



Australian
Human Rights
Commission

Draft General Comment on Article 12 of the CRPD

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE UN COMMITTEE ON THE RIGHTS
OF PERSONS WITH DISABILITIES**

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1 Introduction

1. The Australian Human Rights Commission is Australia’s ‘A status’ national human rights institution, operating in compliance with the Paris Principles.
2. The Commission makes this submission to the UN Committee on the Convention on the Rights of Persons with Disabilities (the Convention) in response to its request for submissions on the draft General comment on Article 12 of the Convention – Equal Recognition before the Law.
3. The Commission notes that the Australian Government issued a Declaration on Article 12 at the time of ratification. The Declaration refers to Australia’s understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.¹
4. The Commission also notes that the Australian Law Reform Commission is currently conducting an inquiry into legal barriers for people with disabilities. The Inquiry will include examination of the laws and legal frameworks within the Commonwealth jurisdiction that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity.² Some useful guidance may come from this inquiry when it reports later in 2014.

2 Recommendations

5. The Commission makes the following recommendations in relation to the text of the draft General Comment. We would be pleased to elaborate on these points further to the committee if requested.

Recommendation 1: The General Comment includes greater clarity on the issue of non-derogability of Article 12.

Recommendation 2: That the General Comment refer to situations where it is difficult or impossible to determine the will and preference of the person with a disability.

Recommendation 3: The Committee give greater clarity to the scope of Article 12.3 supports and consider whether they should be limited to those goods and services that are specifically required for the exercise of legal capacity.

Recommendation 4: The Committee provide a more detailed explanation of the two traditional approaches to assessing mental capacity.

Recommendation 5: The Committee include consideration of the nature of immediate obligations and the doctrine of progressive realisation, particularly where a State Party is genuinely not able to provide the full supports that are required.

3 Article 12 – Equal recognition before the law

6. The Commission notes that Article 12 of the Convention requires an end to laws, policies and programmes that:³

- deprive people with disabilities of their right to legal capacity on the basis of disability
- do not provide people with disabilities access to the supports required to exercise their legal capacity.

7. Article 12.1 provides:

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

8. The Convention article reflects the language of and reaffirms the right to equality before the law contained in Article 6 of the Universal Declaration of Human Rights (UDHR)⁴ and Article 16 of the ICCPR.

9. Article 6 of the UDHR provides:

Everyone has the right to recognition everywhere as a person before the law.

10. Article 16 of the ICCPR provides:

Everyone shall have the right to recognition everywhere as a person before the law.

11. Article 12.2 of the Convention provides that people with disabilities enjoy legal capacity on an equal basis with others. The Article is similar to the language of Article 15.2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which provides that:

States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity.⁵

12. Article 12.3 is concerned with the requirement of States Parties to take appropriate measures to provide people with disabilities access to the support they require to exercise their legal capacity.
13. Article 12.4 provides that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse of the arrangements. The safeguards must ensure that the measures:
 - respect the rights, will and preferences of the person
 - are free of conflict of interest and undue influence
 - are proportional and tailored to the person's circumstances
 - apply for the shortest time possible
 - are subject to regular review by a competent, independent and impartial authority or judicial body.
14. Article 12.5 requires States to 'take all appropriate and effective measures' to ensure people with disabilities have the right to own property, control their financial affairs, have equal access to bank loans, mortgages and other financial relationships and are not arbitrarily deprived of their property.

4 Non-derogability of Article 12

15. Commentators have proposed that Article 12 should be interpreted as a non-derogable and absolute right.
16. Paragraph 5 of the Draft General Comment states:

The UDHR, the ICCPR, and the CRPD each specify that the right to equal recognition before the law is operative 'everywhere'; in other words there are no circumstances permissible under international human rights law where a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited.⁶
17. Although the Convention does not include a prohibition on derogation of Article 12, the ICCPR prohibition applies to the Convention by virtue of Article 4.4 of the Convention. This article provides that the provisions of the Convention do not derogate from existing international human rights law.
18. As already mentioned (paragraph 7), Article 12.1 of the Convention reaffirms the non-derogable and absolute right contained in Article 16 of the ICCPR.
19. The Travaux Préparatoires on Article 16 indicate that the Article is concerned with the capacity to be a person before the law and 'was not intended to deal with the question of a person's legal capacity to act, which might be restricted for such reasons as minority ...'⁷
20. Commentators on Article 16 consider that the capacity to act can be restricted. Volio inferred that the right included both personal status and the right to make legal dispositions – the capacity to have rights and the capacity to act.⁸ However, Nowak distinguishes the capacity to be a person before the law from the capacity to act and states that:

