



# Convention on the Rights of Persons with Disabilities

Distr.: General  
19 May 2017

Original: English

## Committee on the Rights of Persons with Disabilities

### Decision adopted by the Committee under article 2 of the Optional Protocol, concerning communication No. 14/2013\*, \*\*

<i>Communication submitted by:</i>	D.R. (represented by counsel Phillip French)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	14 August 2013 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 9 August 2012 (not issued in document form)
<i>Date of adoption of decision:</i>	24 March 2017
<i>Subject matter:</i>	Institutionalization of person with intellectual and mental impairment; access to social housing
<i>Procedural issue:</i>	Admissibility — exhaustion of domestic remedies
<i>Substantive issues:</i>	Discrimination on the ground of disability; exercise of legal capacity; deprivation of liberty; restrictions of rights
<i>Articles of the Convention:</i>	4, 5 (2), 14, 18, 19, 22, 26 and 28
<i>Article of the Optional Protocol:</i>	2

1. The author of the communication is D.R., an Australian national born on 18 May 1961 who has lived at the Jacana Acquired Brain Injury Centre in the Australian State of Queensland since 1998. He claims to be a victim of violations by Australia of articles 14, 18, 19, 22, 26 and 28 of the Convention. The Optional Protocol entered into force for Australia on 19 September 2009. The author is represented by Phillip French, counsel from the Australian Centre for Disability Law.

\* Adopted by the Committee at its seventeenth session (20 March-12 April 2017).

\*\* The following members of the Committee participated in the examination of the communication: Ahmad Al-Saif, Danlami Umaru Basharu, Monthian Buntan, Imed Eddine Chaker, Theresia Degener, Jun Ishikawa, Samuel Njuguna Kabue, Kim Hyung Shik, Stig Langvad, László Gábor Lovász, Robert George Martin, Martin Babu Mwesigwa, Carlos Alberto Parra Dussan, Coomaravel Pyaneandee, Valery Nikitich Rukhledev, Jonas Ruskus, Damjan Tatić and You Liang.



## A. Summary of the information and arguments submitted by the parties

### The facts as submitted by the author

2.1 D.R. is a 52-year-old man. He has a mental and intellectual disability arising from an acquired brain injury. He receives a Disability Support Pension and has no other assets. On 8 July 1998, the author was admitted to the Jacana Acquired Brain Injury Centre in Bracken Ridge, a suburb of Brisbane in the Australian state of Queensland. Jacana is a slow-stream rehabilitation service operated by the Prince Charles Hospital, which is administrated by Queensland Health, an agency of the government of Queensland. D.R. was admitted there to take part in a rehabilitation programme, with the aim of enabling him to regain and develop the skills necessary for him to live and work in the community as independently as possible. He has lived there ever since. The author is currently accommodated in the Jabiru Unit of Jacana, which consists of five pods, each with four single bedrooms, a communal shower facility, a toilet, a day room, an activities room and administrative offices.

2.2 In around July 2000, the author was advised by the medical staff at Jacana that his rehabilitation programme would cease and that he had been assessed as ready for discharge. However, the medical staff determined that accommodation and disability support services had to be made available in the community before the author could be discharged. From July 2000 to August 2010, Jacana staff made various referrals and applications on behalf of the author for community-based accommodation and support services. None were successful. Consequently, the author could not be discharged from the Centre. In August 2010, Jacana staff submitted a further application to the Queensland Department of Communities Housing and Homelessness Services and Disability and Community Care Services for social housing and disability support services. These services assessed the author as eligible for social (or public) housing and as having a “high need” for housing. His name was placed on the housing register. Nonetheless, Housing and Homelessness Services stated that social housing would not be allocated to the author unless he was first provided with disability support services. Disability and Community Care Services assessed the author to be eligible for disability support services; however, it indicated that it did not have capacity to fund disability support for the author. The author’s application for social housing is therefore indefinitely deferred. The author’s financial affairs are subject to compulsory administration by the Public Trustee of Queensland and he therefore has no power to manage his pension personally.

2.3 At the date of his communication, the author was still unable to be discharged, as he still did not have access to accommodation and disability-related support services in the community. He had no apparent prospect of transition to community-based living with the disability-related support he requires. According to the Australian and Queensland government policy guidelines, the author remains, in effect, a homeless person.

2.4 The author submits that Jacana is a residential institution that affords very limited privacy to its residents. He submits that he has his own room, but that staff and other residents can enter at any time, even when he does not wish them to. There are very limited facilities to enable the author to have personal possessions, which are at permanent risk of theft and damage.

2.5 The author further submits that even though Jacana purports to be a “slow-stream rehabilitation centre”, he is not provided with rehabilitation interventions that would assist him to gain independence: all tasks of daily living are done for him, and his self-care and daily living skills have deteriorated. At all material times, the author has objected to his detention at Jacana and has sought to leave the Centre.

2.6 By letter dated 9 September 2011, solicitors acting on behalf of the author lodged complaints with the Australian Human Rights Commission alleging that he had been subjected to discrimination by the governments of Australia and Queensland in terms of his access to accommodation and to disability-support services as a consequence of his disability, in violation of the Australian Disability Discrimination Act 1992. The author’s solicitors also submitted complaints to the Australian Human Rights Commission alleging that the governments of Australia and Queensland had engaged in acts and practices violating the author’s rights under the Convention. By letter dated 12 October 2011, the

Australian Human Rights Commission notified the heads of the relevant Australian and Queensland government agencies of those complaints and sought a response. By letter dated 4 November 2012, the Attorney-General's Department under the Government of Australia denied all allegations that it had engaged in acts or practices that were contrary to the author's human rights. In the letter it was further argued that it was not possible for the author to complain under the Australian Human Rights Commission Act about acts or omissions of the executive branch because the jurisdiction of the Commission was limited to administrative acts.

