#

# People with Disability Australia : 2009

# Everyone, everywhere:

# recognition of persons with disability as persons before the law

Table of Contents

[Foreword 5](#_Toc242162789)

[Glossary 7](#_Toc242162790)

[Introduction 10](#_Toc242162791)

[Basic human rights concepts explained 13](#_Toc242162792)

[Convention on the Rights of Persons with Disabilities 20](#_Toc242162793)

[Cross cutting interpretive issues 24](#_Toc242162794)

[Article 12: Equal recognition before the law 32](#_Toc242162795)

[Interpreting Article 12 in light of other specific obligations 42](#_Toc242162796)

[Equal recognition before the law – the content of the right 48](#_Toc242162802)

[Equal recognition before the law – measures required to give effect to the right 52](#_Toc242162803)

[Major legal and institutional measures 52](#_Toc242162804)

[Major policy and programmatic measures 55](#_Toc242162805)

People with Disability Australia

People with Disability Australia (PWD) is a national peak disability rights and advocacy organisation. It is an organisation of, and for, persons with all types of impairment and disability. PWD was founded in 1981, in the International Year of Disabled Persons, to provide persons with disability with a voice of our own.

PWD works towards a vision of a socially just, accessible and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all persons with disability are respected and celebrated.

Purpose of position paper

Everyone has a fundamental human right to be recognised everywhere as a person before the law. However, in many contexts this right is not made real for persons with disability, and in fact, the right is often violated, sometimes very seriously.

This position paper has been developed to raise awareness about the right of persons with disability to recognition everywhere as a person before the law. It also aims to raise awareness about the obligations on all governments to ensure the respect, protection and fulfilment of this right. Additionally, the paper will be of use to persons with disability, their families and advocates in their advocacy to secure the human rights of persons with recognition and equality before the law.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) places major emphasis on the obligations of governments to ensure that persons with disability, through their representative organisations, are actively involved in all aspects of policy development and decision-making that impact upon them. The paper outlines PWD’s formal policy position with respect to recognition of persons with disability before the law, as a leading representative organisation for persons with disability. It will therefore inform policy makers and others who seek to incorporate a disability and human rights perspective into their work.

Acknowledgements

This policy was written for PWD by Phillip French of Phillip French Consulting.

PWD acknowledges with appreciation the contribution of:

* Mr Graeme Smith, Public Guardian, New South Wales
* Mr Mark Pattison, Executive Director, National Council on Intellectual Disability
* Ms Kathleen Cunningham, Provincial Coordinator, Vulnerable Adult Community Response, Public Guardian and Trustee of British Columbia, Canada
* Mr Michael Bleasdale, Executive Director, Leadership Team, People with Disability Australia
* Jenny Speed, Manager, Individual and Group Advocacy, Logan, People with Disability Australia
* Ms Therese Sands, Executive Director, Leadership Team, People with Disability Australia

each of whom provided a peer review of the final draft policy. The preparation of the paper benefited considerably from contributions and debate at a roundtable seminar conducted by the Australian Human Rights Commission, the Disability Studies and Research Centre, and the NSW Office of the Public Guardian on Equal Recognition Before the Law in September 2009.

PWD also acknowledges with appreciation the contribution of members of its internal policy advisory groups who provided detailed advice and comments in the development of the policy. In particular, PWD thanks Jan Daisley and Joana d’Orey Novo for their contribution.

Citation

This publication may be cited as:

People with Disability Australia, *Everyone, Everywhere: Recognition of Persons with Disability as Persons before the Law*, 2009

or

French, P, Everyone, *Everywhere: Recognition of Persons with Disability as Persons before the Law*, People with Disability Australia, 2009

ISBN: 978-0-9807364-3-4

© People with Disability Australia 2009

Foreword

In this position paper, People with Disability Australia add to their outstanding contribution to advancing the rights of people with disability within Australia and on the international stage.

Organisations of people with disabilities around the world including People with Disability Australia put a lot of work into the drafting and agreement of the Convention on the Rights of People with Disabilities – the DisCo for short.

They argued, and governments agreed, that this new human rights treaty was needed to ensure that human rights really do apply to everyone everywhere, every day. It was not enough to have general human rights instruments such as the Universal Declaration of Human Rights and the twin human rights Covenants of 1966 which, while they recognise rights which apply to “all individuals” and without “any discrimination” - fail to even mention disability let alone describing in any detail how to turn rights into realities for people with disability.

They also argued successfully that the DisCo should not perpetuate the division of what were meant to be indivisible human rights, into categories of civil and political rights on the one hand, and economic social and cultural rights on the other. Too often this division has I think encouraged two parallel streams of inaction:

* economic social and cultural rights are largely ignored as purely aspirational claims for money, and
* civil and political rights are regarded as purely negative statements, of things for governments not to do, and in particular of laws to strike down or not to make.

In a first world democracy like Australia these streams can too often come together in a tide of complacent belief that things are basically ok and that human rights talk is just a grab for power by human rights lawyers.

The lived experience of disability is, of course, that things are not basically o.k. and that there is more to human rights than reviewing a few laws from time to time.

The great French jurist Rene Cassin said during the drafting of the Universal Declaration:

... it would be deceiving the peoples of the world to let them think that a legal provision was all that was required ... when in fact an entire social structure had to be transformed.

The DisCo reflects this point far more clearly than previous human rights instruments, in setting out an agenda for action, and for translating human rights concepts into realities. The DisCo offers, indeed demands, a fresh look at familiar civil and political rights – including

the basic right of recognition as a person before the law as set out in Article 12. A fresh look cannot start from the assumption that we already comply with these basic and familiar rights, or that existing legal measures alone are enough to ensure compliance by governments and to ensure that people with disability are able to exercise their rights in practice.

I am very pleased to add these few words of introduction to an excellent contribution by People with Disability Australia towards making human rights a reality in this area.



Graeme Innes
Disability Discrimination Commissioner
Australian Human Rights Commission

Glossary

**Core human rights treaties**

The international human rights system includes many different types of human rights instruments. These instruments have different status or importance. The highest status and most important human rights instruments are the ‘core’ human rights treaties which are:

* International Covenant on Civil and Political Rights
* International Covenant on Economic, Social and Cultural Rights
* International Convention on the Elimination of All Forms of Racial Discrimination
* Convention on the Elimination of All Forms of Discrimination Against Women
* Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
* Convention on the Rights of the Child
* Convention on the Rights of Persons with Disabilities
* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
* International Convention for the Protection of All Persons from Enforced Disappearance

**De facto equality**

The term ‘de facto equality’ refers to the effect of specific positive measures to achieve equality, but which do not in fact represent equal treatment. The term is sometimes used interchangeably with ‘substantial equality.’

**Domestic remedy**

A ‘domestic’ remedy is a remedy for a human rights violation that is provided for by Australian law. An effective ‘remedy’ is a means available in law by which a human right may be enforced, or the infringement of a right may be prevented, redressed or compensated.

**International Bill of Rights**

The ‘International Bill of Rights’ comprises the United Nations Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).

**Non-state actors**

The term ‘non-state actor’ refers to agents other than government, and includes private individuals, corporations and non-government organisations.

**Party (to a human rights treaty)**

Treaties are not automatically binding upon nations. They are only binding upon ‘parties’ to the treaty (like parties to a contract). A nation becomes a ‘party’ to a human rights treaty when it ‘ratifies’ or ‘accedes’ to the treaty by depositing formal documents with the United Nations indicating its willingness to be bound by the obligations set out in the treaty.

**Supported exercise of legal capacity**

Supported exercise of legal capacity involves an individual adopting a course of action, or making a decision with the assistance of another person. The assistance provided may involve explaining the issues in easy to understand form, identifying options, and outlining benefits and risks. It may also involve making recommendations about a course of action. However, the person is genuinely free to adopt a course of action or make a decision contrary to such advice. The person, rather than their assistant, is responsible and accountable for the action or decision.

**Substitute exercise of legal capacity**

Substitute exercise of legal capacity involves a proxy adopting a course of action or making a decision on behalf of the person. The proxy ought to respect the rights, will and preferences of the person in deciding on a course of action but it is the proxy who takes the action or makes the decision. It is also the proxy who is responsible and accountable for that action or decision.

**Treaty**

A treaty is an international agreement concluded between governments in written form and governed by international law. The term ‘treaty’ is a general term used to describe an instrument of this type. It encompasses a wide range of specific instruments, including conventions, covenants, and optional protocols.

**Treaty body**

A ‘treaty body’ is a committee of independent experts elected by the parties to the treaty. The treaty body is responsible for monitoring the implementation of the treaty on behalf of the parties. Its principal method of doing so by reviewing and making observations on periodic state party and other reports on the implementation of the treaty. The treaty body may also have the function of receiving, investigating and determining individual communications (or complaints) from persons alleging violations of the treaty. Some treaty bodies may also conduct inquiries into gross or systemic violations of human rights within a state party.

Introduction

Recognition of everyone, everywhere, as a person before the law is a fundamental human right recognised in a number of international human rights instruments including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It is an essential element of the rule of law, which requires that all persons irrespective of their status or characteristics bear the same legal rights and duties.

This right has, historically, applied to persons with disability on an equal basis with others. However, there has been very limited attention given to the ways in which this right ought to be realised with respect to persons with disability, or to the ways in which the right has been violated with respect to persons with disability. At various times up to the present, in most parts of the world, laws, practices and customs have prevailed that have either directly or indirectly deprived persons with disability of an independent legal identity, and of the right to equal protection and benefit of the law.

In fact, it is strongly arguable that persons with disability, in all parts of the world, have experienced the most systemic and most serious deprivation of this right, yet this has barely been recognised in mainstream human rights implementation efforts.

These issues were brought to critical attention in the formulation of the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD now sets a substantial agenda for state parties that involves not only ensuring explicit formal recognition of the right in national law, but also provision of the measures necessary for persons with disability to effectively realise this right in reality on an equal basis with other persons. In doing so, in many cases, parties may need to overcome many centuries of law and custom that has either directly, or indirectly, deprived persons with disability of their full enjoyment of this right. Importantly, this includes many centuries of English law and custom that underpin Australia’s approach to this issue.

By world standards, Australia may claim to have relatively evolved disability policy including with respect to the recognition of persons with disability as persons before the law. However, it would be quite wrong to assume in relation to the right to recognition as a person before the law, or indeed in relation to any other right, that the CRPD has nothing to add in the Australian context. In fact, the CRPD speaks very directly to the scope, fundamental structure, and content, of Australia’s laws in relation to the legal capacity of persons with disability. It also calls into focus the adequacy of Australia’s institutional and programmatic arrangements for ensuring that this right is genuinely realised by persons with disability on an equal basis with others.

