth, practice of withholding life-saving treatment from a newborn child with disability, or, neglect with indifference or lack of prioritisation of life of children with disabilities (e.g. malnutrition and starvation in institutional settings);
- breach of Article 7³⁹ – exceptionally high rates of physical and sexual abuse of people with disability, abuse and neglect in institutional settings, and inhuman and degrading treatment experienced in institutional, residential, school and home settings;

³⁰ Degener, T, “Disabled Persons and Human Rights: The Legal Framework”, in Degener, T and Koster-Dreese, Y (eds) *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, 1995, p. 9.

³¹ Adopted and proclaimed by General Assembly resolution 48/96 of 20 December 1993.

³² Quinn, G, and Degener, T, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, p. 34.

³³ *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, paragraph 14.

³⁴ Degener, T, “Disabled Persons and Human Rights: The Legal Framework”, in Degener, T and Koster-Dreese, Y (eds) *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, 1995, p. 9

³⁵ *Ibid*

³⁶ Quinn, G, and Degener, T, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, p. 2.

³⁷ The Toonen Case, see Williams, G, *Human Rights Under the Australian Constitution*, 2002, p. 19-20.

³⁸ ICCPR Article 6(1). Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

³⁹ ICCPR Article 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

- breach of Articles 23⁴⁰ and 24⁴¹ – sterilisation of young girls and women with intellectual disabilities; and
- breach of Article 22⁴² – difficulties accessing public and private places and spaces.

In summary, while recourse could be had to the main human rights treaties, if the convention that is currently being drafted⁴³ is realised, this would provide a great single repository and clear statement of the norms and rights of people with disability.

Use of International Treaties by the High Court of Australia

The decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 that a treaty signed and ratified by Australia ‘might give rise to a legitimate expectation that decisions will conform to the terms and principles of a treaty’ is of particular relevance for people with disability due to the impact of reliance on services and support by a variety of tribunals and government departments (e.g. decisions regarding welfare support, accommodation services, guardianship services, education).

As ‘the capacity of the administrative arm of government to affect the human rights of individuals is great’,⁴⁴ the possibility that a large number of administrative decisions impacting on the lives of people with disability, in particular for those with severe disabilities, will raise legitimate expectations that human principles will be adhered to is great.

International law has had a significant influence in the development of Australian common law. In *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42, in the context of considering native title and the consequences of Australia ratifying the Optional Protocol to the International Covenant of Civil and Political Rights, Brennan J (Mason CJ and McHugh J agreeing) stated:

The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule ...

In so many respects, this line of reasoning could be used to great advantage for the protection of rights of people with disability – references to international standards, universal human rights, unjust discrimination and fundamental values.

However, since *Mabo(2)* there has been more cautious interpretation and use of international law. For example, in *Dietrich v The Queen* (1992) 177 CLR 292 it was held that international law is a

⁴⁰ ICCPR Article 23 (2). The right of men and women of marriageable age to marry and to found a family shall be recognized.

⁴¹ ICCPR Article 24(1). Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

⁴² Article 22: (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests; (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals, or the protection of the rights and freedoms of others....”

⁴³ *Ad Hoc Committee On A Comprehensive And Integral International Convention On The Protection And Promotion Of The Rights And Dignity Of Persons With Disabilities*, United Nations meeting in New York, July-August, 2002.

⁴⁴ McMillan, J, and Williams, Neil, “Administrative Law and Human Rights”, in Kinley, D (ed) *Human Rights in Australian Law*, 1998, p. 63.

legitimate source only when the common law is ambiguous or uncertain. The finding in this case that the High Court did not extend international norms to support the right of an accused to counsel at public expense is of serious concern to people with disability. Of necessity, due to the fact that systemic changes are required to secure protection of the human rights of people with disability, almost any finding will have a large financial ramification.

If the financial ramification of the enormous cost of services to be funded to guarantee human rights protection is going to impede the delivery of decisions in favour of people with disability, the notion of the High Court as independent arbiter is seriously questioned. Kirby J, however, has continued to acknowledge that international law is a legitimate and important influence on the development of constitutional and common law⁴⁵. In *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 148 he stated 'international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights.'

International law has also been receiving recognition as playing an important role in the interpretation of statutes by extending s15AB(2) *Acts Interpretation Act* 1901⁴⁶. Courts have developed this line of reasoning to find that in cases of ambiguity, Commonwealth statutes should be constructed such that they are in accordance with Australian obligations under international treaty⁴⁷.

