



human
rights

law
resource
centre



Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000
DX 38227 Flagstaff
P: + 61 3 9225 6695
F: + 61 3 9225 6686
hrlrc@vicbar.com.au
www.hrlrc.org.au
ABN: 31 117 719 267

18 February 2008

Disability Discrimination Section
Human Rights Branch
Attorney-General's Department
Robert Garran Offices, National Circuit
Barton ACT 2600

By email: DisabilityConvention@ag.gov.au

Dear Sir/Madam

Ratification of the UN Convention on the Rights of Persons with Disabilities

Thank you for the invitation to comment on the possible ratification of the UN Convention on the Rights of Persons with Disabilities.

The Human Rights Law Resource Centre strongly supports ratification of both the Convention and the Optional Protocol.

It is well recognized that people with disabilities are more vulnerable than the broader community to a range of deprivations and disadvantages, including poverty, social exclusion, discrimination, poor health, unemployment and low educational attainment.¹

The Convention enshrines the civil, political, economic, social and cultural rights that are necessary to ensure that people with disabilities have the capacity and opportunity to fully participate in and contribute to our community. It sets out a detailed code for the implementation of human rights for persons with disabilities. The Optional Protocol provides a mechanism by which individuals and groups may submit a complaint to the Committee on the Rights of Persons with Disabilities that a State has breached its obligations under the Convention, provided the complainant has first exhausted domestic remedies.

¹ See, eg, UN, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (2007) 1-6.

Ratification of the Convention

Australia, including Australian civil society, played an important role in the negotiation of the Convention and was among its first signatories. With the commitment of the Rudd Government to a more constructive engagement with the UN and the international community, ratification of the Convention would demonstrate that Australia will once more play a leading role in the development, implementation, realization and enforcement of fundamental human rights standards.

In our view, ratification of the Convention would have a range of legal, political, social, cultural and economic benefits, including:

- (a) promoting human dignity, equality and mutual respect;
- (b) imposing responsibilities and implementation obligations, and ensuring accountability, on the part of governments; and
- (c) promoting a human rights-respecting culture in Australia.

There is strong evidence that a human rights approach to disability and disadvantage can:

- (a) empower marginalised and vulnerable individuals, communities and groups;
- (b) provide a framework for the development of more effective, efficient and holistic public and social policy;
- (c) promote more flexible, responsive, individualised and 'consumer friendly' public and social services;
- (d) challenge 'poor treatment' and thereby 'improve the quality of life' of marginalised and disadvantaged individuals and groups; and
- (e) assist in the development of more effective social inclusion and poverty reduction strategies.²

There is also an increasing body of economic research which demonstrates that there is a strong correlation between effective and equitable social policy, on the one hand, and economic development and growth on the other.³ Seen this way, ratification and implementation of the Convention may yield substantial economic benefit.

In terms of the timing of ratification, we consider it very important that this occur as soon as possible. Only States that have ratified the Convention are entitled to nominate and select members of the Committee on the Rights of Persons with Disabilities, which must occur within six months of the treaty entering into force.

² See, eg, British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006); Ministry of Justice (UK), *Human Rights Insights Report* (2008); Audit Commission (UK), *Human Rights Act: Improving Public Services* (2003); Office of the United Nations High Commissioner for Human Rights, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002).

³ See, eg, Thandika Mkandawire (ed), *Social Policy in a Development Context* (2004); Amartya Sen, *Development as Freedom* (1999); Nick Pearce and Will Paxton (eds), *Social Justice: Building a Fairer Britain* (2005).

Ratification of the Optional Protocol

In our view, there is also a very strong case for ratification of the Optional Protocol to the Convention. The Optional Protocol provides a mechanism whereby a remedy may be sought where domestic remedies are unavailable or ineffective.

The availability of effective remedies for human rights breaches or implementation failures is critical. According to the UN High Commissioner for Human Rights:

Rights and obligations demand accountability; unless supported by a system of accountability, they can become no more than window-dressing. Accordingly, the human rights approach ... emphasises obligations and requires that all duty-holders, including States, be held to account for their conduct in relation to international human rights.⁴

Ratification of the Optional Protocol would:

- (a) complement and strengthen existing domestic protection mechanisms of the rights of persons with disabilities;
- (b) foster and promote systemic analysis (and change where necessary) of laws and policies affecting the rights of persons with disabilities;
- (c) enhance public awareness and understanding of the human rights of persons with disabilities;
- (d) provide an effective remedy where a rights violation was found; and
- (e) potentially vindicate the laws, policies or practices of the State where a complaint was dismissed.⁵

Other Matters – Substitute Decision-Making and Involuntary Treatment

We understand that issues have been raised regarding the proper interpretation and application of articles 12, 17 and 25(d) of the Convention, and in particular whether these provisions render substitute decision-making and involuntary treatment unlawful.

