

TO: Helen Owens
Presiding Commissioner
Public inquiry into the *Disability Discrimination Act 1992*
Productivity Commission
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FROM: Val Pawagi
ACT

DATE: Thursday, 20 November 2003

SUBJECT: Definition of 'Disability Rights'

1. The definition of *disability rights* used by the Productivity Commission in the Draft Report on the Review of the *Disability Discrimination Act 1992* (see below) does not adequately capture for me its true meaning. Given the importance of the definition of disability rights to the inquiry overall, I contend that the definition requires revision.

"Disability rights refer to the human rights of people with disabilities. The term does not necessarily imply any special rights but rather an entitlement to the same rights as those of the rest of society." (p.12)

2. I agree with the Commission's statement that '*disability rights refer to the human rights of people with disabilities*'. I disagree, however, with the Commission's assertion that disability rights '*do not necessarily imply any special rights*'. My reticence in accepting this part of the Commission's definition is based on the additional rights contained in the Declaration on the Rights of Mentally Retarded Persons (1971) and the Declaration on the Rights of Disabled Persons (1975), which are both incorporated in the Commonwealth *Human Rights and Equal Opportunity Act 1986*.
3. The Declaration on the Rights of Mentally Retarded Persons itemises rights that are of importance to them to develop their ability and maximum potential, which includes proper medical care and physical therapy, education, training and rehabilitation. It recognises the need to protect people with intellectual disability from exploitation and to appoint a qualified guardian where necessary. The Declaration cautions against taking the mere inability to exercise rights fully as a free rein for their complete withdrawal (see Attachment A).
4. The Declaration on the Rights of Disabled Persons proclaims the equal civil and political rights of people with disability. They are also 'entitled to the measures designed to enable them to become as self-reliant as possible'. The Declaration identifies a number of economic and social rights of importance for the development of capacities and social integration. Other noteworthy passages refer to the right of people with disability to have their specialist needs taken into consideration at all stages of economic and social planning, the right to protection against exploitation and treatment of an abusive or degrading nature, and the right of

disability organisations to be usefully consulted in all matters regarding the rights of people with disability (see Attachment B).

5. As stated above, the Human Rights and Equal Opportunity Act incorporates these two Declarations, and the rights recognised in them form part of the definition of 'human rights' under this Act. Although the Declarations do not create international legal obligations in the same way as a treaty, they represent accepted international standards. And although the Declarations do not add substantially to Commonwealth power to legislate, they do provide guidance as to how the Commonwealth should exercise such powers as it has, in related areas. I am acutely aware that the Act only gives limited protection to the rights contained in these Declarations. This is because the Act only applies to 'acts or practices' of the Commonwealth; it does not make breaches of the rights set out unlawful nor does it provide for enforceable remedies.
6. Based on the above, below is a revised definition of disability rights for the Commission's consideration.

Disability rights refer to the human rights of people with disabilities. The term implies that people with disabilities are accorded the full range of rights as other persons. To ensure that people with disabilities enjoy the same rights as other persons, they are entitled to additional rights, including measures that enable them to become as self-reliant as possible.

DECLARATION ON THE RIGHTS OF MENTALLY RETARDED PERSONS

UN Document Series Symbol: ST/HR/

UN Issuing Body: Secretariat Centre for Human Rights

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Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971

The General Assembly,

Mindful of the pledge of the States Members of the United Nations under the Charter to take joint and separate action in co-operation with the Organization to promote higher standards of living, full employment and conditions of economic and social progress and development,

Reaffirming faith in human rights and fundamental freedoms and in the principles of peace, of the dignity and worth of the human person and of social justice proclaimed in the Charter,

Recalling the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Declaration of the Rights of the Child and the standards already set for social progress in the constitutions, conventions, recommendations and resolutions of the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the United Nations Children's Fund and other organizations concerned,

Emphasizing that the Declaration on Social Progress and Development has proclaimed the necessity of protecting the rights and assuring the welfare and rehabilitation of the physically and mentally disadvantaged,

Bearing in mind the necessity of assisting mentally retarded persons to develop their abilities in various fields of activities and of promoting their integration as far as possible in normal life,

Aware that certain countries, at their present stage of development, can devote only limited efforts to this end,

Proclaims this Declaration on the Rights of Mentally Retarded Persons and calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights:

1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.

3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.
6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

DECLARATION ON THE RIGHTS OF DISABLED PERSONS

UN Document Series Symbol: ST/HR/

UN Issuing Body: Secretariat Centre for Human Rights

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Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975

The General Assembly,

Mindful of the pledge made by Member States, under the Charter of the United Nations to take joint and separate action in co-operation with the Organization to promote higher standards of living, full employment and conditions of economic and social progress and development,

Reaffirming its faith in human rights and fundamental freedoms and in the principles of peace, of the dignity and worth of the human person and of social justice proclaimed in the Charter,

Recalling the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Declaration of the Rights of the Child and the Declaration on the Rights of Mentally Retarded Persons, as well as the standards already set for social progress in the constitutions, conventions, recommendations and resolutions of the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the United Nations Children's Fund and other organizations concerned,

Recalling also Economic and Social Council resolution 1921 (LVIII) of 6 May 1975 on the prevention of disability and the rehabilitation of disabled persons,

Emphasizing that the Declaration on Social Progress and Development has proclaimed the necessity of protecting the rights and assuring the welfare and rehabilitation of the physically and mentally disadvantaged,

Bearing in mind the necessity of preventing physical and mental disabilities and of assisting disabled persons to develop their abilities in the most varied fields of activities and of promoting their integration as far as possible in normal life,

Aware that certain countries, at their present stage of development, can devote only limited efforts to this end,

Proclaims this Declaration on the Rights of Disabled Persons and calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights:

1. The term "disabled person" means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.

2. Disabled persons shall enjoy all the rights set forth in this Declaration. These rights shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family.

3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.

4. Disabled persons have the same civil and political rights as other human beings; paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation or suppression of those rights for mentally disabled persons.

5. Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.

6. Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthotic appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration or reintegration.

7. Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.

8. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.

9. Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities. No disabled person shall be subjected, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom. If the stay of a disabled person in a specialized establishment is indispensable, the environment and living conditions therein shall be as close as possible to those of the normal life of a person of his or her age.

10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

11. Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

12. Organizations of disabled persons may be usefully consulted in all matters regarding the rights of disabled persons.

13. Disabled persons, their families and communities shall be fully informed, by all appropriate means, of the rights contained in this Declaration.