Overall, these developments indicate that development in the international sphere of human rights can impact on constitutional interpretation of human rights by placing the process of rights development in Australia within a broader legal and social framework⁴⁸.

Judicial Activism – Now You See It, Now You Don't

Some legal commentators have spoken out against the judicial activism that holds much promise for people with disability. For example, Tucker has criticised the High Court for incorporating international norms and identifying implied rights in judgments⁴⁹. In particular, Tucker argues that even if judges feel the need to act politically to address serious issues that are being ignored politically (eg. *Mabo v Queensland (No 2)* (1992) 175 CLR 1) they should defer such issues to legislators and refrain from making policy judgments as 'legislators are generally better placed than judges to make informed policy judgments and they enjoy a capacity to mobilise political support that judges lack'⁵⁰.

However, as stated previously, the problem here is of legislators only acting on behalf of the majority or an attempt to gain majority votes, hence minority, marginalised and disadvantaged groups will never have their needs protected or actualised in these circumstances.⁵¹ It is interesting to note that the examples used by Tucker of cases where judges had forged ahead were instances where there had been a long history of legislators not intervening for minority groups (eg. the *Mabo (No 2)* decision) which illustrates the point.

For people with disability, judicial activism is applauded and encouraged rather than criticised. Another development in this area which could provide protection to the human rights of people with disability is the approach expounded by Kirby J in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 147 '[w]here the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which

⁴⁵ In *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 and *Kartinyeri v Commonwealth* (1998) 152 ALR 540.

⁴⁶ Williams, G, *Human Rights Under the Australian Constitution*, 2002; p. 22.

⁴⁷ *Ibid*, p. 22. Citing *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, *Kartinyeri v Commonwealth* (1998) 152 ALR 540 in support.

⁴⁸ *Ibid*.

⁴⁹ Tucker, DFB, "Natural Law or Common Law: Human Rights in Australia", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 120.

⁵⁰ *Ibid* at 121.

⁵¹ Kirby, M, "Judicial Activism", in *Through the World's Eye*, 2000, Chapter 9, p. 93.

would involve a departure from such rights⁵². This would allow recourse to fundamental rights as expressed in the various United Nations conventions and the Universal Declaration of Human Rights, and those found in common law.

This development is significant when combined with the method of constitutional interpretation as originally expounded by O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 367-368:

...where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.

This approach could result in an expansive reading of the external affairs power in s51(xxix). The increasing influence of international developments in the deliberations of the High Court,⁵³ together with the approaches expounded by Kirby J in *Newcrest* and O'Connor J in *Jumbunna* bodes well that the recent international focus and potential new convention on disability⁵⁴ will have important repercussions for people with disability in Australia. On the other hand, for an increasingly conservative High Court adopting a narrower approach, a new UN convention regarding disability would be a necessary precursor to any further development in case law.

A Disability Convention

Quinn and Degener, after an extensive review of the current United Nations human rights instruments with respect to disability, argue for the adoption of a specific convention on the rights of people with disability in order to underpin the existing instruments. They argue a new convention would clearly stipulate obligations in the area of disability to States and also encapsulate a coherent set of norms in one document for people with disability rather than the norms being dispersed through a multitude of instruments⁵⁵. NEDA supports these arguments.

⁵² Murphy J and Gaudron J have also adopted similar approaches (see Williams, G, *Human Rights Under the Australian Constitution*, 2002, p. 70).

⁵³ Williams, G, *Human Rights Under the Australian Constitution*, 2002, p. 233.

⁵⁴ *Ad Hoc Committee On A Comprehensive And Integral International Convention On The Protection And Promotion Of The Rights And Dignity Of Persons With Disabilities*, United Nations meeting in New York, July-August, 2002.

⁵⁵ Quinn, G, and Degener, T, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, p. 293-297.

Question 2:

If you consider the current international framework does not provide sufficient protection for the rights of people with disability because these are matters not adequately covered in existing international instruments, please specify these.

As stated above, the current framework does not adequately protect the rights of people with disability for a number of reasons, including:

- disability is not specifically stated as a reason for non-discrimination, and therefore, recourse to protection mechanisms provided by international conventions is weak;
- there is currently a lack of acknowledgement that social disadvantage has been created by society and governments in the first place (e.g. poor educational opportunities, restricted opportunities for employment, transport and access problems) and that, without the removal of the barriers (by governments) that have been imposed, it will be difficult to actualise economic, social and cultural rights;
- current treaties focus on formal individual discrimination practices and do not address systemic issues;
- conventions need to be broader than non-discrimination in order to realize the human rights of all people, including the rights of people with disability, and that these rights need to be more than the realisation of a passive existence – they need to include rights to ‘the goods and benefits deemed essential for individual wellbeing, dignity and fulfillment’⁵⁶.

