

People with Disability Australia (PWDA)
The Australian Centre for Disability Law (ACDL)
The Australian Human Rights Centre (AHRCentre)

Committee on the Rights of Persons with Disabilities:
Draft General Comment on Article 12 of the Convention,
Equal Recognition before the Law

Submission
February 2014

About Us

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

The Australian Centre for Disability Law (ACDL) is a community legal centre, which specialises in disability discrimination and human rights law and policy. We provide legal advice and representation to persons with disability and their associates. ACDL campaigns to change and improve the law for a society where people with disability will be able to participate in all aspects of life. We undertake law reform, continuing legal education, and community legal education activities.

The Australian Human Rights Centre (AHRCentre) aims to promote public awareness and academic scholarship about domestic and international human rights standards, laws and procedures through research projects, education programs and publications. The Centre brings together practitioners, research fellows and student interns from Australia and internationally to research, teach, and debate contemporary human rights issues.

Introduction

1. PWDA, ACDL and the AHRCentre warmly welcome the opportunity to provide a response to the Draft General Comment on Article 12 of the Convention Equal Recognition Before the Law. Our organisations have substantial expertise in this area of the law and practice, and a long history of advocating for the recognition of legal capacity for people with disability in Australia and internationally.
2. PWDA and ACDL were at the forefront of civil society's involvement in the negotiation of the UN Convention on the Rights of Persons with Disabilities (CRPD), and are keen to see how the development of this General Comment can progress the implementation of Article 12 into Australian law and practice.
3. In September 2013 representatives of PWDA, ACDL and the Australian Human Rights Centre (AHRCentre) were in Geneva for the Committee's Constructive Dialogue with Australia. For more information on our international engagement

on the CRPD, including Article 12, please see the website of the Australian Civil Society Parallel Report Group to the CRPD <http://www.disabilityrightsnow.org.au/> and the UN Ad Hoc Committee pages of the PWDA website <http://www.pwd.org.au/issues/un-ad-hoc-committee-meetings.html>

4. The adoption of the (CRPD) provides an extrapolation of existing human rights and fundamental freedoms as they relate to people with disability, in the context of a contemporary understanding of disability. The contemporary understanding of disability affirms people with disability as subjects of rights as opposed to being passive objects of care and protection. As subjects of rights, people with disability are entitled to support in the exercise of these rights. Similarly, States have an obligation to remove barriers to the enjoyment of human rights and fundamental freedoms for people with disability.
5. With regard to Article 12, this results in a contemporary interpretation of legal capacity which establishes that denying or diminishing an individual's capacity to act based on the existence of impairment is discriminatory.
6. PWDA, ACDL and the AHRCentre believe that the General Comment would be significantly strengthened as it relates to the capacity to act if the existing ambiguity surrounding equal recognition before the law was addressed. The General Comment is an opportunity to provide States Parties with clear guidance on Article 12 and its relationship with its parent Article, Article 16 of the International Covenant on Civil and Political Rights (ICCPR), by clearly articulating how the contemporary interpretation of disability relates to the existing jurisprudence and limitations on equal recognition before the law and legal capacity.

Antecedents in international law

7. The Draft General Comment affirms the presumption that all persons with disability have full legal capacity. This implies that both the capacity to have rights and the capacity to act are non-derogable elements of international law, and that States have an obligation to realise all elements of Article 12 from the moment of ratification. However, legal antecedents have previously established that the capacity to act can be limited in certain situations.

Article 16 ICCPR

8. The principle of equality before the law is recognised as a fundamental element in the exercise of human rights, with roots in Article 6 of the Universal Declaration of Human Rights. Article 16 of the ICCPR consequently established this right in international law, and interpretation of this provision accords the right of legal

personality to all people as subjects of rights: everyone shall have the right to recognition everywhere as a person before the law.

9. However, this refers only to the capacity to have rights. To the extent that the capacity to act was discussed in the drafting of the ICCPR, the Travaux Préparatoires expresses the view that there may be restrictions on the capacity to act for “minors, people of unsound mind and persons convicted of a crime for which restriction is provided by law”.¹ Academic commentary supports the interpretation that such restrictions on the capacity to act would not violate Article 16.²

Article 15 CEDAW

10. Article 15 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides authority for the interpretation of legal capacity to include the capacity to act, and establishes that denial of legal capacity on the basis of sex is discriminatory. However, the drafters of this Convention also envisaged that the autonomous exercise of the capacity to act may be subject to additional requirements such as minimum age and the ability to understand actions and consequences, i.e. ‘unsound mind’. The view being that in such cases an individual may be unable to protect their own interests.³
11. The authors of this submission believe that in light of the contemporary understanding of international law provided by the CRPD, the interpretation of legal capacity has moved on significantly from these positions. In doing so the authors concur with the universal recognition of capacity for all people with disability as articulated in Article 12.
12. However in its current form, the General Comment does not adequately clarify how and why the capacity to act of all people with disability is non-derogable, or explain why the concept of ‘unsound mind’ can no longer be substantiated as a basis for limiting the capacity to act in the interpretation of international human rights law.
13. All States breach Article 12 to some extent, and commonly use various forms of ‘unsound mind’ provisions as justification for doing so. In order to end these practices it is essential that the General Comment clarify the source of power and

¹ M Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (1987), p 336.

