

The Working Draft of the Rights of Persons with Disabilities Act, 2010: Does it exceed its Mandate in Including Provisions Relating to Other Disability Legislations?

## **I. Introduction**

This is a brief Note on the Working Draft of the Persons with Disabilities Act dated 1.12.2010 (“Working Draft”) on the specific issue of how it relates to the three other disability legislations being the National Trusts Act 1999, the Mental Health Act 1987 and the Rehabilitation Council of India Act, 1992.

From the Working Draft it is seen that there are several provisions which are contradictory to some of the provisions in these three legislations in significant ways. This Note also raises concerns as to whether the Working Draft has exceeded its mandate given by the Committee to only amend the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (“PWD Act”) by attempting to draft a comprehensive disability law which includes even the other disability legislations .

## **II. The Committee and its Mandate:**

The Ministry of Social Justice and Empowerment, through an Office Memorandum,<sup>1</sup> constituted a Committee to “draft a new legislation to replace the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995” (“Committee”).<sup>2</sup> The main aim of setting up the Committee was to ensure that the PWD Act was in consonance with the United Nations Convention on the Rights of Persons with Disabilities and not to amend any of the other disability legislations.<sup>3</sup>

After the Committee was set up, the minutes of the meeting of the Committee dated 22-07-2010<sup>4</sup> show that the Chairperson reminded the Committee members of the specific purpose for which it was set up and was therefore “not going to debate on formulating one comprehensive law that would repeal all other current disability legislations such as The National Trust Act, Mental Health Act and Rehabilitation Council of India Act, etc.”<sup>5</sup>

Subsequently, the Consultant appointed by the Committee released several drafts and the latest Working Draft of the Rights of Persons with Disabilities Act, 2010 is dated 01.12.2010 (“Working Draft”).<sup>6</sup> The Working Draft surprisingly states that “the mandate of the Committee to the Consultant was to put together a **comprehensive legislation** which covers all rights of all persons with

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<sup>1</sup> GOVERNMENT OF INDIA. DEP’T OF SOCIAL JUSTICE AND EMPOWERMENT, OFFICE MEMORANDUM FOR THE CONSTITUTION OF A COMMITTEE TO DRAFT A NEW LEGISLATION TO REPLACE THE PWD ACT, 1995., F.No. 16-38/2006-DD.III, (30<sup>th</sup> April 2010).

<sup>2</sup> *Id*

<sup>3</sup> *See id*

<sup>4</sup> *See* MINUTES OF MEETING, 2<sup>ND</sup> MEETING OF THE COMMITTEE TO DRAFT NEW LEGISLATION FOR PERSONS WITH DISABILITIES., ( 22<sup>nd</sup> July 2010).

<sup>5</sup> *See id* at Page 1.

<sup>6</sup> *See* Working Draft of the Rights of Persons with Disabilities Act, 2010, *available at* <http://www.disabilitystudiesnalsar.org/newlaw.php>. (Last visited on 24-01-2011).

disabilities.”<sup>7</sup> Further, the Statement of Objects and Reasons of the Working Draft proposes to “**replace the current disability legislations with a comprehensive law** which recognizes all rights of all persons with disabilities.”<sup>8</sup>

These statements in the Working Draft raise some confusion as to whether the mandate given by the Committee has been clearly understood before the drafting process commenced. If the mandate was indeed to only amend the PWD Act and not to amend any of the other legislations such as the National Trusts Act, the Mental Health Act and the Rehabilitation Council of India Act, then the drafting should have been restricted to amending the PWD Act to the extent possible, and not to affect the provisions of the other legislations.

### **III. The Working Draft on Other Disability Legislations**

The Working Draft does not suggest any amendments to the other disability legislations such as the National Trust Act, 1999, Mental Health Act, 1987 and Rehabilitation Council of India Act, 1992. However, as to the effect that the Working Draft should have on these other legislations, it leaves a “Pending Question” which states<sup>9</sup>:

