



Protecting the RIGHTS of persons with DISABILITY **a new convention**

By Phillip French and Rosemary Kayess

On 13 December 2006, the General Assembly of the United Nations adopted the *Convention on the Rights of Persons with Disabilities* (CRPD) and an associated *Optional Protocol*.¹ The CRPD is the first UN human rights treaty to be adopted in the 21st century, and it is reputedly the most rapidly negotiated major human rights treaty in the history of international law.²

On 30 March 2007, the CRPD was signed by 81 nations and the European Union – the highest number of opening signatures recorded for any human rights treaty; 44 nations also signed the *Optional Protocol*. By the end of October 2007, 118 nations had signed the CRPD and 67 the *Optional Protocol*.³ Australia signed the CRPD on 30 March 2007, but has not yet signed the *Optional Protocol*. Both are likely to come into force by the end of 2007.⁴

The CRPD has been hailed as a great landmark in the struggle to reframe the needs and concerns of people with disability in terms of human rights. The rapidity with which it was developed, and the enthusiasm with which the international community has embraced it, appears to be unique in the history of international human rights law.⁵ Speaking for the secretary-general of the UN on the occasion of its adoption, the deputy secretary-general said the CRPD heralded the 'dawn of a new era – an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long'.⁶

The chairman of the negotiating committee was voicing a general consensus when he characterised the CRPD as embodying a shift away from a social welfare response to disability to a rights-based approach.⁷ In this respect, the CRPD is, at least ideologically, based upon a social model of disability.⁸ This model views impairment as an aspect of human diversity, and 'disability' as the result of the interaction of people with impairments with socially constructed attitudinal and environmental barriers.⁹

BACKGROUND

In the second half of the 20th century, the UN developed seven core human rights treaties.¹⁰ With very limited exceptions, these treaties do not deal expressly with the human rights of people with disability. Nevertheless, because they are of general application, they extend, in theory at least, to people with disability on an equal basis with others. Until 2001, the accepted view was that, because of the general applicability of existing treaties, a specific disability human rights convention was unnecessary.¹¹

However, in reality, existing human rights treaties have done little to protect or promote the rights of people with

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disability. In part, this is because these treaties, both in their formulation (the applicability problem) and in their implementation by human rights practitioners and multi-lateral agencies (the expertise problem) have not addressed the specific forms of human rights violations that people with disability experience. There has also been a general failure within the UN system to recognise people with disability as rights-bearers and to interpret their needs and concerns in terms of human rights (the visibility problem).¹²

Although the *raison d'être* for developing the CRPD was that existing human rights instruments have failed people with disability, the General Assembly mandate under which the CRPD was developed stipulated that the negotiating committee was not to develop any 'new' human rights,¹³ but merely apply existing human rights to the particular circumstances of people with disability. Proposing that instruments that have historically failed people with disability should nevertheless provide a useful blueprint for securing their rights in the future is paradoxical, to say the least.

Despite what might be characterised as the 'official fiction' that the CRPD does not set down any new human rights, it would seem clear that it has, in fact, modified traditional human rights concepts in key respects. It contains entirely new or amplified formulations of human rights, including a number of collective or social group rights, such as the right to research and development,¹⁴ awareness raising,¹⁵ social protection and poverty reduction,¹⁶ and to development and international co-operation¹⁷ (sometimes called 'third generation rights'). The CRPD also incorporates a number of 'universal' equality measures (such as the right to an accessible environment,¹⁸ which has the potential to benefit many people, not just those with disability), which are sometimes described as 'fourth-generation rights'.

In addition, the CRPD incorporates highly disability-specific interpretations of existing human rights, which transform former 'non-interference' rights (or 'negative' rights) into positive state obligations. For example, the right of non-interference with personal opinion and expression is transformed into a positive state obligation to provide public information in accessible formats and to recognise sign languages, Braille, and augmentative and alternative >>

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communication.¹⁹ Similarly, the guarantee of equality before the law is extended into a positive obligation to ensure access to justice for persons with disability.²⁰ In these and other respects, the CRPD blends civil and political rights ('first generation' rights) with economic, social and cultural rights ('second generation' rights). It appears to abandon, in effect, the distinction between those rights that are subject to immediate versus progressive realisation.²¹

CONVENTION TYPOLOGY AND ELEMENTS

The CRPD is a 'thematic' human rights convention in that it sets out the human rights of a specific group – people with disability. Because it is made up of different 'generations' of rights, the CRPD is also a 'hybrid' convention.

