PUBLIC INTEREST ADVOCACY CENTRE

NSW DDLC Disability Discrimination Legal Centre (Inc.)

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

Comments to the Federal Attorney-General's Department

on the

Chair's Text for the

Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities

14 July 2006

The organisations recognise the work of the following staff and members in the preparation of this submission: Josh Brock, Christine Ngan, Rosemary Kayess, Jo Shulman and Robin Banks.

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Introduction

The NSW Disability Discrimination Legal Centre (DDLC)

The NSW Disability Discrimination Legal Centre (**NSW DDLC**) was established in 1994 to help people with disability understand and protect their rights under disability discrimination laws.

NSW DDLC does this in a number of ways:

- the delivery of direct legal services to people with disability, their associates, advocates and representative organisations where discrimination has occurred;

- the development and delivery of community legal education in relation to disability discrimination and the rights of people with disability, to promote awareness of the legal options available to people with disability to enforce their rights; and

- the undertaking of policy work in areas relevant to disability discrimination and human rights, including law reform.

NSW DDLC aims to promote a society where all people can participate in all aspects of life through:

- the removal of barriers, whether physical or attitudinal;
- the elimination of discrimination;
- the empowerment of people with disability;
- education and awareness of the rights of people with disability, and
- advocating publicly and privately for recognition of rights of fair, equitable and non-discriminatory treatment.

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit legal and policy centre. PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision-making.

PIAC's key goal is to undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

PIAC's work extends beyond the interests and rights of individuals; it specialises in working on issues that have systemic impact at both a NSW and National level. PIAC's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services for free or at minimal cost.

Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, Community Legal Centres, private law firms, professional associations, academics, experts, industry and unions to achieve its goals.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Australian Lawyers for Human Rights

Australian Lawyers for Human Rights (**ALHR**) is an association with a membership of over one thousand Australian lawyers committed to promoting awareness of and adherence to human rights in Australia. ALHR is an unfunded association that relies on the efforts of its members to engage in public policy debates that affect the protection and promotion of human rights at a domestic level.

The United Nations convention development process

In December 2001, the General Assembly of the United Nations assented to a resolution to establish an Ad Hoc Committee to consider proposals for a Comprehensive and integral international convention on the rights and dignity of persons with disabilities. Six sessions of the Ad Hoc Committee have been held to date. At its Second Session, the Ad Hoc Committee achieved consensus that a specific thematic convention dealing with the human rights of persons with disability would be developed, and established a Working Group to develop a draft text proposal for such a convention. This task was completed in January 2004.

In its following four sessions, the Ad Hoc Committee has undertaken an extensive First and Second Reading of the Working Group's draft text, and many proposals for amendment have been made by participating member States, non-government organisations, and national human rights institutions. At the end of the Sixth Session, the Ad Hoc Committee approved a proposal that its Chair, the New Zealand Ambassador to the United Nations, New York, His Excellency Don MacKay, develop a synthesised text that reflects the work of the Ad Hoc Committee to date. This 'Chair's Text' will form the basis of further negotiations.

On 7 October 2005, His Excellency Don MacKay provided his draft text under cover of an open letter to the Ad Hoc Committee. The Australian Government has invited a number of stakeholders to comment on the draft text.

On 2 December 2005 NSW DDLC, PIAC and ALHR provided comments on the draft text.

In June 2006, the Australian Government again invited a number of stakeholders to comment on the most recent 'Working Draft'.

Consultation process

NSW DDLC, PIAC and ALHR welcome this further opportunity to comment on the 'Working Text' (**the Working Text**) for the Draft Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (**the Draft Convention**).

We acknowledge that the Draft Convention is the result of many weeks of debate and negotiation between member states and, as such, will always represent something of a compromise position.

We are of the opinion that the Draft Convention is a significant improvement on previous drafts. However, we make the following recommendations to the Australian Government to improve both the readability and the effect of the Draft Convention.

Summary of Recommendations

Recommendation 1

NSW DDLC, PIAC and ALHR recommend that the Australian Government support the definition of disability put forward by the Chair.

Recommendation 2

NSW DDLC, PIAC and ALHR put forth the following definition of reasonable adjustment:

'Reasonable accommodation' means necessary and appropriate modification and adjustments not constituting an unjustifiable hardship*, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. The following factors should be considered in determining whether a modification would constitute unjustifiable hardship:

(a) the financial costs and resources available to the provider;
(b) the benefits and costs to the community including:
(i) the modification's ability to address systemic patterns of inequality within society; and
(ii) the discriminatory costs of not providing the modification; and
(c) the impact on public health and safety.

It is the responsibility of the provider to demonstrate and provide reasons why they are unable to provide the accommodation.

* One feature that can be used to promote 'unjustifiable hardship' is that to include the term, would arguably lessen the need to consider the factors that should be considered (as these are established under existing jurisprudence).

Recommendation 3

NSW DDLC, PIAC and ALHR recommend that the Australian Government support the definition of disability put forward by the Chair.

Recommendation 4

NSW DDLC, PIAC and ALHR recommend that the Australian Government support the retention of Article 17 to ensure that the Convention properly limits and regulates the use by States Party of compulsory treatment in respect of people with disabilities.

Recommendation 5

NSW DDLC, PIAC and ALHR recommend that the monitoring provisions of the Discussion Text be adopted and that the Government should advocate for the following amendments:

1. That Article 35 be amended so as to require that the Committee on the Human Rights of Persons with Disabilities be made up predominately of people with disability and also contains members from other human rights treaty bodies.

