Research Report


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Introduction

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability was established by Letters Patent on 4 April 2019. The Letters Patent note that Australia has:

“…[I]nternational obligations to take appropriate legislative, administrative and other measures to promote the human rights of people with disability, including to protect people with disability from all forms of exploitation, violence and abuse under the Convention on the Rights of Persons with disabilities.” ¹

Therefore, the purpose of this report is to assess Australia’s level of compliance with the United Nations Convention on the Rights of Persons with Disabilities (CRPD),² which upholds the human rights and inherent dignity of people with disability. As violence, abuse, exploitation and neglect denigrate the human rights and inherent dignity of people with disability, such acts necessarily breach Australia’s international obligations under the CRPD.

This assessment will focus upon articles 5 to 33 of the CRPD which substantiate the rights of persons with disabilities and the associated obligations of governments.³ The full text of the CRPD and the Optional Protocol are attached as appendices to this report. Each of these articles will be analysed and an assessment will be made of Australia’s level of compliance with each. Analysis will be largely confined to the documents flowing from Australia’s appearances before the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) in Geneva. This is because the CRPD Committee is the primary body which monitors the implementation of the CRPD in countries which have signed up to the Convention.

In this introductory segment, Australia’s ratification of the CRPD will be analysed. The meaning of ratification will be explained, together with the purposes and scope of the CRPD. The operation of the CRPD’s interpretive principles and the doctrine of progressive realisation will also be analysed.

The CRPD Committee undertakes the task of monitoring how nations have complied with the CRPD, and accordingly its structure and mandate will be analysed. It’s Concluding Observations and its General Comments will be explained.
Finally, the work of the CRPD Committee in examining individual complaints under the Optional Protocol will receive brief comment.

**Australia and the CRPD**

After several years of careful drafting in which persons with disabilities played a significant role, the CRPD came into force on 3 May 2008. Several months later, Australia became one of the first countries to ratify the CRPD. In other words, the Government of Australia agreed to be bound by the CRPD. In the following year, Australia acceded to the CRPD’s Optional Protocol. The Optional Protocol to the CRPD sets forth a mechanism whereby persons who assert that any of their CRPD rights have been violated may complain directly to the CRPD Committee.

Under Australian law, the ratification of an international instrument or convention does not mean that its provisions become part of our domestic law automatically. Of course, Australia’s ratification of a convention or covenant may, and often does, influence the curial interpretation of legislative provisions and/or common law rules. However, this does not mean that the international instrument is part of Australia’s domestic law. That can only happen when Federal, State or Territory parliaments enact into domestic law the substance of the relevant covenant or convention.

The first sentence of article 1 states that the purpose:

> [I]s to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

**The CRPD, Human Rights and Interpretation**

The CRPD is a human rights treaty that is designed to protect the human rights and inherent dignity of persons with disabilities. The CRPD is needed because so many persons with disabilities throughout the world are unable to fully enjoy all of the human rights which most non-disabled persons take for granted. The CRPD is a United Nations human rights treaty which has at its core the human rights and inherent dignity of persons with disability and was influenced by the social model.

The CRPD gives protection to all persons with disabilities, which is defined in the second sentence of article 1 as including:
...those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

This broad definition of persons with disabilities adopts what is known as the social model of disability. This model was developed by disabled intellectuals in Britain in the 1980's. The social model recognises that disability 'is an evolving concept', and that persons with impairments are often prevented from exercising all of their human rights and fundamental freedoms by social, attitudinal and environmental barriers.

Unlike other United Nations human rights treaties, the CRPD contains eight general principles in article 3. These principles are aids to interpreting the substantive articles of the Convention. The principles are as follows:

A. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
B. Non-discrimination;
C. Full and effective participation and inclusion in society;
D. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
E. Equality of opportunity;
F. Accessibility;
G. Equality between men and women;
H. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4(2) of the CRPD provides as follows:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

Article 4(2) is significant as it requires taking account of the doctrine of progressive realisation. This doctrine originated in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* of 1966. The framers realised that these rights would take time to implement depending upon the economic and social capacities of each nation. Article 2 of ICESCR provides in part that nations are required:
However, the rights set forth in the CRPD cannot be neatly divided between economic, social and cultural rights, and civil and political rights. This is because some of the CRPD rights are economic, social and cultural, whereas other rights are better designated as civil and political. A number of the articles straddle both types of rights. This divide reflects reality where individual rights intersect, however the CRPD adopts the doctrine of progressive realisation with respect to rights or portions of rights which are designated as economic, social or cultural. Therefore, the divide is of some significance when assessing a nation’s level of compliance with the CRPD.

As the doctrine of progressive realisation is not applicable to the civil and political rights in the CRPD, they must be immediately granted by ratifying countries. This divergence between civil and political rights as against economic social and cultural rights is somewhat problematic for the CRPD because it contains both forms of rights and on occasions the line between civil rights and economic rights is not always clear.

The CRPD Committee

The primary function of the CRPD Committee is to monitor the implementation of the CRPD in the countries which have ratified this Convention. The CRPD Committee comprises 18 members who are elected at the biennial meetings of the ratifying nations. Each member is elected for four-year-terms, with half the committee membership retiring every two years. Members may only be re-elected once which means that members may only serve for a maximum period of 8 years.

A majority of members have always been persons with disabilities. Their countries are from all over the world, and they represent the various legal systems, be they Common Law, Civil Law or Islamic Law.

Each country which ratifies the CRPD must forward to the CRPD Committee an Initial Report within two years of its ratification. Australia published its Initial Report on 3 December 2010. Thereafter, countries must submit periodic reports at least every four years. Australia published its Combined Second and Third Periodic Reports on 1 September 2018.
Article 36(1) of the CRPD details the monitoring powers of the CRPD Committee. It provides in part as follows, ‘each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned.’ To fulfil these functions, the CRPD Committee holds what is known as a constructive dialogue with each reporting country. The dialogue takes place in Geneva with government delegations being questioned by members of the CRPD Committee. It is common that the CRPD Committee is provided information through alternative or shadow reports written by disabled person’s organisations and by the country’s national human rights body. In Australia, this is the Australian Human Rights Commission.

Australia’s Initial Report was considered in a constructive dialogue in September 2013. Six years later in September 2019, Australia’s Combined Second and Third Periodic Reports were examined in a constructive dialogue. At the conclusion of a constructive dialogue, the CRPD Committee gives its verdict on the country’s efforts in a short document which is called its Concluding Observations. The Concluding Observations on Australia’s Initial Report were published in September 2013 and its Concluding Observations on Australia’s Combined Second and Third Periodic Reports were released in September 2019.

For the 2019 constructive dialogue, the CRPD Committee utilised its simplified reporting procedure which was introduced to encourage nations to fulfil their reporting obligation on time. The process is as follows: the CRPD Committee sends countries a series of questions known as a list of issues, the state party responds and the CRPD Committee receives the response as fulfilling the reporting requirement. Therefore Australia’s Combined Second and Third Periodic Report is simply the responses to the list of issues with which it was provided.

Through an examination of the Concluding Observations on Australia, especially having regard to the 2019 Concluding Observations, the views of the CRPD Committee on Australia’s level of compliance with each article can be determined.

All of the United Nations human rights treaty bodies like the CRPD Committee, from time to time also publish General Comments. The General Comments of the CRPD Committee assist with an analysis of Australia’s level of compliance with the CRPD.
because they set forth the Committee’s view on how articles of covenants and conventions should be interpreted. Since 2014, the CRPD Committee has published seven General Comments, each of which expounds how an article of the CRPD should be interpreted. For example, General Comment No. 1 is titled ‘Article 12: Equal Recognition before the Law’. As its name implies, General Comment No. 1 details how article 12 of the CRPD should be interpreted. This provision is concerned with the legal capacity of persons with disabilities. While the General Comments of United Nations treaty bodies like the CRPD Committee are not strictly binding in law, they are highly persuasive and may be taken into account in interpreting human rights treaties.

**Individual Complaints and the Optional Protocol**

Under the Optional Protocol to the CRPD, individuals or groups of individuals who assert that one or more of their CRPD rights have been violated, may lodge a complaint to the CRPD Committee. Of course where the actions complained of occurred before the country ratified the Optional Protocol, the complaint is inadmissible unless the conduct continued after ratification. Furthermore, where an applicant has failed to exhaust her or his internal legal remedies, the complaint will be dismissed, unless ‘….the application of the remedies is unreasonably prolonged or unlikely to bring effective relief’. Several applicants have made successful complaints against Australia, and these decisions of the CRPD Committee also provide information on Australia’s level of compliance.

In the following segments, each article, commencing with article 5 and concluding with article 33 will be ‘unpacked’ to be understood and an assessment will be made of Australia’s level of compliance with each provision. Australia has taken some important steps to meet its CRPD obligations. However, Australia is a wealthy nation, and should be held to a high standard. More than a decade after ratification, there are many rights in the CRPD that have not been incorporated into Australian law, and there are still too many Australians with disability who experience discrimination, disadvantage and human rights violations, especially among First Nations peoples.
Article 5 Equality and Non-Discrimination

Introduction

Article 5 is at the very centre of the CRPD because it champions equality for all before the law and it prohibits discrimination on the basis of disability. As Rachele Cera notes:

The right to equality and non-discrimination is a fundamental principle of international human rights law: it gives concrete expression to the central idea of human rights system that all human beings are equal and, regardless of their status or membership of a particular group, are entitled to a set of rights.37

Throughout history, many persons with disabilities, and especially those with cognitive, psychosocial and sensory disabilities, have suffered from both the unequal and discriminatory application of the law. This is why article 5 is one of the most important provisions in the CRPD.38

This segment will outline Australia’s laws prohibiting discrimination and then analyse the concepts of intersectional discrimination39 and multiple forms of discrimination and how they represent the CRPD Committee’s vision of equality. Comment will be made on Australia has fallen short in not outlawing intersectional and multiple forms of discrimination.

Understanding Article 5

Article 5 paragraph 1 proclaims that nations:

… [R]ecognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.40

Article 5 paragraph 2 prohibits discrimination by providing that ratifying countries must:

… [P]rohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.41

Interestingly, this prohibition is not solely confined to the grounds of disability, but extends to all grounds.

The term ‘discrimination on the basis of disability’ is defined expansively in article 2 as meaning:
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, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.42

Article 5(3) says that to promote equality and to eliminate discrimination, countries must ensure that reasonable accommodation is provided. ‘Reasonable accommodation’ is a term of art defined in article 2 as meaning:

Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.43

Reasonable accommodation is a rather imprecise concept which is best illustrated by an example. Suppose an employer refuses to employ a person with mobility disabilities because there is no accessible toilet in the workplace. This will amount to discrimination in contravention of article 5 of the CRPD because reasonable accommodation requires the employer to install an accessible toilet, unless this modification amounts to a disproportionate or undue burden.