Some of the problems related to the inability of treaties or domestic law to achieve substantial change to the protection of human rights for people with disabilities often stems from the term “equality” and what it means in theory and in practice. There are at least different ways of defining equality: a focus on the need for even-handedness by insistence on strict equality; a focus on equality of opportunity; and, a focus on equality of results⁵⁷.

When examining equality, Gaze argues that the question is fraught with problems as there are no accepted ways of assessing it or measuring it, and then there are the differences in preference for equality of opportunity or equality of results. To overcome this, Gaze suggests it is best to examine the concepts of inequality, discrimination and disadvantage together.⁵⁸ For example, discrimination is legally defined as between individuals, but disadvantage is a social construct requiring systemic and not individual responses.

Unless context is accommodated in discourses in equality, social disadvantage will remain a serious and pervasive problem, and legal rights and their remedies will be meaningless⁵⁹. As an example, an analysis of human rights decisions on disability in Canada, where there is a constitutional guarantee of equality without discrimination to persons with mental or physical disabilities,⁶⁰ revealed that there are serious limitations of achieving inclusion of people with disabilities into society through the human rights process⁶¹.

⁵⁶ Henkin, L, *The Age of Rights*, 1990.

⁵⁷ Quinn, G, and Degener, T, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, p. 16-18. The model of ‘equality of opportunity’ is the preferred model in the international disability arena. This is evidenced by the United Nations instrument adopted in 1993 *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*. Quinn and Degener suggest that this model calls for several forms of governmental action: tackling structural exclusion; improved education and training to maximise participation in socially responsible and productive roles in civic society; tackling discrimination; and tackling wider societal attitudes.

⁵⁸ Gaze, B, “Some Aspects of Equality Rights: Theory and Practice”, in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 189.

⁵⁹ Ibid.

⁶⁰ *Canadian Charter of rights and Freedoms*, section 15, Part I of the *Constitution Act* 1982.

⁶¹ Mosoff, J, “Is the Human Rights Paradigm “Able” to Include Disability: Who’s In? Who Wins? What? Why?” (2000) 26 *Queens Law Journal* 225.

Of serious concern, was the lack of recourse to this legal avenue by people with severe disabilities, who are the most disadvantaged and vulnerable of people in society and open to the most serious human rights violations. Furthermore, it was found that decision-makers were much more likely to order individualised remedies (generally monetary compensation for discriminatory practices rather than correction of treatment received) rather than remedies requiring systemic responses⁶². The latter would have a more significant and meaningful impact in addressing long-term social change.

While there is currently no binding international human rights instrument which explicitly protects the human rights of people with disability,⁶³ it could be argued that the main human rights treaties have generally been underused as a means to assist with the protection and advancement of the rights of people with disability⁶⁴. But this is a tedious, drawn out case-by-case process that relies on an enlightened activist judiciary. With the current vogue for Capital C conservative appointments to the High Court of Australia, 'implied rights' may take a long time to provide the necessary protection of the rights of people with disability.

In summary, while recourse could be had to the main human rights treaties, if the convention that is currently being drafted⁶⁵ is realised, this would provide a great single repository and clear statement of the norms and rights of people with disability. It would make it a lot easier for courts to recognize the rights of people with disability.

The Convention, Legislation & Rights

As mentioned above, even a specific convention and domestic legislation would be insufficient to fully protect the rights of people with disability. Due to a whole range of systemic factors, people from a NESB with disability are not able to have their rights realised as per reasons listed below. These factors need to be addressed for human rights to be promoted and protected in day-to-day life.

Low take-up

Generally, people from a NESB with disability are reluctant to use the complaints based legislation due to:

- the complexity of the process involved – high degree of English literacy and comprehension of the Australian legal and service system is required;
- fear of reprisal – a very real fear for those who originally come from countries under harsh dictatorships or no concept of the 'rule of law';
- the associated costs – by and large, people from a NESB with disability are poorer than their Anglo-Australian counterparts;
- the adversarial nature of making complaints; and
- the burden of proof that rests on the complainant.

Information

Information regarding the various processes involved with the legislation mentioned above are not accessible to people from a NESB with disability. The primary reason for this is that most of the information is produced in English. Unfortunately, many of the legislative processes are not known to people from a NESB with disability.

⁶² Ibid.

⁶³ Degener, T, "Disabled Persons and Human Rights: The Legal Framework", in Degener, T and Koster-Dreese, Y (eds) *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, 1995, p. 9.

