

## EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

*Human Rights and Equal Opportunity Commission Act 1986*

*Convention on the Rights of Persons with Disabilities Declaration 2009*

On 17 July 2008 Australia ratified the Convention on the Rights of Persons with Disabilities (the Convention) and it came into force for Australia on 16 August 2008. The Convention aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. It provides that people with disability are to exercise human rights and fundamental freedoms on an equal basis with others. The Convention does not create any new rights or entitlements. Rather, it expresses existing rights in a manner that addresses the needs of people with disability. Details of the Convention are set out in **Attachment A**.

Consistent with the obligations in the Convention, and particularly Article 33(2), the Attorney-General has declared the Convention under section 47 of the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act) to be an international instrument relating to human rights and freedoms for the purposes of that Act. Article 33(2) of the Convention provides that parties are to maintain, strengthen, designate or establish a framework, including one or more independent mechanisms, to promote, protect and monitor its implementation.

Subsection 47(1) of the HREOC Act provides that the Minister may, after consulting the appropriate Minister of each State by writing, declare an international instrument ratified or acceded to by Australia to be an instrument relating to human rights and freedoms for the purposes of the Act.

On 3 September 2008, the Attorney-General wrote to relevant Ministers of each of the States and Territories consulting them on his intention to make such a declaration in relation to the Convention. All States and Territories responded favourably to the proposal, except for Western Australia, which did not formally respond.

On 20 April 2009 the Attorney-General declared the Convention an international instrument relating to human rights and freedoms under section 47 of the HREOC Act.

### Effect and Impact of Declaring the Convention

The effect of declaring the Convention is to empower the Australian Human Rights Commission, by virtue of section 11 of the HREOC Act, to exercise its powers in relation to the human rights in the Convention and to report on the Convention's implementation.

In particular, the Commission may:

- examine Commonwealth enactments and, on the request of the Attorney-General, examine proposed enactments, to ensure that they are not inconsistent with or contrary to the rights in the Convention and report to the Attorney-General the result of any such examination
- inquire into an act or practice that may be inconsistent with or contrary to the rights in the Convention – and seek to settle such a matter through conciliation or otherwise to report to the Attorney-General on the inquiry
- promote an understanding and acceptance of the rights in the Convention, including through undertaking research and educational programs
- report to the Attorney-General as to the laws that should be made by the Commonwealth on matters relating to the Convention
- report to the Attorney-General as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Convention
- examine any other relevant international instrument to determine whether there are any inconsistencies between it and the Convention, and report to the Attorney-General the results of any such examination.

Although the Australian Human Rights Commission already has the power to conduct inquiries and present reports in relation to the rights and freedoms recognised in a number of international instruments, the impact of declaring the Convention is that it enables the Commission to exercise its powers with direct reference to the rights as they appear in the Convention.

The Commission is independent of Government and thus the declaration also operates to implement Article 33(2) of the Convention. Declaring the Convention under the HREOC Act furthers Australia's commitment to implementing the Convention.

Schedule 1 of the declaration contains a copy of the Convention and Schedule 2 of the declaration contains a copy of Australia's instrument of ratification.

Under subsection 47(2) of the HREOC Act, the declaration enters into force upon the publication in the *Gazette* of the declaration together with a copy of the Convention and the instrument of ratification. Pursuant to subsection 56(1) of *Legislative Instruments Act 2003* the requirement for gazettal is satisfied by registration on the Federal Register of Legislative Instruments. The requirements in section 57 of the Legislative Instruments Act for tabling and disallowance replace the requirement in subsection 47(3) of the HREOC Act for tabling and disallowance of declarations made under the section.

## **CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES**

### **OBLIGATIONS**

The purpose of the Convention, as set out in Article 1, is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all people with disability, and to promote respect for their inherent dignity. People with disability are defined in the Convention to include ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.

Article 4 sets out the general obligations under the Convention. States Parties are obliged to ensure and promote recognition of the fact that people with disability are entitled to all human rights and fundamental freedoms, without discrimination of any kind on the basis of disability. To achieve this aim, States Parties undertake to:

- abolish or modify laws, policies or practices that discriminate against people with disability
- take into account the rights of people with disability in policies and programs
- ensure public authorities and institutions act in accordance with the Convention
- eliminate discrimination on the basis of disability
- undertake or promote research and development of accessible goods, services and facilities that can be made available at the lowest cost
- provide accessible information on new technologies which assist people with disability, mobility aids and devices
- promote the training of professionals and other staff working with people with disability in the rights of people with disability
- implement those obligations in the Convention that are immediately applicable according to international law and, to the maximum of available resources, aim to implement progressively the obligations relating to economic, social and cultural rights, and
- closely consult with and actively involve people with disability, including children with disability, through representative organisations.

#### *Levels of obligation*

Different categories of rights in the Convention carry different levels of obligation. In addition, the varying language used to describe the level of an obligation provides States Parties with flexibility in implementing the Convention.