In its General Comment No. 6 on Equality and Non-Discrimination of April 2018, the CRPD Committee explains the two elements of reasonable accommodation in the following words:

The duty to provide reasonable accommodation in accordance with articles 2 and 5 of the Convention can be broken down into two constituent parts. The first part imposes a positive legal obligation to provide a reasonable accommodation which is a modification or adjustment that is necessary and appropriate where it is required in a particular case to ensure that a person with a disability can enjoy or exercise her or his rights. The second part of this duty ensures that those required accommodations do not impose a disproportionate or undue burden on the duty bearer.44

Finally, article 5(4) makes it clear that ‘specific measures which are necessary to accelerate or achieve de facto equality’ for persons with disabilities do not constitute discrimination. For example, the provision of scholarships to persons with disabilities to
enable them to undertake tertiary education does not amount to discrimination because the scholarships are necessary to accelerate or achieve equality.

**Australian Laws Prohibiting Discrimination**

At the federal level, the Parliament of Australia has enacted four separate statutes prohibiting discrimination on race, sex, disability and age. They are the *Racial Discrimination Act*, the *Sex Discrimination Act (SDA)*, the *Disability Discrimination Act* (DDA) and the *Age Discrimination Act*. These enactments must be read together with the *Australian Human Rights Commission Act*, which establishes the Australian Human Rights Commission (AHRC) and regulates the processes for making and resolving complaints under the four Acts which prohibit discrimination.

On the other hand, the anti-discrimination statutes of the States and Territories are in the main single comprehensive statutes which prohibit discrimination on a broad spectrum of grounds including disability. This patchwork of legislation is complex and establishes differing complaints regimes.

In fact, the DDA pre-dates the CRPD by about a decade and a half. The DDA does not use the words ‘reasonable accommodation’ and ‘disproportionate or undue burden’. Instead it uses the terms ‘reasonable adjustments’ and ‘unjustifiable hardship’. It is clear that the term ‘reasonable adjustments’ as set forth in the DDA, is narrower than is the CRPD phrase ‘reasonable accommodation’. In *Sklavos v Australian College of Dermatologists* a Full Bench of the Federal Court of Australia gave a narrow interpretation of ‘reasonable adjustments’. Dr Sklavos wished to practice as a dermatologist. He participated in the training program of the Australasian College of Dermatologists, however, he was required to pass a final written and clinical examination.

It was accepted that Dr Sklavos suffered from a psychiatric condition of having a phobia of sitting examinations. Dr Sklavos argued that he had been directly discriminated against because the College refused to make reasonable adjustments by altering his assessment regime so that he could be assessed without a written or clinical examination. The issue before the Federal Court was whether the College was required to make reasonable adjustments by altering its assessment regime for Dr Sklavos. The Federal Court dismissed Dr Sklavos’ claim because he could not establish that the failure by the College to make the adjustments he requested treated him less favourably because of
his disability. The College refused to make the reasonable adjustments because they would interfere with the integrity of the examination process. This refusal was permissible as it was not because of Dr Sklavos disability. The requirement that reasonable adjustments must be because of the disability was adopted by the Federal Court owing to the rather strange wording of section 5(2)(b) of the DDA. This provision requires that ‘the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably…’ Therefore, Dr Sklavos failed in his claim that the College had directly discriminated against him. 56

Intersectional Discrimination and Multiple Forms of Discrimination

The concepts of intersectional discrimination and multiple forms of discrimination are intertwined with one another, however, their differences are significant and are often misunderstood. Prohibitions on conduct which is discriminatory will operate when they are enacted into law by domestic legislation. The prohibition of intersectional discrimination and multiple forms of discrimination seek to outlaw discriminatory acts on more than one ground, such as disability and sex, but they do so in different ways.

In 2018 the CRPD Committee published its General Comment No. 6 on Equality and Non-Discrimination. 57 The CRPD Committee explained how these two concepts differ from one another. The Committee wrote that multiple discrimination:

… [I]s a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated. Intersectional discrimination refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination. 58

The Committee gave the following example of a situation of intersectional discrimination:

… [W]hile the denial of access to general health-related information due to inaccessible format affects all persons on the basis of disability, the denial to a blind woman of access to family planning services restricts her rights based on the intersection of her gender and disability. In many cases, it is difficult to separate these grounds. 59
The General Comment notes that while article 6 of the CRPD is the only provision to mention ‘multiple discrimination’, multiple and intersectional discrimination may occur in any combination of two or more grounds. In light of the normative content and obligations outlined therein, ratifying countries are required to take a number of steps to ensure the full domestic implementation of article 5, and one such step is that nations:

Adopt specific measures with a view to achieving inclusive equality, in particular for persons with disabilities who experience intersectional discrimination, such as women, girls, children, older persons, and indigenous persons with disabilities.

In its 2019 Concluding Observations on Australia’s Combined Second and Third Periodic Reports, the CRPD Committee expressed concern that there was no effective legislative framework to protect persons with disabilities from systemic, intersectional and multiple forms of discrimination, especially at the Commonwealth level. It then reiterated its 2013 recommendation that Australia strengthen anti-discrimination laws, particularly the DDA, to address and prohibit intersectional and multiple forms of discrimination.

In 2012, the Australian Government released an exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Draft Bill) which would have consolidated the four separate discrimination acts into a new statute. The Draft Bill introduced intersectional claims into federal anti-discrimination law as highlighted in the 2013 Report of the Senate Legal and Constitutional Affairs Legislation Committee (SLCALC). The Draft Bill adopted several new policy positions. The ‘major changes’ included the ‘recognition of discrimination on the basis of a combination of attributes’. Clause 19 set out the definition of ‘discrimination’ for the purposes of the Draft Bill:

**Discrimination by unfavourable treatment**

(1) A person (the first person) discriminates against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.

Discrimination on the basis of a combination of attributes is exemplified in the Explanatory Notes to the Bill:

This ensures that where a person has two or more attributes (for example, an Asian woman, an Indigenous person with a hearing impairment, an elderly woman), that person is able to demonstrate unfavourable treatment because of the individual attributes or as a result of the
combination of the attributes. For example, an Asian woman may not be able to demonstrate unfavourable treatment of Asians generally or women generally, but that an employer based a decision on being an Asian woman.67

The advantages of adoption of an intersectional anti-discrimination ground on the rights of persons with disabilities are clear. Intersectionality is central to the new model of inclusive equality developed in the CRPD which addresses structural and systemic discrimination against people with disability.68

The incorporation of an intersectional ground in Australian anti-discrimination law would further the progressive development of domestic discrimination law and international law. Sadly, however, the draft Bill was shelved, supporting the view that intersectionality is not a concept well understood by Australian legislators and policy-makers.69 Indeed, even in the SLCALC’s Report on the Draft Bill, the implications of introducing intersectional claims was not discussed.

In 2014, the Australian Law Reform Commission (ALRC) Report titled Equality, Capacity and Disability in Commonwealth Laws noted the range of significant systemic concerns raised by the operation of Commonwealth anti-discrimination legislation and practice for people with disabilities, including its failure to cover intersectional discrimination.70 Pereira argues that those who possess multiple, co-existing protected attributes are not well catered for by federal anti-discrimination law in Australia. The treatment of intersectional claims as independent is burdensome for complainants who have to satisfy different tests for each claim they make.

The point is illustrated by Maxworthy v Shaw71 which was heard in the Australian Federal Magistrate’s Court in 2010. The Complainant was a single mother of four children, two of whom were of school age and lived with her. The complainant suffered from Crohn’s disease, which is a disease of the bowel which required her to wear a colostomy bag. Her Crohn’s disease was exacerbated by fatigue and stress.

In February 2008, her work was to dispense food from a mobile sandwich van. The Respondent employer wished her to increase her working hours commencing at 7:00 am and concluding at 2:30 pm for five days a week. The Complainant said that she could not start work that early as she had to organise her children for school. The hostility of the
Respondent to her family responsibilities and disability led to her becoming ill with fatigue and stress. Her employment was terminated by the Respondent.

The complainant brought proceedings under the DDA and the SDA which eventually came before the Federal Magistrate’s Court of Australia in 2010. Her claims covered both direct and indirect discrimination under the two discrimination statutes. However, Federal Magistrate Nicholls found that the Complainant had suffered direct discrimination under the DDA and the SDA, and therefore it was not necessary to delve into the other aspects of her claims.

Federal Magistrate Nicholls explained that the test for direct discrimination under the DDA was whether because of her disability, the Complainant had been treated less favourably by the Respondent than the Respondent would have treated a person without the disability.

The Federal Magistrate further explained that the test under the SDA was whether because of her family responsibilities, the Respondent treated the Complainant less favourably than the Respondent would have treated a person without family responsibilities.

The Federal Magistrate held that the Complainant had been directly discriminated against contrary to the DDA owing to her disability and also because of her family responsibilities in contravention of the SDA. The Complainant was awarded damages. From a reading of the decision, it is clear that the conduct of the Respondent related to the Complainant’s attribute of disability and to her attribute of family responsibilities. In other words, these two attributes were inter-connected.

This decision shows that complainants can be required to meet different tests for a single instance of discrimination where the conduct arises as a result of the intersection of more than one protected attribute. To require this level of proof discriminates against intersectional claimants in a manner fundamentally opposed to the purpose of anti-discrimination legislation, by increasing the evidentiary hurdle they must overcome.

This case exemplifies how the law, in most cases, sticks tenaciously to ‘single-axis’ models of discrimination law thereby failing to address the lived experiences of those who experience discrimination on multiple and intersecting grounds.
The CRPD Committee's Assessment of Australia's Level of Compliance

In its 2019 report to the CRPD Committee, the AHRC was concerned that ‘… in the absence of comprehensive human rights protections people with disability are not adequately protected from intersectional discrimination’.76

The AHRC added that the lack of remedies for intersectional discrimination impacted significantly upon First Nations people.77

It is clear that the laws of the Australian Parliament do not provide remedies for intersectional discrimination. These laws also require complaints of multiple or intersectional forms of discrimination to be brought under two or more statutory regimes. It is clear that Australia is not fully complying with article 5 of the CRPD. However, it is worth noting that the Australian Human Rights Commission considers two or more complaints as one for the purposes of conciliation, thereby offering some potential for intersectional factors to be considered.78

It is suggested nevertheless that Australia’s anti-discrimination laws be amended to enable complaints to be made concerning intersectional and multiple forms of discrimination. It is unlikely that in the near future, the Australian Parliament will seek to enact a single statute covering all forms of discrimination, including intersectional discrimination. At the very least, it is suggested that the federal laws be examined with a view to harmonising the statutes to enable the bringing of complaints of discrimination on more than one attribute.

