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Submission

UN Draft Convention on the rights of people with disabilities

INTRODUCTION

PDCA

The Physical Disability Council of Australia Ltd (PDCA) is the national peak organisation representing the interests and views of people with physical disability across Australia.

People with physical disability

In 1998, 3.6 million people in Australia had a disability (19% of the total population). A further 3.1 million had an impairment or long-term condition that did not restrict their everyday activities. Of those with a disability, 87% (3.2 million) experienced specific restrictions in core activities, schooling or employment.

Self care, mobility and communication are fundamentally important activities underlying all aspects of everyday life. Most people with a disability (78%, or 15% of the total population) were restricted in one or more of these core activities. Depending on the level of assistance needed or difficulty experienced, restriction in core activities was profound (3% of the total population), severe (3%), moderate (4%) or mild (6%) (table 2). Participation in education and the labour force contributes to personal development and independence. Of those with a core activity restriction, 47% (1.3 million) people were also restricted in schooling or employment. A further 327,900 people without a core activity restriction were restricted in schooling or employment.^a

The experience of people with physical disability

Regardless of individual differences, it can be said with confidence that people with a physical disability, particularly those with significant mobility handicaps:

1. Will experience discrimination within the community in some form;
2. have great difficulty gaining access to public and private buildings because of physical barriers such as steps, steepness of site and lack of parking
3. face greater costs than other people because of their disability (equipment, modifications to vehicles, household appliances and housing, home maintenance, transport, personal and health care and managing a household)
4. generally cannot access public transport and are reliant on taxis, with varying levels of subsidy throughout Australia, or on private vehicles
5. face significant discrimination in finding a job and obtaining promotional opportunities, despite the avenues for redress through disability discrimination legislation
6. have lower incomes than their age/education peers due to greater difficulties in getting employment and in achieving promotion
7. have fluctuating income if their impairment is associated with medical conditions leading to episodic periods of hospitalisation and/or absence from work. (Such people include some people with spinal cord injury, Post Polio, muscular dystrophy, Cerebral palsy and Multiple Sclerosis etc)
8. Access to affordable, secure and appropriately designed housing is a critical issue for people with a physical disability. Lack of access to such housing has a major impact on our capacity to participate fully in the life of the community and to live as independently as possible within our own households.

^a ABS Catalogue No. 4430.0 Disability, Ageing and Carers 1998

PDCA's Position

PDCA is in full support of the development and implementation of a Comprehensive and Integral International Convention to promote and protect the Rights and Dignity of Persons with Disabilities.

PDCA does not support the Australian Government's position that a new Convention is not required and that people with disability would be better served by the

*"option of a new instrument in the form of a protocol or annex to one of the existing human rights treaties"*¹.

PDCA believes that this position reflects the Australian Government's failure to acknowledge the commitment required to address the current human rights violations experienced by people with disability and in addition, PDCA is extremely concerned about how the Australian Government came to adopt this position and questions its legitimacy given the lack of opportunity provided to people with disability across Australia to contribute to this process prior to this draft document being produced.

This submission will:

- outline the concerns with the Australian Government's contribution to the Ad Hoc Committee
- Analyse the current draft text and provide advice on how the text can be improved to ensure that the Convention will provide adequate protection for people with disability in Australia.

¹ Point 4 in the contribution by the Government of Australia to the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, established by General Assembly Resolution 56/168.

Our response to the Australian Government position

PDCA believes that the Australian Government in their response to the Draft UN Convention appear to believe that Australia is doing well and is fully committed to the inclusion of people with disability so doesn't believe that a convention is necessary because additional regulation is costly and burdensome. The Australian Government it seems would prefer an annexe or protocol to existing rights laws, rather than an international convention

PDCA does not share this view, because there is an assumption that everyone is already included in Australia and has the same access to employment, education, housing, and income supports etc as experienced by all other Australians.

PDCA believes that the concept of 'reasonable adjustment should be made explicit in Australian law (for instance in the Disability Discrimination Act DDA 1992). But the Government's contribution to the UN Convention debate seems to go beyond the text of the DDA where reasonable adjustment is implied rather than explicit.