*“The issue of the induction of the National Trust and the Rehabilitation Council as separate chapters could not be attempted primarily because there was no time left to undertake a coherent and systematic exercise. It may also be noted that as the length of the statute expanded we felt a constraint of space in even incorporating all the provisions of power and accountability in the chapter on the Disability Rights Authority. It may also be noted that all significant authorities in the country have dedicated legislations around them. In this view of the matter the Committee would need to consider whether it would wish to suggest the creation of One Disability Law Code and within which have legislations on : Disability Rights; the Disability Authority; the National Trust; and the Rehabilitation Council. Or whether it would also wish to induct the National Trust and the Rehabilitation Council into this legislation?”*

Added to this, the Memorandum on Disability Code (“Memorandum”) prepared along with the Working Draft explains that the reasons mentioned in the Pending Question along with the lack of time prevented the working out of the linkages between the DRA, the National Trust and the Rehabilitation Council of India.<sup>10</sup> About the other dedicated legislations, the Memorandum states as follows<sup>11</sup>:

*“Since we reached the opinion that the newly established DRA should have its own legislation we also concluded that the National Trust and the RCI should have their own legislations which should spell out the specific tasks each of those authorities should carry out to implement the*

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<sup>7</sup> See *id* at Explanatory Note.

<sup>8</sup> See *id* at Statement of Objects and Reasons.

<sup>9</sup> Explanatory Notes: Rights of Persons with Disabilities Act Working Draft, Part IV, available at <http://www.disabilitystudiesnalsar.org/explanatory-notes.php>. (Last visited on 24-01-2011)

<sup>10</sup> See Memorandum on Disability Code, Background, available at <http://www.disabilitystudiesnalsar.org/bcp-disability-code.php>. (Last visited on 24-01-2011)

<sup>11</sup> See *id* at Dedicated Legislations.

*rights recognized in the New Rights for Persons with Disabilities Act. The National Trust should be the authority which addresses the issue of multiple discrimination and be mandated to proactively formulate policies and programs by which to ensure the equality and non discrimination of persons with disabilities who are so disadvantaged and the RCI could work on HRD. The composition and powers and functions of the three bodies should be so created that it ensures convergence of operation.”*

With regard to the Mental Health Act, the Memorandum makes the following recommendation<sup>12</sup>:

*“The proposed new law recognizes the paradigm of legal capacity with support. It also recognizes the right to life, liberty and integrity of all persons with disabilities. The recognition of these rights requires a re-examination of the Mental Health Act. Even if it is accepted that community living and no force are what is required for all; it is necessary to ask what should be done with the existing institutions and the inmates housed in them. The process of dismantling cannot be done without creating alternative services and there is a need to make a transit legislation which addresses this interim situation. The reason for making the transit legislation comes from the main law but to allow coherent operation and efficient implementation of these transitory measures it is better that they are contained in a separate legislation.”*

These statements in the Explanatory Notes to the Working Draft shows that it not restricted itself to only amending the PWD Act as envisaged by the Mandate given by the Committee. An examination of the Working Draft shows that it has neither completely substituted the provisions of the three other disability legislations into the Working Draft, nor has it restricted itself to amending only the PWD Act - it is somewhere in the middle, where some many provisions which are covered by the three other disability legislations are significantly altered and at the same time these legislations are not sought to be amended simultaneously.

If the intention of the Working Draft is to replace all the other disability legislations, then it clearly exceeds the mandate of the Committee.

Some of the provisions of the Working Draft which are overlapping and contradictory to the 3 other disability legislations are discussed below:

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<sup>12</sup> See *id* at Transitory Measures

Provisions of the Working Draft	Provisions affected in other disability legislations	Comments
<p><u>Section 2(n)- Definition of ‘Person with disabilities’</u>: a person with any physical, mental, intellectual, developmental or sensory impairments which in interaction with various barriers may hinder full and effective participation in society on an equal basis with others</p>	<p><u>The National Trust Act- Section 2(j) defines a person with disability as</u>: a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disabilities.</p> <p>Section 2 (h) defines multiple disability as a combination of two or more disabilities as defined in the PWD Act, 1995;</p>	<p>While the Working Draft seeks to define disability on a social model, as per the UNCRPD, the National Trust Act defines a person with disability in the context of medical conditions and only covering conditions such as autism, cerebral palsy, mental retardation or a combination of these conditions.</p> <p>The broad definition to a person with disability given in the Working Draft needs to be incorporated into the National Trusts Act, by suggesting an amendment to Section 2 (j), in Schedule 1 of the Working Draft so as to ensure that all persons coming within the definition of ‘disability’ are covered by the benefits of the National Trusts Act. If this is not done, then persons with many kinds of intellectual and other disabilities would be left out of the purview of the National Trusts Act. Since the two definitions follow two different schools of thought, it results in vagueness and inconsistency.</p>