The CRPD Committee was also concerned that the DDA was narrower in its coverage than is article 5 of the CRPD.79 This is hardly surprising as the DDA pre-dates the CRPD. It would be helpful to better align the DDA with article 5 of the CRPD by removing the term ‘reasonable adjustments’ and replacing it with the CRPD’s ‘reasonable accommodation’. While the DDA does not fully align with article 5 of the CRPD, Australia’s network of federal State and Territory anti-discrimination laws do prohibit most instances of disability discrimination.
Article 6 Women with Disabilities

Article 6 is a standalone provision in the CRPD designed to uphold the rights and inherent dignity of women and girls with disabilities. Dr Marianne Schulze explains that the issues facing women and girls with disabilities throughout the world mean that:

Women with disabilities experience gross violations of their human rights as victims of rape, forced sterilization and multiple discrimination due to being a woman and a person with disabilities. Their parenting abilities are frequently questioned and their children taken from them against their will. Their right to marry and found a family is often limited to the point of complete denial – as is the case for men with disabilities. High rates of violence both at the hands of family members and care–givers prevail among women with disabilities."81

This is why article 6 is of central importance to uphold the human rights and inherent dignity of women with disabilities in Australia and especially of First Nations women with disabilities.

Understanding Article 6

Article 6(1) says that countries:

…[R]ecognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. 82

In the previous segment on article 5 concerning equality and non-discrimination, intersectional and multiple discrimination was discussed. It was shown that Australia falls short by not enacting laws to grant redress to victims of multiple and intersectional discrimination. Article 6(1) re-affirms that women and girls often suffer multiple forms of discrimination which should be prohibited by all nations. It follows that Australia’s failure to comply with article 5 equally constitutes a failure to comply with article 6.

Paragraph 2 of article 6 exhorts nations to:

…[T]ake all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention. 83

In its 2016 General Comment No. 3 on article 6, the CRPD Committee explains that this provision:
… [I]s a response to the lack of recognition of the rights of women and girls with disabilities, who worked hard for its inclusion in the treaty text. It reinforces the non-discriminatory approach of the Convention in its particular application to women and girls and requires that [countries] go beyond refraining from discriminatory actions, to adopting measures aiming at the development, advancement and empowerment of women and girls with disabilities and promotes measures to empower them … to take decisions in all areas affecting their lives.  

The CRPD Committee added that:

Article 6 is a cross-cutting article related to all articles of the Convention to remind [countries] to include the rights of women and girls with disabilities in all actions aimed at implementing the Convention.

**Violence against Women with Disabilities**

There is anecdotal evidence that women and girls with cognitive, psychosocial and communication disabilities, especially First Nations women and girls with disabilities, are particularly vulnerable to and experience violence at unacceptably high levels. However, there has been very little published research on the issue. Australian Civil Society Parallel Report Group Disability Rights Now reported to the CRPD Committee in 2013, from existing research that:

More than a quarter of rape cases reported by females in Australia are perpetrated against women with disability. It is estimated that between 50 - 70 per cent of women with psychosocial disability in Australia have experienced past physical or sexual abuse, including child sexual assault. A recent Victorian study found that 45% of women in psychiatric hospital wards had been sexually assaulted, 67% had been sexually harassed and 85% felt unsafe. Women and girls with disabilities who live in institutions experience, and are at particular and significant risk of violence, frequently involving sustained and multiple episodes. The overwhelming majority of perpetrators of sexual abuse of women and girls with disabilities in institutions are male caregivers, a significant proportion of whom are paid service providers.

The problem of abuse of women and girls with disability has been recognised and some mechanisms for redress have been established. For example, the NDIS Quality and Safeguards Commission is empowered to deal with complaints from NDIS participants against providers who engage in exploitative or degrading conduct. In 2018, the Australian Human Rights Commission released its report on 'A Future without Violence', which made thoughtful recommendations to eliminate violence in institutional settings.
Article 16 of the CRPD is titled ‘Freedom from Exploitation, Violence and Abuse’. In a later segment of this report on humane treatment, article 16 and Australia’s efforts to prevent violence against women and girls with disabilities, especially First Nation women and girls with disabilities, is assessed.

The CRPD Committee's Assessment of Australia's Compliance

In its 2013 Concluding Observations on Australia, the CRPD Committee expressed concern at ‘reports of the high incidence of violence against, and sexual abuse of, women with disabilities.’ Relatedly, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) expressed its concern at the lack of national legislation prohibiting all forms of gender-based violence against women. The CEDAW Committee recommended that the Australian Government:

Adopt Federal legislation that is in line with the Convention and prohibits all forms of gender-based violence against women and girls, and shift the power to legislate on this matter to the Federal Parliament.

In its Combined Second and Third Periodic Reports of September 2018, the Australian Government highlighted the programs which have been put in place to endeavour to prevent violence against women and girls with disabilities. These included portions of the National Disability Strategy 2010-2020 and the National Plan to Reduce Violence against Women and their Children 2010–2022.

In its 2019 Concluding Observations published after Australia’s second Constructive Dialogue, the CRPD Committee recommended that Australia strengthen measures to address intersectional and multiple discrimination. The Committee further recommended that steps be taken to ensure that women with disabilities and especially indigenous women with disabilities obtain NDIS services.

Finally, the CRPD Committee recommended that Australia:

Adequately support organizations and networks of women and girls with disabilities, particularly those representing Aboriginal and Torres Strait Islander women with disabilities, to engage in all initiatives to promote gender equality and ensure their effective participation in the development of policies for gender equality and the advancement of women and girls.
In conclusion, apart from failing to provide mechanisms to redress intersectional discrimination, Australia has made strenuous efforts to prevent violence against women with disabilities, and especially First Nations women with disabilities. Australia's efforts to combat violence against persons with disabilities, especially women and girls and First Nations people with disabilities, is discussed in more detail in the segment of this report covering articles 14 to 17 of the CRPD.
Article 7: Children with Disabilities

Introduction

The word ‘children’ appears in the English version of the CRPD on 24 occasions, while the word ‘child’ is mentioned a dozen times. Article 24 on inclusive education mentions children in the context of educating blind, deaf or deafblind children, but its thrust is to ensure inclusive education for all children with disabilities. Despite many provisions dealing with the welfare of children with disabilities, article 7 of the CRPD is the primary provision on the topic.96 Throughout this report, comments are made with respect to children in many applicable articles in the CRPD. However, this segment will focus on article 7.

It is important to appreciate that the first human rights treaty to devote an article concerning children with disabilities was the 1989 Convention on the Rights of the Child (CRC), article 23 of which is titled ‘Children with Disabilities’. Paragraph 1 of Article 23 of the CRC says that countries:

... [R]ecognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.97

The CRC was also the first covenant or convention to include children with disabilities in its general discrimination provision.98 To grasp the reach and scope of article 7 of the CRPD, it is necessary to appreciate that it operates in tandem with the CRC.99 The links between the CRC and the CRPD are enunciated in paragraph [R] of the CRPD preamble which recognises that:

...[C]hildren with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child.

Understanding Article 7

Article 7(1) obliges nations to ‘... take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.'100
The CRPD Committee has not yet published a general comment on article 7. However, the Committee on the Rights of the Child (CRC Committee) released its General Comment on Children with Disabilities in 2006. The CRC Committee commented that under article 23 of the CRC children have the right to enjoy ‘… [a] full and decent life in conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.’ These words also apply to the implementation of article 7(1) of the CRPD which requires nations to uphold the human rights and fundamental freedoms of all children with disabilities and to protect them from multiple discrimination, including intersectional discrimination.

Article 7(2) reads ‘in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.’ This provision is clearly adapted from article 3(1) of the CRC which provides that ‘in all actions concerning children… the best interests of the child shall be a primary consideration.’

In 2013, the CRC Committee published General Comment No. 14 on the best interests of the child. The CRC Committee wrote that the best interests of the child is a threefold concept:

- A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered;
- A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen and;
- A rule of procedure: Whenever a decision is to be made that will affect a specific child … the decision-making process must include an evaluation of the possible impact … of the decision on the child.

For completeness, the special interests of the child test appears twice in article 23 of the CRPD concerning guardianship and adoption, and the separation of a child from her or his parents.

Paragraph 3 of article 7 seeks to give voice to children. It requires countries to ensure that:

… [C]hildren with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.
This paragraph is derived from article 12 of the CRC which also requires countries to take note of the views of children. Article 12(1) of the CRC and article 7(3) of the CRPD each contain the phrase ‘[children’s] views being given due weight in accordance with their age and maturity’. In interpreting this phrase in article 7, regard must be had to article 3 of the CRPD which sets forth general principles including principle H which requires:

Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The phrase ‘the evolving capacities of children’ is also taken from article 5 of the CRC which requires countries to respect the rights of parents and other care givers to ‘…provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.’ This phrase recognises that childhood is not a single, fixed, universal experience and that their lives require different degrees of protection, provision, prevention, and participation at different stages of their lives.

In a nutshell, article 7(3) obliges authorities to identify the views of children which they are required to take into account having regard to their age and maturity. However, authorities are also obliged to provide children, disability and age appropriate assistance to ascertain their views.

The CRPD Committee's Assessment of Australia's Compliance

In its 2013 Concluding Observations issued after Australia’s first Constructive Dialogue, the CRPD Committee was critical of Australia’s efforts to comply with article 7.

The Committee was concerned that:

... [T]he National Framework for Protecting Australia’s Children is focused on child protection against violence, abuse and neglect, and that there is no comprehensive national policy framework for children, including children with disabilities that articulates how the rights of children should be implemented, monitored and promoted.

The CRPD Committee recommended that Australia increase its efforts to promote and protect the rights of children with disabilities by incorporating the Convention...
into legislation and adopting policies and compliance frameworks that apply to children and young people generally.\textsuperscript{116}

The Committee further recommended that Australia adopt policies and programs ensuring that children with disabilities have the right to express their views on all matters concerning them.\textsuperscript{117}

In its Combined Second and Third Periodic Reports to the CRPD Committee in 2018 the Government of Australia detailed the early intervention requirements of the National Disability Insurance Scheme (NDIS) which enable children under six to receive treatment without having to go through the complex NDIS participation processes.\textsuperscript{118} However, the focus of the Government remains on child safety and child protection from violence.\textsuperscript{119} While the report states that Australia respects the right of children with disabilities to express their views,\textsuperscript{120} the Government simply noted that it had requested the Australian Law Reform Commission (ALRC) to undertake a comprehensive review of the family law system, including ‘how decision-makers can be most effectively informed of the best interests of children and the views of children’.\textsuperscript{121}

In its 2019 report to the CRPD Committee, the Australian Human Rights Commission echoed the 2013 criticisms made by the CRPD Committee. The AHRC was concerned that legislation, policies and compliance frameworks which apply to children generally do not incorporate the rights of children with disabilities as set forth in both the CRPD and the CRC.\textsuperscript{122} The AHRC was particularly concerned that children with disabilities are often not provided with disability and age appropriate assistance to articulate their views, especially in Australia’s family law system.\textsuperscript{123} Accordingly, the AHRC recommended that:

\begin{quote}
The Australian Government amend the \textit{Family Law Act 1975} (Cth) to require that children are provided with assistance and accommodations to express their views in all matters that affect their rights or interests.\textsuperscript{124}
\end{quote}

In its 2019 Concluding Observations, the CRPD Committee continued to be concerned about ‘the lack of focus on the rights of children with disabilities in the national plan of action for the realisation of the rights of the child’.\textsuperscript{125} It was also troubled that children with disabilities often still lacked disability and age appropriate assistance to enable them to express their views.\textsuperscript{126}
The CRPD Committee made five recommendations:

1. That there should be a focus on the rights of children with disabilities in any national plan of action.
2. That children with disabilities receive access to quality and human rights-based early intervention mechanisms.
3. That legislation should be amended to require that children are provided with age-appropriate support and accommodations to express their views in all matters that affect their rights or interests.
4. That culturally suitable support for Indigenous children with disabilities and their families should be funded and resourced at the local community level.
5. That as a matter of urgency, all refugee and asylum seeking children, particularly children with disabilities and their families should be removed from detention facilities.\(^\text{127}\)

**Conclusion**

The Australian Government and the governments of the States and Territories are utilising resources to assist children with disabilities in various aspects of their lives. The focus is still on child safety and child protection from violence and abuse.