2.7 By letter to the Australian Human Rights Commission dated 2 July 2012, Crown Law argued on behalf of the State of Queensland that the Commission had no power to inquire into acts or practices of the government of Queensland that were inconsistent with or contrary to the author's human rights. At that stage, the author was advised by his lawyers that his disability discrimination claim would certainly fail before the courts, as the discrimination he claimed occurred in the context of programmes falling within the category of "special measures" that applied only to persons with disability and that, as such, could not give rise to disability-based discrimination claims pursuant to section 45 of the Australian Disability Discrimination Act.

2.8 The author argues that a claim of direct disability discrimination is also likely to fail because the Court will probably determine that his circumstances are "materially different" to other social housing applicants because he has been assessed as requiring disability support services, and that the conduct of the State of Queensland is reasonable given that the author needs to be provided with disability support services before he can take up social housing. Even if a claim of disability discrimination could be made under the Australian Disability Discrimination Act, the State of Queensland is likely to successfully argue that the immediate provision of disability support services would constitute an unjustifiable burden. Furthermore, liability for disability discrimination against the Commonwealth as an ancillary cannot be established unless liability for disability discrimination against the State of Queensland as principal can first be established. The author's complaints against the Commonwealth would therefore inevitably fail.

2.9 The author further submits that he has no power to initiate legal proceedings by himself in relation to his claim of disability-based discrimination as he is subject to an administration order under the Queensland Guardianship and Administration Act 2000. Consequently, only the Public Trustee may initiate (or authorize) such proceedings on the author's behalf.

2.10 The author finally specifies that the Australian Human Rights Commission is still attending to some aspects of the author's human rights complaints, but that its jurisdiction in that regard is very limited. The Commission convened a conciliation conference, but in the author's case, the authorities of the State party that have been called have refused to participate in conciliation. Additionally, the procedure before the Commission does not give rise to any enforceable remedy for violations of human rights, and can therefore not be considered as effective.

### **The complaint**

3.1 The author claims that State party's decisions and practice have amounted to a violation of his rights under articles 14, 18, 19, 22, 26 and 28 of the Convention, read alone and in conjunction with articles 4 and 5 (2) of the Convention.

3.2 As regards his allegations under article 14 of the Convention, the author submits that his stay, against his will, at Jacana has continued after the entry into force of the Convention for the State party, and that it amounts to an arbitrary detention on discriminatory grounds. As his estate is subject to administration by the Public Trustee of Queensland, he is unable to manage his pension and has no option to choose his own residence. The author further argues that the State of Queensland has failed to provide him with community-based accommodation and support services because of his disability, leaving him segregated and isolated from the community.

3.3 The author submits that, as he has been compelled to live at the Jacana facility, he has been deprived of his liberty of movement and of his right to choose his residence, in violation of his rights under article 18 of the Convention.

3.4 He argues that his institutionalization at Jacana amounts to a violation of article 19 of the Convention because it has prevented him from living independently in the place of his choice, and with whom he chooses. He also considers that his institutionalization has prevented him from being included in the community, being obliged to live in a medically oriented residential institution.

3.5 The author also argues that his privacy is subject to constant interference at the Jacana facility as, while he has a single room, he otherwise has very little privacy from staff and other residents, who are able to enter his room at any time. The author considers that this situation amounts to a violation of his rights as enshrined in article 22 of the Convention.

3.6 The author further claims that, since he is at Jacana, he has not received rehabilitation services that would enable him to strengthen and maintain his abilities. He argues that Jacana is a medically oriented institution in which he is isolated from the community and where he does not have access to the rehabilitation services he would need to support his full inclusion in the community. As time passes, he is becoming more passive, dependent and institutionalized owing to his continued detention. The author argues that this situation amounts to a violation of article 26 of the Convention.

3.7 The author alleges that his forced accommodation in a ward and the repeated denial of access to public housing and to disability support services have prevented him from accessing the adequate standard of living and social protection he is entitled to under article 28 of the Convention.

3.8 The author also claims that in relation to all the alleged breaches, the State party has violated articles 4 and 5 of the Convention because it has not taken all the measures necessary to promote the full realization of articles 14, 18, 19, 22, 26 and 28 to the maximum extent of its available resources. He further argues that the State party has failed to prohibit all discrimination based on disability, and to provide equal and effective legal protection against discrimination.

#### **State party's observations on admissibility and the merits**

4.1 On 22 December 2014, the State party submitted its observations on the admissibility and merits of the communication. It notes that the author has an intellectual impairment resulting from an acquired brain injury induced by a drug overdose, which resulted in asphyxia. It further notes that the author first came to Jacana Centre to undertake rehabilitation programmes to regain living skills. Like all residents in the Jabiru Unit where he is staying, the author can freely move around the building and has his own radio, television and refrigerator in his room. He receives a Disability Support Pension of approximately \$A 776.70 each fortnight, a pension supplement of \$A 63.50 each fortnight, rent assistance of \$A 127.60 and an emergency supplement of \$A 14.10, amounting to a total fortnightly payment of \$A 981.90. His financial affairs are subject to compulsory administration by the Public Trustee of Queensland under the Guardianship and Administration Act, and the Public Trustee Act 1978 (Queensland). The Public Trustee pays Queensland Health approximately \$A 15,600 each year for the accommodation and support services that the author receives at the Jacana Centre. This is based on a daily fee that covers accommodation, meals, laundry, medications and other services provided, including recreational activities. The Public Trustee retains the balance on behalf of the author. These monies can be used for the purchase of individual equipment to assist him, to support his transfer to community living when accommodation becomes available and for social activities.