The debates concerning equal recognition of persons with disability as persons before the law have centred on those circumstances where persons with disability may require support or a surrogate to exercise capacity, particularly with respect to decision-making, and those circumstances where autonomy related rights may be limited to prevent or minimise the risk of a person causing harm to self or other persons. These are certainly critical issues worthy of detailed critical attention.

However, it is equally important that the right to equal recognition as a person before the law is not narrowly understood as pertaining only to supported and substitute decision making and to compulsory assistance, or to persons with cognitive impairment. In fact, the issue arises in a wide range of contexts, and sometimes for persons with other impairment types. For example, persons with disability may be inappropriately regarded as lacking legal capacity:

* To serve on boards and committees under Australian corporations and associations law (a person with mental illness may be automatically disqualified from holding the office of a director or committee member);
* To hold high public office, for example as a politician or judge (mental illness, per se, may be specified as a ground for removal from office);
* To exercise civic duties (persons with sensory, intellectual, or psychosocial impairments may be precluded from serving on a jury, or from voting in elections);

The right to recognition as a person before the law also arises in a wide range of civil law contexts other than those typically governed by guardianship and mental health laws – for example, in the law of contracts, the law of succession, in relationship (family) law, and as already noted, in laws related to civic duties, corporation law, and employment law.

Very importantly, the issue also arises in a criminal law context with respect to the fitness of certain persons to be tried for an offence, the culpability of certain persons for an offence they have committed and in relation to appropriate sentencing and diversionary options for particular persons.

It is therefore important for the right to be interpreted and applied in a way that will realise genuine recognition and equality before the law for persons with disability in all these, and other, contexts. This will not always be an easy task. There are challenging issues to work through and competing considerations. There is also a great deal of misunderstanding, ignorance, and prejudice to combat.

In applying ourselves to this task we must bear firmly in mind not only the phenomenology of ‘disability’ and the way that our barrier-filled society denies equality to persons with disability. We must also bear in mind the ontological reality of ‘impairment’ and its impact on the instrumental potential of some persons. A genuinely inclusive disability human rights paradigm cannot assume that all persons with disability are at all times capable of exercising legal capacity independently – in the instrumental sense – because that is plainly not always possible. To adopt such a fiction would result in the denial of the human rights of many persons.

Nor can we allow the idealisation of all informal support arrangements, and the demonisation of all formal support arrangements related to the exercise of legal capacity. The situation is much more complex than that. There is unrealised potential to be tapped, and serious human right violations to be confronted and resolved, in both areas.

We trust this paper will be a useful contribution to this process.

Basic human rights concepts explained

### What are human rights?

Human rights are fundamental rights and freedoms that are intrinsic to every person by virtue of their status as a human being. In this sense, human rights are said to be ‘inalienable’ because they can neither be given to a person, nor can they be taken away from them.

Human rights are universal norms in the sense that they are recognised by the international community as intrinsic to every person irrespective of their national, cultural, political, geographic, social, religious or temporal context, and any other personal characteristics, such as gender, race, sexuality, age, or disability. They are norms applicable to all persons, at all times, in all societies.

Of course, this does not mean that human rights are not violated. However, the violation of a human right denies a person the ability to enjoy or attain the right: it does not disentitle the person to the respect, protection and fulfilment of the right. Governments have a fundamental responsibility to avoid human right violations, and to immediately remedy such violations when they do occur. This has particular significance for the right of persons with disability to recognition everywhere as persons before the law in Australia, because this right is often poorly observed, and sometimes seriously violated.

The fact that such failures are commonplace, and to a very significant degree, institutionalised in public policy and programmes, does not alter the responsibility governments must bear, and the immediacy with which they must act to remedy these failures; indeed, it intensifies the urgency for action.

### The source of human rights

The ultimate source of all human rights is the dignity of the person. Human dignity refers to the inherent worth, uniqueness, equality and autonomy of all human beings, and our ability to realise our potential. Dignity might also be conceptualised as the end goal of human rights. Human rights express the conditions necessary for human dignity to be fully realised.

As human dignity is the source, and goal, for all human rights, it has an important role in reconciling apparent conflicts and tensions between rights when these arise. Such tensions and conflicts must be resolved in a way that ensures the respect, protection and fulfilment of human dignity.

As we shall explain later, this principle has important implications for the interpretation and implementation of the autonomy related rights of all persons, including persons with disability. Personal autonomy, however important, is ultimately subordinate to human dignity, and therefore governments have a responsibility to ensure that it is not exercised in a way that is degrading to human dignity.

### Human rights and Australian law

Australia is a party to seven of the United Nations’ core human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities, each of which incorporate elements of the right to recognition as a person before the law.

When the Australian Government enters into a treaty on behalf of the nation, the terms of that treaty become binding upon all Australian Governments.[[1]](#endnote-1)  That is, although it is the Commonwealth Government that enters into the treaty, all Australian States and Territories are equally bound by the terms of the treaty and have a direct responsibility for its implementation. This has important implications for the implementation of the right to recognition as a person before the law in Australia, because the responsibility for laws and programmes bearing on this issue is shared between the Commonwealth and State and Territory Governments.

International treaties to which Australia has become a party are binding upon Australia in its relationship with the international community. In other words, Australia is accountable to the international community for ensuring that the rights set out in these treaties are respected, protected and fulfilled within Australia.

There are several mechanisms through which such accountability is exercised. Australia is required to make periodic reports to the relevant treaty body in relation to its progress in realising the rights enunciated by the treaty. Australia may also have agreed that the treaty body may receive and investigate individual communications (or complaints) alleging that Australia has violated a human right recognised by a treaty. In some cases, Australia may have also agreed that the treaty body may conduct inquiries into alleged gross or systemic violations of human rights. In fact, Australia has accepted each of these accountability measures in relation to the human rights recognised in the Convention on the Rights of Persons with Disabilities.

Australia’s entry into an international treaty, does not, however, make the terms of that treaty part of Australian law. For this to occur, with some very limited exceptions, an Australian Government must legislate to incorporate the treaty obligation. In fact, human rights treaties usually make this a general obligation on parties.[[2]](#endnote-2) In some cases, this has occurred in Australia. For example, the Disability Discrimination Act, 1992 partly incorporates the obligation on Australia to protect persons with disability from discrimination on the ground of disability. However, not all human rights recognised by Australia are currently incorporated into Australian law, and therefore not all can be enforced under Australian law.

This is the case with the right to recognition as a person before the law, only elements of which are recognised and enforced by Australian law. There is also a great deal of inconsistency in the recognition and enforcement of this right between Australian States and Territories.

### Nature of human rights obligations

When a nation becomes a party to an international human rights treaty it solemnly undertakes, at the most fundamental level, to ‘recognise’ the rights the treaty enunciates and to guarantee these rights to its people without discrimination of any kind. The obligation to ‘recognise’ human rights requires parties to undertake a number of substantial actions.[[3]](#endnote-3) These obligations apply to all human rights including the right of persons with disability to equal recognition before the law. In general, parties must:

* Adopt laws, policies and programmes to give effect to the right of persons with disability to equal recognition before the law;
* Modify or abolish laws, policies, customs and practices that violate the right of persons with disability to equal recognition before the law;
* Promote human rights in the development of polices and programmes related to, or impacting upon, the equal recognition of persons with disability before the law;

The CRPD extends and amplifies these obligations in a number of key dimensions.[[4]](#endnote-4) Parties must:

* Prohibit and eliminate discrimination on the ground of disability by state and non-state actors in all areas that impact upon the equal recognition of persons with disability before the law;
* Refrain from engaging in any act or practice that is inconsistent with the right of persons with disability to equal recognition before the law, and ensure that public authorities and institutions act in conformity with the right of persons with disability to equal recognition before the law;
* Ensure that research is undertaken to develop and apply the principle of universal design to laws, policies and programmes relating to the right of persons with disability to equal recognition before the law;
* Provide accessible information to persons with disability to assist in the realisation of their right to equal recognition before the law;
* Consult with, and actively involve persons with disability, through their representative organisations, in the development of policies and programmes related to, or impacting upon, the right of persons with disability to equal recognition before the law;
* Collect appropriate information, including statistics and research data, to enable them to formulate and implement policies to give effect to the right of persons with disability to equality before the law;
* Establish or designate within government focal points and coordination mechanisms to facilitate action in relation to the right of persons with disability to equal recognition before the law across different sectors and at different levels of government;
* Establish or designate within the nation one or more independent mechanisms to protect and monitor implementation of the right of persons with disability to equal recognition before the law;
* Fully involve persons with disability and their representative organisations in monitoring implementation of the right of persons with disability to equal recognition before the law.

These obligations apply to all aspects of Australian legal systems.

### Levels of human rights obligation

Under international law, nations accept three levels of obligation in relation to the realisation of all human rights. They must *respect* human rights, they must *protect* human rights, and they must *fulfil* human rights.

The obligation to *respect* human rights operates as a restraint on arbitrary or unjust government action. Governments must not interfere with the ability of persons to realise and enjoy their human rights. With respect to the right to equality before the law, this means that governments should refrain from any action that would arbitrarily or unjustly deprive persons with disability of the right to equality before the law (for example, by enacting or maintaining legislation that disqualifies a person with psycho-social impairment from holding office on the mere basis of their status as a person with mental illness).

The obligation to *protect* human rights requires governments to take action to prevent non-state actors (such as private individuals, non-government agencies and corporations) from arbitrarily or unjustly interfering with the ability of persons to realise and enjoy their human rights. With respect to the right to equality before the law this would include measures such as legislation to prevent financial institutions from refusing to open bank accounts for persons with intellectual impairment, or refusing to allow persons with intellectual impairment to operate a bank account independently.

The obligation to *fulfil* human rights requires governments to take positive action to ensure that all human rights are enjoyed to the full extent by all persons. With respect to the right to equal recognition before the law this would include positive measures to ensure that persons with disability are able to exercise legal capacity on an equal basis with others. Examples of such measures could include the funding of personal assistants for persons with disability to help them to understand and make important decisions without the need for the appointment of a substitute decision-maker.

