



International
Labour
Office

**Draft UN Convention on the Protection and
Promotion of the Rights and Dignity of Persons
with Disabilities**

Chair's Text 7 October 2005

Provisions on Work and Employment

ILO Technical Advisory Note

1. Introduction

- 1.1 In the process of drafting a UN Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, a Chair's text has been prepared as the basis for negotiations at the 7th Session of the Ad Hoc Committee in New York, January 16 to February 3, 2006.
- 1.2 This Chair's text replaces the Working group text as the basis for negotiating a final agreement, starting at the forthcoming Ad Hoc Committee Session. The Chair aims to have an agreed final text by August 2006. In the covering letter to his text, the Chair states that at the January meeting he will be 'asking colleagues whether there is anything in the attached text that they absolutely cannot accept. Any suggestions for improvement or change that do not quickly draw a consensus will have to be foregone, or we will find ourselves engaged in a protracted process that has no end.'
- 1.3 While welcoming the emphasis on promoting labour market opportunities for persons with disabilities in the Chair's text, the ILO is concerned about the lack of provision in Article 27 (Work and Employment) for alternative forms of work for people who may be unable to work in the open labour market, temporarily or on a more long term basis, as is provided for in ILO Recommendation No. 168. In order to influence deliberations on this point at the AHC Session, a technical advisory note on alternative forms of work for persons with disabilities has been prepared. This note will form the basis of an ILO presentation at the 7th Session of the Ad Hoc Committee.

2. The Convention extends to all persons with disabilities

- 2.1 As presently drafted, Article 27 contains valuable provisions concerning the employment of persons with disabilities in the open labour market. However, other than in the opening phrase: 'States Parties recognise the right of persons with disabilities to work ..,' the Article fails to address the rights of the vast majority of persons with disabilities throughout the world who do not and/or cannot work in the open labour market.
- 2.2 Human rights and fundamental freedoms are the birthright of all. Article 23 of the Universal Declaration of Human Rights¹ states: 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.' The International Covenant on Economic, Social and Cultural Rights (ICESCR) reiterated that provision in binding treaty form. States Parties to the Covenant recognise the right of everyone to work, which includes the right to the opportunity to gain one's living by work freely chosen or accepted, and undertake to safeguard that right.²

¹ 10 December 1948

² Article 6.1

- 2.3 These same rights apply to persons with disabilities. The UN Committee on Economic, Social and Cultural Rights has stated unequivocally: ‘..the Universal Declaration of Human Rights recognises that all human beings are born free and equal in dignity and rights and, since the Covenant’s (ICESCR) provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognised in the Covenant. In addition, insofar as special treatment is necessary, States Parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability.’³
- 2.4 Equality of opportunity is the objective of the European Union’s long-term strategy on disability, which aims to enable disabled people to enjoy their right to dignity, equal treatment, independent living and participation in society.⁴ Phase two (2006-2007) of the EU Disability Action Plan 2004-2010, which covers all 25 EU Member States, focuses on the active inclusion of people with disabilities, building on (a) the concept of disability reflected in Article 26 of the EU Charter of Fundamental Rights: ‘The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community, and (b) ‘on the values inherent in the forthcoming UN Convention on the protection and promotion of the Rights and dignity of Persons with Disabilities.’⁵ The latter phrase suggests that the EU expects a more inclusive Article 27 in the proposed Convention than the current text. To underline that expectation, the EU Communication goes on to say: ‘It is implicit in the citizens’ concept that disabled people have the same individual choices and control in their everyday life as non-disabled people.’
- 2.5 The right to decent work, freely chosen or accepted, applies to all persons with disabilities, including those who do not or cannot work in the open labour market. Article 27 should explicitly acknowledge that right.