4.2 Throughout his stay at the Jacana Centre, the author has received rehabilitation services. In July 2000 approximately, he was assessed as ready for discharge and was advised that his rehabilitation programme would cease. Since then, he has received transitional rehabilitation services, intended to maximize physical and communication

functionality and to enable him to undertake activities of daily living with supervision and support.

4.3 On 1 July 2010, the author submitted an application to Disability and Community Care Services to receive disability funding support. He identified a need for continual support for home living, social skills, self-direction, learning and community access. He was assessed as eligible to receive funding when it became available. On 11 November 2010, the author applied to the Chermside Housing Service Centre for subsidized social housing, requesting accommodation in the Brisbane suburbs of Strathpine, Bray Park, Bracken Ridge, Chermside, Stafford or Kedron. He asked for a duplex, cluster housing or a senior's unit and provided a medical report demonstrating that he would require support and supervision 24 hours each day, and a carer to assist with daily living. He also stated that he wanted to reside with another person from the Jacana Centre. His application was assessed as eligible and of "high need for housing assistance" under the State of Queensland's Disability and Community Care Services housing needs assessment policy.

4.4 In December 2010, the then Queensland Department of Communities, which was responsible for disability and community care services, obtained a report from an occupational therapist at the Jacana Centre containing recommendations as to the author's housing needs. In view thereof, and the author having nominated a prospective co-tenant, his application was listed on the housing register for housing with a shared support arrangement. This type of housing is aimed at helping applicants to live successfully in the community with ongoing support. It involves a group of people living together or in close proximity to share support services.

4.5 On 22 February 2011, the author indirectly advised the Chermside Housing Service Centre that he no longer wanted to live in shared accommodation and would require a duplex in the area of Chermside and Stafford. He was advised that his request would reduce the number of available housing options, and that a shared housing option could be secured earlier. The author maintained his choice, which was respected.

4.6 On 24 March 2011, Disability and Community Care Services prepared an integrated support plan for the author. The plan confirmed his goal to obtain subsidized housing alone in a duplex arrangement. It was decided that the author met the criteria for the "formation of a new household arrangement", which assists applicants with a disability who need to establish an independent household.

4.7 On 2 October 2011, an occupational therapist from the Chermside Housing Service Centre undertook an assessment of the author's needs. The author was listed for existing ground-floor accessible two-bedroom social housing, with handrails and a hobless shower. On 24 October 2011, the Department of Communities confirmed the author's request for duplex-style accommodation. On 2 November 2011, a stakeholder meeting involving the author took place. His support and housing needs were confirmed, and the suburbs in which he would accept housing were updated.

4.8 Since late October 2011, the occupational therapist from the Chermside Housing Service Centre has communicated with the author in an attempt to broaden the areas where he would accept social housing, thereby broadening (but not guaranteeing) the possibility to identify a suitable dwelling for him.

4.9 On 21 March 2013, the Department of Housing and Public Works provided the author with an application for a social housing assistance review to ensure that the information held as to his needs was current. On 15 April 2013, a completed review form was submitted on his behalf, without any changes to his preferred locations of residence. The author remains listed at the approved status of "very high need for housing assistance". In the State of Queensland, housing is allocated on the basis of need, rather than the length of time a person remains on a waiting list. In addition to persons with disabilities, a number of other groups also have very high needs for housing, including indigenous Australians, survivors of family violence (most frequently women and children), refugees and other homeless persons. As at 10 February 2014, there were approximately 4,400 households in the State of Queensland assessed as having a very high need for housing assistance.

4.10 The State party provides a list of available social housing in the six suburbs where the author has indicated his willingness to reside, replying to his request for a two-bedroom apartment, cluster housing or duplexes. Given the limited types of housing suitable for the author and the narrow number of locations in which he is willing to be accommodated, the State party indicates that time would still be necessary before he could be rehoused.

4.11 The author also requires funding to provide the author with the accommodation support services he needs for his health and safety. Being listed as eligible for such funding does not mean that he will receive it immediately when appropriate accommodation is identified by the Department of Housing and Public Works. The author must therefore be identified through the State of Queensland's prioritization policy as one of the highest prioritized individuals for available funding before housing can be provided to him. Such prioritization is necessary because demand for accommodation support funding exceeds supply, and it is done by the Disability and Community Care Services having regard to the priorities of the State and the relative needs of all persons requiring disability funding.<sup>1</sup> The prioritization policy states that as Disability and Community Care Services has finite resources, eligibility on its own does not confer access to specialist disability services. Rather, the cumulative effect of eligibility, needs assessment, prioritization and service availability determines access to these services. It also states that a person's priority, along with the overall demand for and availability of services at a particular time, will be the final determinant for the allocation of specialist disability services. The fact that the author has not yet received any funded disability support does not mean that he will not receive it. This matter is subject to continual review by Disability and Community Care Services, and the author can request to have his assessment reviewed and reassessed at any time to reflect his current situation.

4.12 The State of Queensland is not able to provide a time frame by when the author may be housed. Until housing that the author accepts as being suitable becomes available and he becomes the most eligible for disability support under the prioritization policy, the author will continue to reside in the Jacana Centre and the State of Queensland will continue to fund and provide the support services he needs.

4.13 The State party indicates that the Jacana Centre is a transitional housing provider and a rehabilitation centre administered by the Prince Charles Hospital. It is funded by the State of Queensland on the basis of block funding for residential and rehabilitation care of approximately \$A 7.4 million provided by Queensland Health and \$A 600,000 provided by the Department in the 2012/13 financial year, as well as a contribution by residents and persons receiving rehabilitation there of 87.5 per cent of the Disability Support Pension. The Centre accepts referrals from hospitals across the State of Queensland and from other states.

