

# Human rights and addressing violence against people with disability

**Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability**

19 March 2020

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# Introduction

1. The Queensland Human Rights Commission (**QHRC**) is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**ADA**). Its functions under that Act include promoting an understanding, acceptance and public discussion of human rights in Queensland.
2. The QHRC receives complaints for conciliation under the ADA for discrimination, sexual harassment, victimisation and vilification. Discrimination on the basis of impairment is consistently the dominant ground of complaint to the QHRC, making up between 39% and 44% of accepted discrimination complaints over the past 5 years. The next most common ground is sex discrimination at 13%. The overall number of accepted complaints has been steadily increasing over the years. Impairment discrimination complaints are primarily in relation to employment (53-63%) followed by goods and services, including health services, (16-25%) and then education (7-9%).
3. From 1 January 2020, the QHRC can receive complaints for resolution under the *Human Rights Act 2019* (**HRA**). The QHRC can now also intervene in legal proceedings that raise human rights issues. The HRA presents an opportunity to strengthen protections for people with disability against violence, abuse, neglect and exploitation which can engage a range of protected human rights. The state is responsible for fulfilling rights by ensuring legislation, and decisions and actions by public entities are compatible with human rights and, in some cases, taking positive action to protect human rights against interference by public and private entities. Under the HRA, if a human right is to be limited, then it must be under law, reasonable, and can be demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom (s 13).
4. This submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Royal Commission**) explores key issues and makes specific recommendations relevant to the terms of reference within the expertise and experience of the QHRC.
5. The QHRC may provide additional submissions in response to issues papers or other matters as needed in the future.

# Summary of recommendations

[Recommendation 1: The Royal Commission should consider recommending implementation of a national Human Rights Act which incorporates Australia’s international obligations under the *Convention on the Rights of Persons with Disabilities*.](#_Toc34907052)

[Recommendation 2: The Royal Commission must identify and address the underlying social disadvantages experienced by people with disability which make them more vulnerable to violence, abuse, neglect and exploitation.](#_Toc34907053)

[Recommendation 3: The Royal Commission should investigate recommendations made by the Australian Law Reform Commission in their report *Equality, Capacity and Disability in Commonwealth Laws* (2014) ALRC Report 124 to implement a nationally consistent framework that moves away from substitute decision-making towards supported decision-making models.](#_Toc34907054)

[Recommendation 4: The under employment of people with disability must be meaningfully and holistically addressed.](#_Toc34907055)

[Recommendation 5: The Royal Commission should consider nationally consistent law reforms that strengthen anti-discrimination protections for people with disability in education.](#_Toc34907056)

[Recommendation 6: The number of appropriate and accessible housing options for people with disability must be increased. A possible reform is to implement minimum accessibility standards for all new housing (both social and private).](#_Toc34907057)

[Recommendation 7: The multiple disadvantage experienced by Aboriginal people and Torres Strait Islander people warrants specific focus by the Royal Commission on their rights and the responses needed to fulfil them.](#_Toc34907058)

[Recommendation 8: The Royal Commission must consider the use of restrictive practices in all contexts and ensure the legislative framework and practice is consistent with the rights of people with disability as guaranteed under international law.](#_Toc34907059)

[Recommendation 9: The Royal Commission must consider the issues facing people with disability, particularly children and women, in relation to non-consensual sterilisation and termination of pregnancy.](#_Toc34907060)

[Recommendation 10: In relation to the criminal justice system, the Royal Commission should consider the implementation and effectiveness of Disability Justice Strategies in all Australian jurisdictions as recommended by the Australian Human Rights Commission in its report *Equal before the law* (2014).](#_Toc34907061)

[Recommendation 11: The Royal Commission should specifically investigate the conditions in prisons which exacerbate harm to people with disability.](#_Toc34907062)

[Recommendation 12: The Royal Commission must consider the detention and treatment of people with mental illness, intellectual disability and other cognitive impairment in the forensic system, particularly the risks of indefinite detention and detention where there is reasonable doubt the person ever committed the act constituting the offence.](#_Toc34907063)

[Recommendation 13: The Royal Commission should examine the importance of public awareness raising, professional training, inclusion, data collection and publication, and enforcement, to ensure that the human rights of people with disability are fully realised.](#_Toc34907064)

