



Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

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20 February 2008

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

Dear Mr Arnaudo

Re: Submission on the Possible Ratification of the United Nations Convention on the Rights of Persons With Disabilities – National Interest Analysis

Thank you for the opportunity to provide a submission on the possible ratification of the United Nations Convention on the Rights of Persons With Disabilities (the Convention) as part of a National Interest Analysis.

The Office of the Anti-Discrimination Commissioner Tasmania (OADC) strongly supports Australia's ratification of the Convention. The highest numbers of discrimination complaints in Tasmania to the OADC are made on the basis of disability. Therefore, in our view, ratification represents a powerful commitment to upholding and advancing the rights of persons with a disability.

The Tasmanian *Anti-Discrimination Act* 1998 (the Act) prohibits discrimination on the basis of a number of prescribed attributes, including disability and irrelevant medical record, in a number of areas of public life. These areas are listed in section 22:

- (a) Employment (paid or unpaid work);
- (b) Education and training;
- (c) Provision of facilities, goods and services;
- (d) Accommodation;
- (e) Membership and activities of clubs;
- (f) Administration of any law of the State or any State program (in relation to specified attributes, not including disability or irrelevant medical record);

- (g) Awards, enterprise agreements or industrial agreements (in relation to specified attributes, not including disability or irrelevant medical record).

The scope of s 22 is broad in that it applies to any activity by or against a person (complainant or a respondent) engaging in any activity in connection with the areas listed above.

The Act also prohibits inciting hatred on a number of grounds, including disability: s 19(b).

In addition, s 104 of the Act imposes an obligation on organisations to ensure inter alia that: -

- (a) its members, officers, employees and agents are made aware of the discrimination and prohibited conduct to which this Act relates; and
- (c) no member, officer, employee or agent of the organisation engages in, repeats or continues such conduct.

An organisation is to take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct: s 104(2). An organisation that does not comply with this section is liable for any contravention of the Act committed by any of its members, officers, employees and agents: s 104(3).

The Commissioner also has a number of statutory functions set out in s 6 of the Act. These include:

- (a) to advise and make recommendations to the Minister on matters relating to discrimination and prohibited conduct;
- (b) to promote the recognition and approval of acceptable attitudes, acts and practices relating to discrimination and prohibited conduct;
- (c) to consult and inquire into discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;
- (d) to disseminate information about discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;
- (e) to undertake research and educational programs to promote attitudes, acts and practices against discrimination and prohibited conduct;
- (f) to prepare and publish guidelines for the avoidance of attitudes, acts and practices relating to discrimination and prohibited conduct;

- (g) to examine any legislation and report to the Minister as to whether it is discriminatory or not;
- (h) to investigate and seek to conciliate complaints;
- (i) to collect and analyse data relating to complaints;
- (j) any other prescribed functions.

The Act provides comprehensive coverage of a number of the matters in the Convention. As will be seen from the following discussion, there is unlikely to be substantial conflict or gaps between the Act and the Convention in the areas where the Act applies.

The following discussion will demonstrate where the Act complies with a number of the Articles set out in the Convention. It should be noted that the OADC will only be commenting on the Articles where the Act may apply. In some instances the OADC will offer a general comment.

Article 1: Purpose

While the Act does not have a specific objects section, it is generally accepted to be beneficial legislation aimed at preventing discriminatory acts and practices on a number of grounds including disability and irrelevant medical record. Therefore, the OADC considers it helpful to have an international statement of some of the fundamental principles and obligations that underpin the Act, particularly relating to non-discrimination.

Article 2: Definitions

It is noted that the definition of disability in the Act is broader than the definition in the Convention, as it encompasses pre-existing and temporary illnesses (see s 3 of the Act).

In addition, at this point it is important to note that the definition of reasonable accommodation may be less onerous than the statutory defence of unjustifiable hardship contained in ss 45 and 48 of the Act. If this is the case, in relation to the Articles of the Convention that encompass the concept of reasonable accommodation, ratification of the Convention will not be any more onerous than the present test in Tasmania. Further, the same defence of unjustifiable hardship applies under the Commonwealth *Disability Discrimination Act 1992*. Therefore, legal change would not be required to implement these terms in the Convention.

However, to remove the potential for ambiguity, one option to consider may be the lodgement of a 'statement of understanding' that indicates a preferred interpretation of reasonable accommodation to mean accommodation short of imposing unjustifiable hardship.

Article 3: General principles

The Act is broadly consistent with the General Principles set out in Article 3.

Article 4: General obligations

Article 4 is broadly consistent with the Act, particularly s 104 and s 6.

Section 104(2) provides that organisations must take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct.

The promotion of training for staff working with persons with a disability is one step that organisations can take to comply with s 104.

Further, one of the statutory functions of the Commissioner is to promote the recognition and approval of acceptable attitudes, acts and practices relating to discrimination and prohibited conduct. The Commissioner carries out this function by providing corporate training and community education to a range of Government and non-Government bodies and not for profit organisations.