4.14 The Centre provides comprehensive multidisciplinary assessment and rehabilitation for persons with acquired brain injuries. It holds a case conference each time a person arrives to determine their rehabilitation needs and their discharge goals. Each three months, or earlier if there are changes, a full physical, social and psychological assessment is conducted and a new support plan is developed in consultation with the person concerned, which sets goals for the next three months. Relatives and support persons are invited and, if they are unable to attend, copies of the reports considered at the meetings are made available. The multidisciplinary team ensures a smooth and coordinated transition to the community. This involves liaison with other rehabilitation services, community-care providers and support agencies. People residing at the Centre are encouraged to develop or maintain their daily living skills. A range of recreational activities are organized, such as religious services, barbecues, happy hour and karaoke, outings to the movies, lunches out, sailing, sporting events, visiting community gardens, developing gardening skills and quizzes and bingo. Some people are also able to leave for the weekend or for special occasions to spend time with family and friends. The State party therefore considers that the Centre is not a "slow-stream rehabilitation service" that operates according to a "medical model", and it indicates that there is no current proposal to redevelop the Jacana Centre.

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<sup>1</sup> See section 8 of the Disability Services Act 2006 (Queensland).

4.15 As regards the author's claims related to the administration order he is subjected to, the State party considers that they are unsubstantiated. In particular, it submits that the author did not provide consent for the authorities of Queensland to release pertinent personal information, such as medical records that would illustrate that he is becoming passive, dependent and institutionalized, which the State party denies. The State party refers to the Guardianship and Administration Act, which acknowledges that: (a) an adult's right to make decisions is fundamental to the adult's inherent dignity; (b) the right to make decisions includes the right to make decisions with which others may not agree; (c) the capacity of an adult with "impaired capacity" to make decisions may differ according to: (i) the nature and extent of the impairment; (ii) the type of decision to be made; and (iii) the support available from members of the adult's existing support network; (d) the right of an adult with impaired capacity to make decisions should be restricted to the least possible extent; and (e) an adult with impaired capacity has a right to adequate and appropriate support for decision-making.<sup>2</sup> The Act seeks to strike an appropriate balance between "the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making" and their "right to adequate and appropriate support for decision-making".<sup>3</sup>

4.16 The State party submits that the general principles that must be applied by anyone appointed as an administrator<sup>4</sup> include a presumption of capacity, and a recognition of the fact that all persons have the same human rights and of the importance of encouraging and supporting a person to live and participate in the community.<sup>5</sup> A person must be given the support and information necessary to participate, their views and wishes must be sought and taken into account and the least rights-restrictive approach must be adopted. If substituted judgment is necessary,<sup>6</sup> it must be done in a way that takes the views and wishes of the person into account to the highest possible extent.

4.17 Under section 12 of the Guardianship and Administration Act, orders can only be made for the appointment of an administrator for financial matters, such as the Public Trustee, when (a) an independent tribunal is satisfied that the person has impaired capacity, (b) a decision is needed on a particular matter or the person is likely to do something that involves, or is likely to involve, an unreasonable risk to their health, welfare or property, and (c) without that appointment, that person's needs or interests will not be adequately met or protected. In accordance with section 15 of the Act, to select an appropriate administrator, the tribunal must pay due regard to, inter alia, possible conflicts of interest and to the compatibility between the persons concerned.

4.18 In the present case, the State party accepts that some of the conduct complained of by the author occurred prior to 20 September 2009 and continued after the Optional Protocol came into effect. However, it considers that the author's allegations are inadmissible for non-exhaustion of domestic remedies and lack of substantiation. As regards the exhaustion of domestic remedies, various remedies were still available to the author when he lodged his communication. The author brought a complaint to the Australian Human Rights Commission against Queensland Housing and Homelessness Services on the basis of disability discrimination in the administration of Commonwealth laws and programmes in relation to the National Affordable Housing Agreement and the National Partnership Agreement on Homelessness alleging a violation of sections 5, 6 and 29 (discrimination in the administration of Commonwealth laws and programmes) of the

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<sup>2</sup> Guardianship and Administration Act, sect. 5.

<sup>3</sup> *Ibid.*, sect. 6.

<sup>4</sup> *Ibid.*, sect. 34.

<sup>5</sup> *Ibid.*, schedule 1.

<sup>6</sup> The State party recalls the Committee's general comment No. 1 (2014) on equal recognition before the law, particularly paragraphs 17 and 26-28. It submits that while the views of the Committee are to be considered in good faith, they are not binding on States parties. The State party retains its interpretative declaration to article 12, which states: "Australia recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards."

Disability Discrimination Act. He also brought a complaint to the Commission that Queensland, through the Department of Communities, had “incited and/or alternatively or additionally has caused, instructed, induced or aided” Housing and Homelessness Services to discriminate against him on the basis of disability. In such a context, the Commission must first try to conciliate the complaint, and has a high rate of success as regards unlawful discrimination.<sup>7</sup> The author’s complaint under the Disability Discrimination Act was still subject to conciliation with the Commission when the author submitted his communication. He was therefore not yet able to bring proceedings in the federal courts to exhaust domestic remedies.

4.19 On 19 May 2014, the State of Queensland was advised by the Commission of its decision to terminate the discrimination complaints of the author under section 46PH(1) of the Australian Human Rights Commission Act because there was no reasonable prospect of settling it. The termination of a complaint enables complainants to bring legal proceedings before the federal courts, seeking an enforceable remedy for unlawful discrimination. The State party makes reference to a range of successful discrimination complaints made under the Disability Discrimination Act against actions of the Commonwealth and the states and territories,<sup>8</sup> and submits that the Disability Discrimination Act clearly provides an effective form of redress in relation to cases of disability-based discrimination. Under such procedure, a court that makes a finding of unlawful discrimination may make such orders as it sees fit. This includes an apology, monetary compensation, the provision of goods or services, an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination, an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant and an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of his or her conduct.

