

National Access to Justice and Pro Bono Conference
Inaccessible justice - the promise and the reality for people with
disabilities
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I acknowledge the traditional owners and pay respect to the elders of the land that we meet on here today. I'd also like to acknowledge and pay respect to people with disabilities who dared to ask for more, more than the leftovers of the charity dinners that were conducted to provide the funds to support the 'deserving poor'.

If it wasn't for the courage of the activists in history to have the audacity to demand that people with disability be treated as subjects with rights as opposed to objects of pity and charity I would not be here today to continue the struggle for justice, equal opportunity and equal dignity without discrimination.

Cultural discrimination, rejection and exclusion of persons with disabilities continue in society and are deeply embedded and have a long history. The first reported discrimination legislation protecting and defending people with disability was developed in India in 600 BC. As you can see, the journey for equality and non-discrimination has been a long one.

Across cultures and throughout time, people with disabilities have been accepted and nurtured. However, predominantly they have been feared, oppressed, excluded, and murdered.

In the 17th and 18th centuries, educational institutions were built to equip people with disability, primarily blind and deaf people, with the skills to function and participate in society.

In the 19th century, government and community attitudes changed. A new-found belief arose that people with disabilities would be better off living in institutions, such as mental asylums, state schools, and homes for the feeble minded.

However, by the late 19th-century attitudes had changed and people with a disability were seen as objects of pity and charity. In 1883, Governor Butler of Massachusetts said:

"Give them an asylum, with good and kind treatment; but not a school. A well fed, well cared for idiot is a happy creature. An idiot awakened to his condition is a miserable one".

This was the rise of the asylum era, a period in which it became popular to warehouse people with intellectual and other disabilities. The notion of protecting the person with an intellectual disability from the community and from him/herself encouraged the change from institutions having an educational goal to becoming asylums for exclusion, and outlets for future government policies of apartheid.

At that time Australia was still a British colony in its infancy .During this period the only institutions we had were jails. Therefore people with intellectual disability and mental illnesses who came to the attention of the authorities and who were deemed 'problems' were locked in our jails, the first institutions.

Perhaps an interesting question for social scientists today is whether there is any correlation between the early practice of imprisoning people and the current over-representation of people with a disability in the criminal justice system?

In the 20th century in Europe, the USA and Australia, the attitude that people with intellectual disabilities and mental illness were a social menace gained momentum. It manifested in policies and practices that condoned the detainment of children with intellectual disabilities, and the confinement of people with mental illness, in regulatory or non-regulatory facilities that were promoted and perceived in policy as situations of care and control. Additionally, in the 1920s and 30s we saw the rise of eugenics. And the overt push to eliminate such menaces or problems via euthanasia were advocated in Europe and the USA.

In the 1930s, Dr. Alexis Carrel, of the United States of America, a Nobel Prize winner who had been on the staff of the Rockefeller Institute since its inception, publishes his book "Man the Unknown." In it he suggests the removal of the mentally ill and the criminal by small euthanasia institutions equipped with suitable gases.

The Murder of the Handicapped

Wartime, Adolf Hitler suggested, "was the best time for the elimination of the incurably ill." The physically and mentally handicapped were viewed as "useless" to society, a threat to Aryan genetic purity, and, ultimately, unworthy of life. At the beginning of World War II, individuals who were mentally retarded, physically handicapped, or mentally ill were targeted for murder in what the Nazis called the "T-4," or "euthanasia," program.

Hitler officially orders end to "euthanasia" killings

Mounting public criticism by Catholic Bishops of the "euthanasia" killings prompts Adolf Hitler to order the end of the program. By this time, between 250,000 – 1 million German and Austrian physically or mentally impaired patients have been killed.

Post World War II

The Nazi atrocities that were eventually revealed to the world after World War II softened the enthusiasm of the pro-euthanasia lobby. Henceforth it supported only voluntary euthanasia. However, we only have to look at the prosecution of Dr Kevorkian, more colloquially known as Dr Death, this century., to establish that people with disability are still subjects and targets of the euthanasia movement. 52% of the persons murdered by Dr Kevorkian did not have a terminal illness, they had a disability. Ninety per cent were women.