### Types of rights

Human rights are typically conceptualised as falling into two basic categories:

* **Civil and political rights** - These are rights that protect the individual from the arbitrary exercise of power by government, and that protect the individual’s right to self-determination free from arbitrary (unlawful) exercise of power by government. Examples of civil and political rights are the right to life, freedom of movement, freedom from discrimination, the right to vote, freedom of conscience, and freedom of association.
* **Economic, social and cultural rights** - These are rights that seek to protect and enhance the economic status, social and cultural wellbeing of peoples. Examples of economic, social and cultural rights include the right to work, the right to social security, the right to an adequate standard of living, the right to health and the right to education.

Civil and political rights are sometimes referred to as ‘fundamental freedoms’ or ‘negative rights’ because they recognise and protect the individual from arbitrary (unlawful) interference by government.

Economic, social and cultural rights are sometimes referred to as ‘positive rights’ or ‘positive obligations’ because they require governments to take action (rather than refrain from it) to improve the wellbeing of peoples.

Civil and political rights tend to focus on the rights of individuals, whereas economic, social and cultural rights tend to focus on the rights of peoples.

The right to equal recognition before the law is a civil and political right.

### Standard of human rights obligation[[5]](#endnote-5)

Under international law, civil and political rights are subject to a different standard of obligation to economic, social and cultural rights.

Civil and political rights are ‘immediately realisable’, which means that a party must give immediate effect to these rights. In other words, a party must immediately respect, protect and fulfil civil and political rights in their entirety otherwise it will violate these rights.

Economic, social and cultural rights are ‘progressively realisable’, which means that nations do not have to immediately fully comply with their obligations in relation to these rights, but must work to fulfil these obligations over time.

### indivisibility, inter-relatedness and Interdependence of all human rights

Despite the traditional categorisation of rights, and the different standards of compliance applicable to civil and political rights, and economic, social and cultural rights, it is widely accepted that both in theory and in practice all human rights are *indivisible*, *interdependent and interrelated*.

Human rights are ***indivisible*** in the sense that each human right is of equal status and cannot be entirely separated or prioritised conceptually or practically from other human rights.

This point is of potentially fundamental importance in relation to the right to equal recognition before the law. It means that Article 12 ought not to be interpreted in a way that gives it primacy over other human rights – it must be interpreted in a manner that is compatible with other human rights. For example, the right to freedom from all forms of exploitation, violence and abuse (including self harm), and the right to the highest attainable standard of health care are rights of equal value with the autonomy related rights recognised in Article 12, and their realization ought not to be constrained by the interpretation and application of Article 12.

Human rights are ***interrelated*** in the sense that they do not exist or function in isolation from one another, and they are ***interdependent*** in the sense that the realisation of any one human right will depend on the realisation of other rights.

For this reason, the respect, protection and realisation of Article 12, as a civil and political right, will often require concerted positive action towards the realisation of particular economic, social and cultural rights. For example, the ability to exercise legal capacity will to some extent be dependent upon access to education (Article 24). Similarly, access to appropriate health care, including mental health care, will impact on the ability of some persons with disability to exercise legal capacity on an equal basis with others.

Convention on the Rights of Persons with Disabilities

### Introduction and rationale

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the United Nations General Assembly in December 2006. It entered into force at the international level on 3 May 2008. It is now the principal international instrument dealing with the human rights of persons with disability.

The CRPD was developed in an effort to overcome the ‘invisibility’ of persons with disability in international human rights law and practice. Although the major human rights covenants apply to persons with disability on an equal basis with others, it is now generally accepted that these treaties have done little in fact to protect, promote and fulfil the human rights of persons with disability.

In part, this is because these treaties, both in their formulation and in their implementation, have not penetrated to many of the specific forms of human rights violation persons with disability experience. For the most part, the human rights set out in the major covenants are expressed at a high degree of generality. This is sometimes problematic in a disability context because it may not be obvious how these general statements apply to the specific human rights concerns that persons with disability face. There has also been a general failure to recognise persons with disability as right-bearers and to interpret their needs and concerns in terms of human rights.

With some important exceptions, these problems have also been reflected in Australia’s domestic implementation of its international human rights obligations, including in relation to the right of persons with disability to equal recognition before the law.

The General Assembly mandate under which the CRPD was developed recognised these problems. It stipulated that the primary rationale for the CRPD was to apply existing rights to the particular circumstances of persons with disability. Accordingly, the CRPD has been conceptualised as an ‘implementation’ convention; one that sets out a detailed code for how existing rights should be put into practice with respect to persons with disability.

### Status of the CRPD in Australia

Australia ratified the CRPD on 17 July 2008, and in accordance with the procedure established by Article 45, the CRPD came into force with respect to Australia on 17 August 2008.

The United Nations General Assembly adopted an Optional Protocol to the CRPD at the same time it adopted the CRPD. The Optional Protocol establishes a communications (or complaints) procedure that allows individuals and groups to complain to the Committee on the Rights of Persons with Disabilities (the CRPD Treaty Body) about violations of CRPD rights provided they have exhausted any reasonably available domestic remedies for the violation. It also establishes a procedure that allows the Treaty Body to conduct inquiries into gross or systemic violations of CRPD rights. The Optional Protocol also came into force at the international level on 3 May 2008.

Australia acceded to the Optional Protocol on 21 August 2009 and in accordance with Article 13, the Optional Protocol came into force with respect to Australia on 21 September, 2009. Under the Optional Protocol all CRPD rights may be the subject of a complaint to the treaty body, including alleged violations of the right to equal recognition before the law.

### Social model of disability

The CRPD makes it clear that understanding disability according to the social model is essential to a human rights based approach to the needs and concerns of persons with disability.

The social model posits that disability is the result of the interaction between persons with impairments and a barrier-filled physical and social environment. It therefore carries the action implication that the physical and social environment must change so as to enable persons with impairments to participate in society on an equal basis with others. A social model perspective does not deny the reality of impairment or its impact on the individual. However, it does challenge the physical and social environments to accommodate impairment as an expected incident of human diversity.

The social model of disability contrasts most directly with what is sometimes referred to as the ‘medical’ model of disability, or less frequently, as the ‘individual model’, in which disability is viewed as the product of impairment; for example, the ‘inability’ to make a decision is viewed as a consequence of the characteristics of intellectual impairment (limited ability reason, concentrate and remember).

The CRPD rejects the medical model of disability and places fundamental emphasis on the acceptance of impairment and the removal of barriers to inclusion and participation (for example, by ensuring that information necessary for decision-making is structured and explained in a way that is easy to understand). In other words, the CRPD seeks to change society in order to accommodate persons with impairment: it does not seek to change persons with impairment to accommodate society. It asserts the right of persons with disability to engage with the physical and social environment on their own terms, and it calls upon society to welcome and accommodate the diversity and contribution that persons with disability bring to their communities.

### Sources of CRPD rights

The primary sources of CRPD rights are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). For this reason it is important to understand the source of each CRPD right, because, among other things, this indicates which rights must be immediately complied with, and which rights are to be the subject of progressive realisation over time. Broadly speaking, articles 10 to 23 and article 29 of the CRPD are civil and political rights, and articles 24 to 28 and article 30 are economic, social and cultural rights.

### STUCTURE OF THE CRPD

The CRPD comprises 50 articles and its Optional Protocol comprises 18 articles. Although the CRPD is not formally divided into sections, it is made up of clusters of different types of articles, as explained in detail in Appendix 1. In brief, Articles 1 and 2 contain general interpretive information, Articles 3 to 9 set out general obligations on parties, and Articles 10 to 30 set out specific obligations related to specific human rights and fundamental freedoms. To understand the full implications of CRPD rights and obligations it is necessary to read its articles in relationship to each other, rather than in isolation.

The CRPD’s interpretative articles and general obligations are of a ‘cross-cutting’ nature, in that they must be taken into account in the interpretation and application of each of the specific obligations. In many instances they serve to amplify and extend the scope and content of the specific obligations. This is true with respect to the right of persons with disability to equal recognition before the law. In particular, the general principles set out in Article 3 and the general obligations set out in Article 5 Equality and non-discrimination and Article 9: Accessibility must be read together with the specific obligations set out in Article 12: Equal recognition before the law.

It is also important to read the CRPD’s specific obligations in relation to each other. This is not only because all human rights are indivisible, interdependent and inter-related, but also because, in some instances, one specific obligation will condition how another specific obligation is to be interpreted and applied. With respect to the right of persons with disability to equal recognition before the law, there are a number of fundamentally important intersections of CRPD rights that must be observed and understood: these intersections involve the relationship between Article 12: Equal recognition before the law, and:

* Article 13: Access to Justice
* Article 14: Liberty and security of the person
* Article 16: Freedom from exploitation, violence and abuse
* Article 17: Protecting the integrity of the person
* Article 21: Freedom of expression and opinion, and access to information, and
* Article 25: Health.

Cross-cutting interpretive issues

As noted above, the interpretation and application of Article 12 must take into account some cross-cutting principles, obligations and interpretive elements from the preamble and Articles 1 to 9 of the CRPD.

### Application to ‘all’ persons with disability

Article 1 makes it clear that the fundamental purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by ‘all’ persons with disability. This includes persons who have long-term physical, mental, intellectual or sensory impairments. It is therefore essential that all CRPD articles are interpreted and implemented in ways that reflect the needs, circumstances, and human rights concerns of all persons with disability; no-one ought to be left behind.

This obligation is reinforced in several other ways. Article 3(d) provides that the CRPD must be interpreted and implemented in a manner that is consistent with the principle of respect for difference and acceptance of persons with disability as part of human diversity and humanity. In other words, implementation efforts must recognise and accept the diversity of persons with disability. This interpretive principle is reinforced by preambular paragraph (i) which indicates that the CRPD was formulated, and ought to be interpreted and implemented, in a way that recognises the diversity of persons with disability. In this respect, it is important to note that preambular paragraph (j) also indicates that the CRPD was formulated, and ought to be interpreted and implemented, in a way that recognises the need to promote and protect the human rights of all persons with disability, including those who require more intensive support.

In summary, the CRPD explicitly recognises the diversity of persons with disability, and seeks to ensure that even persons with the most intensive support needs are not left behind in implementation efforts. Article 12 must therefore be interpreted and applied in a way that will ensure that all persons with disability are able to effectively realise their right to equal recognition before the law, including those who are unable to exercise autonomy related rights, or who are only able to do so to a very limited extent.