4.20 The State party notes that, as of the date of its response, the author has not submitted any such complaint, that the 60-day time limitation period has now expired, and that the author has not sought any extension. The State party considers that while the author outlines the reasons why he considers that there is “no reasonably available domestic remedy”, this is not the test under article 2 (d) of the Optional Protocol, which requires that all available domestic remedies must be exhausted except where the application of remedies is unreasonably prolonged or unlikely to bring effective relief. The State party notes the author’s submission that the legal advice he received indicated that he did not have a high chance of success if he were to bring proceedings before the courts, but submits that no evidence is provided in that regard.

<sup>7</sup> According to the Australian Human Rights Commission annual report for 2012/13, 65 per cent of the complaints were successfully resolved that year.

<sup>8</sup> Examples referred to by the State party: *Barghouthi v. Transfield Pty Ltd* (2002) 122 FCR 19, *Haar v. Maldon Nominees* (2000) 184 ALR 83, *Travers v. New South Wales* (2001) 163 FLR 99, *McKenzie v. Department of Urban Services* (2001) 163 FLR 133, *Oberoi v. Human Rights and Equal Opportunity Commission* (1995) EOC 92-714, *Sheehan v. Tin Can Bay Country Club* (2002) FMCA 95, *Randell v. Consolidated Bearing Company (SA) Pty Ltd* (2002) FMCA 44, *Forbes v. Australian Federal Police (Commonwealth of Australia)* (2003) FMCA 140, *McBride v. Victoria (No. 1)* (2003) FMCA 285, *Bassanelli v. QBE Insurance* (2003) FMCA 412, *QBE Travel Insurance v. Bassanelli* (2004) 137 FCR 88, *Darlington v. CASCO* (2002) FMCA 176, *Clarke v. Catholic Education Office and Another* (2003) 202 ALR 340, *Power v. Aboriginal Hostels Ltd* (2004) FMCA 452, *Trindall v. NSW Commissioner for Police* (2005) FMCA 2, *Hurst and Devlin v. Education Queensland* (2005) FCA 405, *Drury v. Andresco Hurl Refractory Services Pty Ltd (No. 4)* (2005) FMCA 1226, *Wiggins v. Department of Defence — Navy (No. 3)* (2006) FMCA 970, *Vickers v. The Ambulance Service of NSW* (2006) FMCA 1232, *Hurst v. Education Queensland* (2006) 151 FCR 562, *Rawcliffe v. Northern Sydney Central Coast Area Health Service* (2007) FMCA 931, *Gordon v. Commonwealth of Australia* (2008) FCA 603, *Maxworthy v. Shaw* (2010) FMCA 1014, *Innes v. Rail Corporation of NSW (No. 2)* (2013) (FMCA) 36, *Stephens-Sidebottom v. State of Victoria (Department of Education and Early Childhood Development)* (2011) FCA 893, *McKenna-Reid v. Rigo* (2011) FCA 883, *Clarke v. Catholic Education Office and Another* (2003) FCA 1085, *Haar v. Maldon Nominees* (2000) FMCA 5, *Access for All Alliance Inc v. Hervey Bay City Council* (2004) FMCA 915.

4.21 The State party further submits that to seek legal advice about remedies is not sufficient to exhaust domestic remedies. It refers to the jurisprudence of the Human Rights Committee according to which mere doubts about the effectiveness of such remedies did not absolve an author from pursuing them.<sup>9</sup> It adds that disability is included as a ground of discrimination under the Queensland Anti-Discrimination Act 1991, but that the author does not seem to have brought a complaint before the Anti-Discrimination Commission Queensland. The State party therefore submits that domestic remedies have not been exhausted and that the author's communication should be held inadmissible.

4.22 The author also requested that the Commission undertake, under sections 11 (1) (f) and 20 (1) (b) of the Australian Human Rights Commission Act, an inquiry into his claims, alleging that the Commonwealth had engaged in acts or practices that were inconsistent with his human rights. By way of remedy, he sought "appropriate ongoing housing and support services" to enable him to live in the community, and provision of appropriate ongoing rehabilitation and "disability specific health services ... to attain and maintain maximum independence and physical ability". In a letter dated 19 May 2014, the State of Queensland was advised by the Commission that the Commission was still reviewing aspects of the inquiry. It remained before the Commission at the time of the submission of the State party's observations. In that regard, the State party notes the jurisprudence of the Human Rights Committee according to which such an inquiry is an administrative remedy and that any decision, even if it were in an author's favour, could not be described as one which would, in terms of the Optional Protocol, be effective.<sup>10</sup>

4.23 As regards the author's submission that the administration order adopted in his case prevents him from initiating legal proceedings and that only the Public Trustee can do so on his behalf, the State party submits that the author is subject to a Certificate of Authority under which a public trustee is appointed as the administrator of his financial matters.<sup>11</sup> The State party considers that given the definition of "financial matters", and in the absence of a copy of the administration order adopted in his case, it is unclear that it would prevent him from initiating legal proceedings.

4.24 The State party further submits that the author failed to provide sufficient evidence to substantiate any of his claims: he does not demonstrate that his disability has been exacerbated as a result of residing in the Jacana Centre, and does not provide any information as to the basis on which administration orders were made. Additionally, the author did not provide his consent to enable the State party to access the documentation that would have been relevant to meaningfully assess his claims. The State party therefore considers that the author's claims should be held inadmissible under article 2 (e) of the Optional Protocol. Should the Committee find the author's allegations admissible, the State party submits that they are without merit.