⁶⁴ Quinn, G, and Degener, T, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, p. 2.

⁶⁵ *Ad Hoc Committee On A Comprehensive And Integral International Convention On The Protection And Promotion Of The Rights And Dignity Of Persons With Disabilities*, United Nations meeting in New York, July-August, 2002.

Also, a certain degree of English literacy is needed to understand the workings of these Acts. NEDA's constituents come from non-English speaking backgrounds and developing English language skills takes time. Government funding in terms of English classes is extremely low and most of the time, these classes are not accessible to people with disability.

Comprehension

Whilst English literacy can be an issue for people from a NESB, there is also an issue with comprehension – of the legislation, of rights, the Australian service system etc. Information provided to the community about these issues is not accessible (i.e. either the information is in English only or in formats not accessible to people with disability or is written in complex formats that are not accessible to anybody). To be able to use the legislation effectively, an individual must have at least a decent comprehension of Australian law, policies and services.

In addition, an individual must also have an understanding of rights. For many people with disability, and especially for people from a NESB, the idea of rights is still very new.

NESB-Disability Intersection

People from a NESB with disability experience discrimination based on both disability and ethnicity. It has been NEDA's experience that issues of ethnicity and disability are interdependent and one cannot be valued over the other or even separated out.

Given that people from a NESB with disability experience multiple layers of discrimination, it becomes difficult to separate the different forms of discrimination experienced, especially given that discrimination can take on very subtle forms.

Example:

A person with disability working in a Sheltered Workshop is told to go into the Manager's Office. The Manager closes the door and then calls the person a 'crippled wog!'

Has the person been discriminated against on the basis of their disability or their ethnicity?

Question 3:

If you consider that there are problems with the reporting and monitoring processes contained in the current international framework for the protection of human rights of people with disability, please specify these.

Some commentators have criticised the efficacy of the United Nations as a system to promote and protect human rights by criticising its ability to monitor and report infringements⁶⁶. Indeed, given the situation for people with disability in Australia, it was of great surprise to find that Australia was singled out as ‘an outstanding example of good practice’ in its third periodic report to the United Nations under the *International Covenant of Civil and Political Rights* with regard to people with disability⁶⁷.

Problems with the UN treaty system include:⁶⁸

- The independent experts to monitor the treaties vary in number of members per committee and there is an issue with regard to the quality of the reports they receive (no uniformity requirements with regard to report format and great delays in reporting) and dealing with the reports once they are received.
- Questions with regard to the membership of these treaty monitoring committees – many are not independent (more than 50% are employed by their governments) – and the manner in which they work – part-time and very poorly paid.
- It is possible to list reservations to treaties which can render them meaningless upon signing and ratification;
- With respect to treaties that allow individual communications, there are delays in dealing with these communications (sometimes up to 4 years).

With regard to the development of a Disability Convention, the expert committee should be comprised of people with disability. Also the monitoring mechanism needs to be strong enough to:

- ensure for greater compliance with the Convention;
- ensure implementation of measures and standards as set out in the convention;
- ensure realization of rights of people with disability to participate fully in society;
- allow for a standardised reporting format;
- allow for efficient processing mechanisms upon receipt of reports and individual complaints;
- allow for remedies to be provided when rights have been violated; and
- allow for effective mechanisms (including follow-up mechanisms) for intervention for non-compliant States.

⁶⁶ Bayefsky, AF, ‘The UN and the International Protection of Human Rights’, in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 74.

⁶⁷ Quinn, G, and Degener, T, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, p. 66-69.

⁶⁸ Charlesworth, H. The world order and Australia’s position. Paper delivered at the Disability Studies and Research Institute conference “Towards a comprehensive and integral international convention to promote and protect the rights of persons with disabilities”, Sydney, 21 February, 2003.

CLOSING

Legislation and conventions alone cannot improve our societies or guarantee human rights in practice; but it can provide a vital framework and structure to set us in the right direction. Laws are a vital component in broader mechanisms to redress the systemic inequalities and unfair discrimination that remain deeply embedded in social structures, practices, attitudes and environments⁶⁹.

NEDA supports the development of a United Nations convention on the rights of people with disability. However, we recognise that the development of this Convention alone will not resolve the numerous human rights issues facing people with disability due to the number of problems that exist within the treaty system, and the potential limited impact of the treaty system on domestic law and community attitudes.