### Autonomy, independence and self-determination

The underlying policy of the CRPD places major emphasis on recognition and respect for the autonomy and self-determination of all persons with disability. The principal source of this obligation is Article 3(a) which provides that the CRPD ought to be interpreted and implemented in a way that demonstrates respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons. However, this principle is also included in paragraph (n) of the Preamble, which indicates that the CRPD was formulated, and ought to be interpreted and applied in a manner that recognises the importance for persons with disability of their individual autonomy and independence, including the freedom to make their own choices.

One dimension of autonomy, independence and self-determination is personal decision-making. The CRPD also places major emphasis on the involvement of persons with disability in decision-making processes about issues that affect them. While the major textual references refer to representative participation in the development of legislation and policies, Preambular paragraph (o) indicates that the CRPD was formulated, and must be interpreted and implemented, in a manner that provides persons with disability with the opportunity to be actively involved in decision-making processes about policies and programmes, including those that directly affect them. Paragraph (o) has a personal, as well as a collective, dimension.

In summary, the CRPD seeks to recognise, respect, protect and fulfil the right of persons with disability to exercise personal autonomy and independence in all areas of life. This policy must, of course, take account of diversity of persons with disability, but it applies irrespective of impairment type or the intensity of the person’s support needs. Consequently, state parties must ensure that even persons with the most intensive support needs receive assistance that will enable them to function as autonomously and as independently as possible.

### Equality and non-discrimination

The right of persons with disability to equality and non-discrimination is dealt with by Article 5 of the CRPD. Articles 5 and 12 have a critical interdependence in providing persons with disability with the protection of the rule of law. In particular, the requirement that persons with disability are equal before and under the law protects against the arbitrary application of laws to persons with disability.

Article 5 also requires state parties to recognise that all persons are entitled without any discrimination to the equal protection and benefit of the law. These two dimensions of the right to equality provide important insight into the proper scope of measures required to realise equal recognition before the law. In brief, they require that persons with disability are accorded a legal personality, and the support necessary to exercise legal capacity, that will ensure that the law protects and benefits them on an equal basis with other persons.

Article 5 requires state parties to prohibit discrimination on the basis of disability and guarantee to persons with disability equal and effective legal protection against discrimination on all grounds. ‘Discrimination’ is defined in Article 2 to mean any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others.

Discrimination is a form of arbitrariness which is incompatible with human rights generally and with the rule of law in particular. Among other things, Article 5 protects persons with disability against arbitrary laws, such as those that would apply only to persons with disability.

Under international law the standard of equality that state parties must achieve is ‘substantive’ equality (equality of opportunity or equality of outcome).[[6]](#endnote-6)  This requires state parties to recognise the pre-existing disadvantage to which persons with disability will be subject in many situations, and to take positive measures to overcome this disadvantage so as to ensure that a right can be enjoyed on an equivalent basis with others. The CRPD requires state parties to take two basic forms of positive action. They must ensure that reasonable accommodation is available, and they must take specific positive measures to overcome pre-existing disadvantage.

Article 2 of the CRPD defines ‘reasonable accommodation’ to mean necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disability the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Specific positive measures are those which disproportionately or exclusively benefit persons with disability, or a sub-group of persons with disability, in order that they may achieve de-facto equality.

Importantly, substantive (or de-facto) equality does not mean treating persons with disability the same as every one else, where this would only entrench pre-existing disadvantage. For this reason both reasonable accommodation and specific positive measures are excluded from the definition of discrimination – these forms of differential treatment of persons with disability are, in fact, positively required by the CRPD.

This has very important implications for persons with disability and the right to equal recognition before the law. It will require state parties to take specific legislative and policy measures and establish appropriate institutional and programmatic arrangements that will ensure that all persons with disability are not only recognised as equal before and under the law in form, but fully enjoy equal protection and benefit of the law in fact.

In relation to such positive or special measures, it is important to understand that the principle of non-discrimination will not permit treatment of persons with disability differently from other persons except where this different treatment will assist in overcoming pre-existing disadvantage. In other words, positive measures are ‘relieved’ from the obligation not to discriminate only to the extent that they are beneficial. However, the implementation of these beneficial measures remains subject to the principle of non-discrimination.[[7]](#endnote-7)  Consequently, positive measures cannot be implemented in a way that is detrimental to any human right.

### Children with disability

Article 7 deals with children with disability, and requires state parties to interpret and implement all human rights and fundamental freedoms recognised in the CRPD in a manner that will ensure that children with disability enjoy these rights and freedoms on an equal basis with other children.

Article 12 must therefore be interpreted and applied so as to ensure that children with disability enjoy recognition before the law, and are provided with support to exercise their legal capacity, on an equal basis with other children.

Specifically, Article 7 requires recognition of the ‘best interests of the child’ as a primary consideration in all actions concerning children with disability. It also requires that state parties recognise that children with disability have a right to express their views freely on all matters affecting them, and for these views to be given due weight in accordance with their age and maturity, on an equal basis with other children.

Article 7 also imposes a specific obligation on state parties to provide disability and age-appropriate assistance to children with disability to realise these rights.

### Awareness-raising

The CRPD recognises that the ability of persons with disability to realise their human rights and fundamental freedoms is potentially constrained or facilitated by the attitudes of others. Arguably, this is especially the case with respect to Article 12, where negative attitudes about the human worth, capability and potential of persons with disability have profoundly limited their recognition as persons before the law, their equality before and under the law, and the benefits and protections provided to them by the law.

Article 8 therefore imposes obligations on state parties to foster respect for the rights and dignity of persons with disability, to combat stereotypes, prejudices and harmful practices relating to persons with disability, and to promote awareness of the capabilities and contributions of persons with disability. These obligations relate to all levels of society, including within the family. Measures must include:

* Initiating and maintaining effective public awareness campaigns to nurture receptiveness to the rights of persons with disability, and to promote positive perceptions and social awareness of persons with disability, including in relation to their skills and abilities;
* Fostering an attitude of respect for the rights of persons with disability at all levels of the education system;
* Encouraging all organs of the media to portray persons with disability in a manner consistent with their human rights and fundamental freedoms; and
* Promoting awareness-training programmes regarding persons with disability and the rights of persons with disability.

### Accessibility and universal design [[8]](#endnote-8)

Article 4(1)(f) of the CRPD imposes a general obligation on parties to undertake or promote research and development of universally designed goods, services, equipment and facilities, and to promote their availability and use. It also requires parties to promote universal design in the development of standards and guidelines. Article 2 defines ‘universal design’ to mean the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation of specialised design.

Universal design is based upon seven principles:

* Principle 1: Equitable use

The design is useful and marketable to people with diverse abilities

* Principle 2: Flexibility in use

The design accommodates a wide range of individual preferences and abilities

* Principle 3: Simple and intuitive

Use of the design is easy to understand, regardless of the user’s experience, knowledge, language skills, or current concentration level

* Principle 4: Perceptible information

The design communicates necessary information effectively to the user regardless of ambient conditions or the user’s sensory abilities

* Principle 5: Tolerance for error

The design minimises hazards and the adverse consequences of accidental or unintended actions

* Principle 6: Low physical effort

The design can be used efficiently and comfortably and with a minimum of fatigue

* Principle 7: Size and space for approach and use

Appropriate size and space is provided for approach, reach, manipulation and use regardless of user’s body size, posture or mobility

Universal design has obvious relevance to the built environment. The accessibility of the built environment has a fundamental role in determining the degree to which persons with disability enjoy equal protection and benefit of the law, and in some cases it may impact on the degree to which they are able to realise equality before and under the law. For example, if court buildings, or parts of the interior of court buildings (such as a jury box), are physically inaccessible persons with mobility impairment may be unable to exercise civic duties (undertake jury service). If way-finding information in court buildings is inaccessible (for example, if it is too complicated or hard to read, persons with cognitive impairment may be unable to meet the demands of a summons to appear before the court).

However, it is essential to appreciate that universal design is a general principle, with applicability across many contexts. For example, Principles 1, 3 and 4 have particular relevance to the design of information materials about the legal system. Information ought to be produced in a way that makes it readily accessible to persons of diverse abilities; it ought to be easy to understand regardless of the person’s existing level of knowledge and skills, their language skills, and their level of concentration; and, it ought to communicate necessary information to the user regardless of the user’s sensory abilities.

The adoption and implementation of the principles of universal design means that the built environment and service delivery arrangements related to the exercise of legal rights and performance of legal duties meet the needs of most persons. It is therefore not only a more inclusive and broadly beneficial approach, it is also a much more efficient and cost effective approach. If the built environment and generic services meet the needs of most persons, there is substantially less need to develop and fund specialist or parallel systems to compensate for the inaccessibility of the mainstream system. There will also be substantially less need to make specific adjustments to enable individuals to utilise the mainstream system.

The terms of Article 4 of the CRPD as they relate to universal design are reinforced by Article 9. Article 9 imposes general obligations on parties to ensure that persons with disability are able to access all aspects of the physical and social environment on an equal basis with others. This includes an obligation to ensure information and communications and public facilities and services are accessible to persons with disability.

To implement this obligation, parties are required to pursue a range of measures, including the following measures which have direct relevance to the right to equal recognition before the law:

* Develop and adopt minimum standards and guidelines for the accessibility of all public services and facilities, and monitor their implementation;
* Ensure that non-state actors that provide services and facilities for the public also take account of the accessibility requirements of persons with disability;
* Provide training for all stakeholders on accessibility issues facing persons with disability;
* Provide signage in Braille and easy to read and understand forms in all public buildings and facilities;
* Provide forms of live assistance and intermediaries to facilitate accessibility to public buildings and facilities;
* Provide any other form of assistance or support to persons with disability to ensure their access to information; and
* Promote access for persons with disability to new information and communication technologies and systems, including the Internet.

It is important that these measures are pursued in all aspects of life, including in all those areas where persons with disability seek, or must exercise, legal capacity.

Article 4, in relation to universal design, and Article 9 need to be interpreted and applied together. Universal design is a principal means by which parties can meet their obligations under Article 9, particularly with respect to the development of guidelines and standards for accessibility.

However, it is equally important to appreciate that Article 9 also requires a range of specific, positive measures to ensure accessibility and that these go beyond the scope of the principle of universal design.

Article 12: Equal recognition before the law

Article 12 is a specific application of the traditional right of all persons to recognition everywhere as a person before the law, and its primary sources are Article 6 of the Universal Declaration of Human Rights (UDHR) and Article 16 of the International Covenant on Civil and Political Rights (ICCPR). In this respect Clause 1 of Article 12 requires parties to ‘reaffirm’ this right with respect to persons with disability because it is an obligation that pre-exists the CRPD.