3. Insufficient recognition of alternative forms of work and employment

- 3.1 While the right to work applies to all, persons with disabilities who work outside the open labour market have the greatest need to have their right to work legally recognised and the most to gain from the protection and promotion of that right. Yet they appear to be largely excluded from draft Article 27.
- 3.2 The UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities state that while the aim should always be for persons with disabilities to obtain employment in the open labour market, ‘for persons with

³ UN Committee on Economic, Social and Cultural Rights, General Comment No 5, 1994, para 5

⁴ European Commission Communication, Situation of disabled people in the enlarged European Union: the European Action Plan 2006-2007, COM(2005) 604 final, 28.11. 2005

⁵ *ibid.* pps 8-9

disabilities whose needs cannot be met in open employment, small units of sheltered or supported employment may be an alternative.⁶

- 3.3 The right of persons with disabilities to engage in work or employment 'which, wherever possible, corresponds to their own choice and takes account of their individual suitability for such employment' is acknowledged in ILO Recommendation No. 168.⁷ Measures called for by the ILO to promote such employment opportunities include appropriate government support for the establishment of various types of sheltered employment for disabled persons for whom access to open employment is not practicable, encouragement of the development of cooperatives by and for disabled persons, appropriate government support for the establishment and development of small-scale industry and other types of production workshops by and for disabled persons, provided such workshops meet defined minimum standards.⁸
- 3.4 The European Commission has formally recognised the need for alternative forms of work and employment for persons with disabilities and made legal provision to enable EU Member States to provide financial aid to support such employment where necessary.⁹
- 3.5 Alternative forms of work and employment extend considerably beyond those mentioned in Article 27, viz. self-employment, entrepreneurship, starting one's own business. They include sheltered employment, supported employment, protected employment schemes, provision of contract labour to companies, enclaves, mobile work crews, reserved occupations, social enterprises, community enterprises, community cooperatives, cottage industry and worker cooperatives.
- 3.6 Some indication of the number of persons with a disability in alternative forms of work and employment may be gained from the following examples:¹⁰

- Germany 2004: 236,000 in state-registered sheltered workplaces¹¹
- Poland 2002: 190,000 in registered sheltered workplaces¹²
- United States 2004: 140,000 in supported employment¹³
- Japan 2000: 130,061 in sheltered workshops¹⁴

⁶ Rule 7 (7)

⁷ Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No. 168)

⁸ *ibid.*, para 11 (b), (e), (f)

⁹ Commission Regulation (EC) No 2204/2002

¹⁰ Further information in Annex. For more detailed discussion see ILO Working Paper No. 14 'The Right to Decent Work of Persons with Disabilities,' 2003

¹¹ Rehabilitation and integration of people with disabilities (2005), Federal Ministry of Health and Social Security, Germany, http://www.bmgs.bund.de/nm_617014/EN/Social-Security/Disabled-persons/disabled-persons-node,param=.html__nnn=true

¹² Joint Memorandum on Social Inclusion of Poland, 2003, 21, European Commission and The Government of Poland, http://europa.eu.int/comm/employment_social/social_inclusion/docs/pl_jim_en.pdf

¹³ Robertson et al, Supported employment in the public sector for people with significant disabilities. *Journal of Vocational Rehabilitation*, 2004, 21, 9-17

- France 2002: 16,651 in sheltered workshops; 96,651 in Centres d'aide par le travail¹⁵
- Sweden 1999: 33,000 in sheltered workshops; 50,000 in subsidised¹⁶ employment
- Italy 1997: 17,000 in social enterprises
- Australia 2001: 14,872 in supported employment¹⁷
- Flanders 2004: 14,477 in sheltered workshops¹⁸
- Norway 2004: 8,308 in sheltered workplaces¹⁹
- New Zealand 2001: 5,400 in sheltered workshops²⁰
- Finland 2004: 2,681 in sheltered workplaces²¹
- A study for the European Commission in 2000, covering 15 EU Member States, Australia and the United States concluded that sheltered employment continues to be a major source of employment for persons with disabilities.²²

3.7 An emphasis on the open labour market may not only exclude the majority of those for whom the proposed Convention is intended and who are most in need of having their rights protected, it could also aggravate the precariousness of much of the work engaged in by many persons with disabilities, inhibit or discourage the creation of further such work opportunities and increase the risk of exploitation.

3.8 Persons with disabilities are not a homogenous group. They are individuals, with individual differences in their work motivation and job satisfiers. The type of employment (open, sheltered, supported, etc) is not necessarily an indicator of its value to an individual. Some may, for example, opt for work which best meets their social needs rather than work which pays more but is less satisfying. Every person has the right to free choice of work. That choice is not and should not be restricted to work 'to earn a living.'