NEDA believes we need a convention for the following reasons:

- a Disability Convention could cover both ethnicity and disability and provide a good stop-gap to cover the rights of people from a NESB with disability;
- the Convention could be a useful repository of rights – a single document that safeguards the rights of people with disability and ethnicity in a concrete way without having to infer and extrapolate rights and protection from other instruments;
- Australian domestic law is weak and there is currently insufficient protection of the human rights of people with disability through the Constitution;
- a convention would assist with the development of appropriate legislation;
- a convention could create international monitoring and complaints processes;
- a convention, by ratification, could have indirect impact on administrative law by the creation of a legitimate expectation that principles expounded in the convention will be upheld;
- a convention could shape the development of Australian common law;
- a convention would give status and visibility to disability as a human rights issue;
- a convention would help to build an international movement, especially as the majority of people with disability live in developing countries and there needs to be international support for global change;
- a convention would assist to focus aid programs to both prevent disability (malnutrition, war, unsafe work places etc) and assist with rights recognition to the maximum extent possible while recognizing resource levels of each country.

NEDA believes that a disability convention which reflects the cultural diversity that exists amongst all people with disability could in fact provide a very useful framework for ensuring that the rights of people from a NESB with disability are safeguarded.

NEDA argues for the need to ensure participation of people with disability in the development of a disability convention both at a national level (resources to assist NGO's to work with the Australian government to form a combined informed response) and at an international level (resources to assist disability NGO's to be represented at international disability meetings).

⁶⁹ Pahad, E. The need to adopt the UN convention: what can Australia learn from the South African experience? Opening address delivered at the Disability Studies and Research Institute conference "Towards a comprehensive and integral international convention to promote and protect the rights of persons with disabilities", Sydney, 21 February, 2003.

APPENDIX 1: NESB-Disability Data

Different Definitions

There is very limited data available about people from NESB with disability. When attempting to analyse what available data there is, the different definitions used when referring to 'NESB' create many problems.

Below are NEDA's calculations of people from NESB with disability missing out on Commonwealth funded disability services in Australia.

Language Other than English (LOTE) spoken at home - A Partial Definition of NESB

The Australian Bureau of Statistics (ABS) and most government departments, including the NSW Ageing and Disability Department (ADD), define NESB as a person who is either:

- born overseas in a non-English speaking country
- speaks a language other than English (LOTE) in the home.

NB: THIS DOES NOT INCLUDE 2nd GENERATION NESB.

The 1996 ABS statistics show that:

- 15.5% of the Australian population are people who speak a LOTE (language other than English) at home [**ABS, 1996 Census**].

From these figures, NEDA estimates that 15.5% of all people with a disability living in Australia speak a LOTE at home.

The 1998 statistics show that:

- 19% of the population in Australia has a disability [**ABS, 1998 *Disability, Ageing and Carers: Summary of Findings***].

Using this information, NEDA estimates that 2.9% of the population or 568,385 people in Australia have a disability and speak a LOTE⁷⁰.

The Department of Family and Community Services latest data suggests that:

- 6.2% of consumers of Commonwealth funded disability employment services speak a LOTE at home. [**Dept of Family and Community Services, Disability Services Census, 1998**].

**Thus, from the information provided above it can be concluded that:
2 out of 3 people who speak a LOTE at home with disability
miss out on receiving
Commonwealth funded disability employment services.**

⁷⁰ 19% x 19.3 million (2001 projected pop'n of Australia) = 3,667,000 people. 15.5% x 3,667,000 (people with disability in NSW) = 568,385 which = 2.9% x pop'n of Australia.

NESB - A Complete Definition

NEDA follows the Department of Immigration and Multicultural Affairs (DIMA) in its definition of NESB. That is, NESB refers to a person who is either:

- born overseas and whose language or culture is not English or Anglo-Celtic / Saxon
- born here in Australia and the first language or culture of at least one parent is not English or Anglo-Celtic / Saxon
- born in Australia with linguistic or cultural background other than English or Anglo-Celtic / Saxon who wish to be identified as such.

NB: THIS INCLUDES 2nd, AND POSSIBLY 3rd GENERATION NESB.

The ABS statistics show that:

- 41% of the population were either born overseas (English speaking + non-English speaking countries) or have one or both parents born overseas (English speaking + non-English speaking countries)
- 60% of those born overseas or with one or both parents born overseas come from a non-English speaking background [**ABS, 1996 Census**].

Using this information, NEDA estimates that 24.6% of the population of Australia are people from a NESB⁷¹. Thus, 24.6% of all people with a disability living in Australia are from a NESB.