The CRPD comprises 50 articles and its *Optional Protocol* 18 articles. Articles 1 and 2 of the CRPD are interpretive. Article 1 sets out the general purpose of the convention, which is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disability, and to promote respect for their dignity'. It also describes the class of persons to whom the convention applies.²² This is a broad and opened-ended description that includes those with long-term physical, mental, intellectual or sensory impairments. Article 2 defines key terms that have very specific meanings in the CRPD, including 'communication', 'reasonable accommodation', and 'universal design'.

Articles 3 to 9 of the CRPD are general obligations that must be applied to all aspects of the convention's implementation. Article 3 enunciates the general (or normative) principles upon which the CRPD is based, which include respect for the inherent dignity of persons with disability, non-discrimination, and the full and effective participation of persons with disability in society. It provides what one senior commentator has referred to as the CRPD's 'moral compass'.²³ Article 4 sets out the general obligations that nations assume on ratification or accession to the CRPD. This includes, for example, the obligation to incorporate the terms of the convention into national laws, policies and programs, and to repeal national laws that are inconsistent with the convention. Article 5 imposes an obligation on nations to recognise that people with disability are equal with others, and to prohibit discrimination on the ground of disability. Most importantly, it requires nations to ensure that

the impairment and disability-related needs of people with disability are reasonably accommodated.²⁴

Article 6, 'women with disabilities', and Article 7 'children with disabilities', require nations to implement the CRPD in a manner that will ensure that women and children with disability are able to exercise and enjoy their human rights and fundamental freedoms on an equal basis with men and other children. These gender and age equality measures are reinforced in the CRPD's preamble and at a number of other key points.

Articles 8 and 9 present what are undoubtedly two of the greatest challenges to the international community. Article 8 requires nations to promote a fundamental change in societal attitudes, by fostering respect for the rights and dignity of persons with disability and by combating stereotypes and prejudice. Article 9 requires nations to ensure that the 'environment' is accessible to people with disability so that they may live independently and participate fully in all aspects of life. The environment is very broadly conceptualised, and includes not only built structures, but also transport, information and communications (including the internet). The Article also specifically refers to a principle of geographic equity, requiring equivalent levels of environmental accessibility in both urban and rural areas.

Articles 10 to 30 of the CRPD set out the specific human rights and fundamental freedoms recognised by the convention.

Broadly speaking, Articles 10 to 23 and Article 29 are based in civil and political rights. In some cases, these are new or amplified applications or extensions of these rights. For example, Article 13 significantly extends the traditional right of equality before the law into a positive obligation to ensure access to justice.²⁵ Article 16 extends the traditional right to freedom from torture or cruel, inhuman or degrading treatment to freedom from all forms of exploitation, violence and abuse.²⁶ Articles 17, 19 and 20 significantly extend the traditional right of liberty and security of the person in startling ways. Article 17 is particularly directed towards non-interference with both the physical body and the mind, and is the product of very vigorous advocacy against compulsory treatment of those with psychosocial impairments. Article 19 equates the right to liberty with the right of persons with disability to live in and be a part of the community. It prohibits institutional models of supported accommodation for persons with disability, and requires national investment in community-based living options. Article 20 equates the right to liberty with the maximum personal mobility of people with disability. It will also require national investment in mobility aids, assistive technologies, and forms of live assistance for people with disability. From an implementation perspective, it is intriguing that these articles are, despite their appearance, civil and political rights, and therefore subject to the standard of immediate realisation.²⁷

Articles 24 to 28 and Article 30 are based on economic, social and cultural rights.

Articles 24 and 27 deal with the right to education and work respectively. They place over-riding emphasis on

inclusion and participation by people with disability in the mainstream education system and labour market, supported by the measures required to realise these rights.

Article 25 deals with the right to health. It is particularly directed towards ensuring that people with disability enjoy non-discriminatory access to comprehensive general and specialist health services in the local communities in which they live. Article 26 extends the traditional rights to health, work, education and social security to habilitation and rehabilitation, with the aim of ensuring that people with disability have access to developmental learning and rehabilitation programs that will enable them to develop (or recover) their maximum potential. Article 28 deals with the right to an adequate standard of living and social protection. The concept of social protection is arguably significantly broader than the traditional right to social security. The Article also incorporates obligations in relation to reducing poverty, providing specialist disability services, and assisting with the extra costs of disability.

Finally, Article 30 deals with the rights of people with disability to participate in cultural life, recreation, leisure and sport. Again, the primary emphasis is placed on access and equal participation. However, the article also recognises the specific cultural and linguistic identity of people who are deaf, and guarantees recognition of sign language and deaf culture.