In Paragraph 16, the clause poses a risk of negating assertions of discrimination because one's family is able to substitute for fair treatment.

PDCA is aware of instances where people are denied services they would otherwise be entitled to because they are 'coping' within a family.

Paragraph 20 of the Australian Government response does not explicitly mention areas like access to justice; education; employment; new private dwellings; and social justice.

Paragraph 21 is a restatement of rhetoric instead of action. It is worrying when we read about 'over-prescription' of laws and regulations.

How else, we ask, can everyone be sure of people's rights and responsibilities?

Paragraph 22 appears to lack any coherent vision for the 21st century and this belief is supported by many people with disabilities that we discussed this with.. We believe this is backward looking rather than forward to a better future of social inclusion for all people.

Paragraph 27 restates the Australian government's insistence that discrimination against people with disability in Migration Law is necessary.

PDCA disagrees with this position and statement.

Paragraph 31 discusses monitoring etc, and PDCA believes it imperative to lobby for robust monitoring and reporting of action to eliminate discrimination, including lack of progress reporting.

Paragraph 33 is about "Complaints and PDCA believes it is regrettable that the Australian Government response to date has nothing to say about strengthening complaints mechanisms and levelling the playing field.

Why a convention is needed?

PDCA believes that a UN Convention has the potential to become a single set of binding norms that have the potential to protect the rights of people with disabilities particularly where rights are not customary such as mental illness, contagious health such as leprosy etc.

- We believe that such a document will improve the profile and status of people with disabilities throughout the world by modernising rights which will be “trans systemic” and carry symbolic value affirming rights.
- Some countries with existing laws such as America with the ADA and Australia with the DDA are seen as ‘soft laws’ and are becoming out of date.
- A UN Convention could Improve domestic policies and create extensive reference points for the future,
- A UN Convention will provides another layer of protection or the layer of protection in countries without existing laws to protect people with disabilities
- A UN Convention will provide a shift away from medical framework to a social framework
- The current lived experience of people with disability is testament to the fact that the rights of people with disability are not being protected and that the current instruments are not able to effectively redress the situation. Of major concern in Australia, are the numerous documented instances of widespread abuse of people with disability,² the inhuman way in which many people with disability are forced to live³ and the myriad forms of discriminatory practices that occur against people with disability within our society.

There is currently no binding international human rights instrument that explicitly protects the human rights of people with disability⁴. Apart from the Convention on the Rights of the Child that contains an article on the rights of disabled children (Article 23), none specifically mention disability. Interestingly, although people with disability are the largest minority group in the world, they are not covered by the United Nations concept of minority⁵.

Additionally, although people with disability are not specifically mentioned in the ICCPR, it is accepted that they are covered by reference in the Preamble to “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family...” and the references in Articles 2 and 26 that no distinction or discrimination shall be made on any ground such as “birth or other status” (emphasis added). Equivalent reference in International Covenant of Economic, Social and Cultural Rights (ICESCR) is Article 2(1).

² Community Services Commission, *Young Deaths – Children with Disabilities in Care. A Review of the Deaths of Eight Children and Young People at the Mannix Children’s Centre, 2002*; Community Services Commission, *Disability, Death and the Responsibility of Care. A Review of the Characteristics of 211 People with disability who Died in Care Between 1991 and 1998 in NSW, 2002*; Frohmader, C, *Women with Disabilities and Violence. A Report of the National Women with Disabilities Australia (WWDA) Violence Workshop, 1999*; Brady, S, and Grover, S, *The Sterilisation of Girls and Young Women in Australia – A Legal, Medical and Social Context. A Report Commissioned by the Federal Disability Discrimination Commissioner, Human Rights Equal Opportunity Commission, 1997*.

³ Stewart, DG, “Institutional Culture and People with Intellectual Disabilities: Experiences of an Inquirer”, in Hauritz, M, Sampford, C, and Blencowe, S (eds), *Justice for People with disability: Legal and Institutional Issues*, 1998, p. 185; Chenoweth, L, “Closing the Doors: Insights and Reflections on Deinstitutionalisation” (2000) 17 *Law in Context* 77; Community Services Commission, *Unmet Need – Submission to the Standing Committee Inquiry into Residential and Support Services for People with a Disability, 2002*; Community Services Commission, *Food for Thought ... A Report Card on Nutritional and Mealtime Practices in Accommodation Services for People with disability – 1997 to 2002, 2002*.