Art. 16 does not protect the capacity to act. Therefore limitations on the capacity to act with regard to children, juveniles or mentally ill persons, which are provided for in all legal systems, do not represent a violation of Art. 16.⁹

Whilst it is correct that Volio provided a broader interpretation of Article 16, one that includes the capacity to act, he also noted that the rights implied in legal personality could be restricted by way of exception: 'by narrow, explicit norms of limited character, usually relating to age, incapacity, etc.'¹⁰ Nowak's interpretation is considered to be the authoritative interpretation of Article 16.¹¹

21. The Commission also notes that the word 'everywhere' contained in Article 16 of the ICCPR concerns the territorial scope of the right rather than capacity to act.¹²

22. The Commission considers that there is a strong moral argument for the capacity to act to be a central element of legal personality. Quinn describes legal capacity as an epiphenomenon.¹³ Existing alongside of personhood it enables people to sculpt their own lives, to open up zones of personal freedom and interactions such as opening and maintaining a bank account, buying and selling accommodation and so on.¹⁴ As Bach observes:

If one can inherit property (thus having one's legal personality recognized as under the predominant interpretation of Article 16 of the ICCPR) but not be able to exchange that property for other assets to pursue one's life goals (because one is found not to have the legal capacity to make the necessary legal dispositions), it is difficult to see how one's full personhood is being recognized and protected.¹⁵

23. However, when the CRPD provisions are considered in the light of international law, it appears that non-derogability applies to Article 12.1 only and that limitations may be placed on the exercise of legal capacity contained in Article 12.2.

24. This approach is supported by Bach who notes that Article 16 of the ICCPR, Articles 15.1 and 15.2 of CEDAW and Articles 12.1 and 12.2 of Convention effectively extract legal capacity from the right to recognition as a person before the law.¹⁶ This means that whilst the right to recognition as a person before the law cannot be diminished, the capacity to act can be limited:

... but these Conventions appear to provide no restrictions on diminishing the legal capacity to act, provided, since CEDAW and CRPD, that such restrictions are not made on the basis of sex or disability.¹⁷

25. A significant point in this quotation is that restrictions or limitations cannot be based on sex (in the case of Article 15.2 of CEDAW) or disability (in the case of Article 12.2 of the Convention). Where a limitation is placed on the legal capacity of a person with disabilities, a State Party would need to apply the usual rules to limitations placed on human rights, including:

- for public order
- be provided by law
- be non-discriminatory
- be compatible with the nature of the right

- apply for the shortest time possible.¹⁸

In the future, denying a person with disabilities the right to legal capacity on the basis of disability, is likely to be considered as a violation of Article 12 and other related Convention articles such as Article 3 (General Principles), Article 4 General Obligations and Article 4 (Equality and Non-Discrimination).

26. In view of the analysis of Article 12.1, the Commission is concerned that the Draft General Comment is not clear on whether the Committee is referring to the whole of Article 12 when it refers to non-derogability or to Article 12.1 only. If the Committee is referring to the whole of Article 12 as non-derogable and absolute, the Commission is concerned that States Parties will reject the Committee's interpretation thereby jeopardising the significance of the Draft General Comment.
27. **The Commission recommends the Committee provide greater clarity on the non-derogability of Article 12.**

5 Legal Capacity and Mental Capacity

28. The Commission agrees with the Committee that people with disabilities, for example, people with communication impairment, people with complex and multiple support needs, people with severe psychosocial disabilities and people with cognitive impairment have had their legal capacity denied or limited on the basis of their mental capacity.
29. In view of the legal analysis above and Article 5 of the Convention (Equality and non-discrimination), the Commission considers that denial of legal capacity on the basis of mental capacity is discrimination on the prohibited ground of disability.¹⁹ Hence mental capacity should not be used as a reason to deny or limit a person's right to equality before the law.
30. The Commission suggests that the only valid reason for undertaking an assessment of decision-making capability should be to assist with the assessment of what supports are to be provided to the person to ensure that their rights, will and preferences are respected.
31. The Commission notes that the Committee has included an explanation of approaches to assessing mental capacity. **The Commission recommends that a more detailed explanation of the two traditional approaches to assessing mental capacity is required.** This would provide more information to those who are unfamiliar with the topic. A clearer explanation of the application of these approaches is contained in the article by Professor Bernadette McSherry, *Legal Capacity under the Convention on the Rights of Persons with Disabilities*.²⁰

6 Facilitated decision-making

32. The Commission notes that the Draft General Comment directs that substitute decision-making regimes need to be abolished to ensure that people with

disabilities enjoy legal capacity on an equal basis with others in all areas of life.²¹

