

**JSCOT
Human Rights Branch
Classification, Human Rights and Copyright Division
Attorney-General's Department.
Canberra**

**Response to the Joint Standing Committee on Treaties (JSCOT) on
the Australian National Interest Analysis for CRPD.**

I write to support the immediate Ratification of the Convention on the Rights of Persons with Disability and its' Optional Protocol.

However the NIA raises some issues I need to respond too. Firstly in paragraph 5 it is stated that Australia was a leader in the development of the Convention. I think the public servants who wrote this document have started to believe their own political spin. The previous Howard Government approached this Convention in the same way it approached its' other UN Human Rights obligations, that is to water them down as much as possible. In the early years the Howard Governments delegation argued there was no need for a new Convention. It was not until the majority of countries at the UN Adhoc Meetings and growing voice of the Australian Disability Movement gained traction that the Howard Government abandoned it's no new Convention approach. The Howard Government continually argued against substantive Articles recognising and addressing the discrimination and abuse of Women, Children and Indigenous people even though National Disability Consultations called for their inclusion. While in the later years the Australian Delegation was more of a team player and lead a Task group in the development of the text for the Education Article this was done under the eye of the conservative Howard Government approach. At the final Adhoc meeting the Australian Delegation lobbied hard to allow substituted decision making and compulsory treatment in Articles 12 and 17, further they tried to censor the word occupation from the Preamble. They achieved neither of these outcomes and their zealous lobbying on top of many years of conservative approach put them offside with most other delegations and the International Disability Community. The Howard Government has had almost no involvement in disability issues in International Forums such as the UN ESCAP Disability Expert Forums where Regional Disability strategies were developed by these UN, Government and NGO Experts. Nor did they fund NGO's to attend these meetings. The Rudd Government has considerable bridge building to do.

The NIA states the Australian Government needs early ratification to participate in the inaugural elections of the Committee. If Australia is to nominate someone from Australia, this must be done according to the 'Paris Principles' that is the person must be independent of Government and its' Agencies. We also need to select a person who is an Expert in International Disability Policy Development and as this is not the International Court, legal expertise should not be seen as compulsory criteria. Finally we must have an Australia wide public advertising with selection by an Independent Panel.

The issues of substituted decision making and compulsory treatment are controversial here in Australia and Internationally. The status quo at present allows these interventions here in Australia. However these interventions are violations of peoples' right to choose their medical treatments. There are many examples around the world where the system of Supported decision making enables even profoundly disabled people to make decisions and get the medical treatment they need. This takes time. The medical system prefers substituted decision making and compulsory treatment so they can quickly manage compliance. Recent Australian Disability Consultations continue to support the old status quo of substituted decision making and compulsory treatment. These organisations have been strongly influenced by HREOC continuing vocal support for these old systems and their refusal to consider alternatives. However the support for substituted decision making and compulsory treatment in these Consultations was not unanimous and there is a significant number of people opposed to these interventions. The International Disability Community including those representing people with psychosocial and intellectual disability are against substituted decision making and compulsory treatment. During the Adhoc meetings at the UN in New York, these International organisations along with the vast majority of countries work hard to prevent substituted decision making and compulsory treatment being included in the Convention text of Articles 12 and 17. I have attached a paper against these coercive systems developed by the Legal Capacity Taskforce in the International Disability Caucus and the IDA CRPD Forum.

Another interpretation being consider is to continue to allow discrimination against refugees and migrants with disabilities from entering Australia. This not only affects these people with disabilities but their whole family which are prevented from coming to Australia. These discriminatory actions continue to be exempted from the Disability Discrimination Act as the Department know if tested in the court they could not prove 'unjustifiable hardship'.

In Australia the battle to change substituted decision making and compulsory treatment to supported decision making and consent will be ongoing. However if the Australian Government submits these interpretations internationally as part of it's ratification of the CRPD, they will be vigorously opposed by the International Community. These interpretations will confirm to the international community that the new Rudd Government is as conservative on these issues as the previous Howard Government. Any chance for Australia to be a leader in implementing the Convention will be lost.