⁴ Ibid.

⁵ Degener, T, “Disabled Persons and Human Rights: The Legal Framework”, in Degener, T and Koster-Dreese, Y (eds) *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, 1995, p. 9.

A current alternative is the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*⁶. While these Rules do not have legal effect,⁷ they do imply a strong moral and political commitment for States to take action. It is incorrect for the Australian Government to overemphasise the impact of the *Equalization of Opportunities for Persons with Disabilities* in its ability to shape development of laws and policies as it is not a binding instrument. However, the Convention would be binding and have weight with regard to shaping international law and community expectations.

The lack of progress in Australia to eliminate discrimination against people with disability is evidence that the current treaties are clearly not designed to address discrimination against people with disability and are failing in this regard.

In relation to our domestic legislation, the Productivity Commission finds in its review of the Disability Discrimination Act that the measures under the DDA “amount to a somewhat mixed report card” and that “there is still some way to go⁸”

What should the UN Convention contain?

Any UN Convention on the rights of people with disabilities should be clear on how international principles can be applied

- A universal monitoring and reporting mechanism across all countries
- A UN Convention should not be locked into time and should be forward looking in nature

Monitoring and reporting mechanisms

If monitoring mechanisms are to be seriously considered then Government's should work on solutions that have already been proposed to lessen the burden of reporting in each country. Lack of any such mechanism should not be the reason why a new Convention is not supported.

Reasonable Accommodation & Unjustifiable Hardship

The existence of the ‘unjustifiable hardship’ argument continues to undermine the objective to remove disability discrimination by providing a loophole and abrogating responsibility so that people with a disability are continually left shouldering the burden of discrimination and unable to participate as fully as possible in society as “people without a disability”.

The question is “who should bear the costs of ‘justifiable’ and ‘unjustifiable’ hardship” if discrimination is to be rectified. Methods need to be devised whereby, for example, individual businesses do not need to bear the cost independently but the costs are shared by the government and community as a whole.

Exemptions: Immigration

Yet again the issue of ‘safeguards’ or exemptions on the basis of disability with regard to migration is a matter of serious concern and continues to undermine the Government's supposed commitment to non-discrimination.

PDCA refutes the Government's position that:

⁶ Adopted and proclaimed by General Assembly resolution 48/96 of 20 December 1993.

⁷ Quinn, G, and Degener, T, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, p. 34.

⁸ Productivity Commission, *Review of the Disability Discrimination Act 1992 – Draft Report*, October 2003, p.111.

“...any draft convention should include specific safeguards to ensure that the integrity of States’ migration programs are not affected in any way by forcing removal or waiver of health requirements and by frustrating the removal of non-citizens”

and that Australia current discriminatory policy is

“..intended to minimize any negative impact of migration on the health system and the Australian community⁹.”

Of particular concern is the Australian Government’s fiscal argument that entry will have a negative impact on the health system and the Australian community. If the Government was serious about financial ramifications of various characteristics outside disability, then other risk taking behaviours should also be included that are known to be more burdensome on the health system e.g. smoking. The implication that having a disability implies ill-health and an excessive burden on the health system is erroneous.

The most problematic exemption is the current exemption of the Migration Act (section 52) from the provisions of the Disability Discrimination Act (DDA). People with a disability are often ineligible to immigrate to Australia because of their disability – visas are often rejected on the basis of a person's disability.

Specific sections within the Migration Act give the Australian Minister for Immigration and Multicultural Affairs discretionary power to grant admittance into Australia (see Appendix 2). This process does not allow for consistency or fairness and encapsulates the ‘squeaky wheel’ syndrome which means that sometimes the loudest or the most desperate, provided they are aggressive enough, get what they want, whilst others miss out.

The exemption of the Migration Act from the DDA epitomises the two-tiered value system afforded to people with disability living in Australia on the one hand, and potential migrants with disability on the other.