It is suggested that to fully comply with article 7 of the CRPD, the Australian Government should examine its policies and relevant legislation, in order to take steps to incorporate the human rights approach to children with disabilities into its policies, plans and frameworks. It is also necessary to provide children with disabilities with age appropriate assistance to express their views, not solely in family disputes, but in all aspects of life, having regard to their evolving capacities.
Article 8 Awareness-Raising

Understanding Article 8

Article 8 requires ratifying countries to:

[U]ndertake to adopt immediate, effective and appropriate measures:

- a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
- c) To promote awareness of the capabilities and contributions of persons with disabilities.

Measures to this end include:

- a) Initiating and maintaining effective public awareness campaigns designed:
  - i. To nurture receptiveness to the rights of persons with disabilities;
  - ii. To promote positive perceptions and greater social awareness towards persons with disabilities;
  - iii. To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
- b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;
- c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;
- d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.¹²⁸

Article 8 requires ratifying countries to adopt immediate, effective and appropriate measures to raise awareness throughout society of the rights, dignity, capabilities, and contributions of people with disabilities, and combat stereotypes, prejudice, and harmful practices, including intersectional discrimination.¹²⁹ It also specifies the reach and substance of these measures, requiring states to initiate and maintain public awareness campaigns, foster respect for people with disability within all levels of the education system, and encourage the media to portray persons with disabilities in a manner consistent with the Convention.

In his commentary on article 8, Aurélie Baranger summarises its scope as follows:
Article 8 calls for awareness-raising at all levels of society and in all areas of life to bring about real change in the lives of people with disabilities. Tackling wide-spread ignorance, as well as debunking “stereotypes and prejudices” associated with disability, is a necessary step towards the full recognition of people with disabilities as subjects with rights who are entitled to full participation in society.\textsuperscript{130}

Thus, article 8 seeks to communicate a vision for an inclusive society in which persons with disabilities are able to play positive roles in all aspects of life; including in families, schools and places of work.

From the outset of the negotiations which led to the CRPD, the drafters were determined to eliminate negative attitudes which were commonplace until very recently, and to require countries to adopt a positive approach to persons with disabilities. It was hoped that such an approach would lessen discrimination, change stereotypes and sociocultural patterns that present an obstacle to persons with disability.\textsuperscript{131}

**The CRPD Committee's Assessment of Australia's Compliance**

In its Initial Report to the CRPD Committee of December 2010,\textsuperscript{132} the Australian Government was unable to point to any significant awareness-raising measures operating at the time, other than the educational activities of the Australian Human Rights Commission,\textsuperscript{133} and the National Disability Awards that celebrate the achievements of persons with disabilities.\textsuperscript{134} By 2018, the situation had not changed substantially, and the only new program the Australian Government could point to was funding of Disability Persons’ Organisations to conduct media campaigns to raise awareness.\textsuperscript{135} This advantage was offset by the cessation of the National Disability Awards.\textsuperscript{136}

In its Concluding Observations of October 2019, the CRPD Committee indicated that Australia is not in full compliance with article 8, expressing its concern about the lack of progress on awareness-raising.\textsuperscript{137} It recommended that Australia include awareness raising in its next National Disability Strategy.\textsuperscript{138} The Committee also recommended that its efforts ‘to promote a positive image and awareness of the human rights of all persons with disabilities’ be developed with the participation of all persons with disabilities, especially woman, Aboriginal and Torres Strait Islanders, cultural and linguistically diverse persons (CALD), and LGBTQIA+ persons.\textsuperscript{139}
Article 9 Accessibility

Understanding Article 9

Article 9 is a radical provision that seeks to cover the entire gamut of accessibility and requires countries to:

Take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, and to other facilities and services open or provided to the public, both in urban and in rural areas...

Provided such facilities and services are open or offered to the public. It makes it clear that ‘buildings’ include schools, medical facilities and places of work. Ratifying nations are also required to identify and eliminate obstacles and barriers to accessibility in buildings, roads and transport and the provision of information. Accessibility is additionally required when providing emergency services in the event of natural disaster.

The importance of such provisions is apparent from a glance around any urban area in Australia. This reveals buildings that are inaccessible and important public information that is not presented in formats accessible to persons who are blind or deaf. Without full accessibility of the kind identified in article 9 of the CRPD, it is not possible for persons with disabilities to be equal participants in society, since they are effectively prevented from obtaining education, undertaking work, and participating in community activities.

Article 9(2) exhorts countries to promulgate and monitor minimum standards and guidelines for facilities and services open or provided to the public. Private entities which conduct such facilities and services must take into account accessibility. With reference to communications and the provision of information, article 9 purposefully encompass new and emerging communication technologies, including the internet. It also encourages ratifying countries to promote the design and development of technologies which are accessible at minimum cost.

The CRPD Committee’s General Comment No.2 sets out minimum standards and a guideline for accessibility. In the view of the Committee, article 9 requires all newly designed objects and products to be fully accessible. However, compliance with respect to existing infrastructure, transportation and services, is required to be in accordance with the doctrine of progressive realisation: changes may therefore be
undertaken gradually, provided there are definite time frames and adequate resources allocation to enable the removal of existing barriers.151

Examples of the reach of the provisions of article 9 include two CRPD Committee judgments that found nations in breach for failing to provide accessible information for persons who are visually impaired. In the first, a new tram network in Austria did not include digital audio systems needed to provide information on the arrival and departure of trams to people with visual impairments.152 In the second, private bank ATMs in Hungary failed to provide access via Braille and audio assistance.153 In both cases, the CRPD Committee deemed commitments to provide accessibility at a later date to be inadequate.154 These precedents show that where governments, private bodies and corporations operate new technologies, they need to ensure the technologies are made fully accessible from the outset.

The CRPD Committee's Assessment of Australia's Compliance

In a series of interactions between 2010 and 2019, the CRPD Committee and the Australian government discussed Australia’s compliance with article 9. In its Initial Report to the CRPD Committee in 2010,155 the Australian Government explained that under section 31 of the Disability Discrimination Act 1992 (Cth), the relevant Minister may promulgate legislative instruments prescribing enforceable disability standards on a wide range of matters.156 The Government referred to the Transport Standards 2002 157 which set forth minimum accessibility standards to be met by public transport providers.158 These standards require any new transport systems to be fully accessible, and allow for gradual implementation of the standards for existing systems. In 2013159 and again in 2019,160 the CRPD Committee expressed its concerns about the length of time it was taking to ensure full transport accessibility, and recommended that measures be put in place to ensure mandatory implementation of the standards and monitoring of compliance.161

The CRPD Committee in its 2019 Concluding Observations recognised the importance of the Disability Standards for Accessible Public Transport 2002162, the Disability (Access to Premises – Buildings) Standards 2010 163 and the National Standards for Disability
Services. However the Committee highlighted the lack of a national frameworks for reporting compliance.

Some work has been undertaken in this area. In 2009 a National Dialogue on Universal Housing Design was formed with the aim of making homes easier and safer to use for all occupants including people with disability. In 2010, members of the National Dialogue published the Liveable Housing Design Guidelines (LGDH). The LGDH incorporated an aspirational target for all new homes to be designed to LGDH standards by 2020 with ongoing reviews to track progress. Despite the LGDH an independent review found that the housing industry was set to only achieve less than five percent of the National Dialogue’s 2020 target.

The Australian Government’s Combined Second and Third Periodic Reports highlighted the implementation of the National Standards for Disability Services 2014, which outlined accessibility standards for all disability employment and advocacy services funded by the Commonwealth. These standards seek to promote a nationally consistent approach to improving the quality of these funded services for persons with disabilities. The Government also highlighted its digital standard, which was formulated and overseen by the Digital Transformation Agency. The digital standard requires the Government and its agencies to ensure that government online services designed after 6 May 2016 are accessible to all persons with disabilities.

In its report to the CRPD Committee in July 2019, the Australian Human Rights Commission (AHRC) conveyed its view that the transport standards and the premises standards have been weakened by failures to ensure consistent application and implementation. It recommended that:

The Australian Government undertake a gap analysis of Australia’s laws and policies to identify measures needed to ensure accessibility for people with disability, on an equal basis with others. In particular, gaps relating to:

(i) accessibility of information and methods of communication,
(ii) air travel,
(iii) emerging forms of transport services, including ride sharing services,
(iv) emerging technology and digital accessibility, and
(v) Commercial premises, public spaces and amenities.
The AHRC also recommended that ‘[t]he Australian Government introduce a mandatory minimum standard of accessibility in the National Construction Code for all private dwellings in Australia’.177 Australia’s Disabled Persons Organisations wrote a shadow report to the CRPD Committee titled ‘Disability Rights Now 2019’ which mirrored the criticisms of the AHRC.178

The CRPD Committee’s Concluding Observations were broadly in agreement with the positions taken by the AHRC and the shadow report. The CRPD Committee recommended that the Australian Government establish a mechanism for mandatory compliance with the transport standards, the premises standards and the national standards for disability services.179 It further recommended that federal law be amended to provide mandatory rules for accessible housing.180 Finally, it wrote that the Government should ‘… implement the full range of accessibility obligations under the Convention, including regarding information and communication technology and systems, and ensuring effective sanction measures for non-compliance.’181

To conclude, it is clear that the Australian Government has taken meaningful steps to comply with article 9, but more work is needed to ensure full accessibility to public and private spaces across Australian society.
Article 10 Right to Life

Understanding Article 10

The right to life is at the very centre of the United Nations human rights treaties. The right to life is affirmed in the *Universal Declaration of Human Rights* of 1948 and in the other major covenants and conventions. It is a right of central significance to persons with disability, since historically, some societies devalued the lives of their disabled citizens. Even today it is too commonly assumed that many disabled lives are not worth living.

Article 10 provides that:

> States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

The wording of article 10, in particular the words ‘reaffirm’, ‘inherent’ and ‘on an equal basis with others,’ are worth noting as they impliedly reject past perceptions that the lives of persons with disabilities are of lesser importance than the lives of other community members. Article 10 makes it clear that persons with disabilities have the same right to life as do all others.