2. That an additional article be inserted into the draft text relating to the development of State Party action plans, to be done in consultation with the Disability Advocate, the national monitoring body and civil society. The article should specify that reporting is to be carried against the action plan.

3. That Article 39 be amended so that Committee is able to defer reporting by a State Party when compliance with the action plan has been achieved to a high standard.

4. That Articles 45, 46 and 47 be amended so that it is clear that each article is binding unless a State Party declares that it does not recognise the competence of the Committee provided for in that Article. The language used in paragraph 8 of Article 46 is appropriate.

5. That Article 50 be amended so that it is a requirement that the Disability Advocate be a person with a disability.

6. That Article 51 be amended so that it is clear that the agenda of the conference of States Party be based on the recommendations arising out of evaluations by the Committee and the Disability Advocate regarding the effectiveness of the Convention and its implementation by States Party. Further, the Article should be amended to oblige States Party to ensure sufficient resources are available to accredited NGOs to attend and participate in the conference.

7. That Article 52 be amended so that States Party are obliged to consult with the National Monitoring Body and civil society on each occasion that it reports to the Committee. The National Monitoring body should also be given specific powers in relation to shadow reporting, including obtaining comment from civil society. The National Monitoring body should be composed of a majority of persons with a disability.

8. That an additional article be inserted defining the role of the Special Rapporteur, and linking her or his work to the work of the Committee and the Disability Advocate.

1. Article 2 – Definitions

1.1 Definition of disability

NSW DDLC, PIAC and ALHR support the definition of disability proposed by the Chair:

> 'Disability' results from the interaction between persons with impairments, conditions and illnesses and environmental and attitudinal barriers they face. Such impairments, conditions or illnesses may be permanent, temporary, intermittent or imputed, and include those that are physical, sensory, psychosocial, neurological, medical or intellectual.

This definition sufficiently recognises that disability is a dynamic and continuing concept that arises through the interaction of people with disability and the community. In that sense it does not limit the application of disability to circumstances where a person can demonstrate a 'disadvantage' or 'handicap' arising from this interaction. Rather it gives the true effect of the Convention, which is to guide, promote and sustain non-discriminatory practice in relation to disability issues and to address and eliminate any barriers they face in the community.

NSW DDLC, PIAC and ALHR support the inclusion of the six broad categories included in the Discussion Text and feel that any particular disability is likely to fall within one of the categories listed. We also note that the use of the word 'include' necessarily implies a non-exhaustive list and therefore allows for the broad scope necessary to adapt to different understandings of disability as knowledge and awareness develops.

Recommendation 1
NSW DDLC, PIAC and ALHR recommend that the Australian Government support the definition of disability put forward by the Chair.

1.2 Definition of reasonable accommodation

NSW DDLC, PIAC and ALHR continue to strongly advocate **against** the use of 'disproportionate burden' as a qualifier of a State Party's obligation to provide modification and adjustments set out in the definition of 'reasonable accommodation'. We submit that the concept of disproportionate burden is underdeveloped and does not have the clarity and depth of interpretation that can be provided by better-developed concepts such as 'unjustifiable hardship' and 'undue hardship' (see Table 1 below). It is noted that similar concerns have been indicated from many participants in the Convention development process with respect to the meaning and standard of 'disproportionate burden'.[1]

[1] See for example UN Convention on the Rights of People with Disabilities Ad Hoc Committee Daily Summary 25 May 2004 and in particular comments from Israel, Australia, China and Costa Rica and non-government organisations of EDF/WBU/WNUSP, Inclusion International and National Human Rights Institutions.

The fact that the lack of development around the term 'disproportionate burden' might lead to unacceptable ambiguity is illustrated by considering how the term is used in other—but related—legal contexts.

The term 'disproportionate' features in anti-discrimination law as qualifier in indirect discrimination. In this application, the term simply requires a numerical assessment to demonstrate that a condition or requirement impacts adversely on a certain group more than on other groups; for example, a condition or requirement would have a disproportionate impact if more women than men were unable to fulfil the condition or requirement.

As set out in the discussion below, in considering the costs and benefits of a modification or adjustment for people with disability it is impossible to identify a numerical value and the application of this understanding of disproportionate would be unsustainable. The inclusion of a term that has such a divergent meaning in the context of indirect discrimination creates a significant potential for confusion

Despite the fact that the standard of disproportionate burden appears to arise from Article 5 of the Council for the European Union's *Employment Equality Drive* generally there is no clear understanding or jurisprudence of what the standard means in reality. The term 'disproportionate' gives no indication of what level of effort it can be measured against to determine proportionality. It has a very real potential for subjective application and for States Party to the Convention setting their own standards as to what constitutes disproportionate burden.

The preferred test must be unjustifiable hardship or undue hardship. These are tests that are a common feature in the domestic anti-discrimination laws of a number of countries and this has led to the extensive development of jurisprudence around these terms in a number of jurisdictions.[2] The strength of these concepts is that they recognise and appreciate that achieving substantive equality for people with disability will very commonly require an allocation of resources and effort.[3] The test of unjustifiable hardship is able to impose a high threshold that compels States to attend to the proper allocation of resources to achieve substantive equality, while recognising that, in limited and exceptional circumstances, some States will be restricted by their available resources to achieve full equality immediately.