Yours Sincerely,

Frank Hall-Bentick

IDA CRPD Forum

Principles for Implementation of CRPD Article 12

Introduction

Article 12 accords to people with disabilities recognition equal to others as full persons before the law. To be recognized as a full person before the law means that one's legal capacity, including the capacity to act, is equally recognized. Article 12 also imposes a positive duty on the state to establish support measures to ensure that the barriers to exercising legal capacity are removed and that the supports are in place for people with disabilities to fully enjoy and exercise this capacity. Insofar as present day national laws impose barriers to the exercise of legal capacity by persons with disabilities, or deny access to needed supports for the exercise of legal capacity, it is necessary for States in accordance with their obligation under article 4 (1) (b) to modify these laws to bring them in consonance with article 12. In order to assist States Parties in their law reform activity we have outlined the implications of article 12 below.

Overarching Principles

1. *"Legal capacity" is best translated as the "capacity for rights and capacity to act".*
2. *"Legal capacity" for the purpose of the Convention on the Rights of Persons with Disabilities means both the capacity for rights and the capacity to act. This applies in the legal systems of all countries for all people, including those with disabilities.*
3. *The right to enjoy and exercise legal capacity applies equally to all people, including those with disabilities, irrespective of the nature or effects of their disability or apparent need for support. Legal capacity cannot be questioned or challenged based on disability.*
4. *People with disabilities who need support to exercise legal capacity have a right to be provided with such support. Support means the development of a relation and ways of working together, to make it possible for a person to express him or herself and communicate his or her wishes, under an agreement of trust and respect reflecting the person's wishes.*
5. *All people who have difficulty exercising their legal capacity can be accommodated within the support paradigm.*

6. *All adults, including those with disabilities, have an inalienable right to exercise their legal capacity. This means they cannot be prevented from doing something that they are otherwise permitted to do in the exercise of personal autonomy. They also have the corresponding duty to fulfill their responsibilities. Support and/or reasonable accommodation may be necessary to equalize the effective enjoyment of these rights and fulfillment of duties.*
7. *All children, including those with disabilities, have an evolving legal capacity, which at birth, begins with full capacity for rights, and evolves into full capacity to act in adulthood. Children with disabilities have the right to have their capacity recognized to the same extent as other children of the same age, and to be provided with age- and disability-appropriate supports to exercise their evolving legal capacity.*
8. *Parents and guardians have the right and responsibility to act in the best interests of their children while respecting the child's evolving legal capacity, and the state must intervene to protect the legal capacity and rights of children with disabilities if the parents do not do so, in accordance with the Convention on the Rights of the Child. The parents' or guardians' rights to act on behalf of their children cease when the child reaches the legal adult age. This must be the same for all persons to avoid classifying people with disabilities as children at an older age than others.*

Building Legislative and Community Structures for Supported Decision Making

9. *Governments are responsible for replacing existing substitute decision making laws and policies with supported decision making mechanisms that are recognized in legislation and have corresponding policies and programmes to effectively implement a system of supported decision making.*
10. *Governments are responsible for developing, supporting, promoting and offering support services, and for establishing safeguards to ensure a high quality of support and its compliance with standards such as: respect for the rights, will and preferences of the person, freedom from conflict of interest and undue influence, and being tailored to individual circumstances.*
11. *Support must not restrict the rights of the person or coerce the person to act in a particular way. Support must not affect his or her capacity to act. A person cannot be made to accept support against his or her will.*
12. *Different types of support should be promoted and encouraged to meet the wide range of needs among people with disabilities and allow for personal choice among different options. Types of support may include, for example, support networks, personal ombudsperson, community services, peer*

support, personal assistant, and advance planning. Age, gender, cultural and religious preferences, and similar factors must be taken into account, as well as needs expressed by people with different types of disabilities.