Article 5: Equality and non-discrimination

Again, Article 5 is broadly consistent with the Act.

Moreover, the Act includes general exceptions to discrimination, which are aimed at promoting equal rights and opportunities for disadvantaged groups or persons with a special need because of prescribed attribute (including disability or irrelevant medical record).

Section 25 provides that a person may discriminate against another person in any area if it is for the purpose of carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a prescribed attribute.

Further, s 26 provides that a person may discriminate against another person in any program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute.

Articles 6 and 7: Women and Children with disabilities

The Act prohibits discrimination on the basis of disability as well as gender and age, which includes women and children with disabilities. See also submission in relation to Article 23.

Article 8: Awareness – raising

The provisions in Article 8 are consistent with the Commissioner's statutory functions in s 6 to educate the community in relation to acceptable attitudes and practices and principles of non-discrimination.

Further, the OADC recently launched a publication 'Who Said I Can't' on the International Day of Persons With a Disability. The publication, which is available to the general public, is an example of the steps taken by the OADC to promote the achievements of people with a disability and their rights in all aspects of society.

Article 9: Accessibility

Article 9 provides a succinct outline of the steps required to provide access to people with a disability. Failure to provide access, short of imposing an unjustifiable hardship, in the provision of facilities goods and services, can and has formed the basis of complaints to the OADC.

It is noteworthy that complaints of disability discrimination in the area of provision of facilities, goods and services are the second most common area of complaint to the OADC.

The OADC supports Article 9.

Article 10: Right to Life

Article 11: Situations of risk and humanitarian emergencies

Article 12: Equal recognition before the law

The OADC supports Articles 10, 11, and 12.

Article 13: Access to justice

While the OADC cannot deal with complaints against the judiciary due to the well established principle of judicial immunity, we believe that measures promoting access to justice, including training judicial officers on disability issues and ensuring adequate representation for people with disabilities before courts and tribunals (i.e. through Legal Aid services) is imperative.

Promoting and raising community awareness in respect of disability issues and educating people with disabilities about their rights is regularly undertaken by the OADC as part of our community education function.

Article 14: Liberty and security of the person

Other bodies may be better equipped to address this Article.

Article 15: Freedom from torture or cruel, inhuman or degrading treatment or punishment

Article 16: Freedom from exploitation, violence and abuse

Article 17: Protecting the integrity of the person

The OADC expresses its general support for these Articles.

Article 18: Liberty of movement and nationality

As immigration and citizenship laws are Commonwealth areas, we make no comment in relation to this Article.

Article 19: Living independently and being included in the community

Article 20: Personal mobility

The principles stated in Articles 19 and 20 are consistent with the protections afforded under the Act, which prohibit discrimination in the areas of access to services and accommodation.

Article 21: Freedom of expression and opinion, and access to information

The OADC supports Article 21. Measures that ensure people with a disability can receive and impart information and ideas on an equal basis, and that encourage information to be provided in accessible formats is broadly consistent with the Act, particularly as it relates to disability.

Article 22: Respect for privacy

Other bodies may be better equipped to comment on privacy issues.

Article 23: Respect for home and the family

Steps may need to be taken to have uniform laws in relation to sterilisation that ensure the inherent dignity and fundamental freedoms of persons (particularly women and girls) in relation to their fertility.

Article 24: Education

The Act prohibits disability discrimination in the area of education and training. Further, s 104 requires organisations (including educational institutions) to ensure that no officer or employee engages in discrimination or prohibited conduct, and to take reasonable steps to prevent discrimination and prohibited conduct from occurring.

Article 25: Health

The area of provision of facilities, goods and services, would cover complaints against health services on the basis of disability. There is an exception in the Act to discrimination in insurance and superannuation for persons with disabilities.

Section 44(1) states that a person may discriminate against another person on the ground of disability in the provision of services relating to any annuity or insurance or superannuation if the discrimination –

- (a) is based on actuarial, statistical or other data from a reliable source;
- and

(b) is reasonable having regard to that data and any other relevant factors.

(2) Subsection (1) only applies if a person discloses to the Tribunal, when required to do so –

(a) the sources on which the data are based; or

(b) the relevant factors on which the discrimination is based.

The exception in s 44 of the Act is likely to be consistent with the requirement to provide insurance in a fair and reasonable manner pursuant to paragraph (e) of Article 25.

Article 26: Habilitation and rehabilitation

While the OADC notes that there are programs in place for rehabilitation services, there is a significant level of unmet demand.

Article 27: Work and employment

Under the Act, discrimination in employment, which includes the entire process from submitting an application, the interview, events occurring at the workplace and termination of employment, is unlawful.

Section 45 of the Act provides an exception to discrimination on the basis of disability in the area of employment.