The inclusion of this test better addresses the issue of identifying who meets any cost of creating the infrastructure and promoting the attitudinal shift required in Government and society for people with disability to achieve substantive equality. It allows for the scenario where an adjustment would, on an economic basis, be

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2 For examples of the application of this principle see: (Australia) *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 206, (United States) *Haschmann v Time Warner Entertainment Co* 151 F3d 591 and (Canada) *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868.

3 However, it should also be noted that studies relating to the costs of adjustments consistently demonstrate that the majority of adjustments are relatively inexpensive. See, for example, A Cantor, *The Costs and Benefits of Accommodating Employees with Disabilities* (1996); E Dixon, speaking at *European Conference on the Implementation of the Anti-discrimination Directives into National Law*, July 2003; T Deliere 'The wage and employment effects of the Americans with Disabilities Act' (2000) 35(4) *Journal of Human Resources* 693.

calculated to produce a zero profit or even a loss to the party providing the adjustment but would ultimately provides a net social benefit.[4] On this basis, while the test creates a higher obligation on States it also recognises that ultimately modifications and adjustments that are made are in the States' interests. This is particularly well illustrated in the context of employment where the engagement of people with disability in mainstream employment has the potential to provide a significant and valuable contribution to the economies of States, where they might otherwise be substantially or wholly reliant on State welfare systems.[5]

At minimum, if the term 'disproportionate burden' is retained in this definition, it should be accompanied by three important safeguards:

1. The inclusion of a more detailed definition—as is evidenced in the *Employment Equality Directive*—to provide guidance on the elements to be considered in making the assessment of proportionality.

   Although NSW DDLC, PIAC and ALHR strongly argue that there are important differences between the three standards identified—being unjustifiable hardship, undue hardship and disproportionate burden—it is also recognised that the typical application of all three tests identify similar elements to consider and should be explicitly referred to in the Convention. These include:

   (a) An assessment of financial costs and resources available to the provider.

   (b) The benefits accrued and costs to the community at large. This consideration requires an assessment of a range of different factors[6] including:

   - Based on domestic approaches to combating discrimination, the cost to the community should primarily assess the impact of the adjustment or modification on public health and safety.
   - The financial cost is a less relevant concern under this consideration as it should be sufficiently assessed under (a).
   - An assessment of the costs of *not* providing the adjustment or modification. In this sense, a inclusion similar to the Spanish model in *Law on Equality of Opportunities, non-discrimination and universal accessibility of Persons with Disabilities*, Article 7—'the discriminatory impact of *not* providing the measure'—could provide useful guidance.

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4 See Productivity Commission Report and reference to Stein 'The law and economics of disability accommodations' (2003) 53 *Duke Law Journal* 79.

5 See, for example, Human Rights and Equal Opportunity Commission National Inquiry into Employment and Disability *Workability I: Barriers* and *Workability II: Solutions* (2005).

6 See concluding remarks in 7th Ad Hoc Committee Background conference document prepared by the Department of Economic and Social Affairs – *The Concept of Reasonable Accommodation in Selected National Disability Legislation* New York, 16 January – 3 February 2006 (A/AC.265/2006/CRP.1) at www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm

NSW DDLC, PIAC and ALHR submit that the enjoyment of human rights by any member of a community has a net benefit for all members of that community and is a valuable contribution to its social capital. Further, the full enjoyment of equality rights is fundamental to effective democracy. This view is reflected in the preamble to the Universal Declaration of Human Rights and subsequent international human rights treaties.

- A 'rights-based' approach to assessing benefits should be employed in similar terms to the South African approach, which assesses the ability of the accommodation to address systemic patterns of inequality within society.[7]

  NSW DDLC, PIAC and ALHR submit that the inclusion of any person with disability in an equal and non-discriminatory community invariably represents a significant benefit to the community in question.

2. Any standard of reasonable accommodation and assessment of hardship or burden should also include a clear statement that it shall be the provider (not the person with disability) who is required to demonstrate on what grounds the impact could be considered disproportionate. This burden of proof is well established in all jurisdictions[8] with anti-discrimination laws and should be consolidated in international law.

3. Finally, regardless of the adoption of any standard, a saving article should be included that ensures that any State parties with existing anti-discrimination measures that represent a higher standard than that of 'disproportionate burden' will not be permitted to compromise or diminish the application of such laws in light of the Convention. This should be framed in similar (but stronger) terms to Article 5 of the International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights that achieve a similar aim.

Should the test of 'disproportionate burden' be preferred and included without such elaboration or safeguards, NSW DDLC, PIAC and ALHR encourages the Australian Government to consider entering a 'reservation' with respect to this test that clearly states Australia's commitment to a higher standard of 'unjustifiable hardship' and encourage other States Party to make similar commitments to their own stronger domestic frameworks.

NSW DDLC, PIAC and ALHR continue to voice their strong opposition to the inclusion of the term 'burden'. We recognise that the term 'burden' has social

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7 *Code of Good Practice on Disability in the Workplace*, South Africa.

8 See concluding remarks in 7th Ad Hoc Committee Background conference document prepared by the Department of Economic and Social Affairs – *The Concept of Reasonable Accommodation in Selected National Disability Legislation* New York, 16 January – 3 February 2006 (A/AC.265/2006/CRP.1) available at www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm

implications—at least for Western societies—implying that people with disability are 'carried' through community sacrifice. NSW DDLC, PIAC and ALHR believe that people with disability contribute to the community and accommodations are made to facilitate this contribution rather than because society is making a sacrifice or carrying a burden.