- 13. Interim measures may be needed when it is difficult to determine a person's wishes and it appears that the person may need support, or when support fails despite good efforts. In such cases, skilled supporters trained in establishing proper communication and the obligation to respect autonomy should be available to help. Governments should also promote advance planning for support that people may anticipate needing in the future.*
- 14. A person may agree with his or her supporter(s) that the supporter(s) can make certain types of decisions, should the supporter be unable to determine the person's wishes at a particular time. This does not mean that the person loses his or her right to make those decisions. The supporter is bound to keep making the effort to communicate and to follow the person's wishes as far as they may be known.*
- 15. If no such authorization has been made and communication has failed despite good efforts, skilled supporters should continue trying to establish communication, while a decision is made that has the least possible effect in foreclosing opportunities for later revision.*
- 16. Decisions that involve highly personal values and/or controversial measures that may violate a person's physical or mental integrity such as sterilization, cochlear implants, neuroleptic drugs, electroshock and psychosurgery, should not be permitted without the informed and affirmative consent of the person concerned.*

Dismantling Substitute Decision Making Systems

- 17. Governments must act immediately to*
 - a. recognize the equal rights of all persons to have and exercise legal capacity without discrimination based on disability;*
 - b. establish a legislative, policy and financing basis for*
 - i. provision of support in decision making in accordance with the principles outlined above; and*
 - ii. the duty of all those in the public and private sectors to accommodate persons with disabilities who may require support in decision making; and*
 - c. abolish*
 - i. plenary guardianship;*
 - ii. unlimited time-frames for exercise of guardianship;*
 - iii. the legal status of guardianship as permitting any person to override the decisions of another;*
 - iv. any individual guardianship arrangement upon a person's*

- request to be released from it;*
- v. any substituted decision-making mechanism that overrides a person's own will, whether it is concerned with a single decision or a long-term arrangement; and*
 - vi. any other substituted decision-making mechanisms, unless the person does not object, and there is a concomitant requirement to establish supports in a person's life so they can eventually exercise full legal capacity.*

18. All laws and mechanisms by which a person's capacity to act can be deprived or restricted, based on differences in capabilities, must be abolished or replaced with laws that recognize the right to enjoy and exercise legal capacity. In addition to substituted decision-making mechanisms as mentioned above, this includes declarations of incapacity, interdiction, welfare orders, commitment to institutions, and compulsory hospitalization or medical treatment.

19. Similarly, any laws disqualifying a person from enjoying rights or performing legal acts or responsibilities based on disability must be abolished. For example, voting, holding public office, serving on juries, giving or refusing free and informed consent, inheriting or owning property, marriage and raising children, are rights guaranteed in the Convention that also involve an exercise of legal capacity. Support and/or appropriate accommodation must be provided where necessary to exercise these rights and responsibilities. The signatures of people with disabilities are entitled to equal recognition as those of others.

20. In implementing Article 12, governments must address its implications for criminal responsibility and the criminal justice system. Persons with psychosocial disabilities have an equal legal capacity with others to be held responsible for wrongdoing, whether through a civil, criminal or other process, and to be provided with all needed supports and accommodations to ensure access to justice and conditions of punishment that respect human rights and dignity. The death penalty and similar harsh measures must be abolished to ensure humane treatment for all.

21. Implementation of all aspects of Article 12, including the development and provision of support, needs the active involvement and partnership of people with disabilities and the organizations they choose to represent their interests (in particular, organizations of people with disabilities controlled by themselves). All those who seek the protection of the Convention within an evolving concept of disability should be welcomed.

Legal Opinion on Article 12 of CRPD

Several questions are raised around Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). Some of these questions which are common across jurisdictions and have been raised in different parts of the world are as follows: how has legal capacity been constructed in the CRPD? Does it include both the capacity to have rights and the capacity to act? If yes then has this legal capacity been extended to all persons with disabilities or have certain persons been excluded? If not, will it be permissible for a State to enter reservations on those parts of the article which guarantee universal legal capacity?