# A human rights-based approach

1. The Letters Patent requires the Royal Commission to take a human rights-based approach to its inquiry and specifically recognises Australia’s international obligations under the *Convention of the Rights of Persons with Disabilities* (**CRPD**). The CRPD is a thematic human rights convention that incorporates both rights under the *International Covenant on Civil and Political Rights* (**ICCPR**) andthe *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**). It does not develop new rights, but interprets, extends and transforms existing human rights as they apply to people with disability.[[1]](#footnote-1)
2. A human rights-based approach focuses on the promotion and realisation of human rights for all persons with disability without discrimination. It provides a framework from which to achieve comprehensive, fair, inclusive, accountable, and effective solutions.
3. Apart from the protection of specific rights, the CRPD imposes certain overarching responsibilities on government which include:
	1. To adopt laws, policies, programmes, and other measures that protect and fulfil human rights for people with disability (Article 4);
	2. To consult and actively involve representative organisations for people with disability in the development and implementation of these measures (Article 4);
	3. To require public authorities act consistently with human rights for people with disability (Article 4);
	4. To train professionals and staff working with people with disability in human rights to improve the provision of assistance and services in alignment with those rights (Article 4);
	5. To raise awareness at every level of society of the capabilities and contributions of people with disability, fostering respect for the rights and dignity for persons with disability, and combatting negative stereotypes and prejudices (Article 8);
	6. To collect and publicly disseminate appropriate statistical and research data to enable evidence-based formulation and implementation of policies to give effect to human rights for people with disability (Article 31); and
	7. To establish mechanisms within government to facilitate implementation on human rights for people with disability and an independent monitoring mechanism to oversee that implementation (Article 33).
4. At a Commonwealth level, the human rights of people with disability are protected by a range of legislative and common law protections and policies, such as the *Disability Discrimination Act 1992*, *Australian* *Human Rights Commission Act 1986*, the *National Disability Insurance Scheme Act 2013,* and the National Disability Strategy. However, these regimes do not go far enough to meet the obligations under the CRPD as described above, nor do they comprehensively fulfil the specific human rights and fundamental freedoms all people, with or without disability, should enjoy.
5. Queensland’s HRA goes some way to address these gaps at a state level. It consolidates and establishes legal protections for some but not all human rights protected under the ICCPR andtheICESCR. It places obligations on each of the three arms of government to uphold rights and includes in its main objects building a human rights culture in the Queensland public sector, and promoting dialogue about the nature, meaning and scope of human rights.(s 3) It further provides a mechanism for the resolution of human rights complaints. Specific human rights legislation has only been implemented elsewhere in Australia in the ACT and Victoria.
6. To fully protect the rights of people with disability, Australia’s obligations under the CRPD must be fully embedded into domestic law. One way of doing this is to enact national human rights legislation that imposes obligations on the Commonwealth government and other relevant entities to promote, protect, and fulfil human rights. The rest of this submission references the HRA to demonstrate how human rights legislation can be used to identify problems, develop responses, and prevent harms occurring to people with disability.

Recommendation 1: The Royal Commission should consider recommending implementation of a national Human Rights Act which incorporates Australia’s international obligations under the *Convention on the Rights of Persons with Disabilities*.

# Underlying social disadvantage and inequality

1. People with disability can face multiple forms of social disadvantage which contribute to and compound their vulnerability to abuse and neglect. This section discusses some of these disadvantages and the impact the HRA may have in the Queensland context. It is only by recognising, and then addressing these disadvantages, that the harms experienced by people with disability can be properly resolved.

Recommendation 2: The Royal Commission must identify and address the underlying social disadvantages experienced by people with disability which make them more vulnerable to violence, abuse, neglect and exploitation.

## Self-determination

1. All people should have the right to make decisions concerning their own lives. Loss of this right through the appointment of guardians and other substitute decision-makers is disempowering, increases dependence and vulnerability, and reinforces prejudicial stereotypes and paternalistic, patronising and de-valuing attitudes towards people with disabilities. The Australian Senate Community Affairs Committee[[2]](#footnote-2) noted:
* The guardianship process could be considered an abuse itself, particularly because of the loss of rights it entails.
* In more serious cases, guardianship could be sought in order to enact abuse or neglect:
* Evidence has shown that even well-meaning guardians can inflict abuse or neglect through lack of understanding of their role or by being risk averse.
* The fact that a vulnerable person may be prevented through guardianship arrangements from lodging a complaint is also a form of abuse. In many cases, the prevention of reporting violence, abuse and neglect leads to the indefinite perpetuation of inappropriate actions.
1. The Committee went on to make a number of recommendations[[3]](#footnote-3) regarding reform of substitute decision making laws and practice at both a federal and state level, including implementation of a nationally consistent supported decision-making framework as recommended by the Australian Law Reform Commission in their 2014 report *Equality, Capacity and Disability in Commonwealth Laws*.[[4]](#footnote-4) This recommendation was repeated by the United Nations Committee on the Rights of Persons with Disabilities in their Concluding Observations regarding Australia’s implementation of the CRPD in 2019.[[5]](#footnote-5)
2. In Queensland, appointment of a substitute decision maker can engage a person’s right to recognition and equality before the law (s 15 HRA), the right to privacy (s25 HRA), and the right not to be subjected to experimentation or treatment without the person’s full, free and informed consent (s 17(c) HRA). Decision-makers must ensure appointments are justified having regard to the purpose of the appointment and any less restrictive alternatives, such as the provision of support. Interpretation of legal tests of capacity are also affected: for example, the test must start from a presumption of capacity, and not conflate ‘capacity’ with insight, or what is the reasonable or right decision.[[6]](#footnote-6)

### Case study

B and C were siblings with intellectual disability. Their mother was appointed by QCAT as guardian and administrator. After the appointment, B and C received a letter from their bank to say that now they had been appointed an administrator they had no powers to transact, open or close an account or obtain account related information. B lost her wallet containing her bank card. The card was cancelled but the bank refused to issue B a new card, despite B using the card for many years without incident. Subsequently C’s card was also cancelled. There had been no issues with his use of the card either.