33. Article 12.3 of the Convention provides that persons with disabilities are to have access to the supports they require for the exercise of their legal capacity. These supports are to respect the rights, will and preferences of the person.
34. The Commission agrees with the non-prescriptive approach adopted by the Committee when discussing Article 12.3 and 12.4 of the Convention and the forms of assistance that should be provided to people with disabilities as supports will vary from person to person as will type and intensity.
35. At the same time, the Commission considers that the Draft General Comment would benefit from the inclusion of a section on a continuum of decision-making capacity. This would enable inclusion and consideration of those situations where the person has lost decision-making capacity or where the person has never been able to express meaningful preferences for complicated decisions.
36. **Accordingly, the Commission recommends that the General Comment refer to situations where it is difficult or impossible to determine the will and preference of the person with a disability.** This would provide guidance to States Parties in these difficult situations.
37. Bach and Kerzner in *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* provide a 'Continuum of Supports' model which could be referred to in the Draft General Comment.²² The model includes three different levels of support:
 - legally independent – where a person has the ability to make decisions with only minimal support e.g. easy to read information.
 - supported decision-making – where a person is supported by someone they trust to make a decision
 - facilitated decision-making – where the person's will and preferences are not known.
38. The Commission considers that it is especially important for the Draft General Comment to address facilitated decision-making. This is necessary in view of the obligation on States Parties to abolish substituted decision-making regimes.
39. Facilitated decision-making, unlike substituted decision-making, focuses on the rights, will and preferences of the person rather than on the subjective and value-laden 'best interests' test. The Commission notes however that the definition of 'best interests' in some legislation reflects elements of facilitated decision-making, for example, the definition of 'Best Interests' in Section 4(6) of the UK *Mental Capacity Act* (2005).
40. The Commission supports the position adopted by People with Disability Australia, the Australian Centre for Disability Law and the Australian Human Rights Centre in its submission²³ to the Australian Law Reform Commission

*Inquiry into legal barriers for people with disability.*²⁴ The joint submission proposes that in cases where it is not possible to determine the will and preferences of the person, the default position should be to consider the human rights relevant to the situation.²⁵

41. The application of facilitated decision-making should be for as short a time as possible and be proportionate to the need for support and tailored to the person's circumstances.²⁶ It should also be free of conflict of interest and undue influence and subject to review by an independent authority. The Commission considers the burden of proof that the supports are not meeting the rights, will and preference of the person with disabilities should rest with the person asserting this to be the case. The Commission encourages the Committee to set out these requirements more clearly.

7 Interrelationship of Article 12 with other Convention rights & State obligations

42. The Commission recognises the importance of the interrelationship between Convention rights. However, the Commission considers that the Committee should clarify that Article 12.3 refers to those goods and services that are specifically required for the exercise of legal capacity.²⁷ The Draft General Comment currently makes linkages with a large number of other rights in the Convention. The Commission is concerned that these linkages broaden the scope of supports envisioned by the Article.
43. Accordingly, **the Commission recommends that the Committee give greater clarity to the scope of Article 12.3 supports and consider whether they should be limited to those goods and services that are specifically required for the exercise of legal capacity.**
44. The Commission is concerned that the right to support for the exercise of legal capacity is considered to be an immediate obligation on the part of a State Party.²⁸ Despite the Draft General Comment providing that progressive realisation (Article 4.2) does not apply to legal capacity,²⁹ the Commission considers that there will be situations where a State Party is genuinely not able to provide the supports that are required at that point in time.
45. **The Commission recommends that the Committee include consideration of the nature of immediate obligations and the doctrine of progressive realisation, particularly where a State Party is genuinely not able to provide the full supports that are required.**
46. The Committee could acknowledge this difficult situation and clarify that the State Party has an immediate obligation to develop and implement a plan to ensure the progressive provision of supports. An essential requirement in the plan would be indicators and measurable benchmarks, developed with the participation of people with disabilities to ensure relevance and to enable the monitoring of implementation to ensure accountability on the part of the State Party.

47. The Commission is of the view that the Committee should note in the General Comment that the method adopted by States Parties to implement their obligations should be to produce outcomes which are consistent with the rights contained in the Convention. The Commission considers that the Committee could choose to include in the General Comment that the means chosen to implement obligations will be subject to review as part of the Committee's constructive dialogue when examining a State Party's compliance under the Convention.

¹ United Nations Treaty Series, Chapter IV Human Rights, Convention on the Rights of Persons with Disabilities. At https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec (viewed 21 February 2014).

² Australian Law Reform Commission, *Inquiry into Legal Barriers for People with Disability*. At <http://www.alrc.gov.au/inquiries/legal-barriers-people-disability> (viewed 21 February 2013).