The UDHR, the ICCPR, and the CRPD each specify that this right 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. This is reinforced by the terms of Article 4(2) of the ICCPR, which provides that no derogation (limitation) of this right is permissible even in circumstances of public emergency. Although an equivalent prohibition on derogation of the right is not included in the CRPD, the ICCPR parent article provides this protection by virtue of Article 4(4) of the CRPD, which provides that the terms of the CRPD do not derogate from existing international law. In other words, Article 12 should be interpreted as an absolute right like its ICCPR parent article.

Earlier in this paper we explained the obligations on state parties that are associated with the ‘recognition’ of a human rights treaty. Among other things, a state party must enact laws to give effect to the right, abolish or modify laws, policies and practices that violate the right, and take the right into account in all aspects of its decision making and policy setting where the right is engaged. We noted that the CRPD adds significantly to obligations associated with recognition of the treaty.

Paragraph 1 of Article 12 reinforces this general obligation by emphasising that persons with disability have the right to ‘recognition’ everywhere as persons before the law. In other words, the obligations associated with such ‘recognition’ are not merely formal but require substantial state party action to give genuine effect to the right with respect to persons with disability.

As we have also already noted, recognition as a ‘person before the law’ is a fundamental element of the rule of law. It demands recognition of every person as having a unique legal personality that is entitled to bear rights and duties on the same basis as every other person.

Clause 2 of Article 12 adds a new dimension to the traditional right to recognition before the law, or alternatively, it makes an existing dimension explicit, rather than latent. It introduces and situates the concept of legal capacity as a central element of the right to recognition as a person before the law.

‘Legal capacity’ refers to the ability to act to realise legal rights and perform, or be held accountable, for legal duties. In other words, legal capacity is instrumental or functional in character. Clause 2 of Article 12 requires state parties to recognise that persons with disability are entitled to the respect, protection, and fulfilment of this instrumental or functional dimension of the right to recognition before the law.

Legal capacity is a term that is broad in scope, and as we shall shortly outline, it ought to be interpreted and applied in a way that engages the four dimensions of the interdependent and inter-related right to equality before the law – equality before the law, equality under the law, and equal protection and benefit of the law. Importantly, legal capacity must be understood as encompassing personal decision-making, but not as being limited to decision-making. If the right of persons with disability to equal recognition before the law is to be fulfilled, and if this right is to penetrate to some of the principal sites of neglect and violation of the right, the term must be understood and applied in a way that engages all agents of legal inequality.

Clause 3 of Article 12 imposes a duty on state parties to take appropriate measures to provide access by persons with disability to the support they may require to exercise legal capacity; that is, parties must, where required, provide assistance to persons with disability so that they may realise their legal rights and fulfil their legal duties.

It is notable that the clause does not specify the form of assistance that must be provided. ‘Support’ is a broad term capable of encompassing both informal and formal support arrangements, and arrangements of varying type and intensity. In this respect, it is important to appreciate that form of support is logically subordinate to the outcome required. In other words, states must ensure, by whatever means are necessary in the particular case, that every person with disability is able to exercise their legal capacity. Inevitably, the type and intensity of support required will vary significantly between individuals due to the diversity of persons with disability. The underlying policy of the CRPD requires state parties to recognise this diversity.[[9]](#endnote-9)

Nevertheless, the term must be interpreted and applied so as to give effect to the underlying policy of the CRPD, which includes, as we have noted, the general principle that state parties must promote the autonomy and independence of persons with disability.[[10]](#endnote-10)

Clause 4 of Article 12 provides that all measures that relate to the exercise of legal capacity must operate subject to appropriate and effective safeguards to prevent abuse of such arrangements. These safeguards must ensure that such measures:

* Respect the rights, will and preferences of the person;
* Are free from conflict of interest and undue influence;
* Are proportional and tailored to the person’s circumstances;
* Apply for the shortest time possible; and
* Are subject to regular review by a competent, independent and impartial authority or judicial body.

### Respect the rights, will and preferences of the person

The requirement that such measures ‘respect the rights, will and preferences of the person’ imposes an obligation on state parties to ensure that if persons with disability do require support to exercise capacity their autonomy-related rights remain a central consideration. The agent providing support must be under an explicit obligation to ascertain and give effect to the wishes of the person to the maximum extent that it is possible or reasonable to do so taking into account the person’s other human rights.

In this respect, it is important to note that the word ‘respect’ in this context ought to be given its ordinary English meaning, which is to ‘have regard to,’ ‘take into account,’ ‘consider’ and ‘to observe.’ The word ought not to be interpreted or applied in a way that would require the exercise of autonomy-related rights as a condition precedent to the exercise of legal capacity, or in a way that would prevent support being provided contrary to a wishes of a person, where there are compelling circumstances justifying such an intervention. To interpret the phrase in this way would frustrate the purpose of clause 3 of Article 12.

This element of Article 12(4) must be interpreted and applied in a way that takes account of the diversity of persons with disability, and in particular, in a way that takes account of those persons who require more intensive support. It must also be interpreted in a manner which recognises the indivisibility, inter-relatedness, interdependence, of all human rights. In other words, Article 12 ought not to be interpreted in a way that would, in effect, deprive persons with intensive support needs of the ability to realise other human rights.

Nevertheless, this element of Article 12(4) ought to be interpreted as prohibiting any form of supported or substitute decision-making that does not provide for the ongoing engagement of the person with disability in relation to the conduct and decisions that impact upon them to the maximum extent that it is possible to do so.

### free from conflict of interest and undue influence

The requirement that any measures related to the exercise of legal capacity be free from conflict of interest imposes an obligation on state parties to ensure that the conduct and decisions of the agent providing support maximises the interests of the person with disability to the maximum extent possible. The agent should not be subject to competing interests, and most importantly, should not be motivated or affected by self-interest. Related to this, state parties must ensure that the agent providing support does not exercise undue influence over the person with disability to exercise capacity in a way that does not reflect that person’s interests. In other words, the agent must be prevented from arbitrarily or unreasonably subordinating the volition of the person with disability to serve the agent’s interests.

### proportional and tailored to the person’s circumstances & Apply for the shortest time possible

State parties must ensure that any support provided to a person with disability in order for them to exercise legal capacity is proportionate to the need for such assistance, and tailored to the person’s circumstances.

There are two basic dimensions to this obligation that must be kept in mind. First, the level of support provided must be sufficient to enable persons with disability to exercise legal capacity on an equal basis with others in all areas of life. As noted, some persons with disability will require quite intensive support to do so. Second, the level of support provided must be no greater than is necessary for persons with disability to exercise legal capacity in all areas of life. In this respect, the support must not be over-protective of the person.

Support must be proportionate across a number of vectors:

* The scope of the support arrangement should not exceed the issues or areas in which the person requires assistance; that is, support ought usually to be limited to specific issues or areas where the person actively requires such assistance; support should very rarely be plenary in nature;
* The intensity of the support arrangement should be limited only to that which is necessary for the person to exercise capacity; support ought not to be any more intrusive than is necessary;
* The type of support ought to be appropriate to the person’s needs. If the barrier to the exercise of capacity relates to communication, support ought to focus on the augmentation of communication; if it relates to the complexity of information, support ought to focus on the presentation of that information in a more accessible form;
* The agent responsible for providing support ought, as far as possible, be selected by the person who requires that support, and/or otherwise be as close proximity to the person as possible (for example, a spouse, parent, other family member, or close friend). The state ought to formally recognise and support assistance provided to persons with disability to exercise legal capacity provided by their close associates. It ought only to appoint or mandate an agent outside the persons support network (such as a public advocate or guardian) as a last resort;
* The support ought usually to be of limited duration. The duration of the support ought to be limited to the period required for the person to develop or regain the ability to exercise legal capacity autonomously, or with less intensive support, or to the period required to resolve the issues where the exercise of legal capacity is required.

Another way of viewing the proportionality requirement set out in Article 12(4) is that it incorporates the principle of the ‘least restrictive alternative.’ This principle requires that any limit to a human right be minimum necessary in order to achieve a necessary purpose. The principle requires the identification and elimination of non- and less-restrictive options on rational and persuasive grounds before more restrictive options are entertained.

A less restrictive option cannot be eliminated merely because it is less convenient or more costly for a duty bearer. In some instances, a non- or less- restrictive alternative will require significant investment in the development of services and supports that are capable of avoiding reliance upon restrictive measures.

The requirement that support be tailored to the person’s circumstances is additional to, not repetitive of, the proportionality requirement. It ought to be interpreted and applied in a manner that requires on-going person-centred approach to the delivery of support to exercise capacity. The person-centred approach requires issues to be viewed, and action to be formulated and evaluated, from the perspective of the person with disability in an ongoing process of discovery of what is most important for the person. The concept of ‘tailoring’ also implies an individualised planning process for the delivery of support to exercise capacity is closely linked to personal needs and lifestyle goals.

### Subject to regular review by a competent, independent and impartial authority or judicial body

Article 12(4) requires that all measures related to the exercise of legal capacity are subject to regular review by a competent, independent and impartial authority or judicial body. It is important to observe that this requirement applies to *all* measures, not just formal measures such as substitute decision-making. In other words, all persons with disability who require support to exercise capacity must have their circumstances regularly reviewed by a competent authority.

As well as preventing abuse in supported decision-making arrangements, this requirement will also assist in the detection and remedy of neglect in such arrangements; that is, situations where no or insufficient support is being provided to enable the person to realise fundamental human rights and freedoms.

The review mechanism required by Article 12(4) must satisfy three distinct criteria: it must be competent; it must be independent; and, it must be an impartial authority or judicial body.

In this context ‘competent’ refers to a body with due legal authority. Accordingly, it will be essential that the review mechanism is established under statute with compulsory investigative and determinative functions and powers. In particular, it will be essential that the review body is able to provide remedies for individuals who are found to be abused or neglected in supported or substitute decision-making arrangements. Remedies ought to include the ability to order that action is taken to ensure that a person’s human rights are realised, that a person’s capacity to act is recognised, and that the terms of a support arrangement be altered to better suit the needs of the person. It is important to reiterate that the jurisdiction of this review body must extend to all forms of supported decision-making arrangements, not just substitute decision-making arrangements.