The CRPD Committee has not published a General Comment on article 10, and to date its comments in its Concluding Observations have been frugal. After all, countries which have ratified the CRPD generally regard the lives of all persons on their territories as sacrosanct.

Insight into the scope of the article does emerge from Constructive Dialogue’s with State Parties. The 2011 dialogue with Spain examined recent enactments that decriminalised voluntary termination of pregnancy up to 14 weeks, but permitted later terminations where there were serious or disabling anomalies in the foetus. The CRPD Committee recommended that Spain abolish the different time limits for voluntary termination where the difference was based solely upon disability. The Committee relied primarily on the interpretive provisions of articles 1-4, but article 10 was also pertinent to its recommendation.
In Concluding Observations to Sweden in 2014, the CRPD Committee expressed concerns about the increasingly high rate of suicide of persons with disability, and recommended the adoption of measures to reduce suicide risk. In a subsequent 2017 dialogue with Canada, the Committee was concerned about legislation which permitted medically assisted termination of life but did not provide monitoring and safeguards that would ensure the provision of proper palliative care and protect persons with disability from external pressures. As medically assisted dying legislation is enacted in a greater number of ratifying countries, the issue of protecting persons with disabilities from external pressures will become even more important.

The CRPD Committee's Assessment of Australia's Compliance

In its various reviews from 2010 through 2017, the CRPD Committee made no comment on Australia’s compliance with article 10. However, its 2019 Concluding Observations expressed concern about:

… [T]he significantly lower life expectancy of persons with disabilities, particularly persons with intellectual disabilities and within the First Nations communities, … [the] significant number of persons with disabilities expressing suicidal ideation, particularly within the First Nations communities, … [and] the high rate of premature, unexpected but avoidable deaths among persons with disabilities in care settings.

The CRPD Committee recommended that Australia address the life expectancy gap for persons with disabilities. In relation to suicide prevention, the Committee recommended that:

… [T]he National Mental Health and Suicide Prevention Plan includes targeted measures for persons with disabilities and develop, in consultation with Aboriginal and Torres Strait Islander persons with disabilities, culturally appropriate measures to prevent, identify and address the high rate of suicides among those populations, with targeted measures for children with disabilities.

It is fair to conclude that Australia has a high level of compliance with article 10. The establishment of the Disability Royal Commission is itself evidence of a commitment to addressing concerns about life expectancy and suicide of people with disability, especially among marginalised populations.
Article 11 Situations of risk and humanitarian emergencies

Article 11 requires nations to:

… [T]ake, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.¹⁹⁶

The origins of article 11 can be traced to the 2004 Boxing Day Tsunami.¹⁹⁷ The tsunami caused the deaths of more than two hundred thousand people in fourteen countries along the coasts of the Indian Ocean. Four times as many women died as men, and one third of the fatalities were children.¹⁹⁸ Most persons with disabilities in the affected areas were unable to flee the tsunami or to access aid in the aftermath of the disaster.¹⁹⁹ In situations of conflict or natural disasters, women, children, and persons with disabilities are especially vulnerable. This is evident from a range of emergency situations such as the ongoing Syrian civil war, the 2011 earthquake and tsunami in Japan,²⁰⁰ the 2009 ‘Black Saturday’ Victorian bushfires²⁰¹ and most recently the 2019-2020 bushfires throughout many parts of Australia. Natural disasters inevitably cause panic and disruptions in society, and unless appropriate plans are in place many persons with disabilities may be overlooked in evacuations or other emergency procedures. Australia’s National Disaster Risk Reduction Framework has noted, ‘many natural hazards are becoming more frequent and more intense, driven by Australia’s changing climate’.²⁰² ²⁰³ Therefore, as climate change persists rendering natural disasters and social changes more likely it is imperative to develop and implement plans and strategies to assist persons with disabilities and other vulnerable groups in situations of risk and humanitarian emergencies. This segment will explore this issue further within the context of other relevant international frameworks.

Understanding Article 11

Article 11 ensures that in making evacuation plans persons with mobility disabilities are accommodated and able to be brought to safety in line with their needs. Article 11 also overlaps with article 21 of the CRPD to ensure emergency information is broadcast in
accessible formats; the most obvious example is the inclusion of sign language in television broadcasts to ensure that deaf persons also receive necessary emergency information.

Importantly, article 11 requires ratifying nations to have regard to their obligations under international law, including international humanitarian law (IHL) and international human rights law (IHRL). To understand Australia’s obligations therefore requires some knowledge of other international law instruments with provisions relating to crisis situations.

IHRL encompasses the nine United Nations Covenants and Conventions, including the CRPD and the 1989 Convention on the Rights of the Child (CRC). The CRC is the only other UN Convention that addresses humanitarian emergencies. Article 38 of the CRC deals specifically with the rights and protection of children in armed conflict situations. Article 11 of the CRPD provides broader obligations on States Parties as it extends to situations of risk and humanitarian emergencies generally. The existence of an emergency situation within a State does not allow that State to derogate from their obligations under article 11. This is an improvement from the 1966 International Covenant on Civil and Political Rights, which permits a limited form of derogation from a number of its provisions in times of public emergencies which threaten the life of the nation. The very rationale of article 11 is to protect persons with disabilities in armed conflict and disaster situations, thus even derogations permissible under other covenants run contrary to Article 11.

IHL law has a more limited scope than IHRL and developed from the desire to regulate the conduct of combatants in warfare and limit the effects of armed conflict on civilians. Although not free from controversy, the principal rules of IHL are recognised as customary international law. Thus every hostile nation is required to protect civilians and the wounded, including prisoners and other victims of war with disabilities. It is worth noting two points on IHL. First, it only applies to situations of armed conflicts and their aftermaths and not to natural disasters and other emergencies. Second, the use of terms like ‘victims’ in IHL is somewhat old fashioned and harkens back to a charity model, which did not recognise victims of war, by virtue of their position as such, as bearers of human rights.
Although not specifically mentioned in article 11, situations of risk and natural disasters often result in the internal and external displacement of people. This means that international refugee law will also be applicable in some disaster situations. As Australia is a country of re-settlement for refugees, Australia’s responsibilities under the CRPD towards all persons with disabilities on its territory extends to those seeking protection as refugees.

**International Frameworks and Charters**

Two recent documents concerning disaster risk management are of significance; The Sendai Framework for Disaster Risk Reduction 2015-2030 (Sendai Framework), and the *Charter on the Inclusion of Persons with Disabilities in Humanitarian Action* (Charter on Inclusion).

The focus of the Sendai Framework is on ‘disaster risk management’, as distinct from ‘disaster management’. It recognises that in order for disaster risk management to be efficient and effective, it must be ‘multi-hazard and multisectoral, inclusive and accessible’ and encourages governments to ‘engage with relevant stakeholders’ including persons with disabilities ‘in the design of policies, plans and standards.’ In fact, the key to the Sendai Framework is broad consultations with all groups who are likely to be affected in natural disaster situations. The Sendai Framework also explicitly encompasses the experience of the international community in implementing the Hyogo Framework for Action 2005-2015. On the basis of this experience, the Sendai Framework identifies four priority areas that require specific focus from nation states:

1. Understanding disaster risk;
2. Strengthening disaster risk governance to manage disaster risk;
3. Investing in disaster risk reduction for resilience; and
4. Enhancing Disaster preparedness for effective response and to (build back better) in recovery, rehabilitation and reconstruction.

At the May 2016 World Humanitarian Summit held in Istanbul, the Charter on Inclusion was adopted in the wake of large scale migration across Europe and the Middle East. Australia has endorsed the Charter on Inclusion and has contributed funding to its implementation. It is not a legally binding document, but by its endorsement, Australia has expressed support for its philosophy and principles. Article 1 sets forth the purposes of the Charter by requiring signatories to re-affirm their determination:
[T]o make humanitarian action inclusive of persons with disabilities and to take all steps to meet their essential needs and promote the protection, safety and respect for the dignity of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Its essence is to promote full inclusion of persons with disabilities in all aspects of planning for disaster situations and in the operation of these plans when disasters occur. In September 2016, the United Nations held an international summit in New York focusing on mass migration. The resulting *New York Declaration for Refugees and Migrants* (New York Declaration) recognises the ‘special needs of all people in vulnerable situations’ including migrants and refugees who are persons with disabilities. Article 5(e) also provides that Nation States should, in coordination with the United Nations High Commission for Refugees, use any registration process for incoming migrants and refugees to identify special needs and protection arrangement for vulnerable persons including refugees with disabilities. There is still some way to go in this area, but the international community is increasingly recognising the need to identify, consult with and develop special provisions for people with disabilities in international situations of risk.

**The CRPD Committee's Assessment of Australia's Compliance**

The February 2009 Victorian bushfires and their subsequent inquiries alerted Australian governments to the necessity of considering persons with disabilities and other vulnerable groups when planning responses to disaster situations. The development of appropriate plans in response took some time. In its 2013 Concluding Observations, the CRPD Committee expressed concern that disability had not been factored into Australia’s local, State, and national emergency plans, and recommended that it establish nationally consistent emergency management standards in consultation with persons with disabilities.

In September 2017, the CRPD Committee provided Australia with its list of issues under the simplified reporting system. The CRPD Committee requested information about:

> … [T]he measures taken to ensure that the disaster risk reduction plan and strategies at the national, state and territorial levels explicitly provide for accessibility and inclusion of persons with disabilities in all situations of risk, in line with the Sendai Framework …
In its Combined Second and Third Periodic Reports of September 2018, Australia noted that its National Strategy for Disaster Resilience was endorsed by the Council of Australian Governments (COAG) in February 2011, which was relevant to the strategy being implemented in a nationally consistent way. Australia also wrote that it had recently established:

… [A] National Resilience Taskforce to develop a new five year disaster mitigation framework for Australia. This new framework…will be guided by the Sendai Framework including as it relates to persons with disabilities.

The Australian Human Rights Commission observed in 2019, these provisions are not yet in place.

In June 2018, the National Resilience Taskforce held a three day meeting with members of all levels of government, business and the community to develop the National Disaster Risk Reduction Framework (NDRRF). The NDRRF set out a roadmap of actions to be taken from 2019 to 2023 and is designed to guide Australia in reducing risks that flow from disasters. The first three Sendai Framework priorities were highly influential and the fourth has been largely progressed through other national strategies, primarily the Australian Disaster Preparedness Framework.

It is concerning that the NDRRF fails to mention disability. Given that the first three priorities of the Sendai Framework are not focused upon disability, this omission is not surprising. However, the fourth priority of the Sendai Framework is relevant to persons with disabilities, and deferring this fourth priority to other national strategies fails to reflect the intention of the Australian government as expressed in the Periodic Reports.