Recommendation 2

NSW DDLC, PIAC and ALHR put forth the following definition of reasonable adjustment:

'Reasonable accommodation' means necessary and appropriate modification and adjustments not constituting an unjustifiable hardship*, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. The following factors should be considered in determining whether a modification would constitute unjustifiable hardship:

(a) the financial costs and resources available to the provider;
(b) the benefits and costs to the community including:
    (i) the modification's ability to address systemic patterns of inequality within society; and
    (ii) the discriminatory costs of not providing the modification; and
(c) the impact on public health and safety.

It is the responsibility of the provider to demonstrate and provide reasons why they are unable to provide the accommodation.

* One feature that can be used to promote 'unjustifiable hardship' is that to include the term, would arguably lessen the need to consider the factors that should be considered (as these are established under existing jurisprudence).

Table 1 Different standards of reasonable accommodation across jurisdictions

State/ Body	Standard	Legislation and Jurisprudence
Council for European Union	'Disproportionate burden'	*Council Directive 2000/78/EC of 27 November 2000*. Article 5: reasonable accommodation. Preamble (21): To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or other assistance. Article 10: Burden of proof. Preamble (31): Burden of proof is placed on the provider/respondent.
Spain	'Disproportionate burden'	*Law on Equality of Opportunities, Non-discrimination and Universal Accessibility of Persons with Disabilities* Article 7: includes a consideration of: • the costs of the measure; • the discriminatory impact of not providing the measure; • the features of the provider and the ability to obtain funding.
Inter-American	Not specified.	The *Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities* 1999 Although no references are made to the concepts of reasonable adjustment and associated standards, the targets are not qualified by any standard, ie, on a good faith reading although states can 'gradually' implement the purpose of the Convention, their obligations are not limited by a concept of unjustifiable hardship (let alone a lower one of disproportionate burden).
Australia	'Unjustifiable hardship'	*Disability Discrimination Act 1992* (Cth) Section 11: Assessment includes: • the nature of the benefit or detriment for all people concerned; • the effect of the disability of the person; • the costs and financial status of provider. The onus is on the discriminator to establish unjustifiable hardship: *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481 at 492. A high threshold that anticipates a degree of hardship in making adjustments: *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 206. Consideration goes beyond individual and looks to the benefits and costs generally: *Access for All Alliance (Hervey Bay) v Hervey Bay City Council* [2004] FMCA 915 [87].

State/ Body	Standard	Legislation and Jurisprudence
South Africa	'Unjustifiable hardship'	*Employment Equity Act* No 55 of 1998 Referring to reasonable accommodation: the standard of 'unjustifiable hardship' is identified and defined under the *Code of Good Practice on Disability in the Workplace* (6.12) and includes consideration of: • the cost of the accommodation; • the effectiveness of the accommodation; • its impact on the operation of the provider; • its ability to address systemic patterns of inequality within society.
United States	'Undue hardship'	*Americans with Disability Act* 1990 Section 101(10): considerations include: • the nature of the accommodation; • the financial resources available to a provider; • the overall impact on the operation of a provider. The proposed provider must demonstrate undue hardship: *US Airways Inc v Barnett* 535 US 122 SCt 1516 Must extend beyond fears and prejudices and be demonstrated to adversely impact on the provider's operation, eg, other staff/resource implications: *Haschmann v Time Warner Entertainment Co* 151 F3d 591.
Ireland	'Impossible or unduly difficult'	*Equal Status Act* (2000) Section 4(1): 'For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would **be impossible or unduly difficult** for the person to avail himself or herself of the service.' Again recognises that adjustments may come with a cost but assessment is whether the cost is unduly or unjustifiably restrictive. Considerations include cost (section 4(2)) and harm to others (section 4(4)). This act separates the idea of 'cost' and anything that is more than 'nominal' is exempt: section 4(2). However, the overall assessment is still 'impossible or unduly difficult'. The 7th Ad Hoc Committee paper notes that this purely financial focus in unique. It is also noted that section 34(3) allows for discrimination where there is evidence to establish that there will be *significantly* increased costs.

State/ Body	Standard	Legislation and Jurisprudence
Canada	'Undue hardship'	*Canadian Human Rights Act* 1985 Section 15(2): for an accommodation to be denied it must be demonstrated that the measures would impose undue hardship on the provider. Considerations are: • health; • safety; and • costs. Emphasises that expense associated with accommodations typically benefits a wide range of people. Therefore the test of costs is a high one: *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3. Onus is on provider of accommodation to establish that there is undue hardship: *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868. *Ontario Human Rights Code* 1990 Specifically excludes considerations such as business inconvenience and customer preference.
United Kingdom	'Such steps as is reasonable'	*Disability Discrimination Act* (1995) Sections 6 and 21: Although the expression of the test does not confirm with the typical expression—undue hardship or unjustifiable hardship—the factors considered are clearly stated and almost identical. They include: • the ability of the accommodation to meet the needs of the person with disability; • the impact on the operation on business or service; and • the resources available to the provider, including their financial position.
Israel	'Undue burden'	*Equal Rights for People with Disabilities Law* 5758 (1998) Undue burden is defined as a burden that is unreasonable in the circumstances but requires a consideration of: • the cost and nature of the adjustments; • features of the provider; and • existence of external funding available.