In order to facilitate State understanding of their obligations under the CRPD generally and article 12 more particularly we are setting down the following legal opinion.

Construction of Legal Capacity

Legal capacity consists of two integral components: the capacity to hold a right and the capacity to act and exercise the right, including legal capacity to sue, based on such rights. Both these elements are integral to the concept of legal capacity hence recognition to the legal capacity of any group or individual mandates recognition of both these elements. It has been found that denial of legal capacity to any individual or group has also meant negation of both the right to personhood and the capacity to act. On the study of municipal legislations, it has also been found that whenever such discriminatory laws have been challenged, they have been at first replaced by legislations which accord symbolic recognition to the rights of the excluded group, thus whilst the capacity to hold rights is recognized, the capacity to exercise those rights continues to be denied.

In comparison international human rights law, which has often been adopted to counter discriminatory municipal legislations, constructs legal capacity to include both the elements of identity and agency. Article 15 of the Convention on the Elimination of Discrimination of Women is a case in point.

Article 1 of the UN Convention on the Rights of Persons with Disabilities states that the purpose of the Convention is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities” This purpose has to be furthered by all the provisions of the CRPD including the article on legal capacity. And the text of article 12 would need to be read informed by this objective.

Identity and Agency

By paragraph (1) of Article 12 State Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. This paragraph of article 12 addresses the identity requirement of legal capacity and recognizes the personhood of persons with disabilities.

Paragraph 2 of article 12 provides that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” A non-disabled citizen who owns real estate, or a car, a horse or a book is entitled to sell the house, to hire the car, gift the horse or lend the book. All these and similar dispositions as an owner are a part of his or her legal capacity. Paragraph (2) by extending the same rights to persons with disabilities fulfils the agency requirement of legal capacity. The non negotiable nature of this commitment is evidenced by the inclusion of individual autonomy, non discrimination and equality of opportunity in the list of General Principles which the States are under an obligation to uphold. This obligation would require that the States both refrain from actions that undermine the principles and initiate efforts which would promote them.

That paragraph (2) of article 12 provides for the agency requirement of legal capacity is further borne out by the remaining paragraphs of article 12. Thus paragraph (3) of art 12 requires States Parties to “take appropriate measure to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Article 12 (4) concerns itself with the need to guard against the abuse of such support and does so by making provision for appropriate and effective safeguards. Article 12 (5) explicitly mentions that persons with disabilities should be able to inherit, manage financial affairs and own property. Thus both on a purposive and a textual interpretation of article 12 it can be concluded that legal capacity in the CRPD has been constructed like CEDAW to include both the capacity for rights and the capacity to act.

Universal Legal Capacity

On the question whether the CRPD guarantees legal capacity to all persons with disabilities it would be necessary to note that a definition of disability has not been incorporated in art 2 of CRPD. However an inclusive definition finds place in article 1. Such definition includes persons who have long-term physical, mental, intellectual or sensory impairments. Evidently the CRPD has employed the strategy of explicitly naming certain groups in the definition in order to highlight their higher discrimination and the greater need for strategies of empowerment. If national legislations and state practices are examined, it is found that it is these groups of persons with disabilities who are denied legal capacity. The deliberations surrounding the Convention show that the need for a separate Convention for persons with disabilities was felt because the extant human rights Conventions were not disability inclusive and could not provide the requisite justification to challenge exclusionary national laws. In the face of this overarching commitment to the goal of inclusion in the Convention, it is logical to conclude that article 12 would have been drafted in consonance with this larger objective of the CRPD.