<p><u>Section 7A- Right to Legal Capacity and Equal Recognition before Law:</u> (1) Notwithstanding anything contained in any other law to the contrary, persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and have the right to equal recognition everywhere as persons before the law.</p> <p>(2) Any legislation, rule, notification, order, by-law, regulation, custom, practice that deprives any person with disability of their legal capacity shall be in contravention with this Act and hereinafter be void.</p> <p><u>Section 7B:</u> (1) The Disability Rights Authority or any other Authority expressly established for such purpose shall take immediate steps to provide access to suitable support measures for the exercise of legal capacity by persons with disabilities, particularly the persons with disabilities living in institutions and persons who have higher support requirement.</p>	<p><u>The National Trust Act 1999- Section 14:</u></p> <p>(1) A parent of a person with disability or his relative may make an application to the local level committee for appointment of any person of his choice to act as a guardian of the persons with disability.</p> <p>(2) Any registered organisation may make an application in the prescribed form to the Local Level Committee for appointment of a guardian for a person with disability.</p> <p>Provided that no such application shall be entertained by the local level committee, unless the consent of the guardian of the disabled person is also obtained.</p> <p>(3) While considering the application for appointment of a guardian, the local level committee shall consider-</p> <ul style="list-style-type: none"> <li>- whether the person with disability needs a guardian;</li> <li>- the purposes for which the guardianship is required for person with disability.</li> </ul> <p><u>Chapter III- Objects of the Trust</u></p> <p>(a) to enable and empower persons with disability to live as independently and as fully as possible within and as close to the community to which they belong;</p> <p>(b) to strengthen facilities to provide</p>	<p>The National Trust Act does not recognise any right to legal capacity of persons with disabilities. It provides for the appointment of a guardian who will replace the person with disability in the decision making process.</p> <p>As a result of Section 7A (2), of the Working Draft, Sections 14 and 15 and all other relevant provisions of the National Trust Act which do not recognize the legal capacity of persons with disabilities and refer to appointment of a guardian would be rendered void.</p> <p>The reference in Section 7 (2) that any contravening provision of other legislations shall be void is not sufficient and would lead to all kinds of problems in the implementation of the National Trusts Act. Unless the relevant provisions of the National Trusts Act are also amended to bring in provisions of the right to legal capacity, this legislation would not be workable and it would basically render the local level committee without any powers.</p> <p>Further Section 7D of the Draft which provides for creation of support networks, substitutes the functions and objects of the National Trust under the Act. The National Trust is set up with the object of</p>
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<p>(2) Plenary guardianship is abolished. Any legislation, rule, regulation and practice following or prescribing the system of plenary guardianship shall, hereinafter, be void.</p> <p>Section 7C(1): The Designated Authority shall take immediate steps to put in place suitable support measures for the exercise of legal capacity by persons with disabilities and especially for persons with disabilities living in institutions and persons with disabilities who have high support needs.</p> <p><u>Section 7D(1):</u> The Designated Authority shall undertake the task of conceiving new kinds of support, and formulating guidelines on the already included support, in active consultation with persons with disabilities; disabled peoples organizations; parents associations and other concerned members of civil society.</p> <p>(2) The Authority shall devise suitable mechanisms to obtain feedback from the recipients of support on the suitability and</p>	<p>support to persons with disability to live within their own families;</p> <p>(c) to extend support to registered organisations to provide need based services during period of crisis in the family of persons with disability;</p> <p>(d) to deal with problems of persons with disability who do not have family support;</p> <p>(e) to promote measures for the care and protection of persons with disability in the event of death of their parents or guardians;</p> <p>(f) to evolve procedure for the appointment of guardians and trustees for persons with disability requiring such protection;</p> <p>(g) to facilitate the realisation of equal opportunities, protection of rights and full participation of persons with disability; and</p> <p>(h) to do any other act which is incidental to the aforesaid objects.</p>	<p>providing support networks to persons with disabilities. By Section 7D assigning the same function to an unspecified “Designated Authority”, the Draft encroaches in the area which is within the purview of the National Trust.</p>
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<p>usefulness of the support provided and if and whether they desire any modification or addition to it.</p> <p><i>[The rest of the Chapter recognizes that all persons with disabilities have the right to seek support for their legal capacity and make provisions for the same]</i></p>		
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	<p><u>The Mental Health Act (1987) –</u></p> <p><u>Section 3.</u> (1) The Central Government shall establish an Authority for mental health with such designation as it may deem fit.</p> <p>(2) The Authority established under subsection (1) shall be subject to the superintendence, direction and control of the Central Government.</p> <p>(3) The Authority established under subsection (1) shall -</p> <p>(a) be in charge of regulation, development, direction and co-ordination with respect of Mental Health.</p> <p>Services under the Central Government and all other matters which, under this Act, are the concern of the Central Government or any officer or authority subordinate to the Central Government;</p> <p>(b) supervise the psychiatric hospitals and psychiatric nursing homes and other Mental Health Service Agencies (including</p>	<p>The Mental Health Act 1987 does not recognize the right to legal capacity of a mentally ill person. Section 19 takes away the legal capacity of the disabled person as a ‘person’ in the eyes of the law and vests his/her rights in the hands of the relative and the medical officer.</p> <p>This contrasts with the Working Draft in that the Draft recognizes the right to legal capacity of a person with disability and also the right to access support systems to exercise the right to legal capacity. The Working Draft also prohibits the deprivation of a person’s legal capacity and renders all legislations doing so as void.</p> <p>In such a case, the provisions regarding admission of a person under the Mental Health Act are significantly altered by the Working Draft. No recommendations are made as to what should be the legislation regarding the same and how patients should be admitted in case of non-voluntary admissions.</p> <p>The absence of a mandatory hearing of the person with disability before granting a reception order as per Sections 20 to 24 are also not in consonance with the Working Draft provisions of the right</p>
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	<p>places in which mentally ill persons may be kept or detained) under the control of the Central Government;</p> <p>(c) advise the Central Government on all matters relating to mental health; and</p> <p>(d) discharge such other functions with respect to matters relating to mental health as the Central Government may require.</p> <p><u>Section 4</u> provides for the setting up of a State Authority by the State Government with similar functions as the Central Authority.</p> <p><u>Section 19. (1)</u>: Any mentally ill person who does not, or is unable to, express his willingness for admission as a voluntary patient, may be admitted and kept as an inpatient in a psychiatric hospital or psychiatric nursing home on an application made in that behalf by a relative or a friend of the mentally ill person if the medical officer-in-charge is satisfied that in the interests of the mentally ill person it is necessary so to do.</p> <p><u>Sections 20 to 24</u>: These Sections contain</p>	<p>to legal capacity and access to support systems.</p> <p>Sections 50, 51 and rest of the Chapter VI of the Mental Health Act also provide for plenary guardianship and would therefore go against the provisions of the Draft which mandate the implementation of the principle of legal capacity and would be rendered void.</p> <p>These provisions which are contradictory to the Working Draft also need to be amended simultaneously. They cannot exist simultaneously with the Draft with provisions such as 7A (2) and 7B (2) declaring them as void as this would lead to an inconsistency in the legislative intent behind the disability legislations.</p> <p>The entire basis of the Mental Health Act is to deny legal capacity of mentally ill persons and thus this legislation needs to be either repealed in light of the chapter relating to Legal capacity under the Working Draft or needs to be simultaneously amended.</p> <p>Section 7B (1) obligates the Disability Rights Authority to take support measures to person with disabilities living in institutions among others. This attempts to replace the functions of the Authorities</p>
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	<p>various provisions wherein a Magistrate may pass a 'Reception Order' to detain a mentally ill person in a psychiatric hospital or nursing home without necessarily hearing the mentally ill person.</p> <p>50. (1) Where an alleged mentally ill person is possessed of property, an application for holding an inquisition into the mental condition of such person may be made either</p> <p>(a) By any of his relatives, or</p> <p>(b) By a public curator appointed under the Indian succession Act, 1925 or</p> <p>(c) By the advocate – general of the state in which the alleged mentally ill person resides...</p> <p>51. On completion of the inquisition, the District Court shall record its findings on,</p> <p>-</p> <p>(i) whether the alleged mentally ill person is in fact mentally ill or not, and</p> <p>(i) where such person is mentally ill, whether he is incapable of taking care of himself and of managing his property, or incapable of managing his property only.</p> <p>52. (1) Where the District Court records a finding that the alleged mentally ill person is in fact mentally ill and is in capable of taking care of himself and of managing his</p>	<p>established under Section 3 and 4 of the Mental Health Act which are in charge of the regulation and supervision of all institutions such as psychiatric hospital or nursing home. Section 7B (1) provides for the Disability Rights Authority or “any other authority established for such purpose” to take the support measures. Although the Authorities under Section 3 and 4 of the Mental Health Act are not established to take support measures to enable a person with disability to exercise his/her legal capacity, the Authorities are in charge under the Statute to regulate all aspects of institutions such as psychiatric hospitals and nursing homes. Therefore, the substitution of powers among several authorities makes the functions and powers of the Authorities under the Mental Health Act vague and uncertain.</p> <p>Further Section 7C (1) of the Draft also obligates a “designated authority” to take steps to provide support measures to persons with disabilities living in institutions to exercise their legal capacity. By this provision also the Draft is infringing on the powers and functions of the Authorities established under the Mental Health Act as they are in charge of the full supervision of the working of</p>
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	<p>property, it shall make an order for the appointment of the Guardian under Section 53 to take care of his person and of a Manager under Section 54 for the management of his property.</p> <p>(2) where the District Court records a finding that the alleged mentally ill person is in fact mentally ill and is incapable of managing his property but capable of taking care of himself, it shall make an order under section 54, regarding the management of his property.</p> <p><i>[The rest of Chapter the Section and Chapter VI of the Act deal with the procedure of the appointment of the guardian and manager and their duties]</i></p>	<p>institutions such as psychiatric hospitals and nursing homes.</p> <p>Similarly, Section 7D (1) and (2) also encroaches or substitutes the powers of the Authorities under the Mental Health Act to perform support functions and formulate guidelines.</p>
<p><u>Section 10(6):</u> Persons with disabilities have a right to non-coercive, non-restrictive and supportive environment which fully respects their sense of space, safety and security.</p>	<p><u>Mental Health Act- Sections 20 to 24 and Chapter VI (mentioned above)</u></p>	<p>Section 10(6) of the Working Draft which recognises a right of a person with disability to a non-coercive environment contradicts with the provisions under the Mental Health Act (as mentioned) which provide for coercive and restrictive environment by allowing authorities to detain the person with disability and the appointed guardian performing many functions on behalf of the person with disability. Therefore, these provisions of the Mental Health Act need to be revised and amended before the Working Draft can recognise the rights under Section 10(6).</p>