Article 4(2) provides that those obligations in the Convention that stem from economic, social and cultural rights are subject to progressive realisation, which means fulfilling or achieving those rights over time, taking into account available resources. This is without prejudice to the implementation of those obligations in the Convention that are immediately applicable according to international law.

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<sup>1</sup> This summary is taken from the National Interest Analysis [2008] ATNIA 18 tabled on 4 June 2008

Article 4(4) provides that nothing in the Convention shall affect, restrict or derogate from anything contained in the domestic law of a State Party or international law in force for that State which is more conducive to the realisation of the rights of people with disability.

Most Articles require States Parties to take ‘appropriate’ and/or ‘effective’ measures to implement a particular obligation. This affords countries some discretion in determining the best means and policies to give effect to the Convention’s obligations. The primary requirement is to implement the purpose or aims of the Convention in good faith.

#### *Equality and non-discrimination*

Article 5 obliges States Parties to prohibit generally all discrimination on the basis of disability, including by taking all appropriate steps to ensure that ‘reasonable accommodation’ is provided. Reasonable accommodation is defined in Article 2 with reference to necessary and appropriate adjustments that do not impose a disproportionate or undue burden.

States Parties are specifically required to eliminate discrimination in a range of areas, including in matters relating to marriage, family, parenthood and relationships (Article 23), education (Article 24), health (Article 25), employment (Article 27), standard of living and social protection (Article 28) and participation in political and public life (Article 29). States Parties are also required to recognise that women and girls with disabilities are subject to multiple forms of discrimination and, in that regard, take all appropriate measures to ensure the advancement of women (Article 6). The obligation to eliminate discrimination also permeates the majority of the other Articles in the Convention, which oblige States Parties to recognise the status of, or provide access, protection or services to, people with disability ‘on an equal basis with others’.

#### *Recognition before the law, legal capacity and decision-making*

The Convention also requires States Parties to acknowledge the right of people with disability to be recognised as individuals before the law who possess legal capacity on an equal basis with others (Articles 5(1) and 12). Article 12(3) requires States Parties to take appropriate measures to provide people with disability access to the support they may need to exercise their legal capacity. Article 12(4) requires States Parties to ensure that, where such support is provided, appropriate and effective safeguards exist to prevent abuse. The safeguards must be proportionate to the degree to which the person’s rights and interests are affected. Article 12 does not prohibit substituted decision-making arrangements that provide for decisions to be made on behalf of a person with disability where necessary, as a last resort and subject to the safeguards in Article 12(4). Article 17 also provides that people with disability have the right to physical and mental integrity on an equal basis with others. Article 17 does not prohibit compulsory treatment of people with disability where such treatment is necessary, as a last resort and subject to safeguards to prevent abuse.

Children with disability are to be registered immediately after birth and have the right to a name and nationality (Article 18(2)).

In decisions concerning children with disability, the best interests of the child are to be a primary consideration (Article 7(2)). In relation to guardianship and adoption of children, or similar institutions, the best interests of the child are paramount (Article 23(2)). Separation from parents may be ordered by competent authorities, subject to judicial review, only when it is necessary for the best interests of the child (Article 23(4)). States Parties are required to ensure that children with disability are provided the opportunity and assistance to express their views freely on all matters affecting them. Their views are to be given due weight in accordance with their age and maturity, on an equal basis with other children (Article 7(3)).

### *Accessibility*

The Convention also obliges States Parties to take appropriate measures to ensure access to people with disability, on an equal basis with others, to the physical environment, transportation, information and communications and other facilities and services open or provided to the public, including in rural areas (Article 9). These measures are to include the identification and elimination of obstacles and barriers to access to, *inter alia*, buildings, roads, transportation, schools, housing, medical facilities, workplaces, information, communications services and emergency services.

While this obligation also involves prohibiting discrimination, Article 9 provides that States Parties shall take appropriate measures to: establish minimum standards and guidelines for the accessibility of facilities and services open to the public; provide training on accessibility issues; provide in public buildings forms of live assistance (such as escorts at reception) and signage in Braille and easy to read and understand forms; promote access for people with disability to information and communication technologies; and promote the design, development, production and distribution of accessible information and communication technologies.

Accessibility, particularly access to information, is also fundamental to obligations contained in other Articles relating to particular areas of life, including: Article 13 regarding access to justice; Article 16 in relation to protection services; Article 19 regarding access to community services and facilities; Article 21 regarding access to information generally; Article 23 regarding access to reproductive and family planning education and related information; Article 24 in relation to various aspects of education; Article 25 regarding health services; Article 27 regarding access to vocational training and placement services; Article 28 in relation to access to social protection, poverty reduction and public housing programs and retirement benefits; Article 29 in relation to access to election information; Article 30 regarding access to cultural materials, television programs, films, theatres, museums, cinemas, libraries, tourism services, monuments and sites of national importance (as far as possible) and sporting, recreational and tourism venues. Access is to be provided to people with disability on an equal basis with others.