³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3, Articles 12.1 and 12.2 (entered into force 3 May 2008).

⁴ *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948), article 6.

⁵ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981).

⁶ Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the Convention-Equal Recognition before the Law, Adopted by the Committee at its 10th Session (2-13 September 2013), para 5. At <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (viewed 19 February 2014).

⁷ M Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), p 336.

⁸ F Volio, 'Legal Personality, Privacy, and the Family' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 185, p 186.

⁹ M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 370.

¹⁰ F Volio, 'Legal Personality, Privacy, and the Family' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 185, p 187.

¹¹ S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, 2013), p 336; M Bach, *The right to legal capacity un the UN Convention on the rights of persons with disabilities: Key concepts and directions from law reform*, Institute for Research and Development on Inclusion and Society (2009), p 2. At <http://irisinstitute.ca/the-work-we-do/publications/> (viewed 18 February 2014).

¹² M Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), p 336; M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 371; F Volio, 'Legal Personality, Privacy, and the Family' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 185, p 189.

¹³ G Quinn, *Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD* (Concept Paper for the Harvard Law School Project on Disability Conference, Cambridge, 20 February 2010), p 10. At http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html (viewed 21 February 2014).

¹⁴ G Quinn, *Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD* (Concept Paper for the Harvard Law School Project on Disability Conference, Cambridge, 20 February 2010), p 10. At http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html (viewed 21 February 2014).

¹⁵ M Bach, *The right to legal capacity un the UN Convention on the rights of persons with disabilities: Key concepts and directions from law reform*, Institute for Research and Development on Inclusion and Society (2009), p 3. At <http://irisinstitute.ca/the-work-we-do/publications/> (viewed 18 February 2014).

¹⁶ M Bach, *The right to legal capacity un the UN Convention on the rights of persons with disabilities: Key concepts and directions from law reform*, Institute for Research and Development on Inclusion

and Society (2009), p 3. At <http://irisinstitute.ca/the-work-we-do/publications/> (viewed 18 February 2014).

¹⁷ M Bach, *The right to legal capacity un the UN Convention on the rights of persons with disabilities: Key concepts and directions from law reform*, Institute for Research and Development on Inclusion and Society (2009), p 3. At <http://irisinstitute.ca/the-work-we-do/publications/> (viewed 18 February 2014).

¹⁸ United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

¹⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3, Articles 12.1 and 12.2 (entered into force 3 May 2008), Articles 2 and 5.

²⁰ B McSherry, 'Legal Capacity under the Convention on the Rights of Persons with Disabilities' (2012) 20 *Journal of Law & Medicine* 22 p 23.

²¹ Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law*, Adopted by the Committee at its 10th session (2-13 September 2013), para 7. At

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (viewed 23 February 2013).

²² M Bach and L Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice*, Law Commission of Ontario (2010) pp 83-94. At <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner> (viewed 21 February 2014)..

²³ People with Disability Australia, The Australian Centre for Disability Law, The Australian Human Rights Centre, *Submission to the Australian Law Reform Commission: Review of equal recognition before the law and legal capacity for people with disability*. January 2014. At <http://www.alrc.gov.au/inquiries/disability/submissions> (viewed 18 February 2013).

²⁴ Australian Law Reform Commission, *Inquiry into Legal Barriers for People with Disability*. At <http://www.alrc.gov.au/inquiries/legal-barriers-people-disability> (viewed 21 February 2013).

²⁵ People with Disability Australia, The Australian Centre for Disability Law, The Australian Human Rights Centre, *Submission to the Australian Law Reform Commission: Review of equal recognition before the law and legal capacity for people with disability*, paras 28-32. January 2014. At <http://www.alrc.gov.au/inquiries/disability/submissions> (viewed 18 February 2013). The submission cites examples concerning life saving treatment and accommodation. As people with disabilities are should receive the same medical attention as a person without a disability, recourse should be to Article 10 – the right to life. In the case of accommodation, recourse is to Article 19 to ensure the person is accommodated within the community rather than being institutionalised.

²⁶ P French, *Everyone Everywhere: Recognition of Persons with Disability as Persons Before the Law*, People with Disability Australia (2009), p 35. At <http://www.pwd.org.au/pwda-publications/reports.html> (viewed 21 February 2014).

²⁷ M Bach and L Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice*, Law Commission of Ontario (2010) p 74. At <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner> (viewed 21 February 2014).

²⁸ Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law*, Adopted by the Committee at its 10th session (2-13 September 2013), para 30. At <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (viewed 23 February 2013).

²⁹ Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law*, Adopted by the Committee at its 10th session (2-13 September 2013), para 26. At <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (viewed 23 February 2013).