¹⁴ Employment of People with Disabilities, The Impact of Legislation (Asia and the Pacific), Japan Country Profile, March 2003, ILO

¹⁵ Le handicap en chiffres 2005, 96. Centre Technique National d'Etudes et de Recherches sur les Handicaps et les Inadaptations (CTNERHI) <http://www.ctnerhi.com.fr/>

¹⁶ Recruitment to sheltered employment: Evidence from Samhall, a Swedish state-owned company, Skedinger P. and Widerstedt B., Working Paper 2003:11, 4. IFAU – Institute for Labour Market Policy Evaluation.

¹⁷ Training and Employment of People with Disabilities: Australia 2003, An AbilityAsia Country Study, O'Neill G. and Sutherland M., 2003, 50. ILO, <http://www.ilo.org/public/english/region/asro/bangkok/ability/download/australiafinal.pdf>

¹⁸ VLAB – the Flemish Federation of Sheltered Workshops, <http://www.vlab.be>

¹⁹ Manedsstatistikk om arbeidsmarkedet, Nr. 12, desember 2004, 38. AETAT – Arbeidsdirektoratet in Norway, http://www.aetat.no/data/f/0/36/10/9_702_0/maanedstatistikk_des2004.pdf

²⁰ Living with Disability in New Zealand (2004). Ministry of Health, New Zealand, <http://www.moh.govt.nz/moh.nsf/238fd5fb4fd051844c256669006aed57/8acbe31d08a27718cc256f32000724c8?OpenDocument#status>

²¹ Eurostat Working Papers and Studies, Labour market Policy, Qualitative Report Finland 2004, Eurostat Labour Market Policy database, date of extraction: December 2005. The data was received from the Information Services at the Ministry of Labour Finland, the report is not public.

²² Ecotec, Benchmarking Employment Policies for People with Disabilities; a study for the European Commission, 2000

3.9 The existence of, and need for, alternative forms of work and employment for persons with disabilities should be acknowledged in Article 27. The Convention should include an obligation to develop and implement policies that promote and regulate flexible and alternative work arrangements that reasonably accommodate the needs of individual disabled workers and to take appropriate steps to protect the rights of those who engage in such work.

4. The right to just and favourable conditions of work

- 4.1 Sheltered employment has been sometimes criticised for failing to provide proper working conditions and employment contracts. In many cases employees are paid less than the minimum wage. In some cases they receive only 'pocket money' in addition to their normal state disability pension/benefit. Employment, occupational safety and health laws often do not apply.²³
- 4.2 'The 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' (ICESCR Article 6(1)) is not realised where the only real opportunity open to disabled workers is to work in so-called 'sheltered' facilities under substandard conditions.'²⁴
- 4.3 Everyone has the right to the enjoyment of just and favourable conditions of work (ICESCR Article 7). This right applies to all disabled workers, whether they work in sheltered facilities or in the open labour market.²⁵ States Parties have a responsibility to ensure that disability is not used as an excuse for creating low standards of labour protection or for paying below minimum wages.²⁶
- 4.4 The ILO has developed comprehensive instruments regarding the work-related rights of persons with disabilities, including in particular Convention No. 159 and Recommendation No. 168. Measures called for include government support to eliminate the potential for exploitation within the framework of vocational training and sheltered employment.²⁷
- 4.5 Article 27 should acknowledge the right of persons with disabilities to the enjoyment with just and favourable conditions of work which respect, in particular, health, safety and dignity. The Convention should include an obligation to develop and implement policies that promote, regulate and safeguard that right for all persons with disabilities who work, both in the open labour market and in alternative forms of work and employment.

²³ ILO, Vocational Rehabilitation and Employment of Disabled Persons, 1998, p.61; ILO Working Paper N0 14, op cit

²⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No 5, 1994, para 21

²⁵ ibid. para 25

²⁶ ibid.