As mentioned previously, 19% of the Australian population has a disability. Thus, NEDA estimates that 4.6% of the population or 902,082 people in Australia are from a NESB with a disability⁷².

Utilising the limited definition of LOTE (16.8% of population) and adding 7% to account for 2nd and 3rd generation NESB it can be concluded that:

**3 out of 4 people from a NESB with disability
miss out on receiving
Commonwealth funded disability employment services.**

⁷¹ 41% x 19.3 million (2001 projected pop'n of Australia) = 7,913,000. 60% x 7,913,000 = 4,747,800 which = 24.6% x pop'n of Australia.

⁷² 24.6% x 3,667,000 (people with disability in Australia) = 902,082 which = 4.6% x pop'n of Australia

APPENDIX 2: Human Rights Theories and Disability

What are the human rights of people with disability? Are the claims and set of human rights required by people with disability different in any way to those of people 'without disabilities'? This section will attempt to analyse some of the current theories of rights and their applicability to people with disability.

One framework of human rights theories compartmentalises rights into various stages,⁷³ suggesting that an evolutionary path exists, that a hierarchical order has been consented to, and the underlying norm is neutral and applicable to all.⁷⁴ In this model, traditional human rights, which have been readily accepted by most governments, are those termed and classified as 'negative (governmental non-interference) rights', or 'civil and political rights' or 'first generation rights'. Then, there are the newer rights claims, which have been met with more resistance, and are termed and classified as 'positive (access to resources, governmental action) rights', or 'social, economic and cultural rights' or 'second-generation rights'. And finally, there are the most recent additions which are termed and classified as 'rights to self-determination' or 'collective rights' or 'third-generation rights'.

For people with disability this framework poses major problems. Firstly, there is an implicit assumption that everyone has access to the opportunity to provide for themselves.⁷⁵ Secondly, the framework fails to acknowledge that, for people with disability, their social disadvantage has been created by society in the first place (eg. poor educational opportunities, restricted opportunities for employment, transport and access problems) and that, without the removal of the barriers that have been imposed, they could possibly never actualise their economic, social and cultural rights. These rights, therefore, become the major priority. In fact, a commitment to non-interference by the government is the opposite of what is needed, so to speak. What is required is governmental assistance to live 'with dignity', action to remove barriers, and systemic policy changes to change future service delivery and community attitudes. This focus on socio-economic rights being of primary importance for disadvantaged groups was acknowledged by Gareth Evans in his statement that socio-economic rights were 'the preconditions of more sophisticated rights. Freedom of conscience is of no use to a starving man'.⁷⁶ While this is not meant to deny the importance of civil and political rights (the converse problem could also be argued), it does highlight the problem of the current emphasis on civil and political rights and relegation of socio-economic rights, especially for people with disability and other disadvantaged groups.

Sampford outlines additional problems with this framework:

Where the pursuit of human aims requires the negative right of government non-interference and the positive right to resources which enable their pursuit,

⁷³ Williams, G, *Human Rights Under the Australian Constitution*, 2002; Sampford, C, "The Four Dimensions of Rights", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 50 at 51.

⁷⁴ Beth Gaze and Hilary Charlesworth argue that the underlying norm in traditional human rights debate is based on whiteness, maleness and privilege particular male life patterns. They both argue that the failure to recognise other social realities and issues will prevent improvement for disadvantaged groups. Charlesworth, H, "Taking the Gender of Rights Seriously", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 31; Gaze, B, "Some Aspects of Equality Rights: Theory and Practice", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 189.

⁷⁵ Charlesworth, H, "Taking the Gender of Rights Seriously", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 31; Gaze, B, "Some Aspects of Equality Rights: Theory and Practice", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 189.

⁷⁶ Evans G, "An Australian Bill of Rights" (1973) 45 *Australian Quarterly* 4, as cited in Sampford, C, "The Four Dimensions of Rights", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 50 at 53.

government non-interference alone does not secure a 'civil' or 'human' right for all the citizens in the community. It merely secures the right for all those who already possess the resources from some other source. This is not realistically a 'right' of all the citizens. Such a provision might be called a right of a class, group or individual. But if we consider the 'justice constituency' which the government is intended to serve, it is more appropriately called a 'privilege' of the few than a right of all the citizens. ... And where a negative right is more extensive than its associated positive right, the difference constitutes a privilege for those who can afford it.⁷⁷