We find upon examination of the preparatory papers, that the adoption of the paradigm of universal legal capacity was questioned because it was feared that it did not adequately address the concerns of persons with high support needs. It was due to this apprehension that paragraph (3) placed an obligation on State Parties to make provision for support and paragraph (4) was drafted to encompass a range of safeguards against abuse of support. Persons with high support needs may have been one group of persons who could have been denied full personhood and legal capacity, if the provision for support had not been made in article 12. However the combined reading of the definition of disability and the duty to provide support leads to the conclusion that article 12 has been formulated to bring within its aegis all persons with disabilities. This support could be of personal assistants or peers or may even be just a written declaration of the preferences of the person with disability. What the Convention requires is that the support should be based on trust, be provided with respect and not against the will of the person with disabilities.

Reservations

The last question we were required to address was whether states could enter reservations against article 12?

Article 46 of the CRPD and article 14, paragraph 1 of the Optional Protocol to the Convention, do not permit reservations that are incompatible with the object and purpose of the CRPD. Equality and non discrimination along with respect for dignity, individual autonomy and freedom to make one's own choices have been recognized as the general principles of CRPD. The general principles were included to render the object and purpose of the Convention explicit. A reservation on article 12 is antithetical to each of these principles and hence not permissible by article 46 of the Convention. Further if a reservation is entered to either circumscribe the meaning of legal capacity or to limit the persons with

disabilities included under the provision the limitation will not be confined to article 12 alone but will also extend to the other rights guaranteed under CRPD be it: the right to education or the right to work or freedom of speech and expression or political participation. Such a consequence would be destructive of both the letter and spirit of the CRPD and hence unimaginable.

The CRPD by devising the supported decision making model of legal capacity has made an innovative effort to recognise the aspirations of all persons with disabilities; we have issued this legal opinion in order to assist informed understanding of this innovation.

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Argentina:

Santos Cifuentes
Estudio Jurídico Cifuentes y Asociados
Ex Profesor Titular de Derecho Civil, Facultad de Derecho, Universidad de Buenos Aires
Académico de Número de la Academia Nacional de Derecho y Ciencias Sociales
Ciudad de Buenos Aires
Argentina

Agustina Palacios
Directora de la Dirección de Lucha contra la Discriminación y la Promoción de Derechos Humanos, Mar del Plata, Argentina
Profesora de la Facultad de Derecho de la Universidad Nacional de Mar del Plata, Argentina
Coordinadora de la Sección Discapacidad de la Cátedra de Igualdad y No Discriminación "Norberto Bobbio"
Instituto de Derechos Humanos "Bartolomé de las Casas"
Universidad Carlos III de Madrid
Mar del Plata
Argentina

Australia:

Duncan Chappell
Professor of Law
University of Wollongong

New South Wales
Australia

Bernadette McSherry
Australian Research Council Federation Fellow
Rethinking Mental Health Laws Project
Faculty of Law
Monash University
Clayton
Australia

Brazil:

Ana Paula Crosara de Resende
CVI-BRASIL Conselho Nacional dos Centros de Vida Independente
APARU - Associação dos Paraplégicos de Uberlândia
Instituto dos Advogados de Minas Gerais Seção Uberlândia
Advocacia Catani e Crosara
Uberlândia - MG
Brasil

Patrícia Garcia Coelho Catani
Advocacia Catani e Crosara
Uberlândia - MG
Brasil

Chile:

María Soledad Cisternas Reyes
Directora del Programa Jurídico sobre Discapacidad
Facultad de Derecho
Universidad Diego Portales
Santiago
Chile

Costa Rica:

Rodrigo Jiménez
Professor
University of Costa Rica
Master Degree in Disabilities Studies
San Jose
Costa Rica

Denmark:

Holger Kallehauge
Ex High Court Judge
Fhv. Landsdommer
Frederiksberg
Denmark

India:

Amita Dhanda
Professor of Law
NALSAR University of Law
Hyderabad
India

Ireland:

Gerard Quinn
Main Statutory Chair in Law
National University of Ireland
Galway
Ireland

Japan:

