



The Hon Nicola Roxon MP
Attorney-General
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Email: Nicola.Roxon.MP@aph.gov.au

Dear Hon Nicola Roxon MP,

I write about the previous Attorney-General's letter (posted 9th August 2011, ref. AG-MC11/07093, also available at <http://a4.org.au/a4/node/396>, see also <http://a4.org.au/a4/node/375>) in reply to our letter (18th June 2011).

Autism Aspergers Advocacy Australia (A4) is disappointed that the previous Attorney-General's reply does not address the issues raised. Please review A4's original letter and try to respond to the actual issues it raises.

The previous Attorney-General's reply refers to CoAG having “recently endorsed the *National Disability Strategy*, which focuses on mainstreaming the rights of people with disability articulated in the United Nations *Convention on the Rights of Persons with Disabilities*”.

Please be aware that people with autism spectrum disorders (PwASD) were not included in discussions for, or the development of, CoAG's *National Disability Strategy* (NDS). The Government excludes advocates for PwASD from the national disability peak bodies that it recognises and supports (see <http://www.fahcsia.gov.au/sa/disability/pubs/policy/documents/cds/p9.htm> and http://www.fahcsia.gov.au/sa/disability/progserv/consultation_advocacy/Pages/DisabilityPeakBodies.aspx).

In our view, CoAG's NDS is severely flawed. In relation to “Rights protection, justice and legislation” (page 36), it says

Outcome: People with disability have their rights promoted, upheld and protected.

Australia's Human Rights Framework recognises that all Australians are responsible for respecting and protecting human rights and ensuring that our commitment to a 'fair go' becomes a reality for all Australians. Australia has had a rights-oriented focus in relation to disability for many years. This focus is demonstrated in Australia's *Disability Discrimination Act 1992*. It is also implicit in Australia's ratification of the CRPD that views persons with disability as people with rights.

Nevertheless, people with disability continue to face discrimination in many areas of their lives. The Strategy seeks to promote awareness and understanding of the rights of people with disability, improve responses to people with disability in the justice system, ensure their safety and enable them to participate fully in the economic, civic and social life of our nation. ...

Our previous letter shows PwASD do not get “a fair go” in schools or in the legal system. A “fair go” is not reality for Australians with ASD.

Australia’s *Disability Discrimination Act 1992* (DDA) demonstrates Australia's failure/refusal to recognise the **distinct** needs of PwD. Australian Governments mostly recognises that PwD are people and that they mostly have the same rights as people generally. There are exceptions, such as people with intellectual and communication disorders not even being allowed to participate in legal processes.

The problem is that Australia’s *DDA* is about a very limited type of “equality”; the *DDA* is about ensuring the **same** opportunities for PwD as others have. The problem is that PwD have a “disability” which means PwD have needs **beyond** those of people who do not have a disability. The UN CRPD is also about the right of PwD to assistance with overcoming barriers to equal participation: it is not just about having the same opportunities as people who do not have a disability.

Limiting the rights of PwD to the same rights as other essentially denies their disability. It does not respect PwD ... refusing to recognise their difference denies PwD “a fair go”.

The UN CRPD talks about:

- mainstreaming as **part** of the strategy; it does not suggest mainstreaming is the entire strategy
- “policies, plans, programmes and actions ... to **further equalize** opportunities for persons with disabilities” (our emphasis)

People who are blind encounter as much light as anyone else; apparently they have an *equal opportunity* to see. Most people understand that this *equal opportunity* to see does not ensure a person with visual impairment can access printed material or cross a road safely; in other words, most people recognise those with visual impairment have “special needs” (or whatever the latest politically correct term is).

For various reasons, we understand some of the special needs of people with vision impairment and we expect “reasonable accommodations” will be made for them. Despite what the *DDA* says, [Purvis v The State of New South Wales \(Department of Education and Training\) \(2003\) 217 CLR 92](#) and consequently [Walker v State of Victoria \[2011\] FCA 258](#) show the denial of “reasonable accommodations” for other disabilities are lawful in Australia, contrary to the [UN CRPD](#).

Lofty (yet unrealised) principles suggest (see <http://www.judcom.nsw.gov.au/publications/benchbks/equality> and especially <http://www.judcom.nsw.gov.au/publications/benchbks/equality/section01.pdf>, page 1106)

... judicial officers cannot treat everyone the same way if they wish to ensure equality before the law, as to do so could lead to a perception of unfairness and in some cases a legally wrong outcome.⁷

...