See summaries in 7th Ad Hoc Committee Background conference document prepared by the Department of Economic and Social Affairs – *The Concept of Reasonable Accommodation in Selected National Disability Legislation* New York, 16 January – 3 February 2006 (A/AC.265/2006/CRP.1) available at www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm

2. Articles 12 and 17: General Comments

In his Closing Remarks, the Chair describes Article 12 and Article 17 as 'difficult issues' and instructs delegates 'to come to the August session having further considered the various perspectives and positions and with some degree of flexibility about a best way forward'. Some delegations have advocated for the removal of significant portions of Article 12 and even the removal of Article 17 altogether.

NSW DDLC, PIAC and ALHR submit that Article 12 and Article 17 represent two extremely important articles in the Convention. The Convention process was inspired by international recognition that, although universal human rights instruments existed, people with disability were more likely to suffer violations of these basic human rights:

> These violations include malnutrition, forced sterilisation, sexual exploitation … institutionalisation … denial of voting rights, rights to communication, and the right to participate in policy-making.[9]

The most intolerable and unacceptable violations of the rights of people with disability typically arise in relation to denial of their legal capacity and compulsory treatment by the State.

Whilst NSW DDLC, PIAC and ALHR respect the Chair's concerns and remain open to the contributions of alternative perspectives, it is our urgent submission that to be effective in achieving its purpose this Convention *must* recognise and explicitly address the complex issues of legal capacity and compulsory treatment. To consider omitting some, or all, of the content in these articles is not only *not the best* way forward it is *no* way forward.

2.1 Article 12 – Equal recognition as a person before the law

Article 12 deals directly with the question of legal capacity. The inclusion of Article 12(1) is vital as it strongly states the presumption that a person possesses legal capacity. NSW DDLC, PIAC and ALHR argue that the remainder of Article 12 should be read in light of this presumption and be targeted at promoting and protecting the autonomy and independence of all people to make significant decisions about their life.

However, NSW DDLC, PIAC and ALHR also recognise that in certain circumstances people require assistance to exercise their legal capacity and, in exceptional circumstances, require a decision to be made on their behalf. We argue that over-adherence to abstract notions of autonomy and independence can lead to detrimental and disturbing outcomes for individuals who are unable to properly assess and communicate their views on important decisions affecting their health and well-being.

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[9] *Bangkok Recommendations on the Elaboration of a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities* A/AC.265/2003/CRP/10.

Such scenarios have the very real potential to lead to people 'dying with their rights on'[10] when they are unable to access proper treatment and assistance because of their inability to properly communicate their needs and preferences.

Acknowledging the need for support for people with disability exercising their legal capacity and, in exceptional circumstances, the need for substitute decision-making, a failure to include the safeguards in Article 12, which ensure these processes are properly applied and reviewed, is entirely unacceptable.

NSW DDLC, PIAC and ALHR argue that currently Article 12 of the Working Text attempts to provide these safeguards. We acknowledge that further discussion and consultation on Article 12 is warranted, but submit that the following elements must be included:

- That the presumption that a person has capacity on an equal basis with others in all aspects of life be retained and emphasised.

- That States Parties be required to take all available steps, including legislative measures and the proper allocation of resources, to support people with disability to exercise their legal capacity. This includes the development of programs to promote the presumption of capacity and stimulate legal practitioners and health care workers to assist people exercise this right.

- That, if a person requires supported or substitute decision-making processes, those processes be matched by proper safeguards. Most importantly, such processes should be the subject of an independent and impartial review. This review should occur at regular intervals to ensure that the supported or substituted decision-making is still required by the person. Additionally, the person with disability should be entitled to make an appeal against the decision-making arrangement to an independent body at any time.

- It should be clearly stated that supported or substituted decision-making should only be to the extent that is required by the person with disability and should apply for the shortest time possible.

- Furthermore any processes should ensure that the rights, will and preferences of the person are acknowledged and the person is informed of any decision to the greatest degree possible and that any support or substituted decision-maker be independent and free of conflict of interest.

NSW DDLC, PIAC and ALHR submit that the 7th Sesssion Draft EU Position elaborated together with Canada, Australia, Norway, Costa Rica, USA and Liechtenstein on Article 12 sufficiently addresses these important safeguards whilst maintaining a strong presumption in support of people with disability realising their legal capacity.

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

[10] D Treffer, 'The Macarthur Coercion Studies: A Wisconsin Perspective' (1998) 82 *Marquette Law Review* 759.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life,

3. States Parties shall take appropriate legislative and other measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all legislative or other measures which relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to periodic impartial and independent judicial review. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own, inherit or dispose of property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit; and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Recommendation 3
NSW DDLC, PIAC and ALHR recommend that the Australian Government support the definition of disability put forward by the Chair.

2.2 Article 17 – Protecting the integrity of the person

Article 17 goes to the very core of this Convention in identifying what protections are available to people with disability against the coercive exercise of State power. As observed above, people with disability are far more likely to be the subject of abuse from the improper exercise of State power than most other members of the community. Article 17 does *not* empower States to implement programs of compulsory treatment. Rather it seeks to place extremely strict limitations to the exercise of existing State power in relation to people with disability.

The principles that underpin Article 17 should be distinguished from those that drive Articles 12 and Article 15. Articles 12 and 15 are primarily concerned with the ability of a person with disability to exercise their capacity or communicate their consent. Article 17 is concerned with situation where the State imposes treatment with no consideration of the issues of capacity or consent. In this sense, the Article has far-reaching implications for people with disability; in particular those with mental illness who are often the subject of such treatment.