Consequently we may justifiably ask whether there is any correlation between the underlying belief systems and assumptions held by the eugenics movement about who deserves to live and who is obliged to die to ensure we eliminate the undesirable elements of humanity, and the current public health policy to identify, and legally eliminate through abortion, fetuses with impairments such as Down's syndrome?

Equally we may ask whether the popular perception that one would be 'better off dead than disabled' is connected to decisions in law that condone as 'mercy killing' a parent murdering their son or daughter with impairment.

The culture of devaluing persons with disability and subsequent discrimination and exclusion is one very deeply embedded in our society. It exists universally across every nation. The Convention on the Rights of Persons with Disability (CRPD) is recognition by the United Nations that the human rights of people with disabilities have not been respected, protected and fulfilled under the Universal Declaration of Human Rights.

For people with disability around the world, the CRPD promises a paradigm shift in attitudes and approaches for persons with disabilities. Persons with disabilities will no longer be viewed as objects of pity and charity, subjected to inhumane and degrading medical treatment and social protection.

Rather they will be seen as subjects with rights who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society. The CRPD gives universal recognition to the dignity of persons with disability, and sets an ambitious agenda for cultural reform.

Before we can make our justice system universally and comprehensively accessible, we require cultural reform to eliminate discrimination and engender a culture that embraces equality and dignity in the lives of people with disability.

The CRPD provides us with a framework to govern the future policy of that reform and ultimately the cultural reforms that people with disability envisage and deserve.

Eleanor Roosevelt in 1936 articulated human rights in a way that sets an agenda for us collectively to go forth and engage in cultural reform, where

society respects, protects and fulfils all people's human rights irrespective of their class, race, gender, religion, culture, impairment, and sexual preference.

She said,

“Where, after all, do human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person, the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning elsewhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”

Thus, in the challenge of translating what ought to be into what can be in the justice system is something that affects us all. Successful transformation from an inaccessible to an accessible justice system requires us all as individuals, collectives, communities, nongovernment agencies, the private sector, legal sector and governments to collaborate in genuine cultural reform.

I now will share with you some points of interest and structure of the CRPD. The declaration of human rights proclaimed that human rights were indivisible, however in the context of the Cold War we managed to divide civil and political rights from cultural, economic and social rights. The CRPD has reintegrated civil, political, economic, social and cultural rights in the articles.

This convention was the first convention of new millennium it was quickest convention developed, it was completed in four years. The CRPD was proclaimed as the most democratic convention in that NGOs were able to make direct interventions 160 nation-state's and 92 disabled persons non-government organisations registered and participated in the development of the CRPD. The CRPD recorded the highest number of signatories on the opening day of any convention 81 and Australia was amongst those signatories.

Australia ratified the convention on the 17th of July 2008 the CRPD – entered into force with respect to Australia on 18th of August 2008. Australia Ratified the Optional Protocol on: 21-8-2009.

Unfortunately, Australia and Queensland still has no domestic mechanism for advocates to seek remedy of human rights violations.

CRPD structure:

- **Preamble:** not binding, aid to interpretation
- **Articles 1 & 2:** interpretive
- **Articles 3 to 9:** general obligations
- **Articles 10 to 30:** specific obligations
- **Articles 31 to 40:** implementation and monitoring provisions

- **Articles 41 to 50:** operational provisions

Civil and political rights

- *Liberal, non-interference, negative rights* – restraints on exercise of power
- Sourced from *International Covenant on Civil and Political Rights*
- *Immediately realisable*
- Articles 10 to 23 and 29 of CRPD

Economic, social and cultural rights

Require positive action – *positive obligations*

- Sourced from *International Covenant on Economic, Social and Cultural Rights*
- *Progressively realisable*
- Articles 24 to 28 and 30 of the CRPD

State Parties have an obligation to:

- *respect* human rights – must not violate or interfere with
- *protect* human rights – must prevent non-state actors from violating or interfering with
- *fulfil* human rights – must take positive action to ensure realisation.