<p><u>Section 13A (1):</u> Every person with disability has the right to be protected against all forms of exploitation, abuse and violence, including physical, mental, sexual, and emotional on the person of such person with disability in all settings at all places including, home, care-houses, educational institutions, institutions, workplaces, and any other place which resides, co-habits, employs or in other manner inhabits any person with disability whether temporarily or permanently.</p> <p>(2) The Central and State Governments shall take all appropriate administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, bearing in mind also that persons with disability may be subject to discrimination on more than one grounds such as gender, religion, caste, sexual orientation simultaneously with disability;</p> <p>(3) Any organization working with persons with disability or any person, who has reason to believe that an act of exploitation, violence and abuse has been, or is being, or is likely to be committed against any person with disability, may give information about it to the police</p>	<p><u>Mental Health Act- Section 3 and 4 (mentioned above)</u></p>	<p>The Mental Health Act places the authorities under Section 3 and 4 in charge of the regulation and supervision of institutions under the Act.</p> <p>With the enactment o Section 13 A (1) in the Working Draft is unclear as to the role of the authorities under the Mental Health Act.</p>
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<p>officer, or the magistrate in whose jurisdiction such incident occurs is or is likely to occur, or to the District Disability Commissioner who shall take immediate steps on the receipt of such information to stop it and have the persons responsible for it arrested or if it has not occurred, to prevent its occurrence.</p>		
<p><u>Section 13A(11)</u>: The Central and State Governments along with the organizations working in the field of disability rights shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery, rehabilitation and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender and age specific needs</p>	<p><u>Rehabilitation Council of India Act, 1992- Section 21</u>: The Council may prescribe standards of professional conduct and etiquette and a code of ethics for rehabilitation professionals.</p> <p>Regulations made by the Council under sub-section (1) may specify which violation thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any other law for the time being in force.</p>	<p>Section 13A (11) of the Draft prescribes some of the conditions under which rehabilitation shall take place. This function is assigned to the Council under the Rehabilitation Council of India Act. Therefore the Draft displaces the power of the Council under the Act by prescribing the standards to be adopted by rehabilitation professionals who will be in charge of recovery and rehabilitation.</p>