²⁷ Recommendation 168, op cit, para 11(m)

Annex

Alternative Forms of Employment - Examples

Supported Employment

Supported employment originated in the United States as an alternative to traditional rehabilitation programmes for persons with severe disabilities. It is defined by law and regulation as paid work in integrated settings, with ongoing support services, for persons with severe disabilities. The provision of a minimum wage was added to US federal regulations for supported employment in 1997.²⁸

There is a variety of ways in which supported employment may be provided. These include individual placement, enclaves, mobile work crews and small business arrangements.²⁹ An enclave is a group of individuals, usually three to eight, who work in a special training group within a host company. Not all members of the group may move into the company's regular workforce. A mobile crew may be a similar sized group, with one or more supervisors, which travels through a community offering specialised contract services such as gardening or grounds-keeping. The small business option could be a manufacturing service or a subcontract operation, with a small number of workers with disabilities and non-disabled workers. The business might provide only one type of product or service.

The individual placement option would appear to be the dominant one in the United States. In 1995, 77 per cent of supported employment participants were in individual supported employment places, and 23 per cent in some type of group model.³⁰ There is no one 'best' model. As some commentators have said:

'there is a nearly infinite array of supported employment strategies and structures, each of which combines a particular kind of work opportunity with a particular method of ongoing support. Each has advantages and drawbacks in terms of generating real employment outcomes while overcoming barriers to employment experienced by the individuals with disabilities. No single alternative is ideal and none fits all situations. Development of supported employment programmes requires adaptation to local employment opportunities and individual service requirements.'³¹

There has been a steady growth in the number of disabled persons in supported employment over the past two decades. In the United States the number increased from less than 10,000 to over 140,000 in less than ten years.³² The European

²⁸ Wehman, P., Revell, G. and Kregel, J. Supported Employment: a decade of rapid growth and impact, in Wehman, P., Kregel, J. and West, M. (Eds) Supported Employment Research: expanding competitive employment opportunities for persons with significant disabilities. Rehabilitation Research and Training Centre on Supported Employment, Virginia Commonwealth University, 1997

²⁹ Moon, M. and Griffin, S. Supported Employment Service Delivery Models in Wehman, P. and Moon, M. (Eds) Vocational Rehabilitation and Supported Employment. Paul H. Brooks Publishing Company: Baltimore MD, 1988

³⁰ Wehman et al, 1997, op. cit.

³¹ Bellamy, G.T., Rhodes, L.E. and Albin, J.M. Supported Employment. In Kieran, W.E. and Stark, J.A. (Eds) Pathways to Employment for Adults with Developmental Disabilities (pp.129-138), Baltimore: Brooks, 1986

³² Robertson et al, Supported employment in the public sector for people with significant disabilities. Journal of Vocational Rehabilitation, 2004, 21, 9-17

Commission has also recognised the potential of supported employment in creating suitable jobs for persons with disabilities.³³

Social Enterprises

The Social Economy, according to the European Centre for the Social Economy (ARIES), is 'based on the values of economic activities with social goals, sustainable development, equal opportunities, inclusion of disadvantaged people, and civil society.'

The European Commission, which sometimes refers to the Social Economy as the 'Third Sector,' describes it as 'the economic and social fields represented by cooperatives, mutual companies, associations, along with all local job creation initiatives intended to respond, through the provision of goods and services, to needs for which neither the market nor the public sector currently appear able to make adequate provision.' Enterprises of the Social Economy have been defined as 'those entities that do not belong to the public sector, are run and managed in a democratic way, whose members have equal rights, and that adhere to a special regime of property and distribution of profits whereby any surplus is reinvested in the growth of the entity and the improvement of services offered to its members and society at large.'³⁴ A wide variety of social economy enterprises exist, all sharing similar values. They include social firms, social businesses, social enterprises, community enterprises, community cooperatives, development trusts, neighbourhood co-ops, worker cooperatives, social cooperatives, credit unions, microcredit and mutual guarantee societies.

The European Union sees the Social Economy as an important part of the European economic model. In a visit in 2002 to the European Confederation of Workers' Cooperatives, Social Cooperatives and Participative Enterprises (CECOP) the President of the European Commission referred to the fact that cooperatives at that time employed 2.3 million people in the EU.