The rationale is that people with a disability would put an undue burden or hardship on the Australian community because our society does not have the necessary supports to reasonably expect people with a disability to be self supporting. The contradiction is that the Federal Government enacted the DDA to remove these very barriers and discrimination on the basis of disability.

This contradiction could be seen to portray at best a lack of understanding, and at worst a lack of commitment by government to the very objectives of the DDA.

In our belief current immigration practices actually have their greatest impact on families. It is not uncommon for families to immigrate, leaving behind the family member with the disability with a relative. Once settled, they apply for this member to immigrate to Australia. This process is proving to be extremely traumatic for the family, especially for the individual who has been left behind.

PDCA concerns

1. Omissions in the draft include access to public Housing, public Transport, Rights, People with mental illness and other conditions such as Leprosy etc
2. Some concern has been expressed about the Convention having the potential to limit existing rights
3. The reporting burden appears to be on governments, if so, how can it be determined and who does this?
4. We are concerned there may be some downgrading of rights by not listing them
5. Definitions should be tailored to specific human rights of people with disabilities and their requirements such as the right to live, genetic selection, nutrition and hydration
6. How can the Convention be enforced and build on existing laws?

7. How does a treaty fit with domestic law?
8. In the present draft there is no provision for complaints or redress?
9. There is no provision for monitoring?
10. How will states and territories report with their individual legislation?
11. How can positive measures be incorporated into the treaty especially in developing countries and with wealth transfer?
12. How will the treaty penetrate areas of indigenous peoples, those from different cultural backgrounds especially where these groups are the minority rather than the majority? Example African vs. Australian?
13. How can International co-operation be improved in order to embrace a treaty?
14. How will the treaty integrate with existing programmes such as World Bank or loan instruments?
15. What happens in the case of domestic policies having stronger legislation than some other countries, for example Australia with the DDA?
16. There is no one definition of disability that suits all, so how will this be decided?

The document preamble

PDCA is pleased to note that the preamble does make reference to diversity in g) and also specifically to race, colour, language, religion, national or social origin .m)

We strongly believe that a Disability Convention must reflect the cultural diversity that exists in the world if it is to have any use or impact for all people with disability.

If cultural diversity is not incorporated into this Convention right from the beginning of the process, then people with disability from culturally diverse backgrounds will at best only receive partial protection from the Convention

General Principles: Draft Article 2

PDCA supports principle d) in its reference to difference and diversity however we do believe that it may be useful to specifically state what this difference is i.e. gender, culture, age etc.

Definitions: Draft Article 3

PDCA supports the view that the definition of disability should reflect the social model of disability within the Convention which views disability as resulting from social barriers to participation as opposed to the medical model which views disability largely as medical issues that need to be 'cured'. The other benefit of the social approach to disability is that it emphasizes that people with disability have the same rights as those of other members of the community in which they live.

PDCA also supports the position put forward by Women With Disabilities Australia (WWDA) in its submission that given the current draft provides for an Article on Statistics and Data Collection, a globally accepted definition should be adopted to ensure that national and international data is useful.

⁹ Point 27 in the contribution by the Government of Australia to the Ad Hoc Committee.

Positive Attitudes: Draft Article 5

PDCA believes that the implementation of this Draft Article will go some way towards addressing the discrimination currently experienced by people with disability.

However, it is our experience that for community education to produce meaningful outcomes, it is important that it is culturally appropriate for the community that is being targeted. We recommend that 1) be redrafted to read:

“...States Parties undertake to adopt immediate, effective and culturally appropriate measures to...”

Statistics and Data Collection: Draft Article 6

PDCA strongly recommends that section d) be amended so that country of birth and language spoken in the home are at least included in the collection of information.

Meaningful data about ethnicity and cultural origin are critical in the planning and delivery of disability and other community services that respond to the needs of a culturally diverse community. This information is needed for policy development and the planning of delivery of services and resource allocation at all levels: national, state, regional and local.

If the government is serious about improving equity of access and equity of outcome for people from culturally and linguistically diverse backgrounds, it will need data quantifying ethnicity and cultural origin in order to achieve this.

Without the availability of location specific data, the particular needs of the local communities will not be effectively addressed. This information can only come from a regular and comprehensive collection of data.