B and C made a discrimination complaint against the bank. Their mother also claimed discrimination by association. The matter was conciliated with each complainant receiving compensation

Recommendation 3: The Royal Commission should investigate recommendations made by the Australian Law Reform Commission in their report *Equality, Capacity and Disability in Commonwealth Laws* (2014) ALRC Report 124 to implement a nationally consistent framework that moves away from substitute decision-making towards supported decision-making models.

## Employment

1. Employment can be an important protective mechanism for people with disability. With employment comes more independence, choice, a higher standard of living, exposure to new life experiences, and increased support networks, confidence and self-worth. Sheltered workshops with below-award rates of pay are not likely to offer these benefits.
2. Discrimination laws do not address underemployment of people with disability. To address the ongoing systemic underemployment of people with disability, the Royal Commission may want to look at proactive means of increasing long term employment, including incentive schemes, targets and quotas.
3. There remain serious obstacles to gaining employment because of stigma and discrimination. It can be very difficult for a person to prove that they were not employed on the basis of their disability – while people may suspect this is the reason, it is often hard to provide sufficient evidence that this is why the employer made the decision not to hire them. When a person fails to disclose their disability to an employer, and the employer later discovers it, the person with a disability may be then accused of ‘dishonesty’.

### Case study – *Thorne v Toowoomba Regional Council & Anor* [2016] QCAT 212

Ms Thorne suffered from wrist injuries which compromised the use of her hands. She was offered a full time position with Toowoomba Regional Council. Her employment was not continued at the end of her 3-month probationary period.

The Council claimed the reason for not continuing Ms Thorne’s employment was that she had not been honest when asked if there was anything preventing her from performing her duties. However, the Council had been aware of the injury prior to Ms Thorne commencing employment as a result of a pre-employment medical she had undergone, which resulted in a number of restrictions on her duties being put into place.

Towards the end of the probation period, the Council received medical advice that the restrictions that had been imposed would need to remain in place for at least two years. Around the same time, the Council asked Ms Thorne questions about her previous employment, and asked her previous employer for information about the injury.

QCAT found that the Council had contravened the ADA, firstly by asking her and her previous employer for unnecessary information upon which unlawful discrimination might be based, and secondly, by not continuing her employment, on the basis of her disability as well as her threat to make a claim against the Council arising out of an aggravation of her injuries.

QCAT awarded compensation for Ms Thorne’s economic loss and hurt and humiliation but her employment was not reinstated.

1. While the HRA does not protect a ‘right to work’, rights to equality (s 15), privacy (s 25), and the recognition of the inherent dignity and worth of all human beings (preamble) provide impetus for public investment and positive strategies to increase employment opportunities for people with disability.

Recommendation 4: The under employment of people with disability must be meaningfully and holistically addressed.

## Education

1. Like employment, equal access to education would improve the rights and lives, and reduce the risks of harm, for people with disabilities. Inclusive education also exposes school communities to diversity, improving attitudes and understanding towards people with disability both now and in the long term. Unfortunately school experiences for children with disability can be fraught, ranging from inadequate adjustment of teaching strategies, to the use of restrictive practices to manage children with challenging behaviours escalating to suspension and exclusion from school.
2. Direct discrimination action against schools under the ADA and under the Commonwealth *Disability Discrimination Act 1992* requires a ‘comparator’ or proof that the person with disability has been treated less favourably than a person without disability would have been treated in the same or not materially different circumstances.[[7]](#footnote-7) This presents difficulties for students with challenging behaviours, even if the behaviours are a manifestation of their disability, given the High Court’s decision in *Purvis*[[8]](#footnote-8)that the relevant comparator is a student without disability but exhibiting similar behaviours. Discrimination laws in other jurisdictions, such as the ACT and Victoria, do not require identification of a comparator, but rather evidence that a person with an attribute has been treated unfavourably because of that attribute.[[9]](#footnote-9)
3. In response to concerns about *Purvis*, the *Disability Discrimination Act 1992* was amended to impose a general obligation to make reasonable adjustments for people with disability, unless it would cause unjustifiable hardship.(ss 5(2), 6(2)) The ADA provides that if a person would require special services or facilities, it is not discrimination on the basis of impairment if this would impose an unjustifiable hardship on the educational authority.(s 44)
4. There are relatively few complaints in the area of education accepted by the QHRC each year (35 in 2018-19), when considering the 85,662 incidences of suspension, exclusions and cancellations in Queensland schools in 2018[[10]](#footnote-10). Discrimination complaints may not be the most effective mechanism for parents seeking to improve their child’s circumstances: by the time a complaint has been made, relationships between parents and the school may have irretrievably broken down; the child has already settled at a different school or in home schooling; or the harm has already been done and cannot be redressed. Further, despite protections against victimisation under the ADA, parents and other whistle blowers may be fearful of repercussions about speaking out against discriminatory conduct.

### Case study

L was a year 10 student diagnosed with autism and a number of mental health and neurological conditions. She had been attending mainstream school with an Individual Education Program, a case manager and medication.

L broke school rules when she used her mobile phone to make an urgent appointment. The school cancelled her enrolment effective immediately. L’s family claimed that because of her disabilities, she wants to deal with problems immediately and would not have made a conscious decision to break school rules. When questioned, the school indicated that the decision to cancel the enrolment was a culmination of issues, although these were not identified.