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

³ ‘Legal Capacity: Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights’, prepared for the 6th Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 1 to 12 August 2005. Available at <http://www.un.org/esa/socdev/enable/rights/ahc6documents.htm>

scope of the capacity to act for people with disability, including people who States may currently label as being of 'unsound mind'.

14. If this issue is not authoritatively and unequivocally addressed it will remain unclear to States why and how substitute decision making regimes are unlawful, and why and how they breach human rights. In order to achieve this end, three key elements of the General Comment could be considerably stronger:

Breaking the link between impairment type and capacity to act

15. The section explaining the difference between mental capacity and legal capacity should be strengthened. 'Unsound mind' provisions are premised on an understanding of legal capacity as inclusive of mental capacity i.e. cognitive ability. It must be explained more robustly that the existence of a cognitive impairment merely signifies the potential need for an individual to receive support in decision making (as provided by Article 12(3)). This is exactly the same process as applies to persons with non-cognitive impairments such as physical or sensory disability for example.
16. Critically therefore, the existence of a cognitive impairment does not equate to 'unsound mind' or a justification for limiting legal capacity in the form that earlier international instruments may have imagined. To do so would be discriminatory compared to people with other disability who receive support to exercise capacity, and compared to people without disability.
17. Since the CRPD, reference to unsound mind provisions as a basis of denying or diminishing human rights cannot be substantiated. The type of impairment a person may have has no bearing on their right to exercise their capacity to act. Rather their capacity to act is dependent on the integrity, quality and appropriateness of support available.

Highlighting the significance of the integrity, quality, and appropriateness of support

18. The sections on support should be strengthened to clarify that doubts about the capability of a person to exercise their capacity to act, is in fact doubt about the integrity, quality, and appropriateness of their support.
19. The 'test' for whether a person's support enables them to effectively exercise their capacity to act consists of the five step check for safeguards provided in Article 12(4). It may be that for some people deficits in the provision of support need to be addressed. However, it is the support that is tested, restricted, or intervened with and not the person.

20. Highlighting these points would again clarify that the provision of Article 12(4) compliant decision making supports for people with cognitive impairment, where required, would effectively distinguish the category of ‘unsound mind’ as a basis for limitation of the capacity to act as described through earlier international instruments.
21. Therefore, the General Comment should more overtly elucidate to States that the onus is on them to actively facilitate the provision of Article 12(4) compliant support to people with cognitive impairment, as well as all persons with disability if required, to enable them to exercise their capacity to act.

Asserting the rights, will and preference model of support

22. The sections on rights, will and preferences should be strengthened to clarify that best interest models of substitute decision making are incompatible with respecting the rights, will and preferences of people with disability. The CRPD as a whole and specifically Article 3, General principles, enshrines respect for inherent dignity and individual autonomy including the freedom to make one's own choices⁴. This places the person at the centre of decision making, whereas best interest and substitute decision making removes the person from the process. Similarly, application of the best interest test through substitute decision making can no longer be substantiated, as ‘unsound mind’ cannot be justified as a basis for limitation of the capacity to act.
23. Moreover, the General Comment should address and clarify the application of Article 12 in circumstances whereby it is not possible to support a person to ascertain their will and preference.
Although no derogation from Article 12 is permitted, the language of rights, will and preferences leaves room for an alternative form of decision making based on those principles, and which may apply in these circumstances.
24. Logically, this ‘facilitated’ form of decision making would involve a balancing of the person’s demonstrated will and preferences, along with their human rights as relevant to the situation. The balancing act would have to be limited and issue specific, apply for the shortest time possible, and be governed by the principles of proportionality.
25. This model cannot be called supported decision making because the full will and preference of the person cannot be ascertained. However, it differs from forms of substitute decision making because it is based on facilitating access to the

⁴ CRPD Article 3(a)

enjoyment of existing rights, rather than on making decisions on behalf of a person based on a subjective assessment of their best interest. Authoritative guidance is essential here if States are to be confident that law and policy reforms regarding Article 12 will be CRPD compliant.

26. Finally, for the sake of clarity the section on the Interrelationship of Article 12 with other Provisions of the Convention should be removed. Although important and educative material it distracts from the core purpose of the General Comment, which is to plainly articulate the law, as it should be understood.

PWDA, ACDL and the ARHCentre thank the Committee for the opportunity to make this submission.

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