The October 2018 Australian Disaster Preparedness Framework (ADPF) was developed by the Australian Government in consultation with State and Territory governments. The ADPF identifies 21 capabilities that Australia requires in order to be prepared for the aftermath of ‘severe to catastrophic disasters’. These capabilities are not solely the province of governments, and involve the private sector and the broader community. As is explained, the ADPF:

… [I]nforms the strategic governance, policy and investment required for disaster preparedness. The Framework is a dynamic mechanism by which all jurisdictions collectively prepare for severe to catastrophic disasters. It incorporates consideration of risk and consequence, and new and
emerging ideas and technologies, to inform the strategic capability requirements and arrangements across governments and the private, non-government community and international sectors.\textsuperscript{235}

The ADPF is a high level strategy document which leaves many of the details of disaster recovery to the State and Territory governments. Persons with disabilities are only mentioned once under discussion of ‘mass care’:

\begin{quote}
The ability to meet essential needs and provide care to high volumes of affected citizens, both in and away from impacted areas. This includes – but is not limited to – health, psychological, aged, pharmaceutical and disability care.\textsuperscript{236}
\end{quote}

This limited mention is disappointing and limits recognition of disability to the context of health, rather than a consideration integrated throughout disaster preparation and response policy.

In its 2019 Concluding Observations, the CRPD Committee wrote that it remained concerned about the lack of nationally consistent emergency management standards which ‘…. ensure access to disability-specific and disability-responsive support during emergencies.’\textsuperscript{237} The Committee explained that Australia should ensure:

\begin{quote}
In close consultation with representative organizations of persons with disabilities, the establishment of a fully accessible and inclusive mechanism to engage with persons with disabilities in the implementation and monitoring of the Sendai Framework.\textsuperscript{238}
\end{quote}

To conclude, it is clear that Australia is working to ensure that its people are protected and cared for when disasters occur. However persons with disabilities and their representative organisations have not been adequately considered or included in planning thus far in this area as required under the CRPD. The most recent Royal Commission into the 2019/2020 Bushfires presents an opportunity to provide further comment on article 11. The Letters Patent do not make any reference to disability. However, the Royal Commission can inquire into ‘preparedness for and response to … natural disasters and what should be done to improve these arrangements’\textsuperscript{239} and this would hopefully result in ADPF deficiencies being addressed.

In March 2020, together with the rest of the world, Australia was engulfed by the COVID-19 pandemic. Persons with disabilities, and especially those living in institutions are particularly vulnerable. On 16 March 2020, The United Nations Special Rapporteur on the Rights of Persons with Disabilities, Ms Catalina Devandas-Aguilar, released a statement
requesting Governments to assist persons with disabilities at this troubled time. 240 On 26 March 2020, this Royal Commission also issued a Statement of Concern about the impact of COVID-19 on persons with disabilities. 241 The Royal Commission called on Governments to take all necessary measures to protect persons with disabilities during this pandemic. On 15 April 2020, the Royal Commission released its Emergency Planning and Response Issues Paper which seeks information from Australians with disabilities about recent emergencies, including the 2019-2020 bushfires and the current pandemic. It is hoped that this information will assist the Royal Commission in framing its recommendations and also be advantageous to governments seeking to better assist persons with disabilities in times of emergencies. Many organisations of persons with disabilities have also been writing to the Australian Government, reminding it of the plight of persons with disabilities. 242 Australian Governments have been responding to the pandemic and increasing their assistance to persons with disabilities. 243
Article 12: Equal Recognition before the Law

Understanding Article 12

Article 12 is the key provision in the CRPD due to its proclamation that:

[P]ersons with disabilities have the right to recognition everywhere as persons before the law244...[and] enjoy legal capacity on an equal basis with others in all aspects of life'.245

These are words of wide import because they declare that all persons with disabilities have full legal personhood and agency and that these rights are not truncated by their disability, whether sensory, cognitive or psychosocial. In other words, persons with disabilities do not possess a lesser or narrower legal capacity than do persons without disability. The granting of inalienable legal capacity to all persons with disabilities is emblematic of the paradigm shift enshrined by the CRPD – from viewing persons with disabilities as ‘objects’ to be managed, cared for, treated, protected or controlled, to recognising and respecting persons with disabilities as ‘subjects’ of human rights, capable of directing their own lives.

The concept of legal capacity is that all persons are equal before the law. This encompasses the right for persons to be full legal persons, that is, subjects with rights and responsibilities. In order to be a full legal person, an individual must be recognised as a rights holder (possessing legal status / standing) and legal agent (free to exercise their rights). Together, these elements make up legal capacity, a mechanism by which rights and responsibilities are granted or denied to an individual.246 The recognition of universal, full legal capacity is therefore a precondition for the exercise of all other human rights and fundamental freedoms.

Legal capacity is distinct from mental capacity. Mental capacity refers to an individual’s decision-making ability and skills, which may vary amongst people for a range of reasons. While mental capacity may vary, legal capacity remains constant. Mental capacity has been and is used in many countries as a means to assess and deny legal capacity. Article 12 of the CRPD reflects a new approach which prevents different levels of mental capacity being used as a standard to assess and deny legal capacity.

Article 12(3) requires ratifying countries to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal
capacity’. This paragraph recognises that many persons with disabilities may require support to undertake activities concerning legal capacity and is key to giving effect to the paradigm shift envisioned by article 12. By embracing the relational model of autonomy and personhood, article 12(3):

[M]arks a decisive move away from a deficits-oriented guardianship paradigm that at the first sight of a decision-making deficit removes the legal right to make decisions and shifts instead to a supports paradigm that uses the fact of a deficit to explore ways in which supports can be put in place to enable capacity to grow and be exercised.

Support refers to a broad cluster of ‘both informal and formal support arrangements, of varying types and intensity’. Such supports may on occasion be informal where family members, friends and other networks give their support. On other occasions, it may be necessary to alter laws and practices. For example, persons with cognitive and/or psychosocial disabilities may require support through the use of more flexible procedures when appearing in courts or before tribunals. In the segment of this paper on article 14, the doctrines of unfitness to plead and not guilty owing to mental impairment are analysed. The doctrine of unfitness to plead goes against the ethos of article 12 by not enabling persons with severe cognitive disabilities to defend themselves in criminal proceedings. Article 12(3) may also require establishing laws and procedures to formally recognise supported decision-making arrangements.

Article 12(4) addresses the exercise of legal capacity. It is a complex paragraph which is somewhat unclear about when, if ever, legal capacity can be overridden. Its uncertain wording reflects the unresolved disagreements between delegates about whether substituted decision-making is allowable. It does not directly state that all substituted decision-making mechanisms are prohibited, but requires safeguard mechanisms which:

- Respect the rights, will and preferences of persons [with disabilities], are free of 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 reviews.

It is clear that substituted decisions which are made in what are perceived to be in the best interests of persons with disabilities are no longer permitted. Decisions must always respect the rights, will and preferences of persons with disabilities.
Article 12(5) requires governments to ‘take all appropriate and effective measures to ensure the equal rights of persons with disabilities to own and inherit property and to control their own financial affairs.’ Again, support may be required to exercise these rights. A simple example would be requiring banks to produce key documents in easy English format.

Article 12 is the result of long and protracted drafting debates. Arguments traversed whether a person could have full legal capacity with all of its inherent rights, whilst simultaneously being prevented from exercising these rights unilaterally under the regime permitted by article 12(4).

**Substituted Decision-Making**

Substitute decision-making regimes are defined as systems where ‘legal capacity is removed from a person’, ‘a substitute decision-maker appointed,’ and ‘a decision is made by a substitute based on what is believed to be in the best interests of the person concerned’, as opposed to being based on the person’s own will and preferences.

The CRPD Committee’s 2014 General Comment on article 12 strongly criticised this model of support and stated that all substituted decision-making mechanisms should be abolished and replaced by ‘supported decision-making systems’. These are support networks that can assist persons with cognitive and/or psychosocial disabilities to make decisions in accordance with their own will and preferences.

With respect to article 12(4), the Committee contextualised the aims of this paragraph by stating:

> Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

The CRPD Committee also explained the necessary attributes of the safeguards that are embodied in article 12(4) of the CRPD, the primary purpose of which is to ensure a person’s rights, will and preferences are protected and central to the supported decision-making process. The safeguards under the supported decision-making process were expressly established to replace the substituted decision making paradigm and to ensure
that persons with disabilities enjoy the right to legal capacity on an equal basis with others.\textsuperscript{256}

The CRPD Committee usefully set out the elements of a supported decision-making regime in some detail.\textsuperscript{257} First, supported decision-making regimes ‘must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests.’\textsuperscript{258} Second, a person’s mode of communication ‘must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people.’\textsuperscript{259} Third, the person ‘must have the right to refuse support and terminate or change the support relationship at any time.’\textsuperscript{260} Finally, ‘the provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.’\textsuperscript{261}

Accordingly compliance with article 12 requires countries to establish flexible support mechanisms to assist persons with disabilities to make decisions in accordance with their rights, will and preferences. In cases where, perhaps owing to the person being unconscious, or where after significant efforts have been made, it is not practicable to determine the will and preference of an individual, ‘best interpretation of will and preference’ must, by implication, replace ‘best interests’ determinations.\textsuperscript{262} In some limited circumstances, an external decision-maker may need to be appointed. This is the case if the person’s will and preferences remain unknown after significant efforts to discover them have been made, and there is urgency (e.g. consent or refusal of life-saving surgery).\textsuperscript{263} The purpose and extent of such an appointment:

\begin{quote}
Must be made either with the person’s consent or, if no communication is possible to achieve consent, only be made if there is no evidence of objection from the person. The role of an external decision-maker in this context is simply to arrive at the best interpretation possible of that individual’s will and preferences, from all information available about the person, including from trusted individuals in her life. This ‘best interpretation’ can then form the basis for a decision to be made, in situations in which the individual’s true will and preferences remain unknown.\textsuperscript{264}
\end{quote}

Since its publication in 2014, General Comment No. 1 has generated much debate about the two so-called ‘hard cases’ scenarios; where it is argued that persons require substituted decision-making because: (a) it is necessary to act in emergency situations
and when consent cannot be received from the individual; and/or (b) their actions or inactions either may harm themselves or others.  

Some in the medical and psychiatric professions have adhered to the hard cases paradigm, arguing that the total abolition of substituted decision-making can place patients with cognitive and/or psychosocial disabilities in danger. They assert that abolishing substituted decision-making altogether could lead to new violations of a patient’s rights, and may cause harm to the patient and to others. This position reveals a misunderstanding of the characterisation of legal capacity provided by article 12 (which does not frame it as a ‘presumption’, rather a universal attribute). This position also does not have regard to the best interpretation of the will and preferences standard that would apply in the cases the authors discuss. It also ignores the right for persons with disabilities to take risks and make mistakes.