L lodged a discrimination complaint, alleging that her Individual Education Program and behaviour management plan had not been followed, and the school had not made adjustments for her disabilities.

The matter was conciliated, however L was not able to return to the school.

1. The right to access education appropriate to the child’s needs (s 36), the right to recognition and equality before the law (s 15), and the rights of the child (s 26) protected by the HRA complement existing anti-discrimination laws. The HRA potentially broadens the scope for a successful discrimination claim, as it does not require a comparator and brings focus to the importance of providing reasonable adjustments, but does not apply to private schools which are not public entities as defined by the Act. The HRA also empowers the Commissioner to produce a report on unresolved complaints, which can include recommendations on what actions the respondent school should take to act compatibly with human rights, such as policy changes and reasonable adjustments. These reports may be made publicly available (as 88(4) and 90).
2. The HRA may also impact the use of restrictive practices by schools to manage student behaviour. Restrictive practices are discussed in more detail below.

Recommendation 5: The Royal Commission should consider nationally consistent law reforms that strengthen anti-discrimination protections for people with disability in education.

## Housing

1. Inadequate housing options for people with disability result in people being put in group homes, hospitals, facilities or other shared housing arrangements, which increases their vulnerability to abuse and neglect.
2. In relation to accessible housing for people with physical disability, there is currently no mandatory requirement for new housing, or even new social housing, to comply with universal housing design. The Australian Building Codes Board is currently undertaking a Regulatory Impact Statement for potential minimum accessibility standards for housing, to be applied through the National Construction Code. We suggest the Royal Commission considers examining this proposal, with a view to recommending the need for minimum accessibility standards for all new housing (both social and private) to ensure there is an increasing pool of accessible housing stock available over time.

### Case study

The complainant had impairments which required her to use a wheelchair. She approached a housing association which offered her a unit for rent. The unit needed modifications to make it safe, which a consultant reported to the housing association. The complainant agreed to move in while the modifications were being carried out and started to sell her possessions in anticipation of moving to a smaller residence. The housing association then decided that the modifications were too expensive and rented the unit to a person who did not require them.

At conciliation, the housing association argued unjustifiable hardship, but conceded that they did not get quotes for the cost of the modifications. They apologised for not communicating with the complainant in a timely and effective way and agreed to pay compensation and have their staff trained to better understand how to manage this situation in future.

1. Housing is not a protected right under the HRA, but denying a person with disability the ability to choose where they live and with whom potentially engages rights to recognition and equality before the law (s 15), privacy, family and home (s 25), freedom of movement (s 19) and protection of families and children (s 26), and must be reasonable and justified.

Recommendation 6: The number of appropriate and accessible housing options for people with disability must be increased. A possible reform is to implement minimum accessibility standards for all new housing (both social and private).

## Rights of Aboriginal peoples and Torres Strait Islander peoples

1. Australia’s first peoples continue to face inequality following a history of land dispossession, introduced disease, removal of children, stolen wages, state control, and ongoing intergenerational trauma, stigma and discrimination. Employment, education, housing, health, and criminal justice, which have all been identified as key issues contributing to the abuse and neglect of people with disability in this submission, are also priorities in the Closing the Gap strategy to address disadvantage and achieve equality for Aboriginal and Torres Strait Islander peoples.
2. The special importance of human rights for Aboriginal peoples and Torres Strait Islander peoples of Queensland, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources, is recognised in the preamble to the HRA. Section 28 protects the cultural rights of Aboriginal peoples and Torres Strait Islander peoples, in community with others, and the right not to be subjected to forced assimilation or destruction of their culture.
3. A focus on the rights of Aboriginal people and Torres Strait Islander people would include:
	1. Assessment criteria for services, housing, and other supports, and how information is obtained, take into account the multiple and compounding forms of discriminatory disadvantage and vulnerability experienced by Aboriginal people and Torres Strait Islander people with disability[[11]](#footnote-11);
	2. Services offered and provided are culturally appropriate;
	3. Where services cannot be provided at home, consideration is given to the impact of removal of the person from traditional lands, culture or kin;
	4. The distinct culture and identity of Aboriginal people and Torres Strait Islander people is recognised, responded to and incorporated into care plans and decision making;
	5. Planning for service delivery in remote areas, given the higher proportions of Aboriginal people and Torres Strait Islander people living outer regional, remote and very remote areas[[12]](#footnote-12);
	6. Meaningful consultation with Aboriginal and Torres Strait Islander people in decisions that affect them.

Recommendation 7: The multiple disadvantage experienced by Aboriginal people and Torres Strait Islander people warrants specific focus by the Royal Commission on their rights and the responses needed to fulfil them.