The review mechanism must be ‘independent.’ This means that it must be able to exercise its functions and powers without conflict of interest or undue influence. It therefore must not be subject to the structural control or influence, either directly or indirectly, of any agency or individual with an interest that may be affected by the exercise of its functions and powers. This will include not only persons directly involved in providing (or failing to provide) supported or substitute decision-making arrangements, but other interests, such as government departments and service providers, who will be impacted by appropriate efforts to realise the human rights of persons with disability. It would therefore be inappropriate for the review mechanism to be accountable to a government official or department responsible for providing or funding support services for persons with disability, for example.

Related to this, the review mechanism must be ‘impartial.’ It must be capable of investigating and determining issues fairly and on their merits, without fear or favour to any person or agency. In other words the review mechanism ought to perform its functions and powers judicially.

Finally, Article 12(4) provides that the intensity of the safeguards required to protect against abuse of measures to support the exercise of legal capacity must be proportional to the degree to which such measures affect the person’s rights and interests. In other words, the more intensive the assistance provided to the person to exercise capacity, and in particular, the greater the actual or likely impact of such arrangements on the person’s autonomy-related and other human rights, the more intensive should be the scrutiny of these arrangements. Consequently, while all supported and substitute decision-making arrangements ought to be subject to a minimum level of safeguarding, high intensity interventions (such as substitute decision-making) ought to be subject to systematised and robust safeguards to protect against under- or over-protection.

In spite of what is sometimes claimed, it is implicit in this obligation that it is envisaged state parties will be required to recognise and provide forms of support to enable persons with disability to exercise legal capacity that will engage, and in some cases limit (at least theoretically) their autonomy related rights. Otherwise their rights and interests would only be affected in a positive dimension and there would be no need for such intensive scrutiny of these measures.

For example, a specific individual with Prada Willi Syndrome (a condition that falls within the spectrum of intellectual impairment) may consume substances compulsively. These substances could include cleaning fluids and other household chemicals. In order to prevent the person from causing serious self-harm it may be necessary to restrict their access to locations in their own home were poisonous substances are stored (for example, a kitchen or bathroom cupboard, which may have to be kept locked and the key withheld from the person). Such a measure would be a limitation on the autonomy of the person. Whether this measure is justifiable in the circumstances will depend upon a range of factors, and it is appropriate that it be subject to robust independent scrutiny.

On the other hand, providing the same person with practical help to choose clothing (for example, by providing information about its affordability and fit) would, in most circumstances, not involve any restriction to the person’s autonomy related rights. Although the informal support being provided would need to be monitored to prevent or detect exploitation and abuse, it would not be necessary or appropriate to subject such a support arrangement to high level independent scrutiny.

Paragraph 5 of Article 12 requires state parties to take all appropriate and effective measures to ensure the equal right to person with disability to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit. It also requires state parties to ensure that persons with disability are not arbitrarily deprived of their property.

Fundamentally, this requires state parties to eliminate laws and practices that prevent persons with disability from acquiring, maintaining and disposing of real or personal property (or an interest in property, such as a lease). Persons with disability must therefore be accorded capacity under the laws of contract, including in circumstances where they require support to exercise legal capacity in contract. Just as importantly, it requires governments to counteract practices, attitudes and beliefs that militate against persons acquiring, managing and disposing of assets. For example, persons with disability who rely upon social housing and support services ought to be promoted as capable of directly purchasing or leasing their homes, rather than service providers doing so on their behalf, and it ought to be viewed as desirable for them to do so.

It is a necessary incident of the ability to own and dispose of property that persons with disability are viewed, wherever possible, as having capacity to dispose of property under a will. Again, the person ought to be able to exercise this right with support where required and such support must be subject to robust safeguards against abuse.

Perhaps even more importantly, persons with disability must be able to inherit property. In the international context, this means that laws must not prevent persons with disability from inheriting. However, the obligation ought to be viewed as more substantial than merely making inheritance permissible. If persons with disability are truly to have an equal right to inherit property, then the law ought to protect them against discriminatory testamentary intentions. For example, a person with disability ought to be able to assert a legal right to a disposition under a parent’s will that is at least as favourable as any of their siblings, and it is essential that they are provided with assistance to do so where necessary.

Equal access to bank loans, mortgages and other forms of financial credit will require state parties to ensure that laws are in place to prevent all forms of discrimination against persons with disability in financial services. However, as we have already noted, the CRPD mandates substantial equality and not just equal treatment of persons with disability with others. It will therefore be appropriate for state parties to initiate and encourage positive measures to alleviate or compensate for the existing and historic disadvantage and discrimination persons with disability experience in access to financial services. Examples of such positive measures would include shared equity models of home purchase and ownership, micro-credit arrangements, and no-interest loan schemes.

Article 12(5) provides that persons with disability must be recognised as having capacity to manage their own financial affairs. Like the other subject matter in paragraph 5, this right and its associated obligations are expressed as being subject to the terms of the other paragraphs of Article 12. In other words:

* Consistent with paragraph 1, all persons with disability must be recognised everywhere as having the right to own and inherit property and participate in the financial system on an equal basis with others;
* Consistent with paragraph 2, persons with disability must be recognised as having the legal capacity to own and inherit property and to participate in the financial system;
* Consistent with paragraph 3, state parties must take appropriate measures to ensure that persons with disability have access to the support they may require to exercise their legal capacity in relation to owning and inheriting property, and to participate in the financial system;
* Consistent with paragraph 4, all measures that relate to the exercise of legal capacity, must operate subject to safeguards to prevent abuse. These safeguards must ensure that such measures:
	+ Respect the rights, will and preferences of the person;
	+ Are free from conflict of interest and undue influence;
	+ Are proportional and tailored to the person’s circumstances;
	+ Apply for the shortest possible time; and
	+ Are subject regular review by a competent, independent and impartial authority or judicial body.

These safeguards must be proportional to the degree to which such measures affect the person’s rights and interests. The detailed implications of these safeguard measures have already been outlined above.

Finally, Article 12(5) requires that state parties ensure that persons with disability are not arbitrarily deprived of their property. An action will be arbitrary if it is not based upon reasonable and objective criteria set out in a law of general application that is subject to judicial review. Accordingly, such a law could not be limited to persons with disability, or a sub-class of persons with disability, as it would thereby be a law of specific application and therefore discriminatory.

Although this element of Article 12(5) most clearly protects persons with disability from being deprived of their property in an absolute sense, it should also be read as preventing persons with disability from being arbitrarily deprived of the capacity to manage their property. In this respect it reinforces the terms of Article 12(4). Any law that limits a person’s capacity to manage their property must therefore be a law of general application that is based upon reasonable and objective criteria. Moreover the law must operate subject to judicial review. It must not be a discriminatory law of specific application to persons with disability.

Interpreting Article 12 in light of other specific obligations

Earlier in this paper, we noted that as well as looking at the intersection of Article 12 with the general policy and obligations of the CRPD, we must also look at the intersection of Article 12 with other specific obligations. This is not only because all human rights are indivisible, interdependent and inter-related, but because in some instances another specific obligation will condition how Article 12 is to be interpreted and applied.

### Access to justice

Article 13 of the CRPD imposes obligations on state parties to take measures to ensure that persons with disability enjoy effective access to justice on an equal basis with others. Article 13 is therefore an important operational or functional dimension of the rule of law. Many of the measures required for persons with disability to achieve effective access to justice will also relate to their equal recognition as persons before the law, and to the fulfilment of their right to exercise legal capacity on an equal basis with others, with any necessary support.

The term ‘access to justice’ is used in a very broad sense, and encompasses all circumstances in which persons with disability interact with the justice system. This includes their interaction as litigants, witnesses and defendants, but it also includes circumstances where they do so as court administrative personnel, judicial officers, as lawyers, and as jurors, for example. The term also encompasses all types of legal proceedings, and all stages of legal proceedings, including the prior investigative and pre-trial processes.

The requirement that such measures be ‘effective’ must be interpreted and applied in a way that recognises the diversity of persons with disability. Persons from different impairment groups, and individuals within impairment groups, may require different measures. Such measures must ensure that actual or potential violations of the legal rights of persons with disability are competently detected and investigated, that the legal rights of all persons with disability are capable of being brought before the courts, that there is competent prosecution or suit, and competent adjudication, of these matters, and that persons with disability have ready access to competent legal representation. Where a person with disability is a defendant to a criminal charge, these measures must ensure that the person is subject to a fair trial.

The measures required by Article 13 are broad in scope. However the article does refer to three specific measures that state parties must take in order to secure effective access to justice for persons with disability. They must ensure the provision of procedural and age-related accommodations, and they must promote appropriate training for those persons working in the administration of justice, including police and prison staff.

Procedural and age-related accommodations to the legal process are also necessary to ensure that persons with disability are able to exercise legal capacity. For example, it may be necessary for the law to permit, and the court to recognise, a personal legal representative as capable of bringing an action on behalf of the person in order to secure a legal right. It will also be appropriate for the law to permit, and the courts to recognise, representative actions to vindicate the legal rights of persons with disability, where these rights are subject to systematic violation.

Modifications to the legal process may be required for persons with disability to effectively exercise legal capacity and obtain effective access to justice. For example, the courts ought to be obliged to permit the use of sign-language interpreters (for persons in all roles, not just for witnesses), recognise the use of augmentative communication devices, and allow persons with disability to rely upon appropriate support persons to assist them through the legal process. The legal process may need to be slowed and breaks may be required in the course of the proceedings as a whole and in the course of giving evidence. The court room may need to be cleared of noise and distraction.

The rules of evidence ought to permit, in appropriate cases, the giving of narrative evidence, and the giving of evidence that will not be subject to cross-examination. They ought also to empower the court to intervene in cross-examination to prevent a line or style of questioning from confusing a person with disability. The rules of evidence should also enable, in appropriate cases, persons with disability to give evidence in real time via closed circuit television or otherwise from a location removed from a person who stands accused of harming them.

The training of justice system personnel ought to include instruction in relation to the human rights of persons with disability, including their right to equal recognition before the law, and what is required to ensure that they enjoy legal capacity on an equal basis with others.

### Article 16 Freedom from exploitation, violence and abuse

Article 16 of the CRPD requires state parties to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disability, both within and outside the home, from all forms of exploitation, violence and abuse.

The effective protection of persons with disability from exploitation, violence and abuse will require measures to ensure that persons with disability are able to exercise legal capacity, in particular to secure an appropriate remedy where they have been subject to, or are at risk of, these harms. It will also require the establishment and enforcement of robust safeguards against exploitation, abuse and neglect within supported and substitute decision-making arrangements. There is thus an important intersection between Articles 12 and 16.