<p><u>Section 15A (1):</u> All persons with disabilities shall have the right to live independently and in the community in order to enable them to grow and develop and have a meaningful life on an equal basis with others.</p> <p>(2) In order to realize the right recognized in subsection 1 the appropriate government shall launch suitable programs which provide to persons with disabilities choice in place and manner of living, without directing or ordering the person with disabilities to live in any particular living arrangement determined by the state or any other entity.</p> <p>(3) The appropriate governments shall establish sufficient independent and community living environments, taking into consideration gender needs and to accommodate the choices of persons with disabilities,</p> <p>(4) Such independent living will be accompanied with access to such support that will permit person with disabilities to fully realize their choice in manner of living, on an equal basis with others</p> <p>(5) The appropriate governments and Disability Rights Authority shall ensure that community living environments have such provisions and support services and systems, and access to such provisions</p>	<p><u>National Trust Act- Chapter III (As mentioned above)</u></p>	<p>The object of the Trust under the National Trust Act is to perform the functions as outlined under Section 15A of the Draft. The National Trust is set up with the object of ensuring that persons with disabilities can be supported to live independently and in the community. Therefore, the Draft here attempts to replace the task of the National Trust in allotting the obligation to the Disability Rights Authority. Therefore there is an overlap of the functions from amongst the Authorities.</p>
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<p>and support services and systems, that allow for [the choice of] inclusion and participation of the person in general society without any discrimination.</p>		
<p><u>Section 18P:</u> (1) For carrying out the provisions of this Act, the appropriate Government shall establish within such area or limits of a neighbourhood as may be prescribed and such neighbourhood schools, resource centers and special schools as shall be equipped to provide education to all persons with disabilities and along with the establishment of the schools the appropriate government shall:</p> <p>(i) Develop and enforce standards for training educators to teach children with disabilities ;</p> <p>(v) Provide training facilities for teachers such that they are trained to cater to the needs of children with disabilities;</p>	<p><u>Rehabilitation Council of India Act, 1992- Section 21 (as mentioned above)</u></p>	<p>The function of prescribing some standards for rehabilitation professionals are within the purview of the Council under the Act. Rehabilitation professionals also include teachers specially trained for persons with disability. The Draft by providing a general obligation to enforce standards for training to teach children with disabilities is again fading the specific function of the authorities under the Draft and under the Rehabilitation Council of India Act.</p>