## Health

1. As pointed out in the Royal Commission Issues Paper[[13]](#footnote-13), health, and consequently access to adequate health care, for people with disability is fundamental to the fulfilment of human rights. The Committee on the Convention on the Rights of Persons with Disabilities recognised the significantly lower life expectancies of people with disabilities than that of the general population, and the high rates of premature, unexpected and avoidable deaths in care settings.[[14]](#footnote-14)
2. The HRA protects the right of a person to access health services without discrimination (s 37). This is the first time this right has been recognised in an Australian human rights instrument. Other relevant rights are the right to equality (s 15), the right to life (s 16), the right to humane treatment when deprived of liberty (s 30), the right to be protected from cruel, inhuman or degrading treatment, and to not be treated without the person’s full, free and informed consent. (s 17) Taken together, government may have positive obligations to provide reasonable medical treatment, particularly where there is a real and immediate risk to life of a person in state care.
3. Health equity has been examined by the QHRC in two reports. In *Addressing Institutional Barriers to Health Equity for Aboriginal and Torres Strait Islander People in Queensland’s Public Hospital and Health Services*[[15]](#footnote-15), the QHRC identified institutional barriers to closing the gap in health for Aboriginal people and Torres Strait Islander people following an audit of Queensland’s 16 Hospital and Health Services using a matrix tool. The report noted the potential for the matrix to be adapted to address other forms of discrimination including disability.
4. In *Women in Prison* *2019**[[16]](#footnote-16)*, the QHRC acknowledged the overrepresentation of people with disability in prison and the greater health needs of prisoners than people in the general population. The report recommends that prisons be sufficiently resourced to provide timely and responsive health care that is equivalent to that available in the wider community, including mental health care. Revision of continuity of care and pain management guidelines was also needed in view of coronial findings from 2011 into a death in custody in relation to a woman with a history of mental illness and chronic pain.[[17]](#footnote-17) This has relevance outside of prison settings, for people with disability who are deprived of their liberty, are transferred from facility to facility, or receive care from multiple or successive service providers.

# Systems that enable abuse and neglect

1. The following are Queensland examples of systems which perpetuate harm against people with disability, many of which set out with the purpose of protecting those very same people. The HRA again provides potential to address some of the problems, reinforcing support for the passing of a national instrument to protect human rights. However, many of the issues further require legislative amendment and/or holistic system reform to ensure greater protections for people with disabilities.

## Restrictive practices

1. In Queensland, the use of restrictive practices by service providers is regulated by the *Disability Services Act 2006* (Qld) and the *Guardianship and Administration Act 2000* (Qld), which gives oversight responsibility in most cases to the Queensland Civil and Administrative Tribunal (**QCAT**). Service providers must also implement a positive behaviour support plan which is regularly reviewed and contains strategies for the reduction or elimination of the use of restrictive practices.
2. However, the regime does not extend to the use of restrictive practices in hospitals and health facilities, aged care facilities, schools, prisons, other supported residential services (such as boarding houses), or care provided by family or private carers. Restrictive practices applied to involuntary mental health patients in authorised mental health services are dealt with under the *Mental Health Act 2016* (Qld), but are not subject to scrutiny or authorisation by an external, independent body.

### Case study

S was a man in his early 80s with a diagnosis of Alzheimer’s disease and vascular dementia. He was admitted to hospital for intravenous antibiotics to treat an inflammation. He was mobile, relaxed, and could participate in medical assessments.

During the evening, S started experiencing confusion and decreased mobility. He was prescribed an antipsychotic for agitation. S did not have capacity to consent to the medication and his enduring power of attorney was not consulted. After two nights in hospital, S’s behaviour and condition had deteriorated significantly, including that he could not open his eyes or communicate. Further investigation found that S had had a life-threatening reaction to the antipsychotic, with effects including altered mental state. S was discharged from hospital after a month. As a result of his deteriorated condition, S was no longer able to live in the family home and had to be moved to a nursing home.

S alleged he had been chemically restrained for the convenience of the hospital as he needed to go to the toilet frequently at night due to an existing physical condition. There was also evidence that S had been prescribed medication without properly diagnosing the cause of his delirium and in the absence of agitation. A discrimination complaint was made on the basis S was treated less favourably because of impairment and age. The matter was conciliated with an agreed sum being paid by the hospital to S.

1. Practices, howsoever called, which have the effect of continuous supervision and control of a person in a place from which they are not free to leave is a deprivation of liberty. Under both international law and the Queensland HRA[[18]](#footnote-18), such a deprivation is unlawful, unless it is proportionate to the legitimate purpose it is seeking to achieve.
2. Firstly, such a limitation of rights will only be proportionate if it is authorised under law. This can include common law, although public entities which use restrictive practices on the basis of concepts like the ‘doctrine of necessity’ run the risk that such practices will be deemed arbitrary and therefore incompatible with human rights.[[19]](#footnote-19)
3. Secondly, whether more generally the limitation is reasonable and proportionate, the following may be relevant:
	1. the purpose is to protect the individual from serious harm or preventing injury to others;
	2. it is applied only as a measure of last resort for the shortest period of time;
	3. there are safeguards in place, including regular independent reviews to ensure that the continued deprivation of liberty does not become arbitrary, and representation of the individual to participate in that review;
	4. the State is providing or at least exploring less restrictive community based alternatives, and offering the individual rehabilitation or other intervention with a view to reducing the use of detention.[[20]](#footnote-20)
4. Persons deprived of liberty also have the right to humane treatment when deprived of liberty under the HRA.(s 30) This can include matters such as access to an interpreter, to have visits from family, access to medical care and treatment, and ensuring living conditions are of a reasonable standard.
5. Other restrictive practices which do not meet the threshold of deprivation of liberty, may nevertheless limit other human rights under the HRA such as freedom from torture and cruel, inhuman or degrading treatment (s 17), freedom of movement (s 19), and right to privacy, family and home (s 25).
6. Under the HRA, public entities, including registered NDIS service providers, public health employees, public aged care facilities, schools, prisons, and QCAT when acting in an administrative capacity, must act and make decisions that take into account and give proper consideration to the human rights of the person with disability. Failure to comply with these obligations may result in a complaint to the QHRC or can be added argument to other legal proceedings. However, this by itself does not provide the levels of protection and scrutiny needed by people with disability subject to restrictive practices that has been required under international law.