The obligation to protect against all forms of exploitation, violence and abuse ought to be understood as including the obligation to protect persons with disability from serious self-harm and neglect. The reference to harms that occur ‘within … the home’ drives home the point that persons with disability must be protected from harm in informal support arrangements, as well as in more formal arrangements: that is to say, from exploitation, violence and abuse perpetrated by family members, friends and others in close personal relationship with them.

Paragraph 3 of Article 12 requires state parties to prevent the occurrence of **all forms** of exploitation, violence and abuse by ensuring that all facilities and programmes designed to serve persons with disability are effectively monitored by independent authorities. The arrangements designed to assist persons with disability exercise legal capacity pursuant to Article 12(3), and the safeguarding mechanism referred to in Article 12(4) are examples of such authorities. Article 16 therefore serves to reinforce the fact that these mechanisms must be independent of facilities and programmes for persons with disability. In other words, these mechanisms cannot operate subject to the control or influence of authorities that are responsible for services for persons with disability. One important reason for this is that the support mechanism may need to engage in vigorous advocacy directed at service providers to secure the human rights of the person with disability. Similarly, the safeguard mechanism must be capable of ascertaining and asserting the rights of persons with disability distinctly from the interests and influence of service providers and others.

Paragraph 16(5) obliges state parties to put in place effective legislation and policies to ensure that instances of exploitation, violence and abuse of persons with disability are identified, investigated, and where appropriate, prosecuted. Article 16(5) has an important intersection with Article 12(4). These measures it requires ought to extend to circumstances where exploitation, abuse and neglect occur in supported and substitute decision-making arrangements. In particular, as we have already noted, it is essential that these measures provide remedies for persons with disability who have been victims of such harm.

### Article 17: Protecting the integrity of the person

Article 17 of the CRPD asserts that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Among other things, in calling for the respect of the mental integrity of persons with disability, the Article asserts the importance of the autonomy-related rights of persons with disability. In this respect it has an important intersection with Article 12. As in Article 12(4), the word ‘respect’ in this context ought to be given its ordinary English meaning, which is to ‘have regard to,’ ‘take into account,’ ‘consider’ and ‘to observe.’

Article 17, like Article 12, must be interpreted and applied in a way that takes account of the diversity of persons with disability, and in particular, in a way that takes account of those persons who require more intensive support. It must also be interpreted in a manner which recognises the indivisibility, inter-relatedness, and interdependence, of all human rights. In other words, Article 17 ought not to be interpreted in a way that would, in effect, deprive persons with intensive support needs of the ability to realise other human rights.

Nevertheless, this aspect of Article 17, like its corresponding element in Article 12(4) ought to be interpreted as prohibiting any form of supported or substitute decision-making that does not provide for the ongoing engagement of the person with disability in relation to the conduct and decisions that impact upon them to the maximum extent that it is possible to do so.

In this respect the frame of reference is always the specific individual and what he or she requires in order that they may exercise capacity, or be engaged in the conduct and decisions that impact upon them. There is no justifiable basis for any class of persons – such as persons from a particular impairment group – to be subject to a specific form of supported or substitute decision-making arrangement.

Moreover, as we have already noted, that which is maximally possible is not necessarily that which is convenient to provide. Nor is it that which involves no or lesser cost. Sometimes substantial resources, and substantial innovation, will be required in order to ensure that persons with disability have a genuine opportunity to exercise legal capacity and to otherwise effectively participate in the conduct and decisions that impact upon their lives.

### Article 21: Freedom of expression and opinion, and access to information

Article 21 of the CRPD requires state parties to take all appropriate measures to ensure that persons with disability are able to exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.

Article 2 of the CRPD defines ‘communication’ to include languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.’ In other words, the concept and modes of ‘communication’ recognised by the CRPD are very broad indeed. Recognition of, and support for, these forms of communication will often be a precondition for persons with disability to exercise legal capacity, and in this respect, there is an important intersection between Articles 12 and 21.

Article 21 imposes a number of obligations on state parties in relation to the realisation of the right to freedom of expression and opinion and access to information that are directly relevant to the ability of persons with disability to exercise legal capacity. State parties must:

* Provide public information in accessible formats and utilising technologies appropriate to persons with diverse communication needs. Such information must be provided on a timely basis and at no additional cost;
* Accept and facilitate the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication chosen by persons with disability in official interactions;
* Urge private entities that provide public services to provide information and services in formats that are accessible and usable by persons with disability; and
* Recognise and promote the use of sign languages.

In summary, all agencies that provide public services to persons with disability, including all sectors of the justice system, must recognise and adopt information and communication modes that are accessible to persons with disability. The extent to which they do so will have a major impact upon the ability of persons with disability to exercise legal capacity.

### Article 25: Health

Article 25 of the CRPD requires state parties to recognise that persons with disability have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.

Among the obligations that relate to this right is the obligation to require health professionals to provide care of the same quality to persons with disability as to others, including on the basis of free and informed consent. This obligation has an important intersection with Article 12, as the ability to provide free and informed consent is ultimately based in legal capacity.

The terms of Article 12 must therefore be interpreted and applied in a way that will ensure that all persons with disability are able to obtain and enjoy the highest attainable standard of health. This will require a range of informal and formal measures to facilitate the exercise of legal capacity, depending upon the person’s needs.

For example, a person with advanced dementia may not be able to comprehend the nature and risks associated with a proposed invasive medical treatment that is necessary to maintain their health, even with support. Their treating doctor is unable to perform the treatment without such consent. If they did, it would be an assault and battery of the person. Article 12 must therefore be interpreted in a way that will allow a proxy to be recognised or appointed to provide consent to treatment on behalf of the person so as to ensure that the person is able to receive necessary treatment. Such an arrangement would, of course, operate subject to the safeguards specified in Article 12.

Equal recognition before the law – the content of the right

In summary, Article 12 ought to be viewed as a direct application of Article 6 of the UDHR and Article 16 of the ICCPR to the specific circumstances faced by persons with disability. Both of these rights deal with recognition of every person, everywhere, as persons before the law. Article 16 of the ICCPR is a non-derogable right, which means that no limitations to it are permissible in any circumstances.

Article 12 has important relationships with other CRPD articles. Perhaps the most important of these is its relationship with Article 5: Equality and Non-Discrimination, and Article 13: Access to Justice. Together these articles give effect to the rule of law for persons with disability.

In light of the detailed discussion of the terms of Article 12 and related rights earlier in this paper, it might be suggested that the ‘content’ of equal recognition before the law comprises the following rights and corresponding state obligations:

* Recognition of every person with disability in every context as a unique legal personality who bears legal rights and duties on an equal basis with other persons;
* Recognition of every person with disability in every context as entitled to exercise legal rights and duties on an equal basis with others;
* Recognition of legal capacity as the instrumental or functional dimension of the right to recognition before the law. This dimension of the right includes the ability to make decisions, but is not limited to mere decision-making. It refers to the person’s ability to actualise their rights and duties;
* Recognition of the **normative value** that persons with disability have the right to exercise legal rights and duties without arbitrary interference by others;
* Recognition of the personal and structural disadvantage and discrimination faced by many persons with disability, and members of some impairment groups in particular, in effectively exercising their legal capacity, and consequently, of the right of such persons to reasonable accommodation and positive measures that will enable them to exercise legal capacity;
* In particular, recognition of the personal and structural disadvantage and discrimination persons with disability face in exercising legal capacity to obtain goods and services, and to obtain a remedy for the violation of their human, legal and service user rights, and consequently, of the need for effective measures to overcome this disadvantage and discrimination;
* Recognition that, due to the diversity of persons with disability, non-arbitrary support may need to be provided to a person to ensure that he or she is able to exercise legal capacity. This support is justifiable on two grounds:
	+ As a reasonable accommodation; or
	+ As a positive measure.

Differential treatment of persons with disability, where this is to overcome structural disadvantage and discrimination, is not arbitrary;

* Recognition that the forms of assistance required in order to ensure that all persons with disability are able to effectively exercise legal capacity in all contexts are diverse, and vary in intensity. They include legal measures, policy measures, institutional measures and programmatic measures;
* The primary emphasis of such measures ought to be support for the person with disability to exercise legal capacity personally and directly. However, where this is not possible due to the intensity of the person’s support needs, there must be measures permitting the exercise of legal capacity by proxy, including substitute decision-making arrangements;
* Some positive measures to enable particular persons with disability to exercise legal capacity, such as provision for action by proxies, and for substitute decision-making, may involve modifications and limits to autonomy related rights, sometimes only at a theoretical level, but also sometimes in practice. These limits are justifiable (and not arbitrary) where they result in a net benefit to the person. ‘Benefit’ is to be understood in terms of the realisation of the person’s human rights as a whole;
* Recognition that non-arbitrary assistance to exercise legal capacity must be proportionate to need. It must neither result in the under-protection, nor in the over-protection, of the person. In general, it must be the least restrictive form of assistance that is consistent with the full realisation of the person’s human rights. In order to prevent under- or over-protection of the right to exercise legal capacity, state parties must ensure that all such measures operate subject to the safeguards set out in Article 12(4);
* Recognition that the obligation to ensure that the form of support to exercise legal capacity is the least restrictive possible necessitates continuing active identification, development, trial, and promotion of non-restrictive and less restrictive alternatives to more restrictive forms of assistance;
* Recognition that persons with disability have the right to effective protection against arbitrary interference with their ability to exercise their legal rights and duties;
* Recognition of the potential for abuse and neglect in all forms of action by proxy, including in both supported and substitute decision-making arrangements, and consequently, of the obligation to ensure that all such arrangements are subject regular monitoring and review that is closely calibrated in intensity according to the extent to which such arrangements impact upon the person’s rights and interests;
* Recognition of the right of persons with disability to own and inherit property, and to be protected from arbitrary deprivation of property;
* Recognition of the structural disadvantage and discrimination faced by persons with disability in relation to property ownership (which includes interests in property, such as leasehold etc), and of the need for positive measures to combat such disadvantage and discrimination;
* Recognition of the structural disadvantage and discrimination faced by persons with disability in relation to inheritance, and of the corresponding obligation to ensure that the law provides effective remedies for persons with disability whose right to inheritance on an equal basis with others is violated or compromised;
* Recognition of the right of persons with disability to access to bank loans, mortgages and other forms of credit on an equal basis with others;
* Recognition of the structural disadvantage and discrimination faced by persons with disability in the financial services industry, and of the corresponding obligation to ensure that this sector operates subject a strict prohibition on discrimination. Recognition also that a range of positive measures is required in order to ensure that persons with disability are able to enjoy equal access and benefit from financial services;
* Recognition of the normative value that persons with disability have the right to manage their own financial affairs without arbitrary interference by others;
* Recognition that persons with disability may require non-arbitrary support to manage their own financial affairs on the same basis and subject to the same safeguards, as for the exercise of legal capacity more generally.