Articles 31 to 40 of the CRPD are implementation and monitoring provisions. They contain arrangements for implementing and monitoring the convention at both national and international levels, including the establishment of a new treaty body.

Articles 41 to 50 of the CRPD are the operational – or machinery – provisions.

The *Optional Protocol* is a separate document to the CRPD that incorporates an individual complaints procedure allowing individuals and groups to raise complaints with the treaty body where they have exhausted domestic remedies. It also establishes an inquiry procedure in relation to gross or systemic violations of CRPD rights.

PROGRESS TOWARDS RATIFICATION IN AUSTRALIA

While Australia was among the first nations to sign the CRPD, the decision to ratify remains some way off. The attorney-general has indicated that, at this stage, Australia does intend to ratify the CRPD, but not its *Optional Protocol*. The current government's opposition to the *Optional Protocol* stems from its treaty-body reform agenda, which is attempting to rationalise and integrate the human rights treaty bodies. It views the *Optional Protocol* as proliferating current problems with international monitoring bodies.²⁸ However, a final decision will not be made until the usual domestic consultative and deliberative processes are complete.²⁹ These processes are currently only in their preliminary stages.³⁰ In an effort to generate momentum towards ratification, a coalition of Australia's major disability advocacy and advisory bodies has called on all Australian governments to complete domestic consultative and

deliberative processes to ensure that Australia can ratify the CRPD on 3 December 2008 (the day of annual observance of International Day of Persons with Disability).³¹

Current Australian foreign policy requires that all domestic laws comply with the obligations of an international treaty prior to Australia ratifying or acceding to the treaty.³² This presents a delicate strategic dilemma for disability and human rights activists. On the one hand, advocacy directed at demonstrating the gap between CRPD obligations and the actual experience of Australians with disability may result in the Australian government delaying or declining to ratify the CRPD on the basis that Australia does not yet conform to these requirements. On the other hand, arguing that there is no barrier to Australia ratifying the CRPD may be more likely to lead to ratification, but it may also reinforce the view that little action is required to realise the human rights of people with disability in Australia.³³ ■

Notes: 1 UN General Assembly, Document A/AC.265.2006/L.7 and Corr. 1; Resolution Number A/Res/61/106. 2 *Secretary General Hails Adoption of Landmark Convention on Rights of People with Disabilities*, Official Statement of the UN Secretary-General, SG/SM/10797: HR/4911: L/T/4400, 13 December 2006. 3 The act of signing is an indication of an intention, made in good faith, to become a party to a convention. Although a nation that signs a convention must not act in a way that is contrary to its object and purpose (Article 18 of the UN *Vienna Convention on the Law of Treaties* 1969), the act of signing does not itself oblige >>

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- Sun Tzu, 300 BC

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the nation to implement the convention. This obligation vests only when a nation ratifies or accedes to the convention. **4** Jean-Pierre Gonnor, Chief, Secretariat for the CRPD, Division for Social Policy and Development, Department of Economic and Social Affairs, UN Secretariat, *Convention on the Rights of Persons with Disabilities – A Tool for Development*, Address to Second Session of the Biwako Millennium Framework Stakeholders' Coordination Meeting, UN Economic and Social Council for Asia and the Pacific, Bangkok, Thailand, 1-2 March 2007. **5** See, for example, *Secretary General Hails Adoption of Landmark Convention on Rights of People with Disabilities*, Official Statement of the UN Secretary-General, SG/SM/10797: HR/4911: L/T/4400, 13 December 2006; *Press Conference by High Commissioner for Human Rights on Signing of the Convention*, UN Department of Public Information, News and Media Division, New York www.un.org/News/briefings/docs//2007/070330_Disabilities.coc.htm (accessed 30 August 2007). Other claims of uniqueness include the degree of participation by civil society, particularly persons with disability, in the development of the CRPD and the UN's extensive utilisation of the internet to support the CRPD negotiation process. The CRPD is also the first core UN human rights treaty to be signed by the European Union. **6** *Secretary General Hails Adoption of Landmark Convention on Rights of People with Disabilities*, Official Statement of the UN Secretary-General, SG/SM/10797: HR/4911: L/T/4400, 13 December 2006. **7** Ambassador Don MacKay, Permanent Representative of New Zealand in the UN and Chair of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Commentary at a High-Level Dialogue, *From vision to action: The road to implementation of the Convention on the Rights of Persons with Disabilities* held in association with the Signature Ceremony of the CRPD at the UN, New York on 30 March 2007. **8** See further P Abberley, 'The Concept of Oppression and the Development of a Social Theory of Disability' (1987) 2(1) *Disability, Handicap and Society* pp5-19; M Oliver, *Understanding Disability: from Theory to Practice*, Macmillan, Hampshire (1996). **9** This understanding is encapsulated by the description of disability contained in Article 1 of the CRPD. **10** The *International Covenant on Civil and Political Rights*; the *International Covenant on Economic, Social and Cultural Rights*; the *International Convention on the Elimination of All Forms of Racial Discrimination*; the *International Covenant on the Elimination of All Forms of Discrimination against Women*; the *Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. **11** There were three unsuccessful attempts in the 1980s to persuade the General Assembly to formulate a treaty that would deal with the human rights of people with disability. In 1982, Italy unsuccessfully attempted to secure support for such an initiative, and it did so again in 1987. In 1989, Sweden unsuccessfully attempted to do so. **12** For a broader discussion of these issues see G Quinn and T Degener et al, *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability*, Office of the High Commissioner for Human Rights, UN, New York and Geneva, (2002). **13** This point was made repeatedly in the course of negotiations, was a feature of the rhetoric associated with its adoption and opening for signature, and now also permeates