Substitute Decision-Making

In our view, the correct interpretation of the Convention provides that substitute decision-making may take place, but only as a last resort in appropriate circumstances. Wherever possible, supported decision-making is to be preferred to substitute decision-making. Processes for supported and substitute decision-making must ensure the dignity and integrity of the person.

In support of this position, we consider that:

- (a) The recognition in article 12.1 that 'persons with disabilities have the right to recognition everywhere as persons before the law' and 'enjoy legal capacity on an equal basis with others in all aspects of life' does not mean that persons with disabilities have an 'absolute' right to legal capacity (just as a person without a disability does not have an absolute right to legal capacity) but rather a right to legal capacity on the same terms as people without a disability. What is relevant is not the *reason* for the impaired capacity, but rather the *fact* of the impaired capacity. So long as the test as to what constitutes impaired capacity is applied equally to people with and without disabilities, then, in our view, this aspect of

⁴ OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004), 15-16.

⁵ See generally, UN, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (2007) 31-6.

article 12.1 will not be impaired. In this respect, it is relevant to recall the jurisprudence of the UN Human Rights Committee which makes it clear that the right to equality before the law and to the equal protection of the law does not make all differences of treatment discriminatory. If the differentiation is based on reasonable and objective criteria, it will not amount to prohibited discrimination.⁶

- (b) Articles 12.3, 12.4 and 12.5 articulate the safeguards, checks and balances that are necessary if a person is deemed to have impaired legal capacity or to lack legal capacity. These articles are consistent with a model of supported decision-making, which is always to be preferred, but are also consistent with a model of substitute decision-making where it is absolutely necessary as a measure of last resort.

Involuntary Treatment

In our view, the correct interpretation of the Convention provides that involuntary treatment may take place, but only as a last resort in appropriate circumstances. Policies, practices and processes for involuntary treatment must ensure the dignity and integrity of the person.

Article 17 of the Convention provides that 'every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others'. Similarly to article 12.1, this does not establish an 'absolute' right but rather a right that may only be limited in circumstances where the right of a person without a disability would also be limited.

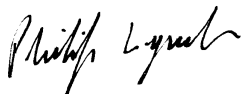
As to whether this article prohibits involuntary treatment, our view is that it does not. The consistent jurisprudence of the European Court of Human Rights is that involuntary treatment does not violate human rights so long as it is a 'therapeutic necessity', with the court needing to be 'convincingly satisfied' that there is such a necessity.⁷ As discussed above, any treatment should constitute the minimal impairment possible and ensure the dignity and integrity of the person.

Conclusion

The Convention enshrines a body of principles and standards – including human dignity and autonomy, participation, equity, accessibility, non-discrimination, empowerment and accountability – that could very valuably guide Australian law, policy and practice in relation to people with disabilities. In our view, it is important that Australia move to ratify the Convention as soon as possible.

Please contact me with any questions on (03) 9225 6695.

Yours sincerely



Philip Lynch
Director

⁶ See, eg, *Broeks v The Netherlands* (172/1984) (9 April 2007); *Love et al v Australia* (983/2001) (25 March 2003).

⁷ See, eg, *Herczegfalvy v Austria* [1992] ECHR 10533/83. See also *R (on the application of N) v Dr M and others* [2002] EWCA 1789; *Hutchison Reid v United Kingdom* [2003] ECHR 50272/99.

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre, an independent community legal centre, aims to promote and protect human rights, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law.

The Centre provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the Centre are:

- (a) the content, implementation, operation and review of the Victorian Charter of Human Rights and Responsibilities;
- (b) the treatment and conditions of detained persons, including asylum-seekers, prisoners and involuntary patients;
- (c) the importance, interdependence, indivisibility and justiciability of economic, social and cultural rights; and
- (d) equality rights, particularly the right to non-discrimination, including on the grounds of race, religion, ethnicity, disability, gender, age and poverty.