In Article 17, NSW DDLC, PIAC and ALHR observe an analogous relationship with Article 6 of the *International Covenant on Civil and Political Rights*, dealing with the right to life and the death penalty. In General Comment 6, the Human Rights Committee observe that:

> … the deprivation of life by authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit circumstances in which a person may be deprived of his life by such authorities. [Further] the Committee is of the opinion that the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be quite an exceptional measure.

By similar reasoning it is noted that the imposition of compulsory treatment on any person represents a serious denial of autonomy. Article 17 is required in the Convention to explicitly acknowledge this gravity and provide all possible procedural safeguards to ensure that people with disability are protected to the maximum extent possible from the exercise of State coercion. To consider omitting Article 17 is to remain silent in protecting and promoting the rights of the most vulnerable members of the community who might be the subject of such treatment.

NSW DDLC, PIAC and ALHR acknowledge the challenge that developing proper safeguards presents. However, it should also be acknowledged that without such obligations State Parties can implement inappropriate treatment systems that leave some of the most powerless groups utterly vulnerable. For example, compulsory treatment orders were used extensively in Russia as a tool for political coercion.[11]

For the reasons above, Article 17 should be drafted carefully to provide all possible safeguards that aim, firstly, at preventing the exercise of State power through the exploration and promotion of alternatives and, secondly, at ensuring its use is strictly limited. For that reason the inclusion of Article 17(1) identifies the over-arching principle that guides States Parties' application of Article 17: the protection of the integrity of people with disability on an equal basis with others.

NSW DDLC, PIAC and ALHR currently support the substance of Article 17. In particular we emphasise the following limits that should be strongly supported:

- A strong statement promoting the integrity of people with disability.

- That compulsory treatment should only be considered in the most exceptional circumstances.

  NSW DDLC, PIAC and ALHR would also include in this consideration that such treatment be identified as the last resort. This would require the State to identify the various alternatives to compulsory treatment and provide evidence as to why they were not appropriate within the circumstances.

- That States have an obligation to research and promote alternatives to limit the need for consideration of compulsory treatment.

- That any compulsory treatment be exercised in the least restrictive way possible and the personal circumstances and interests of the person should always be taken into account.

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[11] See A Pishchita, 'The practice of applying compulsory treatment to mentally disturbed people: a view from Russia' (2005) 24 *Medicine and Law* 717.

- Compulsory treatment should not be imposed if the treatment's sole purpose is to 'correct, improve or alleviate' impairment.

Cases from Australia illustrate the importance of these safeguards. The ability of the State to impose compulsory treatment is typically justified in terms of public safety. The inclusion of Article 17 requires the State to demonstrate not only the relationship between the compulsory treatment and public safety concerns, but also the needs of the person in question and their ability to access appropriate services and support; see for example of where such a balance is properly considered by Justice James in *Sami El Mawas v DPP* [2005] NSWSC 243.

Too often people with disability whose behaviour is perceived as a danger to the general community suffer at the hands of the State because inadequate support services and alternatives have been provided.[12] This can lead to a situation where decisions about compulsory treatment for people with mental illnesses or behavioural disorders who commit criminal offences are left under the discretion of the Health Minister and expose people with mental illness to the very real risk of being indefinitely detained in the jail system as the proper support is unavailable or Minister refuses to exercise their discretion to release the person because of the potential for significant media and community backlash.[13]

Under Article 17 the State will be under an international obligation to consider support services and alternatives before compulsory treatment can be ordered.

One of the significant hurdles to clarifying the application of Article 17 is the inconsistent use of language. References are made to 'forced interventions', 'forced institutionalisation', 'involuntary interventions' and 'involuntary treatment'. In the Convention the distinction between these concepts is unclear and the variation makes it difficult to appreciate the application of Article 17 in relation to other significant articles such as Article 12 and Article 15.

Further the use of the word 'involuntary' is unhelpful in the context of Article 17. As observed before, these articles are directed at treatment that is imposed by the State *regardless* of consent. It matters not if a person enters the treatment voluntarily or involuntarily: if the treatment is imposed by the State it should be the subject of the strictest safeguards. On this basis NSW DDLC, PIAC and ALHR submit that Article 17 should make reference to 'compulsory treatment', a term that acknowledges the exercise of coercive powers of the State, distinguishes the separate application of Article 17 to the issues of consent and capacity, and is broad enough to cover concepts such as institutionalisation.

Having observed these shortcomings in the current drafting of Article 17, NSW DDLC, PIAC and ALHR still advocate for its inclusion, over any suggestion of its removal. Whilst we respect the concerns of many groups in relation to this article, ultimately a Convention that fails to stand up to and address the issue of compulsory treatment will be ineffective in ensuring that States Parties properly protect the rights of people with disability. It will essentially give the green light for States to set their

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12 See, for example, *DPP v Darren John Albon* [2000] NSWSC 896.

13 C Berry, 'Prison no place for the mentally ill' (2005) 23 *Journal of the Public Interest Advocacy Centre* 1.

own criteria for compulsory treatment without the need to properly assess and implement appropriate safeguards that could prevent its arbitrary use and limit it to the most exceptional of circumstances. It would also fail to properly recognise and promote the development of alternatives in providing support to people with disability to participate equally within the community.