<p><u>Section 24F(1):</u> Subject to the provisions of this Act, it shall be the duty of DRA to promote, protect and enforce the rights of persons with disability by such measures as it thinks fit.</p>		<p>This Section does not take into account the functions which are exclusively assigned to other authorities such as the National Trust, Rehabilitation Council and the authorities under the Mental Health Act. If the DRA were to enforce rights as it thinks fit, then it will do so in accordance with the Draft provisions, many of which are contradictory to the powers of the other authorities. Therefore, there will be a contradiction of how the rights of the persons with disability are enforced between the authorities.</p>
<p><u>Section 24H:</u> (1) DRA shall issue codes of practice on the manner in which disability rights consonant service may be provided in amongst others the following areas:</p> <ul style="list-style-type: none"> <li>(a) Health Care</li> <li>(b) Social security including housing, banking and finance ,insurance and any other related matter</li> <li>(c) Work employment and occupation</li> <li>(d) Habilitation and Rehabilitation,</li> <li>(e) Accessibility including physical, infrastructure, virtual, transportation</li> <li>(f) leisure, culture and sport</li> <li>(g) and any other related matter</li> </ul> <p>(2) The Statutory Codes of Practice mentioned under subsection (1)shall be legally binding on the regulated entities; it</p>	<p><u>Mental Health Act- Section 3 and 4</u></p> <p><u>Rehabilitation Council of India Act, 1992- Section 21 (as mentioned above)</u></p>	<p>The Draft provides the DRA with the power to issue codes of practice with regard to many areas in relation to a person with disability. This contradicts with Section 3 and 4 of the Mental Health Act which vests the authorities with the power of supervision and regulation of the institutions under the Act.</p> <p>Further Section 21 of the Rehabilitation Council of India Act provides for the Council to prescribe professionals standards and codes in respect of Rehabilitation professionals. If the DRA were to undertake the same function, then the functions of the Council need to be amended under the Act.</p>