At present there are no statistics available about the incidence of disability within non English speaking communities. Using data from the Australian Bureau of Statistics (ABS) and the Department of Family and Community Services (FaCS), PDCA currently estimate that 4.6% of Australians (902,082 people) are people from a non English speaking background with disability.

Equality & Non-Discrimination: Draft Article 7

The second part of Section 1 of this Draft Article currently reads:

“States Parties shall also prohibit any discrimination and guarantee to all persons with disabilities equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, source or type of disability, age or any other status.”

PDCA fully supports this statement as it will allow people from different cultural backgrounds with disability full protection under this Convention.

Current domestic legislation (i.e. Disability Discrimination Act and the Racial Discrimination Act) has difficulty coping with the intersection between ethnicity and disability. We support the statement that ethnicity and disability are interdependent and one can not be valued over the other.

However, the draft text will in fact allow for more complete protection of the rights of people from non English speaking background with disability.

Freedom from Violence & Abuse: Draft Article 12

Section 3 of this Draft Article reads:

“States Parties shall also take all appropriate measures to prevent violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual exploitation and abuse, by ensuring, inter alia, support for persons with disabilities and their families, including the provision of information.”

We would like to see the word *accessible* inserted before the word *information*.

Access to information is often the first step towards people participating in the community. Access to information means, in effect, access to opportunities and therefore choices to participate in the community by:

- the provision of appropriate information using a variety of methods including alternate languages, audio, braille, easy English or the first language of other countries.
- the overall increase in the use of interpreters independent of families and relatives.

Freedom of Expression & Opinion, and Access to Information: Draft Article 13

Unfortunately, as above, there is nothing in this section about the need for information to be provided in community languages.

For migrant and refugee people with disability it is essential that information be provided in a format that is accessible.

When the Committee considers mentioning specific formats under a) that community languages be listed together with plain language etc.

Accessibility: Draft Article 19

The issue of access in its broadest term applies to all people with disability.

A clear definition of access is required that also includes a component on cultural access.

Health & Rehabilitation: Draft Article 21

This section needs to be strengthened in relation to equity of access regardless of culture.

Right to Work: Draft Article 22

This section needs to be complete re-written to take into account the many human rights violations and abuses that take place in the area of employment.

PDCA believes that people with disability are entitled to:

- meaningful employment
- fair wages
- equal work and professional development opportunities.

In Australia, the current payment of non-award wages to people with disability, by employers that receive Commonwealth employment assistance funding is an abuse of the rights of people with disability.

Of significant concern is the fact that Sheltered Workshops (Business Services) do not comply with the Commonwealth *Disability Services Act, 1986 (DSA)*. Astoundingly, government continues to provide significant amounts of funding (in the millions) to these non-compliant services.

In addition, the Productivity Commission in its review of the DDA found that:

“...disability discrimination in employment remains a significant issue” and that *“...overall, the Act appears to have been least effective in reducing discrimination in employment¹⁰.”*

Social Security & Adequate Standard of Living: Draft Article 23

People with disabilities experience:

- lower levels and recognition of educational qualifications
- lower levels and recognition of work skills and experience
- more costs associated with the cost of disability (see www.pdca.org.au)

PDCA strongly recommends that the Draft Article be amended to include a provision that states people with disability are entitled to access a basic level of social security to achieve an adequate standard of living.

Specific Article

PDCA strongly believes that the Convention needs to contain a specific and separate Article on Cultural Diversity and Disability in order to specifically address the particular discrimination issues that arise from the intersection between culture and disability.

Conclusion

PDCA strongly supports the development and implementation of a Comprehensive and Integral International Convention to promote and protect the Rights and Dignity of Persons with Disabilities.

As such we do not support the Australian Government's current position in relation to this Convention and question the basis with which it reached that decision.

Acknowledgements

- HREOC forum Canberra
- National Ethnic Disability Alliance (NEDA)
- Physical Disability Council of New South Wales (PDCNSW)
- Women with Disabilities Australia (WWDA)

¹⁰ Productivity Commission, *Inquiry into the Disability Discrimination Act 1992 – Draft Report: Draft Finding 5.1.*