4.25 As regards the author's allegations under article 19 of the Convention regarding the right not to be obliged to live in a particular living arrangement, the State party submits that it is an economic, social and cultural right that would require a significant expenditure of resources by States parties, and should accordingly be subject to the recognition of the fact that the full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.<sup>12</sup> It further submits that the obligation on States parties under the Convention is to take measures to progressively realize these rights, as well as to act consistently with the obligations of immediate effect. This right does not require the State party to provide all persons with whatever form of housing or housing arrangements they consider preferable, in addition to providing community support services or accommodation support services to all persons with disability on demand.

4.26 The State party submits that it does not accept the author's claim that the State of Queensland has refused or failed to provide both accommodation and accommodation

<sup>9</sup> See Human Rights Committee, communication No. 9/1997, *D.S. v. Sweden*, decision of inadmissibility adopted on 17 August 1998, para. 6.4.

<sup>10</sup> See communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 7.3.

<sup>11</sup> Guardianship and Administration Act, schedule 2, part 1, section 1 (o).

<sup>12</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations, para. 9.

support services and has not given him the opportunity to choose his place of residence on an equal basis with others under article 19 (a). It understands that residing in the Jacana Centre is not his preference, and acknowledges that he faces barriers to living in the community. However, if he were not accommodated in Jacana Centre, the author would be homeless, with no access to care and support.

4.27 Given the high demand for social housing, the Department of Housing and Public Works has adopted a process to manage the allocation of housing stock. In that regard, the Committee on Economic, Social and Cultural Rights has acknowledged that States parties have a “margin of appreciation” to allocate resources and to set policies that respect, protect and fulfil their obligations under the International Covenant on Economic, Social and Cultural Rights.<sup>13</sup>

4.28 The State party submits that throughout the process of trying to locate alternative accommodation for the author, it has respected his wish to live in particular places, even when this would limit the availability of properties in which he could be accommodated. The State party continues to progressively realize the right of persons with disabilities to community support services as required under article 19 (b) and (c) of the Convention in a manner that most effectively meets their needs, as well as those of their families and carers, in a way that is consistent with local needs and priorities. It describes the policies and programmes developed, and the funds spent to this end. The State party gives examples of six people with high needs (of the same level as the author) who were discharged from Jacana and other Queensland Health facilities between 2011 and 2014, with support packages enabling them to live in the community. As at July 2014, 6 people in the rehabilitation programme at the Jacana Centre were requiring further accommodation and 18 people were awaiting transition to social housing and requiring accommodation support services. The State party considers that these cases demonstrate that, at some stage, the author will also be provided with social housing and accommodation support services, and that his claims under article 19 are without merit.

4.29 As regards the author’s suggestion that Jacana Centre should be closed and the funding presently used to maintain and operate it could be reassigned to community-based disability support,<sup>14</sup> the State party submits that it would result in the author’s homelessness: no adapted social housing is currently available and his needs could not be appropriately accommodated.

*Article 28 — Right to progressive realization to the maximum available resources of an adequate standard of living and to social protection*

4.30 As regards the author’s claims under article 28 of the Convention, the State party submits that this article must be interpreted taking into account the particular circumstances of persons with disability, and in view of article 4 (2), under which each State party undertakes to take measures to the maximum of its available resources to progressively achieve the full realization of economic, social and cultural rights.<sup>15</sup>

4.31 As to the right to adequate housing, the State party considers that its obligation is to take measures to progressively ensure that access to adequate housing is provided in a non-discriminatory way, but that it does not require the State party to provide housing to the entire population or to provide the author, on demand, with social accommodation or services. The State party describes the funds and programmes it has dedicated to progressively realizing the right to adequate housing through the Commonwealth funds and the National Affordable Housing Agreement that commenced on 1 January 2009. The State party notes that article 28 (2) (d) of the Convention requires States parties to ensure access by persons with disabilities to public housing programmes, and that the author alleges that he has been “repeatedly refused” such access. The State party rejects this allegation. It argues that the author has been prioritized as having a “very high need” for housing

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<sup>13</sup> Letter dated 16 May 2012 from the Chair of the Committee on Economic, Social and Cultural Rights addressed to States parties to the International Covenant on Economic, Social and Cultural Rights.

<sup>14</sup> The State party refers to the author’s submission, para. 69.3.

<sup>15</sup> The State party refers to Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991) on the right to adequate housing.

assistance, and that he is now at the top of the waiting lists for available accommodation in the suburbs where he wishes to reside.

*Article 14 — Right to liberty and security of person*

4.32 As regards the author's claims under article 14 of the Convention, the State party considers that they are without merit. It argues that for a person to be deprived of liberty, he or she must be subject to "forceful detention" at a "certain narrowly bounded location". Taking note of the Committee's statement of September 2014 on article 14 of the Convention, the State party submits that the test as to whether detention is arbitrary is whether, in all the circumstances, the detention of the individual is appropriate and justifiable and reasonable, necessary and proportionate to the end that is sought.<sup>16</sup>