<p>shall be so formulated as to obtain compliance of the regulated entities and shall be promoting equality of opportunity;</p> <p>(3) All regulated entities have a duty to comply with the provision of the Statutory Code of Practice; any failure to comply with this duty shall invite action for enforcement action;</p> <p>(4) The Disability Rights Authority has the power to initiate such enforcement action in cases of evident neglect, or constant dereliction from duty or any other circumstances that it deems fit.</p>		
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#### **IV. Section 7A(2) of the Working Draft:**

Section 7A (2) and 7B (2) in the Working Draft are included only within the chapter relating to Legal Capacity. They are phrased unusually to render any legislation, rule, notification, order, bye-law, regulation, custom and practice that deprive a person with disability from exercising his legal capacity as void.

Such a provision in one statute which declares a provision in another statute as void may not even be constitutionally permissible. The function of the legislature is to enact, re-enact, amend and repeal laws. The judiciary under Article 13 of the Constitution can exercise its powers of judicial review to render a provision which infringes on the fundamental rights as void. The legislature however, has no such power.

The Hon'ble High Court of Delhi in *P.L. Mehra and Ors v. D.R. Khanna and Ors* (AIR 1971 Delhi 1) held as follows: “...the decision in *Mahendra Lal Jaini's case*, as to the nature of a statute becoming void under Article 13 confirms the view that the statute itself continues to exist on the statute book but has become “ineffectual, nugatory and devoid of any legal force or binding effect”. The thrust of these words is that such a law cannot be given effect to by the Courts in deciding upon the rights of the parties. These words are significant only for the purposes of the Courts vis-a-vis the rights of the parties. They would be meaningless if applied to the power of the Legislature to re-enact, repeal or amend a statute. For, one can hardly say that these powers of the Legislature cannot be exercised in respect of a statute which is ineffectual, nugatory and devoid of any legal force or binding effect. Indeed, it would be all the more necessary for the Legislature to amend or cure statutes which are suffering from such defects. The nature of the defects is such that only a judicial decision can point them out. It is not by an act of Legislature but only by a judicial decision that one would know whether a statute is ineffectual, nugatory and devoid of any legal force or binding effect.”

Therefore, the declaration of a statutory provision as ‘void’ can only be done by the judiciary as “voiding” of the law only comes into question at the time of the enforcement or implementation of the law. The legislature’s function is to repair the defect in legislation by amending it or repealing the whole legislation.

The Working Draft, in declaring other legislative provisions as void is being vague as to the specific provisions of specific legislations which are to fall under the Section. The Working Draft cannot make a blanket declaration of all laws inconsistent with legal capacity as void without taking steps to identify the provisions and make amendments or deletions.

#### **V. Effect of the Working Draft without amendment of other disability legislations**

The provisions of the Working Draft are introduced in such a way as to affect the provisions of the other disability legislations. In light of this, the need for amending the provisions of these disability legislations is a pressing one. The inconsistencies between the Working Draft and the other disability legislations range from the definition of ‘persons with disability’ to the recognition of the basic principle of legal capacity. As detailed in the table, the National Trust Act follows a completely different basis for determining who a ‘person with disability’ is. If the definition is not amended under the National Trust Act, it results in an inconsistency in the language under the various disability legislations.