⁷ This principle has been referred to as the principle of “substantive equality” — as, for example, cited by McHugh and Kirby JJ in *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 at [202]: “Substantive equality’ directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the

premise that ‘in order to treat some persons equally, we must treat them differently’.

Like the NDS, the High Court's *Purvis v NSW* decision actually ignores “the principle of 'substantive equality'” and is described elsewhere as “making bad law” (see <http://www.austlii.edu.au/au/journals/FedLRev/2007/4.html>).

Australians generally have very few actual rights. Only the Australian Capital Territory and Victoria have passed any human rights law, and those laws are extremely limited (and essentially ineffective for PwD). Suggestions Australians have rights is mostly misleading. Australians have few rights ... and Australian PwD have fewer.

The NDS ignores or denies any need for “substantive equality”; it aims to ensure a decade of inaction on this fundamental disability discrimination issue.

The consequences for PwD are very serious. A [recent report](#) found Australia is

... now one of the poorest performers in disability support among comparable OECD jurisdictions. The employment rate for working-age people with a disability in Australia has declined since the mid-1990s and during the mid-2000s. Australia is ranked 21st out of 29 OECD countries. ...

and

Almost one in two people with a disability in Australia live in or near poverty (45%). This is more than 2.5 times the rate of poverty experienced in the general population and more than double the OECD average of 22%. The OECD average for relative poverty risk is approximately 1.6, which indicates that people with a disability tend to have a poverty risk about 1.6 times higher than people without a disability. Australia is by far the worst performer on this indicator, ranking 27th out of 27 OECD countries, with a relative poverty risk of 2.7.

The consequences for the rapidly growing numbers of PwASD are even more serious due to their distinct special needs that are largely unrecognised by Australian Governments. The ABS recently reported (see <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4428.0>) that:

- “In 2009, the labour force participation rate for people with autism was 34%. This compares with 54% labour force participation rate for people with disabilities and 83% for people without disabilities.”
- “Children with autism need a high level of support to attend school, with 41% needing a counsellor or disability support person and 51% requiring special tuition. Of those children with autism attending school, 24% did not receive any additional support (excluding attending a special school or attending special classes in mainstream schools).”
- “Of people with autism who had finished school, 77% had not completed a post-school qualification. This is well above the rate for both the rest of the population with disability and people with no disability”.

PwASD have substantial issues with “substantive equality” ... their needs are largely unrecognised and unmet.

The previous Attorney-General's letter in reply says ...

In response to the increasing prevalence of children with an autism spectrum disorder in Australia, the Government is providing targeted support for these children, their parents, carers, teachers and other professionals through the *Helping Children with Autism* package.

The *Helping Children with Autism* (HCWA) package was not “in response to the increasing prevalence of children with an autism spectrum disorder in Australia”, it was due to the lack of “substantive equality” under the *DDA* and the failure/refusal of states and territories to provide appropriate ASD-specific services through the CSTDA/NDA. On the other hand, the \$28.7 million increase in funding for HCWA provided in the latest federal budget (see **Helping Children with Autism — additional funding** in http://www.budget.gov.au/2011-12/content/bp2/html/bp2_expense-09.htm) could be said to be “in response to the increasing prevalence of children with an autism spectrum disorder in Australia”.

The HCWA packages funds about 5% of the early intervention that a child with ASD needs, according to advice from the Department of Health and Ageing. Notice that young children with ASD in Australia do not have a right to even 5% of treatment and rehabilitation ... despite the UN Convention on the Rights of the Child. The comparator test in the *DDA* says people without ASD do not need treatment or rehabilitation for ASD so it is lawful to deny such a service to children with ASD.

The letter says the *DDA* “provides that it is unlawful for a person or organisation to discriminate against a person on the basis of disability in a range of areas, including education”. The previous letter about the recent [Walker v State of Victoria](#) and previously [Purvis v NSW](#) show this claim about the *DDA* and the associated *Education Standards* is incorrect. These matters demonstrate discrimination can be both essentially unrecognised in the legal system and lawful under Australian law.

We wish you and your Department well in efforts to consolidate “the five Commonwealth anti-discrimination statutes, including the *DDA* and its Standards into a single comprehensive law as part of Australia's Human Rights Framework”. While we believe it would be appropriate for PwASD to contribute to this process, PwASD, their families and associates are limited by their capacity and the absence of any concrete support from Government for advocacy for PwASD at the federal level (as mentioned above).

Yours sincerely

Bob Buckley
A4 Convenor

4/1/2012