In response, Sampford proposes a four-dimensional model of rights⁷⁸ which consist of three rights (negative rights, protective rights and positive rights) and a psychological dimension (emphasising that the choice to act – or not – must be meaningful, and there must be a set of realistic alternatives to choose from).⁷⁹ Sampford argues that the multidimensional set of rights creates a right to a 'scheme of social arrangements' that will provide for all individuals within the society and that different societies may have different social arrangements. This sets up the possibility for adaptations that correspond to cultural and financial differences in different countries, and that these may also evolve over time. Sampford acknowledges that while rights concerning the actions of others (eg. actions to be prohibited or guaranteed) are sometimes easier to define, the attempt to define the rights to a certain 'standard of existence', while seeming difficult at first, becomes easier when one accepts that human existence cannot be merely passive and that there are certain necessities for life.⁸⁰ Further, he emphasises that it is 'the scheme of social arrangements which secures human rights, not the law by itself'.⁸¹

These problems highlight the difference between the liberal conception of freedom which has dominated the rights debate (with a focus on the individual and freedom from non-interference) and the republican theory of human rights.⁸² Henkin argues that human rights are rights of all individuals in society, and they include claims to the goods and benefits deemed essential for individual wellbeing, dignity and fulfillment.⁸³ Furthermore, he states 'they are claims "as of right", not by appeal to grace, or charity or brotherhood, or love, they need not be earned or deserved' and with regard to 'economic and social benefits, society must act as insurer if individuals cannot provide them for themselves.'⁸⁴ This theory is in accordance with the social model of disability and also rejects the charity driven approach. Of particular importance is the emphasis on a claim upon society for economic and social benefits in a 'no-fault' scheme.

⁷⁷ Sampford, C, "The Four Dimensions of Rights", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 50 at 55.

⁷⁸ Charles Sampford's four dimensions of rights: 1. Negative rights – statement of actions (moral entitlements) that individuals ought to be able to perform without any interference from the state; 2. Protective rights – rights to non-interference from citizens and rights to protection from such interference (positive duty of the state to provide protection and prevent interference); 3. Positive rights – rights to resources in order to have real choices and be able to act upon choices made; 4. Psychological dimension – the choice to act (or not) is meaningful and there are a set of realistic alternatives to choose from. Sampford, C, "The Four Dimensions of Rights", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 50 at 53-54.

⁷⁹ For example, in order to be able to exercise choice, other skills and knowledge are required, demanding rights to education etc. Studies in the United States have found that only a minority of people with disability exercise choice in relation to where and with whom they work. Bellamy, GT, "The Braid of Progress: People with disability and Modern Societies", in Hauritz, M, Sampford, C, and Blencowe, S (eds), *Justice for People with disability: Legal and Institutional Issues*, 1998, p. 2.

⁸⁰ Sampford, C, "The Four Dimensions of Rights", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 50 at 60-61.

⁸¹ *Ibid* at 62.

⁸² Williams, G, *Human Rights Under the Australian Constitution*, 2002, p. 7-8.

⁸³ Henkin, L, *The Age of Rights*, 1990.

⁸⁴ *Ibid*.

Henkin further elaborates this theory by stating that individual human rights cannot be lightly sacrificed even for the good of the greater number, or even for the general good of all. This call is echoed by Frank Brennan who states that individual rights should only be limited 'in the public interest (which should not be confused with popular demand).'⁸⁵ These qualifications are of paramount importance for people with disability who are in the minority and require considerable societal financial resources and restructuring for fulfillment and protection of their rights (eg. re-education of teachers, provision of resources and support to public and private sectors, redesign of environment for public access). These demands could easily be rejected by 'the majority' as requiring too many sacrifices, too much money and not worthwhile enough for the effort.

A hierarchical model of rights is presented by Alice Tay.⁸⁶ In this model, a hierarchy is created by distinguishing essential human rights (that are absolute) from 'other human rights' which are earned, inherited or purchased (which are defeasible and may give way to more urgent claims). However, hierarchical models are rejected in modern human rights discourses⁸⁷. Rather, rights are seen as not being divisible and civil and political rights are seen to go hand-in-hand with social, economic and cultural rights.⁸⁸

One final point needs to be made here about how the emphasis on the rights debate for people with disability differs to those for people without disabilities, and this point is about dignity. 'Dignity' is something people 'without disabilities' take for granted and yet it underlies so much of a daily life routine that it is not thought about as a right. But for people with disability, for many reasons, living a life with dignity is difficult to achieve. For example, this can be due to the structure of the environment (eg. needing to be carried into inaccessible buildings), discriminatory attitudes in public, or inadequate assistance with self-care.