Recommendation 8: The Royal Commission must consider the use of restrictive practices in all contexts and ensure the legislative framework and practice is consistent with the rights of people with disability as guaranteed under international law.

## Forced sterilisation and abortion

1. The non-consensual sterilisation of children and adults with disability was identified by the Australian Human Rights Commission as one of three critical human rights issues for people with disability.[[21]](#footnote-21) In Queensland, sterilisation of an adult or child with impairment can occur with the consent of QCAT**.**[[22]](#footnote-22)
2. Similarly, non-consensual termination of a pregnancy of a woman with impaired capacity can also occur with the consent of QCAT.[[23]](#footnote-23)
3. Forced sterilisation and abortion enliven the right to equality (s 15), the right not to be treated without a person’s full, free and informed consent (s 17), the right to privacy, which includes mental and physical integrity (s 25), the right to family (s 25 and s 26), and the rights of children (s26) under the HRA. Legislative schemes which allow for these practices must therefore be interpreted and applied in a way that strikes the appropriate balance between the purpose and benefits of the procedure against the limitation of fundamental human rights.
4. In its *Concluding observations on the combined second and third periodic reports of Australia[[24]](#footnote-24)*, the Committee on the Rights of People with Disability urged the prohibition of sterilisation and abortion in the absence of free and informed consent.

Recommendation 9: The Royal Commission must consider the issues facing people with disability, particularly children and women, in relation to non-consensual sterilisation and termination of pregnancy.

## Criminal justice system

1. As noted by the Royal Commission’s issues paper[[25]](#footnote-25), people with disability, and particularly Aboriginal and Torres Strait Islander people with disability, are disproportionately accused of criminal offences and overrepresented in correctional facilities. Criminalisation can lead to violence and abuse while incarcerated, and in any event increases vulnerability to violence and abuse by adding another layer of hardship to those already faced by the accused.
2. People with disability face disadvantage and discrimination at every stage of the criminal justice system, from first police contact to incarceration. The barriers to equality and access to justice for people with disability in the criminal justice system was explored in detail by the Australian Human Rights Commission in their 2014 report *Equal before the law*[[26]](#footnote-26). As a result of wide-ranging consultation, the Commission formed the view that each jurisdiction in Australia needed to develop and adopt a Disability Justice Strategy, incorporating certain essential principles and actions that are developed in partnership with people with disabilities. The QHRC recommends the Royal Commission give consideration to the Australian Human Rights Commission’s approach.

Recommendation 10: In relation to the criminal justice system, the Royal Commission should consider the implementation and effectiveness of Disability Justice Strategies in all Australian jurisdictions as recommended by the Australian Human Rights Commission in its report *Equal before the law* (2014).

1. The QHRC researched and reported on the treatment of women in Queensland prisons, including women with disability. In its 2019 report[[27]](#footnote-27), the QHRC recommended: ending the use of solitary confinement for prisoners with disability, screening prisoners for all types of disability upon entry, training prison staff on how to respond and interact with someone with different needs, making reasonable adjustments for prisoners with physical, mental and intellectual disabilities, and providing qualified and appropriate care and support for people with disability. Similar recommendations were also made by Human Rights Watch in 2018.[[28]](#footnote-28)
2. The QHRC anticipates that the HRA will provide an opportunity for prisoners to voice fundamental human rights concerns, either as stand alone complaints or as human rights arguments attached to existing causes of action such as judicial review. To date, the ability to do so has been limited, particularly given that prisoner-made discrimination complaints must first comply with a number of pre-complaint steps, which can take up to 5 months to complete.[[29]](#footnote-29) No other category of complainant is subject to preconditions before making a complaint.

Recommendation 11: The Royal Commission should specifically investigate the conditions in prisons which exacerbate harm to people with disability.

## Forensic mental health and disability

1. The HRA protects every person’s right to liberty and security (s 29). People with disability must not be subject to arbitrary arrest or detention, or be deprived of liberty except under law. At the same time, public authorities are obliged to take appropriate steps to protect the lives, safety and security of the community.
2. Under the *Mental Health Act 2016* (Qld), a person charged with a serious offence who has a mental illness or intellectual or cognitive disability may be referred to the Mental Health Court for determination of whether they have a defence of unsound mind at the time of the offence, or whether they are presently unfit for trial. Where a defence is made out, the Court may make a forensic order if it is necessary, because of the person’s mental condition, to protect the safety of the community. The order subjects a person to involuntary treatment and care, including if necessary in a locked facility, and can only be amended or revoked upon review by the Mental Health Review Tribunal.
3. This system can result in:
	1. A person spending longer in a facility under a forensic order than they would have if they had been sentenced to a period of imprisonment,
	2. A person found unfit for trial being placed on a forensic order, even if there is reasonable doubt that the person ever committed the act constituting the offence. There is no special hearing to determine whether the person committed the offence, such as is available in NSW and Tasmania.
	3. A person being on a forensic order indefinitely. There is no limiting term on a forensic order.
	4. A person seeking to have the conditions of their forensic order relaxed, including access to the community, bearing the evidential onus to prove that this does not pose an unacceptable risk to the safety of the community, because of the person’s mental condition.[[30]](#footnote-30)
4. The issues are compounded for forensic patients with intellectual or cognitive disability, or dual disability, who require specialised support and programs which are different to those effective for persons with mental illness, but (for the majority) are still the responsibility of authorised mental health services who lack the resources and expertise.
5. There is also a lack of suitable accommodation options for forensic patients ready to progress into the community, resulting in a longer stay in hospital for reasons other than risk management. This is a particular problem for older persons who require aged care placement but cannot find a facility willing to accept them.