### *Inclusion and participation in society*

The Convention contains a number of further obligations aimed at enhancing the inclusion and participation of people with disability in society. Article 19 obliges States Parties to take effective and appropriate measures to facilitate full inclusion and participation in the community including by ensuring that people with disability have the opportunity to: choose their place of residence and living arrangements on an equal basis

with others; access in-home, residential and other community support services to prevent isolation or segregation; and access community services and facilities on an equal basis with others.

Other Articles impose obligations specific to particular aspects of inclusion and participation, namely: personal mobility including facilitating affordable transport and affordable access to mobility aids, devices, assistive technologies and forms of live assistance and intermediaries (Article 20); an inclusive education system, in which students with disability receive support within the general education system while individualised support measures are made available with the goal of full inclusion (Article 24); habilitation and rehabilitation to enable people with disability to attain and maintain maximum independence, vocational ability and full inclusion and participation in all aspects of life (Article 26); employment, including promoting employment and self-employment opportunities for people with disability (Article 27); equal standard of living, including assistance for disability-related needs (Article 28); political and public life, including the right and opportunity to vote and be elected (Article 29); and cultural life and sport, including the opportunity for people with disability to develop and utilise their creative, artistic and intellectual potential (Article 30).

#### *Other obligations*

Article 8 requires States Parties to undertake to adopt immediate, effective and appropriate measures to: raise awareness regarding people with disability; foster respect for their rights and dignity; combat stereotypes, prejudices and harmful practices relating to people with disability; and promote awareness of their capabilities and contributions. Such measures include: public awareness campaigns, fostering respect through the education system; encouraging positive portrayal of people with disability in the media; and promoting disability awareness training.

Article 10 requires States Parties to take all necessary measures to afford people with disability the inherent right to life of all human beings on an equal basis with others. Article 11 requires States Parties to take, in accordance with international law, all necessary measures to ensure the protection and safety of people with disability in situations of risk, including situations of armed conflict, humanitarian emergencies and natural disasters. These Articles would have no effect on existing non-refoulement obligations.

Article 14 obliges States Parties to ensure that people with disability enjoy the right to liberty and security of the person on an equal basis with others. People with disability who are deprived of their liberty must be treated in accordance with the objectives and principles of the Convention, including by providing for reasonable accommodation of their disability (Article 14(3)). Article 15 requires States Parties to take all effective measures to prevent people with disability, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment, including non-consensual medical or scientific experimentation.

Article 18 requires States Parties to recognise the rights of people with disability to liberty of movement; to freedom to choose their residence; and to acquire and change their nationality, on an equal basis with others. This includes ensuring that people with disability are not deprived of nationality or other identification documentation on the

basis of disability. Article 18 does not confer any additional rights on people with disability in relation to immigration processes. In particular, Article 18 does not oblige Australia to provide a favourable outcome in visa or citizenship applications.

Article 22 obliges States Parties to afford people with disability the right to the protection of the law against arbitrary or unlawful interference with their privacy, regardless of place of residence or living arrangements. States Parties must also protect the privacy of personal, health and rehabilitation information of people with disability on an equal basis with others.

#### *Implementation, monitoring and reporting*

In implementing the Convention, States Parties are required to collect appropriate statistical and research data (Article 31) and closely consult with and actively involve people with disability, including children with disability, through their representative organisations (Article 4(3)). States Parties are also required to designate one or more focal points within government for matters relating to implementation (Article 33(1)) and establish or maintain a mechanism, including at least one independent body, to promote, protect and monitor implementation (Article 33(2)). Civil society, particularly people with disability, must be involved in the monitoring process.

States Parties are also required to recognise the importance of international cooperation and, without prejudice to national implementation, undertake appropriate and effective measures in this regard (Article 32).

States Parties are obliged to report comprehensively to the Committee on the Rights of Persons with Disabilities on the progress of implementation. The first report must be submitted within two years of entry into force for the State Party, then at least every four years thereafter (Article 35).

#### **FUTURE TREATY ACTION**

Article 47 provides that amendments may be proposed by any State Party. Proposed amendments are to be communicated by the Secretary-General to States Parties with the question of whether a conference of States Parties should be convened to consider and decide on the proposals. If at least one third of Parties agree within four months of the communication, a conference will be convened. Any amendment adopted by a majority of two thirds of the States Parties present and voting will be submitted to the General Assembly for approval and thereafter to all States Parties for acceptance. An approved amendment will then enter into force for those States Parties that accept it on the 30<sup>th</sup> day after two thirds of States Parties have accepted. It will thereafter enter into force for any State Party on the 30<sup>th</sup> day following that Party's acceptance.

Article 47(3) provides an alternative entry into force procedure where the approved amendment relates exclusively to Articles 34, 38, 39 or 40. If the Conference of States Parties so decides by consensus, such an amendment shall enter into force for all States Parties on the 30<sup>th</sup> day after two thirds of the States Parties at the date of adoption of the amendment have accepted it.

## **WITHDRAWAL OR DENUNCIATION**

Article 48 of the Convention provides for denunciation. A State Party may denounce the Convention by written notification to the Secretary-General of the United Nations. A denunciation becomes effective one year after receipt of notification.