A more nuanced approach to article 12 of the CRPD was taken by Australian scholars Callaghan and Ryan. While they accept the aims of article 12, they assert that a form of substituted decision-making will often remain necessary in the second category of hard cases (risk of harm to self or others) after supportive processes have failed to produce an outcome. The authors agree that persons under mental health legislation should be supported to make their own decisions as far as possible. For Callaghan and Ryan:

A person may decide on behalf of another person only where a person lacks decision-making capacity even with the provision of support, and only where the person’s other rights may be infringed by the decision to the extent that the person may suffer harm. Any substituted decision-making of this kind (whether described as ‘proxy’ or ‘representative’ decision-making, or some other term) must, in any case, be subject to safeguards (article 12(4)).

In their thoughtful 2016 article Arstein-Kerslake and Flynn robustly defend the General Comment on article 12 and argue that hard cases can be accommodated within its parameters. The hard cases which they address concern situations where a person’s will and preferences are clear, but that supporting the person’s decision could lead to harm to the person or to someone else. They argue that although the General Comment on article 12 does not directly address these situations, these cases can be accommodated consistently with the principles espoused in the General Comment. They write that:
In a system that prioritises respect for will and preferences, it is possible that a person may express a will and preference to engage in serious self-harm, or harm to others […] Different legal systems have different standards for how much harm an individual is allowed to engage in before state intervention will occur – and whether intervention is only permissible where harm to others is proposed, as opposed to harm to the individual. As long as these standards are applied in a non-discriminatory way to persons with disabilities, on an equal basis with persons without disabilities, there should be no conflict with article 12. Support persons are also not obliged to support an exercise of legal capacity that would implicate them in civil or criminal liability at the domestic level.272

For Arstein-Kerslake and Flynn, making exceptions for hard cases and permitting substituted decision making defeats the rationale and purpose of article 12. Their argument is that support mechanisms can be established where, through trial and error, the wills and preferences of persons with cognitive and/or psychosocial disabilities can be respected within each legal system. This means that the law should only allow state intervention in these cases if it can do so equally for people with and without disabilities.

**Australia’s Implementation of Article 12**

**The 2014 ALRC Report**

In 2013, the Australian Government requested the Australian Law Reform Commission (ALRC), having regard to the CRPD, conduct a comprehensive inquiry into:

[T]he laws and legal frameworks within the Commonwealth jurisdiction that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity.”273

The Australian Government also asked what, if any, changes could be made to Commonwealth laws and legal frameworks to address these matters. In undertaking its inquiry the ALRC closely consulted with persons with disabilities, their representative organisations and respected academics in the field. The ALRC identified five framing principles to govern its inquiry: dignity, equality, autonomy, inclusion and participation, and accountability.274

The ALRC report *Equality, Capacity and Disability* (2014) developed a set of National Supported Decision-Making Principles, supported by guidelines, to direct the reform of all
Commonwealth, State and Territory laws relating to decision making. The National Decision-Making Principles are:

- **Equal rights**: All adults have an equal right to make decisions that affect their lives and to have those decisions respected.
- **Support**: Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.
- **Will, preferences and rights**: The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.
- **Safeguards**: Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

The ALRC also recommended the adoption of the ‘Commonwealth decision-making model’ based on the positions of ‘supporter’ and ‘representative’, under Commonwealth legislation to encourage supported decision-making. It also recommended greater consistency between state and territory terminology, policy and data collection and increased cross-jurisdictional recognition of arrangements. The representative model of decision-making would apply in the ‘hard cases’ discussed above. Some commentators have noted that it retains elements of substituted decision-making.

**Australia’s Interpretive Declaration on Article 12**

When ratifying the CRPD in July 2010, Australia made an interpretive declaration concerning articles 12, 17 and 18, stating how it will interpret these provisions, without purporting to exclude or modify its legal effects. Other nations, such as Canada made similar declarations. The relevant portion of Australia’s interpretive declaration on article 12 is as follows:

Australia recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.

Accordingly, the Government of Australia’s interpretation of article 12(4) is that provided that all of the enumerated safeguards are adhered to, substituted decision-making is permissible in limited circumstances. This contradicts the express statement by the
CRPD Committee in General Comment No. 1 that the proper implementation will require the abolishment, rather than partial retention of the substitute decision-making model.\textsuperscript{280}

**The CRPD Committee's Assessment of Australia's Compliance**

In September 2013, Australia had its first constructive dialogue with the CRPD Committee. In its Concluding Observations, the CRPD Committee recommended that Australia review its interpretive declaration with a view to its withdrawal.\textsuperscript{281} After expressing its concern about the possibility of maintaining the substituted decision-making scheme, and the absence of a ‘detailed and viable framework for supported decision-making in the exercise of legal capacity,’ the Committee recommended that Australia effectively implement the recommendations of the ALRC Inquiry:

To take immediate steps to replace substitute decision-making with supported decision-making and provides a wide range of measures which respect the person’s autonomy, will and preferences and is in full conformity with article 12 of the Convention, including with respect to the individual's right, in his/her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, and to work.\textsuperscript{282}

In the List of Issues Prior to Reporting for the Combined Second and Third Combined Report of Australia, the CRPD Committee asked the Australian Government to indicate the ‘progress made with regard to the … withdrawal of the State party’s interpretative declarations concerning articles 12, 17 and 18’\textsuperscript{283} and to provide information on ‘[t]he time frame for implementing a nationally consistent supported decision-making framework, as recommended by the [ALRC].’\textsuperscript{284}

In its Combined Second and Third Periodic Reports of September 2018,\textsuperscript{285} the Government of Australia stated that it did not intend to withdraw its interpretive declarations and that it was still considering the ALRC’s recommendations.\textsuperscript{286} The shadow report produced by Australia’s Disabled Persons’ Organisations of July 2019,\textsuperscript{287} was critical of Australia’s position regarding the interpretive declaration on article 12. The Shadow Report stated:

A number of Australian laws, policies and practices, including guardianship, estate management and mental health laws deny recognition of people with disability as equal persons before the law, and the right to the assumption of legal capacity. Australia continues to rely on its Interpretive
Declaration to insist that this legislative and policy framework complies with article 12, despite the fact that it breaches, is inconsistent with, and/or fails to fulfil CRPD obligations as outlined in General Comment No.1.288

The Australian Human Rights Commission has also called for the Australian Government to withdraw its interpretative declarations and stated they ‘are inconsistent with the Committee’s jurisprudence and prevent effective implementation of the CRPD.’ 289

After its second constructive dialogue with Australia in September 2019, the CRPD Committee published its Concluding Observations, which again recommended that Australia review and withdraw its interpretive declarations on articles 12, 17 and 18. 290 In relation to article 12, The CRPD Committee recommended that Australia:

(a) Repeal any laws and policies, and end practices or customs, which have the purpose or effect of denying or diminishing recognition of any person with disabilities as a person before the law; [and]

(b) Implement a nationally consistent supported decision-making framework, as recommended in the Australian Law Reform Commission’s 2014 report, ‘Equality, Capacity and Disability in Commonwealth Laws’.291

Over the last decade, there has been a shift in Australia’s network of guardianship and mental health laws which have been influenced by article 12. There has been a gradual move away from substituted decision-making, in favour of various forms of assisted or supportive decision-making regimes. In addition to the 2014 decision-making framework of the ALRC, several of Australia’s jurisdictions have taken steps to varying degrees, to reform their guardianship and mental health laws. The most far reaching reform is Victoria’s Guardianship Act 2019 292 which establishes an assisted decision-making regime and abolishes substituted decision-making. In May 2018, the NSW Law Reform Commission released its report titled ‘Review of the Guardianship Act 1987’.293 The report recommends moving towards supported decision-making regimes with safeguards. A number of other countries have engaged in law reform to implement article 12 and have explored how supported decision-making regimes could operate in practice.294 These warrant further exploration and may serve as examples of best practice and innovative models.295

In the light of these changes, it is suggested that the Government of Australia give strong consideration to revoking its interpretive declaration on article 12 of the CRPD. It is
further suggested that the Government of Australia examine the feasibility of legislating the ALRC’s Commonwealth decision-making model which closely adheres to article 12 of the CRPD. It is also suggested that the Commonwealth, States and Territories adopt a uniform approach to enact decision making models in line with the ALRC recommendations. While Australia’s moves in these legal fields have been rather slow, nevertheless in time most, if not all, jurisdictions will most likely adopt to varying degrees the paradigm change ushered in by article 12.
Article 13 Access to Justice

Article 13 is a broad ranging provision dealing with most aspects of the justice system. Given its breadth, after commenting upon article 13 generally, the components of this provision will be separately analysed. They are: access to justice on an equal basis with others, discrimination and accommodations, access to courts and to information, legal capacity and court proceedings, court-room procedure, jury composition; and appropriate training.

Paragraphs (1) and (2) of article 13 read as follows:

(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

(2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

The words of this provision are broad because the CRPD applies to all ratifying countries throughout the world. The administration of justice differs depending on the applicable legal family, and the available resources and the traditions of each nation.

There is a growing literature on article 13 which has been drawn upon in what follows. In December 2017, the Office of the High Commissioner for Human Rights released its report Right to Access to Justice under Article 13 of the Convention on the Rights of Persons with Disabilities which details the work of the CRPD Committee, together with examples of good practices in several countries. Focus here will be on Australia’s constructive dialogues with the CRPD Committee.

What is clear from a perusal of all of this material is that access to justice is a cross-cutting issue which goes beyond article 13 of the CRPD and also encompasses articles 5, 9, 12, 14, 21 and 29. Put another way, article 13 must be interpreted by having regard to the other major provisions and general principles of the CRPD.
Access to Justice on an Equal Basis with Others

The central phrase in article 13(1) is ‘access to justice for persons with disabilities on an equal basis with others’. It is suggested that these words relate to the ability of persons with disabilities to access justice must at least embody the following content. Persons with disabilities must have the legal capacity to bring and to defend legal and tribunal proceedings. Furthermore, they must be able to participate in proceedings by giving testimony. It may be, depending upon the proceedings, that many persons with disabilities may require the assistance of legal counsel to uphold their rights.

Article 13 does not seek to grant persons with disabilities advantages which others in the community do not possess. The words ‘on an equal basis with others’ makes this clear. In its General Comment No. 6 On Equality and Non-Discrimination (General Comment No.6) of April 2018, the CRPD Committee explained the phrase ‘on an equal basis with others’ as follows:

The phrase “on an equal basis with others” is not only limited to the definition of disability-based discrimination but also permeates the whole Convention on the Rights of Persons with Disabilities. On the one hand, it means that persons with disabilities will not be granted more or fewer rights or benefits than the general population. On the other hand, it requires that States parties take concrete specific measures to achieve de facto equality for persons with disabilities to ensure that they can in fact enjoy all human rights and fundamental freedoms.

Discrimination and Accommodations

The opening words of article 13(1) require ratifying countries to ‘ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations.’ Article 13(1) therefore requires the making of accommodations which are both procedural in nature and age appropriate. The word ‘accommodations’ in article 13 is to be contrasted with the expression ‘reasonable accommodation’ which appears in article 5 of the CRPD which is necessarily linked with article 13.