Recommendation 12: The Royal Commission must consider the detention and treatment of people with mental illness, intellectual disability and other cognitive impairment in the forensic system, particularly the risks of indefinite detention and detention where there is reasonable doubt the person ever committed the act constituting the offence.

# Realisation of rights

1. Under international law, State parties agree to respect, protect and fulfil human rights. States ‘respect’ rights by not interfering in the enjoyment of rights by individuals and groups. ‘Protection’ means that States must protect individual rights at risk of abuse by State, private and foreign entities. ‘Fulfilment’ of rights means positive action by the State to ensure rights can be realised and enjoyed. States also have a duty to ensure individuals can pursue an effective remedy to enforce their rights.
2. The HRA has as its main objects the protection and promotion of human rights, and to help build a culture in the Queensland public sector that respects and promotes human rights. (s 3)
3. The following overarching obligations, provided for variously under the CRPD and the HRA, should form part of the Royal Commission’s considerations to ensure that the human rights of people with disability are fully realised.

Recommendation 13: The Royal Commission should examine the importance of public awareness raising, professional training, inclusion, data collection and publication, and enforcement, to ensure that the human rights of people with disability are fully realised.

## Public awareness raising and professional training

1. Article 8 of the CRPD obliges State parties to raise awareness and foster respect for the rights and dignity of people with disability. This includes combatting harmful stereotypes and prejudices, and promoting the capabilities and contributions of people with disability.
2. The CRPD further requires State parties to promote the training of professionals and staff working with people with disability in human rights.(Article 4(1)(i) This is reflected in the Queensland HRA in its objects to build a culture in the Queensland public sector that respects and promotes human rights, and the express inclusion of registered NDIS providers in the definition of public entities caught by the Act.[[31]](#footnote-31)
3. Both measures are fundamental to changing public perceptions and attitudes towards people with disability, so that they are seen as people and rights-holders, with needs that go beyond basic activities of daily living, and will help address discriminatory practices.

## Participation and inclusion

1. Article 4(3) to the CRPD obliges States to consult and actively involve people with disabilities through their representative organisations in the development and implementation of measures to give effect to the CRPD and in other decisions relating to persons with disabilities.
2. The HRA also gives people with disability the right, and have the opportunity, to participate in public life without discrimination.(s 23) Also relevant is the right to freedom of expression, which may include rights to seek and receive information held by government.(s 21)
3. The meaningful participation of people with disability in policies made about them is more likely to result in successful outcomes, empowers people with disability, values their contributions, and provides another way of educating the community about disability in a positive way.

## Data collection and publication

1. Under Article 31 of the CRPD, States must collect statistical and research data to assist them to formulate, implement, monitor and evaluate policies and other measures that implement the CRPD. Collection must be mindful of the privacy rights held by individuals and have adequate safeguards. There is an additional obligation on States to disseminate the information to people with disability and ensure that the information is accessible.
2. As described above, the rights to take part in public life and to freedom of expression[[32]](#footnote-32) support a right to information and possibly data collection of the kind envisaged by Article 31 of the CRPD: it is difficult to engage in debate, contribute ideas or hold government to account without data.

## Enforcement

1. To realise rights, existing protections or any new protections created to protect people with disability must be enforceable.
2. Barriers to enforceability for people with disability include:
	1. Perceptions that people with disability make unreliable complainants or witnesses, which results in inadequate investigations and few prosecutions, the application of discriminatory tests to prove legal capacity, and people being discouraged from reporting crimes;
	2. Low levels of literacy and education;
	3. Lack of appropriate legal and advocacy supports, which in some cases can stem from a reluctance of the legal profession to take instructions from persons whose legal capacity is in question;
	4. Lack of financial and personal resources;
	5. Lack of reasonable adjustments in the court process;
	6. Fear of repercussions from respondent entities who may be in ongoing positions of power or dependence in relation to the complainant.[[33]](#footnote-33)
3. The Royal Commission will need to explore how these barriers can be addressed, including: alternative dispute resolution pathways, training for relevant staff and professionals, increased legal and advocacy supports, the use of intermediaries, whistleblower protections or representative complaint mechanisms, and other adjustments so that people with disability can engage with court processes on an equal basis with others.