4.33 As to the author's claim that he can only leave Jacana Centre with the agreement of staff, the State party observes that he has "significant cognitive disabilities and requires substantial, if not full-time, support and assistance". It considers that it is unclear whether the author is actually only able to leave the Jacana Centre with the agreement of staff, and if this is the case, whether he has been subject to refusals, and in what circumstances. Requiring the author to advise employees of the Jacana Centre if he is leaving, or even requiring him to seek the agreement of employees of the Centre prior to leaving, does not meet the threshold required to constitute detention. Given the level of assistance he requires, it is important that employees of the Centre are aware of his location to ensure his safety and to facilitate appropriate support whenever necessary. The State party also recalls that persons residing in the Centre are able to leave it to participate in activities in the community as part of a group or to see family and friends. They are therefore not detained. Additionally, orders made under the Guardianship and Administration Act are made subject to a range of considerations and safeguards. They are possible only if an independent tribunal is satisfied that the person has impaired capacity, there is a need for a decision in relation to a particular matter, or where the person is likely to do something that involves, or is likely to involve, an unreasonable risk to his or her health, welfare or property. If the Public Guardian is appointed under a guardianship order in relation to accommodation matters, he or she can make decisions as to where the person under guardianship should reside to ensure that person's safety and well-being. Such decisions do not require the detention of the person, nor do they prevent him or her from residing in social housing or renting accommodation in the community privately if he or she is in a financial position to do so. In the case of the author, he has limited financial means and a range of matters restrict his ability to participate in the open housing market. He cannot reside with family and must therefore be accommodated within existing social housing stock. The State party therefore submits that the author is not subject to detention under article 14 (1), and can therefore not be subject to unlawful or arbitrary detention.

*Article 18 — Rights to liberty of movement and to nationality*

4.34 As to the author's claim under article 18, the State party considers that it is unsubstantiated. It refers to the jurisprudence of the Human Rights Committee according to which the liberty of movement is an indispensable condition for the free development of a person,<sup>17</sup> and everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence.<sup>18</sup> The State party notes that the author refers to the same facts as those in relation to his claim under article 14 (1), and rejects the author's claim that he has been denied the right to liberty of movement: the orders made under the Guardianship and Administration Act do not in any way affect it, nor do they affect his ability to choose his residence. The author is able to freely move around the building, and he participates in a range of recreational activities that involve leaving the Jacana Centre. The State party does not concede that the author has to advise Jacana Centre employees when leaving the Centre, and it reiterates that even if he did, such a requirement would not interfere with his freedom of movement and is necessary to support the author.

<sup>16</sup> See Human Rights Committee, communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 9.2.

<sup>17</sup> See general comment No. 27 (1999) on freedom of movement, para. 1.

<sup>18</sup> *Ibid.*, para. 4.

4.35 As to the author's right to choose his own residence on an equal basis with others, the State party reiterates that the Department of Housing and Public Works has consistently supported his preferences for residing in particular locations, on an equal basis with others, despite the fact that his choices have affected his ability to be housed. The State party therefore considers that the author's claims in that regard are without merit.

*Article 22 — Right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence or other types of communication*

4.36 Regarding the author's claim under article 22 of the Convention, the State party submits that they should be held inadmissible and without merit. It refers to the jurisprudence of the Human Rights Committee according to which interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.<sup>19</sup> A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.<sup>20</sup> As the author currently resides at the Jacana Centre, the State party considers that it is his home for the purpose of article 22, and accepts that every invasion of the "home" that occurs without his consent represents interference.<sup>21</sup> Such interference is only permissible when it is both lawful and not arbitrary. The room where the author resides has space for storage of personal items. Most residents and persons receiving rehabilitation services also have wardrobes for storage, and they can use the noticeboards in their rooms for the display of personal mementos and photographs.

4.37 In relation to the assertion that employees at the Jacana Centre have regular access to the author's room, such access is necessary and reasonable given the high level of care and support that the author requires, and it is always done respecting the author's privacy. The State party considers that the author does not provide any evidence of arbitrary or unlawful interference with his privacy, family, home or correspondence.

*Article 26 — Right to progressive realization, to the maximum available resources, of habilitation and rehabilitation*

4.38 As to the author's claim that the State party has violated his rights under article 26 by not providing him with rehabilitation that would "assist him to develop his self-care and daily living skills or his vocational or other potential", and that he has become "passive, dependent and institutionalized", the State party submits the progressive character of its obligations in that regard. It submits that it is committed to achieving an adequate standard of living for all, including persons with disabilities, and to facilitate their full inclusion and participation in all aspects of life. The State party rejects the author's claim that that realization is not progressing to the maximum extent of the State party's available resources, and submits that expenditure on disability support services, adjusted to take into account inflation, has increased by 4 per cent between 2011 and 2013 and by 23 per cent since 2008.<sup>22</sup>

4.39 The State party indicates that 317,616 people used disability support services in 2011/12, which was an increase of 29 per cent from 2007/08. As part of the Queensland Disability Plan 2014-2019, it is proposed that the number of people receiving specialist disability services will increase from the current 45,000 to approximately 97,000 in 2019, with greater control and choice in relation to individual support planning.<sup>23</sup> The scheme will focus on a person's goals and aspirations, and take into consideration their particular circumstances, including the impact of their disability on their capacity for social and economic participation. The State party further submits that the author is receiving regular

<sup>19</sup> See general comment No. 16 (1988) on the right to privacy, para. 3.

<sup>20</sup> *Ibid.*, para. 8.

<sup>21</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2005), p. 400.

<sup>22</sup> Australia, Australian Institute of Health and Welfare, "Disability support services: services provided under the National Disability Agreement 2012-13", bulletin 122 (July 2014), p. 2.

<sup>23</sup> Government of Queensland, "Queensland Disability Plan 2014-19: enabling choices and opportunities" (2013), p. 7.

rehabilitation services at the Jacana Centre and, as all other residents, he is encouraged to develop or maintain daily living skills in preparation for his return to the community. All activities aim at ensuring that persons receiving rehabilitation services do not become passive, dependent or institutionalized. The State party therefore submits that it is progressively realizing the rights under article 26 and that the author's claims are without merit.