QAI has developed human rights indicators for people with disability, based on the CRPD articles. I draw upon these indicators to highlight points for consideration when engaging in policy and practice reform that will eliminate legislation, policy and practice that:

- permits structural apartheid,
 - promotes negative perceptions and imagery of persons with disability, and
 - condones policy and practices that engender the elimination of impairment which is supported by the values of eugenics:-
- Countries that join in the Convention engage themselves to develop and carry out policies, laws and administrative measures for securing the rights recognized in the Convention and abolish laws, regulations, customs and practices that constitute discrimination (Article 4).
 - As a change of perceptions is essential to improve the situation of persons with disabilities, ratifying countries are to combat stereotypes and prejudices and promote awareness of the capabilities of persons with disabilities (Article 8).
 - Countries are to guarantee that persons with disabilities enjoy their inherent right to life on an equal basis with others (Article 10), ensure the equal rights and advancement of women and girls with disabilities (Article 6) and protect children with disabilities (Article 7).
 - Countries must protect the physical and mental integrity of persons with disabilities, just as for everyone else (Article 17); guarantee freedom from torture and from cruel, inhuman or degrading treatment or punishment, and prohibit medical or scientific experiments without the consent of the person concerned (Article 15).

- Countries are to recognize that all persons are equal before the law, to prohibit discrimination on the basis of disability and guarantee equal legal protection (Article 5).
- They are to ensure access to justice on an equal basis with others (Article 13), and make sure that persons with disabilities enjoy the right to liberty and security and are not deprived of their liberty unlawfully or arbitrarily (Article 14).
- The CRPD articles are cross cutting for example article 6 (general obligation) ensure the equal rights and advancement of women and girls with disabilities and article 10 right to life (A Right). For example would mean that breast screening methods are accessible for women with mobility impairments...

The following slides will shed light on what is required to engender a more accessible Justice System

- Example - ARTICLE 13: Access to Justice States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
- Do persons with disability enjoy effective access to justice at all stages of the legal process?
- Does the legal system provide effective protection of the rights of persons with disability, whether as victims, suspects, defendants, or convicted offenders?
- Is the justice system accessible to persons with disability irrespective of the role in which they participate in it (including as justice system officers and administrative personnel)?
- Are procedural accommodations made to the legal process to ensure effective participation of persons with disability in the legal system?
- Are investigation methods and interview techniques appropriately adapted to the needs of persons with disability?
- Are the laws of evidence sufficiently flexible and adapted to the needs of persons with disability?
- Are justice agency premises (for example, police stations, courts and tribunals) physically accessible to persons with disability (for example, in relation to access for persons who use mobility devices, way-finding for persons who are blind or have cognitive impairment, hearing augmentation for persons who are hearing impaired)?
- Do the administrative processes associated with the justice system (for example, court forms, out-of court communication) accommodate the needs of persons with disability?
- Does the in-court legal process accommodate the needs of persons with disability?
- Are appropriate accommodations available to persons with disability in

the justice system irrespective of the role in which they participate in it (including as justice system officers and administrative personnel)?

- **Are age-related accommodations to the legal process made to ensure the effective participation of children and young persons with disability?**
- Are investigation methods and techniques appropriately adapted to the needs of children and young persons with disability?
- Are the laws of evidence sufficiently flexible and adapted to the needs of children and young persons with disability?
- Does the in-court legal process accommodate the needs of children and young persons with disability?
- **Is appropriate training provided to all justice agency personnel to ensure access to justice for persons with disability?**
- Do justice agency personnel, such as police, court administrators, prison officers, legal practitioners, magistrates and judges receive appropriate training in human rights and access to justice for persons with disability?
- Do justice agency personnel receive appropriate training in the identification of persons with disability involved in the legal process?
- Do justice agency personnel receive appropriate training about adjustments required by persons with disability to the legal process?
- Do justice agency personnel receive appropriate training in communication skills for work with persons with disability?
- Do police receive appropriate training in investigation methods and interview techniques appropriate for work with persons with disability?
- Do police receive appropriate training in investigation methods and interview techniques appropriate for work with children and young persons with disability?

“The rights and dignity of each person in our society, and especially those who cannot speak for themselves, must be protected with zeal by those of us who can.” Nelson Mandela.