# Conclusion

1. We commend the Royal Commission’s broad interpretation of their terms of reference on this important, complex and widespread issue.
2. While there will be obvious and direct causes of harm, it is imperative that the Royal Commission identify and address contributing social disadvantage that renders people with disability vulnerable to harm.
3. It will also be necessary that the Royal Commission carefully examine systems, in many cases developed for the protection of people with disability, but which may in fact perpetuate harms.
4. Any solution will need to incorporate measures that address stigma of people with disability, training for people who support people with disability, collection of data to enhance transparency and accountability, and meaningful measures by which people with disability can enforce their rights.
5. Finally, implementation of a national human rights framework which incorporates Australia’s international human rights obligations, including those contained in the *Convention on the Rights of Persons with Disabilities* will assist to holistically address the problems of violence and other ill harm experienced by people with disabilities.
1. P French, *Human rights indicators for people with disability: a resource for disability activists and policy makers* (2008) at 12. [↑](#footnote-ref-1)
2. Australian Senate Community Affairs Committee, *Report: Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (Nov 2015) at 86. [↑](#footnote-ref-2)
3. Ibid Recommendations 10-12. [↑](#footnote-ref-3)
4. Australian Law Reform Commission (ALRC), Equality, Capacity and Disability in Commonwealth Laws (Aug 2014) ALRC Report 124. [↑](#footnote-ref-4)
5. Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia* (15 Oct 2019) CRPD/C/AUS/CO/2-3. [↑](#footnote-ref-5)
6. See for example *PBU & NJE v Mental Health Tribunal* [2018] VSC 564. [↑](#footnote-ref-6)
7. ADA s 10(1); *Disability Discrimination Act 1992* (Cth) s 5. [↑](#footnote-ref-7)
8. *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92. [↑](#footnote-ref-8)
9. *Equal Opportunity Act 2010* (Vic) s 8; *Discrimination Act 1991* (ACT) s 8. [↑](#footnote-ref-9)
10. Department of Education (May 2019) Available online at <<https://qed.qld.gov.au/det-publications/reports/earlyyears/Documents/sda-by-region.pdf>>. [↑](#footnote-ref-10)
11. See for example *DPP v SE* [2017] VSC 13 at [28]. [↑](#footnote-ref-11)
12. Australian Bureau of Statistics *2075.0 – Census of Population and Housing – Counts of Aboriginal and Torres Strait Islander Australians, 2016*. Available online at <[https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/2075.0Main+Features202016?OpenDocument](https://www.abs.gov.au/AUSSTATS/abs%40.nsf/Lookup/2075.0Main%2BFeatures202016?OpenDocument)>. [↑](#footnote-ref-12)
13. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Health care for people with cognitive disability: Issues paper* (16 Dec 2019). [↑](#footnote-ref-13)
14. Committee on the Rights of Persons with Disabilities (n 5) at [19]. [↑](#footnote-ref-14)
15. A Marrie, *Addressing Institutional Barriers to Health Equity for Aboriginal and Torres Strait Islander People in Queensland’s Public Hospital and Health Services* (Mar 2017) Report to the Anti-Discrimination Commission Queensland. [↑](#footnote-ref-15)
16. Anti-Discrimination Commission Queensland *Women in Prison 2019: a human rights consultation report* (2019). [↑](#footnote-ref-16)
17. Office of the State Coroner, Queensland Courts, *Findings of inquest into the death of Tracey Lee Inglis* (9 December 2011). [↑](#footnote-ref-17)
18. ICCPR Article 9, CRPD Article 14, HRA s 29. [↑](#footnote-ref-18)
19. *HL v United Kingdom* (2004) 40 EHRR 761. [↑](#footnote-ref-19)
20. See General Comment 35 (2014) CCPR/C/GC/35 and CRPD Articles 14 and 16. [↑](#footnote-ref-20)
21. Australian Human Rights Commission *Information concerning Australia’s compliance with the Convention on the Rights of Persons with Disabilities* (25 Jul 2019) Report to the Committee on the Rights of Persons with Disabilities. [↑](#footnote-ref-21)
22. *Guardianship and Administration Act* *2000* (Qld) ss 70 and 80D. [↑](#footnote-ref-22)
23. Ibids 71. [↑](#footnote-ref-23)
24. Committee on the Rights of People with Disability (n 5) at [34]. [↑](#footnote-ref-24)
25. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The Criminal Justice System: Issues paper* (14 Jan 2020). [↑](#footnote-ref-25)
26. Australian Human Rights Commission *Equal before the law: Towards disability justice strategies* (Feb 2014). [↑](#footnote-ref-26)
27. Anti-Discrimination Commission Queensland (n 16). [↑](#footnote-ref-27)
28. Human Rights Watch *“I needed Help, Instead I was Punished” Abuse and Neglect of Prisoners with Disabilities in Australia* (6 Feb 2018). [↑](#footnote-ref-28)
29. ADA Part 12, Ch 6. [↑](#footnote-ref-29)
30. *Mental Health Act 2016* (Qld) s 445. [↑](#footnote-ref-30)
31. HRA s 3(b), s9(2)(a) and s 9(5). [↑](#footnote-ref-31)
32. HRA ss 23 and 21. [↑](#footnote-ref-32)
33. A Gray, S Forell & S Clarke *Cognitive impairment, legal need and access to justice: Justice issues paper 10* (2009) Law and Justice Foundation of NSW. [↑](#footnote-ref-33)