formative implementation dialogue and planning: see, for example, Jean-Pierre Gonnor, above note 4. **14** For example, Article 4(f) and (g) of the CRPD. **15** Article 8 of the CRPD. **16** Article 28(b) of the CRPD. **17** Article 32. International co-operation is not a new concept in international human rights law (cf Article 45 of the *Convention on the Rights of the Child*), but its expression in the CRPD supercedes pre-existing formulations. **18** Articles 3(f), and 9. **19** Article 21 of the CRPD. **20** Article 13 of the CRPD. **21** Paradoxically, this distinction is formally preserved by Article 4, paragraph 2 of the CRPD. However, in substance it is not (see later discussion of civil and political rights). **22** The issue of a definition of 'disability' or 'person with disability' was one of the most controversial in the course of negotiations, and ultimately could not be resolved. This open-ended description reflects the view that 'disability' is an evolving concept. Nevertheless, the CRPD's description of disability is more limited than that already current in Australia in that it requires the disability to be 'long-term', which Australian law does not. **23** G Quinn, Keynote Address to German European Union Presidency Ministerial Conference, 'Empowering Persons with Disabilities', *The UN Convention on the Human Rights of Persons with Disabilities: A Trigger for Worldwide Law Reform*, Berlin, 11 June 2007. **24** This has very important implications for Australian disability discrimination law in light of the High Court's decision in *Purvis v NSW (Department of Education and Training)* (2003) ALR 133, to the effect that s5(2) (direct discrimination) of the *Disability Discrimination Act 1992* (Cth) imposes no positive duty to provide reasonable accommodation: per Gummow, Hayne and Heydon JJ (in the majority) at paras 217-18 and per Kirby and McHugh JJ (in the minority) at [104]. **25** This is the first time access to justice has appeared as a substantive right in a UN human rights instrument. A more traditional formulation of the right to equality before the law is found in Article 12 of the CRPD. **26** This Article also derives from Article 19 of the *Convention on the Rights of the Child*. **27** This means that nations have an immediate obligation to respect and ensure these rights. Economic, social and cultural rights are subject to *progressive realisation*. **28** See further: Department of Foreign Affairs and Trade, *Australian Initiative to Reform the UN Treaty Committees*, available at http://www.dfat.gov.au/un/untreaty_faq.html Honourable **29** Philip Ruddock MP, attorney-general of Australia, Keynote Address to Human Rights and Equal Opportunity Commission, *Workshop on Promoting the Ratification and Implementation of the Convention on the Rights of Persons with Disabilities in Australia*, 28 June 2007. The Australian government's opposition to the *Optional Protocol* stems from its so-called 'Treaty-Body Reform Agenda'. For an overview, see: Department of Foreign Affairs and Trade, *Australian Initiative to Reform the UN Treaty Committees*, http://www.dfat.gov.au/un/untreaty_faq.html (accessed 5 July 2007). **30** For a detailed description of the processes leading to treaty ratification, see Australian Government Department of Foreign Affairs and Trade, *Signed, Sealed and Delivered: Treaties and Treaty Making: An Officials' Handbook* (2005, 6th ed), Treaties Secretariat, Department of Foreign Affairs and Trade, Canberra. **31** Media release, *Human rights and disability representatives call for speedy ratification of UN Convention on the Rights of Persons with Disabilities*, 2 July 2007. **32** Australian Government Department of Foreign Affairs and Trade (2005), above note 30. **33** The Australian Government's early signature of the CRPD suggests that it currently takes the view that Australian laws and domestic arrangements already conform to the requirements of the CRPD, at least broadly speaking.

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