Recommendation 4
NSW DDLC, PIAC and ALHR recommend that the Australian Government support the retention of Article 17 to ensure that the Convention properly limits and regulates the use by States Party of compulsory treatment in respect of people with disabilities.

3. Monitoring

In light of the current debate around the effectiveness of the monitoring mechanisms of conventions to which Australia is a signatory, NSW DDLC, PIAC and ALHR understand the importance of ensuring that such mechanisms in the Draft Convention are appropriate and adapted to the aims of the Convention.

The aims of the Convention as outlined in Article One of the discussion text can be summarised as:

- **To Protect:** to set an internationally agreed standard to achieve equality.
- **To Promote:** to use the standard as an educative tool for states and all component elements of society and to encourage international and national dialogue on these issues.
- **To Fulfill:** to require States Party to achieve that standard.

3.1 The draft articles on monitoring

The draft monitoring articles provide for a range of monitoring mechanisms:

- The establishment of a treaty monitoring committee, the Committee on the Human Rights of Persons with Disabilities (**the Committee**), with a range of responsibilities: Articles 34 to 44.
- The requirement on each States Party to provide regular reports to the Treaty Committee on steps taken to achieve compliance with the Convention: Article 39.
- The requirement on each State Party to promote awareness of the Convention and to publicise the reports of the Treaty Committee in relation to the relevant State Party: Articles 42 and 49.
- The provisions for individuals to communicate directly with the Treaty Committee alleging a breach of the Convention by a State Party: Article 45.
- The capacity of the Treaty Committee to initiate inquiries into serious breaches by a State Party: Article 46.
- The enabling of communications by a State Party about the conduct of another State Party in respect of its obligations under the Convention: Article 47.
- The establishment of the position of Disability Advocate to promote the human rights of persons with disabilities: Article 50.
- The enabling of visits to States Party and research by the Treaty Committee: Article 48.

- The convening of a regular States Party conference: Article 51.
- The requirement that each State Party establish a National Monitoring Committee: Article 52.
- The prohibition of victimisation in respect of any activities under the Convention: Article 53.

3.2 The objectives of monitoring and the aims of this Convention

In an expert paper on monitoring mechanisms[14] provided by the Office of the High Commissioner to the Ad Hoc Committee, the five objectives of monitoring can be summarised as follows:

1. To diagnose and understand the existing situation in the state.
2. To equip states to undertake principled policy-making and effectively evaluate the extent to which progress has been made towards the realisation of the obligations contained in the treaty.
3. To create opportunities for the establishment of a new partnership between states and rights holders.
4. To create opportunities for capacity building and awareness raising.
5. To protect victims of human rights violations.

In order to improve the Discussion Text on monitoring, NSW DDLC, PIAC and ALHR suggest that a starting point should be linking the aims of the Convention to the objectives of monitoring so as to ensure that the aims of the Convention are capable of being met and assessed through the monitoring provisions.

3.3 Convention Aim 1: To protect

NSW DDLC, PIAC and ALHR submit that an assessment of the aim of 'protecting' involves ensuring that international standards are appropriate and adapted to the cause, and that they are capable of being translated into domestic policy. The latter is to an extent identified in 'objective 3' of the expert paper on monitoring mechanisms.

We note that other than Article 38, which provides for the evaluation of the functioning of the Committee, the Discussion Text is silent on the issue of ensuring the Convention is appropriately protecting and promoting the rights of persons with disabilities. We recommend that a new article be inserted into the Discussion Text providing for an international body to be entrusted with the task of regularly reviewing the appropriateness of the Convention and to make recommendations for its further development, for example through the drafting of optional protocols. This body should also provide guidance on translating standards into domestic policy. We recognise the utility of current instruments such as the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities and recommend that the

[14] Office of the United Nations Commissioner for Human Rights, 'Expert Paper on existing monitoring mechanisms, possible relevant improvements and possible innovations in monitoring mechanisms for a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities' (18 January 2006) A/AC.265/2006/CRP.4.

rules continue to be developed so as to provide guidance on mechanisms for achieving obligations under the Convention.

NSW DDLC, PIAC and ALHR suggest that it is appropriate for the Committee to be the international body and it be mandated to work in conjunction with the disability advocate. Through their work as proposed in the other monitoring articles of the Discussion Text, these entities will have sufficient expertise both in the operation of the Convention and the implementation practices of States Party to the Convention. The work of this body in this area should then set the agenda for the biennial conference of States Party on disability. Given the involvement of non-government organisations (**NGOs**) in the drafting of this Convention, these NGOs should also be present at the biennial conference, and States Party should be obliged to ensure sufficient resources are made available to accredited NGOs to enable their attendance.

3.4 Convention Aim 2: To promote

Monitoring to ensure the promotion of the Convention involves two objectives as identified by the Office of the High Commissioner[15]:

3. to create opportunities for the establishment of a new partnership between states and rights holders; and
4. to create opportunities for capacity building and awareness raising.

In order to achieve 'objective 3', it is essential that there is an explicit obligation on States Party to confer with civil society and national human rights institutions when acting under all monitoring articles of the Convention.

In order to achieve 'objective 4', NSW DDLC, PIAC and ALHR recommend that the Disability Advocate be granted specific duties to work with international experts to collect and circulate information regarding international best practice in the area. We are of the view that Article 49 achieves this goal, although it is important to ensure that Article 49 requires that the Disability Advocate be a person with a disability. This, in conjunction with the operation of the biennial conference as recommended above will go some way to achieving this aim. Finally, States Party should be obliged to circulate recommendations of the Committee in accordance with Article 49.