*Articles 4 and 5 — General obligations of States parties and the right to equality and non-discrimination*

4.40 As per the author's claim under articles 4 and 5 of the Convention, the State party submits that they are not substantiated. It submits that it devotes significant effort, including increasing available financial resources, to ensuring that persons with disabilities in Australia are able to enjoy fully, and on an equal basis with others, all human rights and fundamental freedoms in accordance with the Convention. It submits that non-discrimination is a fundamental principle under the Convention and that States parties are obliged to take appropriate measures, including legislative measures, to prohibit discrimination on the basis of disability. Legislative prohibitions are in place at the Commonwealth level and in states and territories. The State party therefore considers that the author's claims in that regard are without merit.

4.41 The State party therefore submits that the author's claims under articles 4, 5 (2), 14, 18, 19, 22, 23, 26 and 28 of the Convention are inadmissible under the Optional Protocol. Should the Committee be of the view that any of the allegations are admissible, it considers that they are all without merit.

**Author's comments on the State party's observations**

5.1 The State party's observations were transmitted to the author for comments on 12 January 2015. Reminders were sent to the author on 26 May, 4 August and 14 November 2015, and on 4 March 2016, informing him that in the event that no information were to be received, the Committee would examine the communication on the basis of the information contained in the file.<sup>24</sup> Nonetheless, no comments were received from the author.

**B. Committee's consideration of admissibility**

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of the Committee's rules of procedure, whether the case is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's submission that some of the conduct complained of by the author occurred prior to 20 September 2009 and continued after the Optional Protocol came into effect, but that the author's communication should be held inadmissible. The State party considers that the author failed to exhaust all available domestic remedies. First, he did not submit a complaint to the Anti-Discrimination Commission Queensland, although disability is included as a ground of discrimination under the Queensland Anti-Discrimination Act 1991. Second, at the time when the author submitted his complaint, the discrimination complaints he had submitted to the Australian Human Rights Commission were still in course. In this connection, the Committee notes that the procedure before the Anti-Discrimination Commission Queensland and the Australian Human Rights Commission do not give rise to any enforceable remedy for violations of human rights, and can therefore not be considered as effective remedies. The Committee also notes that, on 19 May 2014, the State of Queensland was advised by the

<sup>24</sup> In a phone conversation, the author informed the Committee that, for personal reasons, he was not in a condition to provide further comments on time and that he reiterated all the information presented in the initial complaint.

Australian Human Rights Commission of its decision to terminate the discrimination complaints of the author because there was no reasonable prospect of settlement.

6.4 As regards the procedures before the courts, the Committee notes that the termination of a complaint before the Australian Human Rights Commission enables complainants to bring legal proceedings before the federal courts, seeking an enforceable remedy for unlawful discrimination. It also notes that the author has not initiated any such proceeding, and that the time limitation period to do so has expired.

6.5 In this connection, the Committee notes the author's submission that he has no independent power to commence legal proceedings in relation to his claim of disability discrimination as he is subject to an administration order under which the Public Trustee only may initiate (or authorize) such proceedings on his behalf. It further notes the argument of the State party that the author is subject to a Certificate of Authority under which a public trustee is appointed as the administrator of his financial matters, and that given the definition of "financial matters" and in the absence of a copy of the administration order adopted in his case, it is unclear that the order of reference would prevent him from initiating legal proceedings. The Committee also notes that the author did not provide any further information on this issue. In such circumstances, the Committee considers that it is not in a position to determine whether the author could initiate legal proceedings by himself, but notes that in any event, his representatives could do so and actually did so when presenting the author's case to the Australian Human Rights Commission.

6.6 The Committee recalls that, although it is not necessary to exhaust domestic remedies when the application of the remedies is unreasonably prolonged or unlikely to bring effective relief, merely doubting their effectiveness does not absolve the author of a communication from the obligation to exhaust those remedies.<sup>25</sup> The Committee notes the author's submission that the courts of the State party could not provide him with an effective and reasonably accessible remedy under the Disability Discrimination Act or the Anti-Discrimination Act for the following reasons: (a) the discrimination he claimed occurred in the context of programmes falling within the category of "special measures" that apply only to persons with disability and that, as such, cannot give rise to disability-based discrimination claims pursuant to section 45 of the Disability Discrimination Act; (b) even if a claim of disability discrimination could be made under the Disability Discrimination Act, it would be "likely to fail" because, as the author has been assessed as requiring disability support services, his circumstances are "materially different" to other social housing applicants. In this context, the conduct of the State of Queensland would "likely" be considered reasonable because disability support services must be organized before the author can take up social housing, and such support is likely to be qualified as an undue burden; and (c) liability for disability discrimination against the Commonwealth as an ancillary cannot be established unless liability for disability discrimination against the State of Queensland as principal can first be established. The author argues that his complaints against the Commonwealth would therefore inevitably fail. Nonetheless, the Committee also notes that the author does not substantiate any of these arguments, while the State party refers to a range of successful discrimination complaints made under the Disability Discrimination Act against actions of the Commonwealth and the states and territories.<sup>26</sup> Accordingly, the Committee considers that it is not in a position to conclude that the author has fulfilled his obligation to exhaust domestic remedies and finds his communication inadmissible under article 2 (d) of the Optional Protocol.

## C. Conclusion

7. The Committee therefore decides:

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<sup>25</sup> See, for example, Human Rights Committee, communication No. 1511/2006, *García Perea and García Perea v. Spain*, decision of inadmissibility adopted on 27 March 2009, para. 6.2; communication No. 2325/2013, *Kandem Foubi v. Cameroon*, decision of inadmissibility adopted on 28 October 2014, para. 8.4

<sup>26</sup> See footnote 8 above.

- (a) That the communication is inadmissible under article 2 (d) of the Optional Protocol;
  - (b) That the present decision shall be transmitted to the State party and to the author.
-