The social economy has developed in various ways in different countries. In Italy, for example, a recent regulation on social cooperatives has led to a major expansion of the sector and assisted the reorientation of the cooperative sector from a direct focus on delivering benefit for members to providing wider benefits to the local community. Social cooperatives in Italy engage in a variety of commercial, manufacturing, farming and service activities and employed over 17,000 disabled workers in 1997. In the United States the not-for-profit sector dates mainly from the 1960s. Such enterprises benefit from a range of tax exemptions. U.S. government departments are required to procure goods and services from not-for-profit organisations employing persons with disabilities, subject to their being competitive on price and quality. In Spain, ONCE (The Spanish Organisation for Blind Persons) established a foundation (Fundacion ONCE) in 1988 involving representation of different groups of persons with disabilities. The primary goal of the Foundation is to provide employment for disabled persons. In 1989 the Foundation set up FUNDOSA GRUPO as a holding or

³³ *ibid.*

³⁴ Quoted in Viorreta, C. The Social Enterprise in Spain. Paper presented at Transnational Meeting in Cagliari, 29 Sep 1998

parent company of more than 60 enterprises, which in 1997 employed almost 6000 workers, of whom 72 per cent were disabled. The enterprises operate in diverse sectors including laundry, retail sales in hospitals and community centres, telephone marketing, food production and data processing.³⁵ In the United Kingdom there has been increasing interest in social cooperatives, with between 40 and 50 such enterprises providing work for people with disabilities in 1995.³⁶ A more recent report suggests that the social economy accounts for almost 7.3 per cent of all employment in the U.K. There is no indication of the number of disabled persons employed in the sector.³⁷

A fundamental characteristic of social enterprises is that they are created to respond, by providing goods and services, to needs for which neither the private business sector nor the public sector are able or willing to make provision. The future growth potential of the social enterprise sector would appear to offer significant possibilities for new employment opportunities for persons with disabilities.

Sheltered Employment

As ILO Recommendation No.168 implies, there are possibilities for different types of sheltered employment. In their survey of sheltered employment in various countries, Samoy and Waterplas found that even the concept of sheltered employment does not have the same meaning for all people:

‘When government officials are asked to present their system of sheltered employment to foreigners (such as the authors), they will sometimes refer exclusively to organisations providing productive work (in industry or services) to persons with disabilities who have an employment contract and receive a wage. Other officials from the same state or officials from another state may want to include organisations where productive work is certainly not the only and often not even the main aim and where persons with disabilities have no employment contract and receive no wages but only a bonus in addition to their disability pension. Other interested parties, such as workshop organisations or organisations of and for people with disabilities, may share this view or disagree.’³⁸

In their report, Samoy and Waterplas adopted a broad view of sheltered workshops, including types of organisations similar to occupational centres or day centres. However, a minimum of productive activity was required for an organisation to be included. For countries where such institutions are normally not considered as sheltered work, some information was gathered in order to make comparisons possible.

³⁵ quoted in Thornton, P. and Lunt, N. *Employment Policies for Disabled People in 18 countries*. Social Policy Research Unit, University of York, 1997

³⁶ *ibid.* pp237-238

³⁷ U.K. Department of Trade and Industry. *Social Enterprise: a strategy for success*. July 2002

³⁸ Samoy, E. and Waterplas, L. *Sheltered Employment in five member states of the Council of Europe: Austria, Finland, Norway, Sweden and Switzerland*. Council of Europe, 1997, p.6

The Council of Europe also uses a broad definition of sheltered employment:

'Sheltered employment should be open to people who, because of their disability, are unable to obtain or keep a normal job, whether supported or not; it can cover a number of diversified situations, among which are sheltered workshops and work centres. Sheltered work should have a double purpose: to make it possible for people with disabilities to carry out a worthwhile activity and to prepare them, as far as possible, for work in normal employment. To this end, all ways of facilitating the passage from supported to ordinary employment should be devised, such as: the setting up of sheltered work sections in work centres or work centres in sheltered workshops; the setting up of sheltered work sections or work centres within ordinary firms; individual or collective detachment of workers in sheltered workshops or work centres in ordinary firms.'³⁹

³⁹ Council of Europe, A coherent policy for the rehabilitation of people with disabilities, 1992