In summary, while there appears to be no easy schema that is readily accepted by all, and that meets all the needs of people with disability, the four dimensional model as proposed by Sampford based on republican theory would offer much to the realisation and protection of human rights for people with disability.⁸⁹

⁸⁵ Brennan F, *Legislating Liberty*, 1998, p. 2.

⁸⁶ Tay, AES, "Human Rights Problems: Moral, Political, Philosophical", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 23 at 28.

⁸⁷ Van Boven, T, "Distinguishing Criteria of Human Rights", in Vasak, K Alston, P (eds) *The International Dimensions of Human Rights Vol 1*, 1982, p. 43, as reproduced in Steiner, HJ and Alston, P, *International Human Rights in Context: Law, Politics, Morals*, Second Edn, 2000, p. 154.

⁸⁸ Kirby, M, "Human Rights: An Agenda for the Future", in Galligan, B, and Sampford, C (eds), *Rethinking Human Rights*, 1997, p. 2 at 7. Specifically, Kirby J states '[k]nowledge and enjoyment of civil rights depends upon the other basic rights to life: education, health services and an opportunity to flourish in happiness as an individual human being', p. 5.

⁸⁹ . An overview by Williams of the rights debates suggests that while the legal protection of rights will be inadequate on their own to meet the social needs of targeted groups, they may play a major contribution to the promotion of a rights culture; Williams, G, *Human Rights Under the Australian Constitution*, 2002, p. 67.

APPENDIX 3: NESB-Disability Issues

General

Discrimination occurs on an individual and a systemic level. Due to the high level of social control experienced by people with disability, the discrimination faced is often institutional.

People from NESB, in particular those with a disability and recent migrants, experience highly regulated environments where much of the discrimination is systemic.

There are many barriers facing people from NESB with disability including:

- lack of accessible information and knowledge about rights, essential services and supports
- lack of culturally appropriate services and supports
- myths, misconceptions and negative stereotypes about disability and ethnicity in both the NESB and Anglo-Australian communities
- prejudice against people with disability from both NESB and Anglo-Australian communities
- government's emphasis on 'mainstreaming' without acknowledgement of the inequities that exist in relation to ethnicity
- NESB people often do not understand concepts used to describe their situation
- ethnic communities often do not have the capacity to advocate for their needs.

Two areas are discussed in more detail below to help develop an understanding of NESB-disability in relation to this paper. For more information about NESB-disability issues, please visit the NEDA Website: www.neda.org.au.

Discrimination

It has been the experience of NEDA that discrimination relating to both ethnicity and disability is interdependent and does not follow any logical order of preference.

The prejudicial attitudes and misconceptions regarding disability that are present in mainstream society are equally evident in NESB communities. Whilst there are differences in the perception of disability amongst different ethnic groups, the relative degree of stigma attached to disability appear similar across NESB and English-speaking communities.

By and large, NESB communities have missed out on education campaigns about people with disability because those conducting these campaigns have failed to seek out or consult with NESB communities. At the same time there have been consultations with people from NESB with disabilities, but those consultations have not resulted in concrete strategies.

Discrimination on the basis of ethnicity is also a reality. If ethnicity did not play a role in the provision of services to people with disability, the figures of service usage in relation to ethnicity would be comparable to those in the general community. The fact that there are so many Anglo-Australians and so few people from NESB in services shows that ethnicity does matter.

Access to Services & Information

Objective 5 of the *Disability Services Act*, 1986 states that:

Programs and services should be designed and administered so as to meet the needs of people with disability who experience a double disadvantage as a result of their sex, ethnic origin, or Aboriginality.

However, in Australia, **three out of four** people from a NESB with disability miss out on receiving Commonwealth funded disability services. This is in addition to the current unmet need for people with disability in general (see NEDA website for more information).

This figure stands despite genuine efforts made by many to redress this situation. This figure points towards the need to seek systemic solutions to the whole disability services system, involving all stakeholders.

Access to information is often the first step towards people participating in the community. Access to information means, in effect, access to opportunities and therefore choices to participate in the community.

Like all people from NESB, people from NESB with disability and their families and carers experience increased difficulties in accessing services because of the lack of resources made available for interpreters and translations.

Services such as the Translation and Interpreting Service (TIS) and the Ethnic Affairs Commission language services have increasingly adopted the user pays principle, severely restricting the number of free or subsidised on-site and telephone interpreting sessions available to people and non-profit service providers.

The costs for language services are mostly unbudgeted, resulting in:

- a reduction in community services for people with disability from NESB
- the provision of inappropriate information
- the overall increase in the use of family members and other relatives as interpreters, in violation of standards such as confidentiality, dignity, privacy, etc.

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