Yoshikazu Ikehara
Tokyo Advocacy Law Office
Hongo Bunkyo-ku
Tokyo
Japan

Makoto Iwai
Yuri Sogo Law Office
Shinbashi Minato-ku
Tokyo
Japan

Hirobumi Uchida
Department of Private and Criminal Law
Faculty of Law
Kyusyu University
Hakozaki, Higashi-ku,
Fukuoka
Japan

Mitsuhide Yahiro
Nishijin Kyodo Law Office

Nishijin Sawara-ku
Fukuoka
Japan

Mexico:

Santiago Corcuera Cabezut
Consejero de la Comisión de Derechos Humanos del Distrito Federal
Maestro (Master Degree, LLM) en Derechos Humanos
Miembro del Comité de la Convención Internacional para la Protección de
Todas las Personas contra Desapariciones Forzadas de Naciones Unidas
México, D.F.
México

Carlos Ríos Espinosa
Consejero de la Comisión de Derechos Humanos del Distrito Federal
Maestro (Master Degree) y Profesor del CIDE Centro de Investigación y
Docencia Económica
México, D.F.
México

Netherlands:

Lisa Waddington
Extraordinary Professor in European Disability Law
Faculty of Law
Maastricht University
Maastricht
The Netherlands

New Zealand:

Dr. Susan Jane (aka Huhana) Hickey
Auckland Disability Law
Mangere Community Law Centre
Auckland
New Zealand

Nicaragua:

Carlos Emilio Lopez
Ex-Procurador de los Derechos de la Niñez
Profesor Universitario en Universidades Públicas y Privadas en las
facultades de sociología y derecho; Universidad Centroamericana,
Univalle, Paulo Freire y Escuela Judicial de la Corte Suprema De Justicia
Managua

Nicaragua

Peru:

Juan Vicente Ugarte del Pino
Presidente de la Excelentísima Corte Suprema de Justicia de Perú (1987)
Magistrado del Tribunal de Justicia de Acuerdo a Cartagena
Miembro Correspondiente de la Real Academia de Ciencias Morales y
Políticas – España (1988)
Presidente del Curatorium de Doctores del Perú
Vicepresidente del Instituto de Derecho Indiano y de Estudios Clásicos
Director de la Sociedad Peruana de Historia
Director del Instituto Peruano de Historia del Derecho
Lima
Perú

Switzerland:

Christian Courtis
International Commission of Jurists
Legal Officer for Economic, Social and Cultural Rights
Geneva
Switzerland

United Kingdom:

Peter Bartlett
Nottingham Healthcare NHS Trust Professor of Mental Health Law
Faculty of Social Sciences, Law and Education
University Park
Nottingham
United Kingdom

United States of America:

Robert Dinerstein
Professor of Law
American University
Washington College of Law
Washington, D.C.
USA

Arlene S. Kanter
Professor of Law
Meredith Professor of Teaching Excellence
Director, Disability Law and Policy Program

Co-Director, Center on Human Policy, Law, and Disability Studies
Syracuse University
Syracuse, New York
USA

Tina Minkowitz
Attorney
Center for the Human Rights of Users and Survivors of Psychiatry
Chestertown, New York
USA

Dr. Linda Misek-Falkoff
New York, New York
USA

Michael L. Perlin
Director, International Mental Disability Law Reform Project
Director, Online Mental Disability Law Program
New York Law School
New York, New York
USA

Stephen A. Rosenbaum
Lecturer in Law, University of California, Berkeley
Lecturer in Law, Stanford University
Staff Attorney, Protection & Advocacy, Inc.
Oakland, California
USA

Susan Stefan
Center for Public Representation
Newton, Massachusetts
USA

Michael Stein
Executive Director, Harvard Project on Disability
Harvard Law School
Cambridge, Massachusetts
USA

Michael Waterstone
Associate Professor of Law
Loyola Law School
Los Angeles, California
USA