Equal recognition before the law – measures required to give effect to the right

In this section, we outline some of the practical measures state parties ought to take to ensure that all persons with disability are able to exercise legal capacity.

### Major legal and institutional measures

* State parties ought to ensure that domestic law positively recognises the right of all persons in all situations to recognition before the law. This law ought also to create a presumption of legal capacity for all persons, which ought to expressly extend to those circumstances where support may be required for a person to exercise legal capacity;
* State parties ought to modify, repeal or nullify any law or policy, and counteract any practice or custom, that has the purpose or effect of denying or diminishing recognition of any person as a person before the law, or of denying or diminishing any person’s ability to exercise legal capacity. This will necessarily include systematic public education measures directed to sectors where problems are frequently encountered (such as the financial services and health sectors);
* Where the context concerns the ability of any person to fulfil the responsibilities of an office, or a civic duty, the qualifying or disqualifying factor must be the person’s ability to fulfil the inherent requirements of the position, with any reasonable adjustments that they may require. The law should expressly prohibit disqualification based on impairment or disability status;
* State parties ought to enact laws that provide for persons to exercise legal capacity with support. As this law will, in some respects, limit autonomy related rights it must be a law of general application. However, in recognition of the fact that persons with disability will be particularly reliant upon its provisions, it will be appropriate that it includes a general obligation on all relevant actors to provide reasonable accommodation of the needs of persons with disability. It will also be appropriate that the law designates a range of positive measures to ensure that persons with disability are able to exercise legal capacity on an equal basis with others. This law ought to achieve the following:
* It ought to mandate classes of persons to be recognised as entitled to assist persons with disability to exercise capacity, or to exercise capacity on their behalf. Examples of such persons would include:
	+ a person in close personal relationship with the person;
	+ a person nominated by the person as their assistant;
	+ a person appointed by an appropriate authority to exercise legal capacity on behalf of the person;
* It ought to provide for the automatic disqualification of persons from providing assistance to a person with disability to exercise capacity. Examples of such persons would include:
	+ a person with a material interest in the subject matter of an action or decision;
	+ a person disqualified from providing such support by an appropriate authority;
* It ought to impose duties on all relevant actors to recognise arrangements for the support of persons with disability to exercise legal capacity (relevant actors would include financial institutions and health professionals and specialist service providers);
* It ought to establish principles for determining the level and type of support a person requires in order that they may exercise capacity;
* It ought to establish an independent authority with the power to appoint a proxy to exercise legal capacity on behalf of a person with disability where required. Such appointments must comply with the safeguards set out in s 12(4) of the CRPD;
* It ought to incorporate a proportionality test that will ensure that the level of support provided to exercise capacity is neither under nor over protective. This test ought to be based on the express criteria set out in Article 12(4), and upon the principle of the least restrictive alternative which is implied by the safeguards incorporated into Article 12(4). The principle of the least restrictive alternative ought to be expressed so as to require the continuing development, identification, trial and promotion of non-restrictive or less restrictive alternatives as a continuing condition precedent to the imposition of more restrictive alternatives;
* It ought to subject all agents who provide support to persons with disability to assist them to exercise capacity, and all proxies who exercise legal capacity on behalf of persons with disability to an express, active duty to respect, protect and fulfil the human rights of persons with disability to the level of a fiduciary. Failure to fulfil this duty ought to be a basis for the disqualification of the agent, and entitle the person with disability to a remedy for any harm that has resulted from such failures;
* It ought to provide for the establishment of independent institutions with the responsibility to facilitate and oversight supported and substitute arrangements for the exercise of legal capacity. The functions and powers of these agencies ought to include:
	+ The development, implementation and monitoring of a range of supported decision-making options, including personal support programs, such as capacity advocates, personal representatives, and personal ombudsmen;
	+ The development of educational materials and tools to assist persons with disability to better exercise capacity independently or with support;
	+ Power to receive, investigate, determine and make recommendations relating to complaints about abuse, neglect and exploitation in supported and substitute arrangements for the exercise of legal capacity. This role ought to be supported by a range of compulsory powers capable of compelling co-operation or compliance with such investigations;
	+ The power to initiate ‘own motion’ complaints for investigation in relation to potential or actual abuse, neglect or exploitation in supported or substitute arrangements for the exercise of legal capacity;
	+ The power to conduct reviews into the circumstances of a person or group of persons subject to supported or substitute arrangements for the exercise of legal capacity. This ought to include the power to make recommendations to relevant respondents for remedial action;
	+ The power to conduct policy and programme reviews and ‘audits’ of supported or substitute arrangements for the exercise of legal capacity. This also ought to include the power to make recommendations to relevant respondents for remedial action;
	+ The power to undertake own motion enquiries into systemic issues in relation to supported or substitute arrangements for the exercise of legal capacity. This function ought to be supported by a range of royal commission equivalent powers;
	+ The power to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits;
	+ The power to develop and publish policy recommendations, guidelines, and standards to promote quality improvement related to the recognition and support of legal capacity and supported or substitute arrangements for the exercise of legal capacity;
	+ The function and power to collect, develop and publish information, including statistical information, and undertake research into the quality and effectiveness of supported and substitute arrangements for the exercise of legal capacity, and their conformity with human rights standards.
* State parties ought to ensure that remedies for violations of the human, legal and service user rights are readily accessible to persons with disability. To this end, rights of action in relation to the breach of such rights ought to be subject to no ‘standing’ test, or at least to a broad standing test, that will allow any appropriate person to initiate the action on behalf of, or for the benefit of, the person. These rights ought also to be readily capable of enforcement on the basis of representative action.

### Major policy and programmatic measures

* Providing persons with disability with ongoing education and personal development directed at:
	+ Developing knowledge and understanding of legal, human and service user rights, of the remedies that are available for the violation of these rights, and of the support that is available to secure such remedies;
	+ Developing practical knowledge, understanding, skills and tools that will equip persons with disability to exercise legal capacity with as much independence as possible (for example, education and tools to assist with budgeting and money management);
	+ Building self-esteem, self-concept, and self confidence to act with increasing independence;
* Examples of reasonable accommodation required for persons with disability to exercise legal capacity include:
	+ Ensuring that persons with disability have access to information about their legal rights and duties in a format that is accessible to them;
	+ Ensuring that persons with disability are able to communicate with all relevant actors utilising a means or mode of communication of their choice;
	+ Ensuring that issues for action and decision are presented in a way that maximises the potential for the person to understand and decide the issues (for example, complex information ought to be simplified, segmented and explained in easy English);
	+ Providing adequate time for a person to think about, and take advice upon, a proposed course of action or decision;

Information about the availability of, and how to obtain, such accommodations must be readily available to persons with disability and their associates;

* Examples of positive measures that will assist persons with disability to exercise legal capacity include:
	+ Ready access to free or affordable legal advocacy;
	+ Ready access to individual advocacy support;
	+ The ability of a person to indicate in advance how they want decisions to be made when they are unable to make them (for example, an advance directive);
	+ The ability for a person to nominate and register a personal representative to act on their behalf when they are unable to do so (for example, an enduring power of attorney);
* Examples of adjustments and positive measures that will assist persons with disability exercise legal capacity in the legal process specifically include:
	+ Early video-recording of a witnesses’ evidence;
	+ Permitting a witness to give evidence in narrative form;
	+ Allowing a witness to give evidence that will not be subject to cross-examination;
	+ Providing the adjudicator with the power to regulate cross-examination so as to ensure that a witness is not confused by questions, ‘led’ to give unsafe evidence, or intimidated by questioning;
	+ Allowing a person to give evidence via closed circuit television, or otherwise in a position where they cannot be intimidated by an accused;
	+ Allowing expert evidence aimed at informing the court about any aspects of the witness’ evidence related to impairment and disability that might otherwise diminish the credit of the witness, either directly or indirectly;
	+ Allowing a support person to be present with a witness during the course of proceedings to provide emotional support, and to assist in ensuring the person understands the legal process and questions put to them;
	+ Providing sufficient time for the hearing of the matter without undue pressure, and providing regular breaks in proceedings to maximise memory and concentration;
	+ In appropriate matters, promoting alternatives to dispute resolution by judicial determination (such as arbitration, conciliation and mediation). These alternatives may provide greater flexibility for issue resolution, and provide greater scope for the provision of reasonable accommodations;
	+ Education of all personnel involved in the legal process about the human rights of persons with disability, and about the adjustments and measures required in order for them to exercise legal capacity and obtain access to justice on an equal basis with others; and
	+ Establishment of expert investigation and prosecution capacity in relation to persons with disability who appear before the courts.
1. Generally, Article 29, *Vienna Convention on the Law of Treaties,* 1969; this obligation may also be a term of the treaty itself; see for example, Article 4(5) of the Convention on the Rights of Persons with Disabilities. [↑](#endnote-ref-1)
2. Cf Article 4(1)(a) of the Convention on the Rights of Persons with Disabilities. [↑](#endnote-ref-2)
3. Article 2, International Covenant on Civil and Political Rights. [↑](#endnote-ref-3)
4. Articles 4, 31, and 33, Convention on the Rights of Persons with Disabilities. [↑](#endnote-ref-4)
5. Article 2, International Covenant on Civil and Political Rights. [↑](#endnote-ref-5)
6. Human Rights Committee, *General Comment 18, Non-Discrimination,*1989; Office of the High Commissioner for Human Rights. [↑](#endnote-ref-6)
7. *Gerhady v Brown* [[1985] HCA 11](http://www.austlii.edu.au/au/cases/cth/HCA/1985/11.html); [(1985) 159 CLR 70](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281985%29%20159%20CLR%2070) see especially Brennan J at 37. [↑](#endnote-ref-7)
8. See further Centre for Universal Design, North Carolina State University available at [www.design.ncsu.edu/cud](http://www.design.ncsu.edu/cud) [↑](#endnote-ref-8)
9. Article 3(d) and Preambular paragraph (i) of the CRPD. [↑](#endnote-ref-9)
10. Article 3(a) and Preambular paragraph (n) of the CRPD. [↑](#endnote-ref-10)