NSW DDLC, PIAC and ALHR also note that the Special Rapporteur on Disability is given no clear role in the Discussion text, and recommend that its role be further explored and recorded.

3.5 Convention Aim 3: To Fulfil

This entails three objectives as identified by the Office of the High Commissioner[16]:

1. to diagnose and understand the existing situation in the state;
2. to equip states to undertake principled policy-making and effectively evaluate the extent to which progress has been made towards the realisation of the obligations contained in the treaty; and
5. to protect victims of human rights violations.

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15 See n 14 above.

16 *Ibid.*

Central to all of these objectives is the existence of a monitoring body that has the capacity to effectively monitor the fulfilment of these objectives by States. Notwithstanding the reluctance of many States to agree to a Discussion Text that creates an additional treaty body, it is submitted that, in order to be effective and worthwhile, any monitoring must be carried out by a body with specific expertise in disability issues and rights. Current treaty bodies do not have such expertise and accordingly, NSW DDLC, PIAC and ALHR support the establishment of the Committee as delineated in Articles 34 to 47 of the Discussion Text. We note that our support is on the proviso that the majority of the Committee be people with disability. This proviso, whilst novel in relation to the operation of treaty bodies, is warranted in this circumstance, given the subject matter of the Convention, and the empowerment model it embraces.

In order to address the criticisms of some States Party to existing human rights conventions in relation to onerous reporting requirements created by having an additional treaty body, we suggest the following measures to lessen the reporting burden on States Party:

- Shortly after providing an initial report as outlined in Article 39.2, States Party should also provide an action plan outlining their five- to ten-year strategy for achieving improved compliance with the Convention. This action plan should be developed in consultation with the Disability Advocate, the national monitoring body and civil society. It should be focused on thematic issues which the Disability Advocate, civil society and the national monitoring body identify as issues in need of redress. The action plan should provide a plan and timeline for addressing these issues, and all reporting should be against the action plan.
- The Committee should be able to permit a State Party to defer reporting where compliance has been achieved to a high standard.
- Members of other treaty bodies should be included in the Committee, as this will allow the Committee to develop its own practices, in light of the experiences of other treaty bodies.

Further, the national monitoring body, as described at Article 52 of the Discussion Text is a useful idea, and NSW DDLC, PIAC and ALHR recommend that it be supported. In addition to the tasks outlined in the Discussion Text in relation to making recommendations on improvements to laws at a domestic level, the national monitoring body should also be entrusted with specific powers in relation to making recommendations to the States Party in relation to their initial reports, action plans and further reports. Given its independent status, and the lack of resources of NGOs, the national monitoring body should be given powers to consult with NGOs to create 'shadow reports' to the Committee where necessary.

Given the control afforded to States Party to determine the issues about which they report to the Committee, it is important that other processes are available by which other States Party or individuals are able to report on grave or systemic violations of rights set forth in the Convention, to ensure that these violations do not go unaddressed. For this reason NSW DDLC, PIAC and ALHR support the inclusion of Articles 45 (individual communications), Article 46 (inquiry procedure) and Article 47 (interstate complaints procedure) in the Discussion Text. Each of these articles is necessary in that, together, they provide a means by which all world citizens

can access the Committee if necessary. Each of these articles contain a 'compromise' to ensure protection of the sovereignty of the States Party, in the form of a confidentiality clause for communications. Given this compromise and the importance of these articles, there should be a presumption that a state is bound by each of the articles at the time of ratification of the Convention.

Recommendation 5

NSW DDLC, PIAC and ALHR recommend that the monitoring provisions of the Discussion Text be adopted and that the Government should advocate for the following amendments:

1. That Article 35 be amended so as to require that the Committee on the Human Rights of Persons with Disabilities be made up predominately of people with disability and also contains members from other human rights treaty bodies.

2. That an additional article be inserted into the draft text relating to the development of State Party action plans, to be done in consultation with the Disability Advocate, the national monitoring body and civil society. The article should specify that reporting is to be carried against the action plan.

3. That Article 39 be amended so that Committee is able to defer reporting by a State Party when compliance with the action plan has been achieved to a high standard.

4. That Articles 45, 46 and 47 be amended so that it is clear that each article is binding unless a State Party declares that it does not recognise the competence of the Committee provided for in that Article. The language used in paragraph 8 of Article 46 is appropriate.

5. That Article 50 be amended so that it is a requirement that the Disability Advocate be a person with a disability.

6. That Article 51 be amended so that it is clear that the agenda of the conference of States Party be based on the recommendations arising out of evaluations by the Committee and the Disability Advocate regarding the effectiveness of the Convention and its implementation by States Party. Further, the Article should be amended to oblige States Party to ensure sufficient resources are available to accredited NGOs to attend and participate in the conference.

7. That Article 52 be amended so that States Party are obliged to consult with the National Monitoring Body and civil society on each occasion that it reports to the Committee. The National Monitoring body should also be given specific powers in relation to shadow reporting, including obtaining comment from civil society. The National Monitoring body should be composed of a majority of persons with a disability.

8. That an additional article be inserted defining the role of the Special Rapporteur, and linking her or his work to the work of the Committee and the Disability Advocate.