Section 45 states that a person may discriminate against another person on the ground of disability in relation to employment if –

(a) the other person –

(i) is unable to carry out the inherent requirements of the employment; or

(ii) in order to carry out those inherent requirements would require services or facilities not reasonably required by a person without a disability, the provision of which would impose unjustifiable hardship on the person so discriminating; or

(b) the employment involves –

(i) participation in a dramatic performance or other entertainment in a capacity for which a person with a particular disability is required for reasons of authenticity; or

(ii) participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person with a particular disability is required for reasons of authenticity; or

(iii) providing persons with a particular disability with services for the purpose of promoting their welfare if those services are most effectively provided by a person with the same disability.

It is submitted that the exception in s 45 is not inconsistent with the Convention because s 45 states that assistance must be provided to persons with a disability in employment unless that causes an unjustifiable hardship.

Article 27, paragraph (i) has similar terms in that it provides that State Parties are to take steps to ensure that reasonable accommodation is provided to persons with disabilities in the workplace. As noted earlier in this submission, the concept of reasonable accommodation may be less onerous, or alternatively no less onerous, than providing assistance that will not impose an unjustifiable hardship.

Article 28: Adequate standard of living and social protection

The OADC generally supports the provisions of Article 28 and considers it important in affording economic and social rights to persons with a disability.

Article 29: Participation in political and public life

There are existing protections against discrimination on the basis of political belief or activity in the Act. However Article 29 is important in affirming the rights of persons with a disability to be able to participate in public life, including public office.

Article 30: Participation in cultural life, recreation, leisure and sport

The areas of provision of facilities, goods and services under the Act and membership and activities of clubs would apply to the participation in cultural life, recreation, leisure and sport. Accordingly, the Act provides protection and an avenue of redress for a person with a disability that is discriminated against by a service provider or a club in these areas.

The express statement of the steps to be taken to ensure participation and access to these areas is useful in informing and educating the public on how to include people with disabilities in cultural life.

It should be noted that there are exceptions to disability discrimination in the areas of sport, provision of a service, and employment. In relation to the latter, s 45(b)(ii)-(iii) (above) envisages the cultural involvement of people with a disability.

In relation to sport, s 43 provides that a person may discriminate against another person on the ground of disability in relation to any competitive sporting activity by –

(a) restricting participation to that person; or

(b) excluding that person from participating if the person is not reasonably capable of performing any action reasonably required in relation to that activity.

Section 43(a) appears to envisage the provision of sport exclusively for persons with a disability, which can operate as a special measure aimed at advancing the rights of persons with a disability and encouraging participation to the greatest extent.

In relation to access to, and provision of services, s 48 states that a person may discriminate against another person on the ground of disability –

(a) in access to public places, if the provision of access would cause unjustifiable hardship; or

(b) in the provision of goods and services, if that would cause unjustifiable hardship.

Section 48 is consistent with the concept of reasonable accommodation (as discussed earlier).

Accordingly, sections 43, 45 and 48 are not inconsistent with the provisions of Article 30, or the Convention generally.

Articles 31: Statistics and data collection onwards

While there will be cost involved with implementing the reporting functions, it will enhance accountability which in turn should improve the rights of people with a disability to participate in society on an equal footing with others.

Conclusion

There are already comprehensive protections provided in Commonwealth and State legislation that deal with discrimination against persons with a disability in a number of areas of public life. These laws, similar to the operation of the Act in Tasmania, are already meeting the obligations of a number of key Articles contained in the Convention.

Therefore, insofar as the Act applies to matters in the Convention, the OADC envisages that little, or no, legislative change would be required in order to implement the Convention in the event of ratification.

On the other hand, while aspects of the Convention may overlap with State and Commonwealth laws, the Convention is a very helpful tool in clearly defining the obligations of State Parties to enable participation to the greatest extent of persons with a disability. In this regard, the Convention is more detailed than the Act, and

positively articulates the measures required to achieve equality and uphold the fundamental freedoms of people with a disability¹.

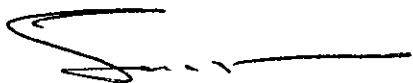
In addition, the Convention seeks to ensure a number of fundamental human rights for persons with a disability that are not expressly included in the Act. For example, freedom from torture or cruel, inhuman or degrading treatment or punishment.

As noted earlier, the Articles dealing with reporting will enhance accountability. It is possible that some of the information required for reporting would already be in the possession of Commonwealth and State Anti-Discrimination agencies, and thereby may reduce costs associated with these Articles.

In light of the aforementioned, the OADC is of the view that ratification of the Convention would serve to highlight Australia's commitment to disability rights in the broader international community.

If the OADC can be of any further assistance, please do not hesitate to contact Catherine Edwards, Complaints Manager.

Yours sincerely



Sarah Bolt
Anti-Discrimination Commissioner

¹ Particularly Articles 8 and 30.