Further, the Working Draft is not correct in declaring that other legislative provisions which deprive a person of legal capacity as void. Declaration that a provision of law is void is not the function of the legislature. Its function is to adequately amend it so as to be consistent with the principles it intends to introduce and enforce. This applies to the principle of legal capacity which the Working Draft aims to bring into all the disability legislations. In order to do so, it has to amend the Mental Health Act and the National Trust Act accordingly.

The authorities under the various disability legislations have their set functions. However, the Working Draft is uncertain as to how to divide the responsibilities of the various authorities. It does not incorporate the various authorities under the Working Draft provisions itself. However, it encroaches on the powers and functions of those authorities by making the Disability Rights Authority or some other 'delegated authority' in charge of them. While doing so, it does not even amend the provisions of the other legislations. This is a serious discrepancy as the enforcement of rights and performance of duties under the legislations. If there is a confusion as to which authority is responsible to perform a specific function, then a person might be deprived of the very rights that the Draft seeks to enforce.

Leaving the other disability provisions unamended leads to an especially difficult situation when the courts have to determine the intention of the legislature while drafting and have to apply that intention while interpreting it. Further, it is not clear as to what rights should be enforced against which authority in court. Therefore, the merging of the areas of function between the various authorities makes the enforcement of rights itself difficult and therefore uncertain.

## **VI. Conclusion**

Thus, as seen from the Working Draft, it is clear that it seeks to be one comprehensive law on disability, which would encompass issues addressed by several other disability laws. The explanatory notes state that it leaves the issue of the DRA and the authorities such as the Rehabilitation Council and the National Trust as a Pending Question.

It also refers to a Disability Code, which would encompass all disability legislation within its framework and raise this as an issue for the Committee to decide, when that has never been the mandate of the Committee. The explanatory notes state that it would bring within its fold all authorities such as the Rehabilitation Council and the National Trust and that the linkages between these authorities and the new Disability Rights Authority set up under the Working Draft would have to be worked out through transit legislation. The Working Draft leaves the discretion to the Committee to come to a conclusion as to whether all the authorities have to be incorporated under the same legislations or a separate Code with all the legislations has to be prepared. Thus, the roles which the authorities have to perform are left uncertain. The Mandate of the Committee was to replace the PWD Act, 1995. Therefore, the powers and functions of authorities which are established under the other disability legislations ought to have been left untouched. Instead, the Working Draft seeks to make a comprehensive legislation covering all the disabilities while it leaves the implementation aspect uncertain and undecided.

These statements along with some of the specific provisions mentioned in the table above show clearly that the Working Draft aims to be some kind of a comprehensive code to bring in all disability legislations within its fold and not only to amend the PWD Act, which was its specific mandate. For these reasons, the Working Draft has exceeded the mandate given to it. This has been suggested even by some members of the Committee.<sup>13</sup>

Further, the Working Draft by only including Section 7A(2) in its chapter relating to Legal Capacity, which would render all other legislation in contravention to it as void, is not suitable and adequate. There would be adverse consequences if the other legislations are not suitably amended. For example, the entire Mental Health Act would need an overhaul if the right to legal capacity is introduced in the Working Draft. The local committees set up under the National Trusts Act would have to be completely abolished as their only role is to appoint guardians, which is completely done away with in the Working Draft. Thus, the mere inclusion of Section 7A (2) is not sufficient and workable, nor is it within the powers of the legislature to include.

The Working Draft has listed in Schedule 1 the amendments suggested to other legislations. This Schedule is incomplete and the specific provisions relating to the National Trusts Act 1999, the Rehabilitation Council of India Act 1992 and the Mental Health Act 1987 are also legislations which need amendment and should be included in this Schedule.

It is crucial that there is clarity on these important issues as to what exactly is being proposed to be amended. Whether it is only the PWD that is sought to be replaced or all other disability legislations are to be replaced by a Disability Code need to be understood by the drafters. If the mandate is only to amend the PWD Act, then it is important that we restrict ourselves to this mandate so as to ensure that other disability legislations are not affected. The other legislations can be amended at their own time, after the present PWD Act has been revised as per the mandate of the Committee.

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<sup>13</sup> "Crisis hits panel on new Disability law" Available at <http://www.tribuneindia.com/2010/20101224/main5.htm>