Article 5 recognises that all persons are entitled to the equal protection of the laws, and it goes on to prohibit all forms of discrimination against persons with disabilities and guarantees reasonable accommodation to combat discrimination. The term ‘reasonable accommodation’ is defined as meaning:
Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." \(^{305}\)

In General Comment No. 6 the CRPD Committee explored discrimination in all its facets. In examining the interaction between article 5 and article 13, the CRPD Committee commented upon the differences between ‘reasonable accommodation’ and ‘accommodations’ which is the linchpin of article 13. The CRPD Committee wrote as follows:

The rights and obligations with respect to equality and non-discrimination outlined in article 5 raise particular considerations with respect to article 13, which, among others, call for the provision of procedural and age-appropriate accommodations. These accommodations are distinguishable from reasonable accommodation in that procedural accommodations are not limited by disproportionality. An illustration of a procedural accommodation is the recognition of diverse communication methods of persons with disabilities standing in courts and tribunals. Age-appropriate accommodations may consist of disseminating information about available mechanisms to bring complaints forward and access to justice using age-appropriate and plain language. \(^{306}\)

Put another way, adjustments and modifications which amount to a disproportionate or undue burden will not qualify as reasonable accommodation. However, when article 13(1) speaks of ‘procedural and age-appropriate accommodations’ they are not limited to accommodations which do not impose disproportionate or undue burdens on court administrators. Therefore, article 13 requires all procedural and age-appropriate accommodations which are necessary to ensure full access to justice for all persons with disabilities.

**Access to Court Rooms and to Information**

Article 9 of the CRPD titled ‘Accessibility’ requires nations to ensure access ‘to the physical environment, to transportation [… and] information and communications.’ \(^{307}\)

In General Comment No. 2; Accessibility of April 2014, \(^{308}\) the CRPD Committee commented upon the interaction between articles 9 and 13 by making the point that:

There can be no effective access to justice if the buildings in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities (article 13). \(^{309}\)
Article 21 of the CRPD is also concerned, amongst other matters, with the provision of information. In respect of providing information in the justice system, article 21 requires that information which is intended for the general public be provided:

In accessible formats and technologies appropriate to different kinds of disabilities in a timely manner ... [as well as] Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.  

In its Combined Second and Third Periodic Reports of September 2018, the Government of Australia explained that: Federal courts provide wheelchair access, hearing loops in court rooms and interpretation services and their websites meet Australian Government standards for web content accessibility. Building works on existing and proposed Court buildings continue to take into account the needs of persons with disabilities. The Family Court and Federal Circuit Court also currently provide live chat as a means of communicating with and helping clients to navigate court practice and procedure. 

Information on what is happening in the States and Territories was less detailed. In its 2019 Concluding Observations, the CRPD Committee recommended that Australia:

Develop nationally consistent Disability Justice Plans across governments to ensure that persons with disabilities, particularly those whose reasonable and procedural accommodations are not adequately met, are supported in accessing the same legal protections and redress as the rest of the community. 

There have been significant improvements since the CRPD came into force more than a decade ago, but much more has to be completed to make justice fully accessible. It is suggested that the development of nationally consistent disability justice plans should be put in place.

More work needs to be done to assess the accessibility of Australia’s courts and tribunals. Similarly, it would be useful to learn how courts and tribunals disseminate information, for example, on accessible websites or available in easy English.

**Legal Capacity and Court Procedure**

It is obvious that for a person to initiate legal proceedings, she or he must have legal capacity to do so. Persons who are under legal guardianship in Australia or who are
detained in mental institutions usually do not possess the legal capacity to bring matters before judges or magistrates.

Article 12 of the CRPD grants all person’s full legal capacity. Article 12(3) requires countries to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’. In General Comment No. 1; Equal Recognition before the Law of 2014, the CRPD Committee commented on the interaction between articles 12 and 13 as follows:

The recognition of the right to legal capacity is essential for access to justice in many respects. In order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals.

In its Combined Second and Third Periodic Reports, the Australian Government explained that increased funding was available for persons with disabilities, but it appears that there is still a funding shortage.

The decision of the CRPD Committee in the following individual complaint case, explains the measures which governments should take to assist persons to exercise their full legal capacity. In Makarov v Lithuania, Mr Makarov complained to the CRPD Committee on behalf of his deceased wife Ms Makarova. Put briefly, Ms Makarova was the victim of a road accident which left her disabled with headaches and loss of memory. A criminal investigation was brought against the other driver, but Ms Makarova was not informed about it, nor was she able to attend court and give evidence. Ms Makarova applied for legal aid which was refused.

The CRPD Committee held that Ms Makarova’s Convention rights under article 12(3) and article 13(1) had been violated. She could not attend the proceeding, the court did not offer any accommodations, and her application for legal aid was refused. Put another way, no measures were taken to uphold her legal capacity under article 12(3), and no accommodations were made by the court to assist Ms Makarova in contravention of article 13(1) of the CRPD.

The Australian government was not able to provide any substantive information on whether courts throughout the nation comply with this requirement. Thus, in its recent Concluding Observations, the CRPD Committee recommended that Australia:
Bring all state, territory and federal legislation, including criminal law, and policy in compliance with the Convention to ensure due process guarantees for all persons with disabilities and ensure a review of the legal situation of persons whose equal recognition before the law is restricted and have been declared unfit to stand to trial.  

**Court-Room Procedure**

Article 13 requires courts and tribunals to make procedural accommodations to enable persons with disabilities, be they litigants, witnesses, jurors or family members, to be able to fully participate in hearings and related procedures. Obviously, where hard of hearing or deaf persons require them, sign interpreters and/or real time captioning must be made available. For persons with cognitive or communication disabilities, it is imperative that alternative and/or augmentative communications are utilised, including the provision of information in easy English.  

White and Msipa have examined the problems of giving evidence in the courts of South Africa and have made modest reform proposals; they show that alternative and augmentative communications also include using appropriate questions to obtain information from a witness with cognitive disabilities. 

The most comprehensive manual on accommodating persons with disabilities in the court-room is the United Kingdom’s *Equal Treatment Bench Book* which sets out a series of accommodations which include videoing evidence beforehand when appropriate, re-arranging the seating and also enabling short breaks in the proceedings. Where a person giving evidence has a cognitive disability or is autistic, an important accommodation will be for lawyers to frame questions in an appropriate manner.  

Western Australia, New South Wales, Victoria and Queensland have versions of equal treatment bench books. Each jurisdiction’s bench book contains a chapter on people with disabilities which includes statistics, a guide on appropriate terminology and descriptions of physical, sensory, intellectual and psychiatric disabilities as well as acquired brain injury and foetal alcohol spectrum disorder. The books are comprehensive and detail pre, during and post-trial considerations with specific attention paid to inclusive and appropriate communication strategies, the provision of evidence and treatment of witnesses along with other practical considerations including taking regular breaks and
amended directions to juries. Court procedure conducted in accordance with bench book guidelines demonstrates Australia’s compliance with article 13.

**Jury Composition**

The participation of persons with disabilities as jurors is topical in the Australian disability community. Article 13(1) guarantees persons with disabilities access to justice, ‘in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings’. Jurors clearly come within the phrase ‘direct and indirect participants’. It is important to read article 13 together with article 29 of the CRPD on ‘Participation in Political and Public Life’. Article 29 requires ratifying countries to grant persons with disabilities ‘political rights and the opportunity to enjoy them on an equal basis with others’ and to ‘ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others’. These rights clearly cover the right to serve as jurors.

Over the last few years, two successful complaints have been made to the CRPD Committee by Australians who have been rejected for jury service. In *Beasley v Australia*, Ms Beasley was summoned for jury duty in New South Wales. When she attended court, she requested Australian sign language (Auslan) interpretation. However, the sheriff refused this request and exempted her from jury service. The CRPD Committee upheld her Complaint. The refusal to reasonably accommodate Ms Beasley by providing her with Auslan interpretation, including the use of an interpreter in the jury-room, violated the access to justice requirement of article 13 of the CRPD. The CRPD Committee further held that the failure to accommodate violated article 5(1) and (3) which prohibit discrimination, and also article 9 which ensures access to communication.

In *Lockrey v Australia*, the facts were similar to those in the Beasley case. Mr Lockrey is also deaf. When summoned for jury service he requested that real-time steno-captioning be made available to enable him to participate as a juror. This request was refused by the sheriff of New South Wales. The CRPD Committee held that the refusal to provide steno-captioning in court and in the jury-room violated the access to justice requirement of article 13 of the CRPD. The CRPD Committee further held that the failure to accommodate violated article 5(1) and (3) which prohibit discrimination, and also article 9 which ensures access to communication.
While momentum is building for further legal reforms to enable deaf persons to utilise interpretation and captioning as jurors, most Australian State and Territory regimes still refuse to accommodate deaf jurors and restrict their access to the justice process contrary to article 13 of the CRPD. These jury laws also exclude persons with other disabilities. For example, in some jurisdictions blind persons are still excluded from jury service.

In its Combined Second and Third Periodic Reports to the CRPD Committee, the Australian Government noted that the Federal Court was harmonising its jury selection and participation manuals with the CRPD, and that some States were seeking to make similar reforms. In its Concluding Observations published after Australia’s second constructive dialogue in September 2019, the CRPD Committee made it abundantly clear that Australia should ‘develop legislation in all states on equal participation of persons with disabilities in the jury system’ However, it is a pity that most State Governments are still refusing to comply with article 13 of the CRPD by enabling deaf and hard of hearing persons to sit as jurors.

Training

Article 13(2) requires ratifying countries to promote appropriate training for those working in the justice field. Appropriate disability training is essential to enable persons with disabilities to fully participate in Australia’s justice system.

In its Concluding Observations after Australia’s first Constructive Dialogue, the CRPD Committee in 2013 stated:

The Committee is concerned at the lack of training for judicial officers, legal practitioners and court staff on ensuring access to justice for persons with disabilities, as well as lack of guidance on how to access justice for persons with disabilities. It is further concerned that access to sign language interpreters or use of Augmentative and Alternative Modes of Communication (AAC) is not supported in all of the States and Territories.

In its Combined Second and Third Periodic Reports, Australia noted that training programs had been commenced, albeit as capacity training under article 12 of the CRPD.

This appears to be a good beginning, but of course much more is required. In its 2019 Concluding Observations, the CRPD Committee recommended that ‘training modules …
are incorporated into mandated training programs for police, prison officers, lawyers’ and court staff'.

**Conclusion**

This paper provides a detailed analysis of the elements of article 13 which guarantees persons with disability full access to Australia’s justice system. This segment, it is suggested, is a springboard for further research, principally into what accommodations are granted to persons with various disabilities in practice in Australia’s Courts and tribunal rooms, and how the operation of these accommodations can be improved.
Article 14 Liberty and Security of the Person

Article 14 is concerned with ensuring persons with disabilities enjoy the right to liberty and security of person on an equal basis with others. Paragraph (1)(b) is the linchpin of the article because it makes it clear that persons with disabilities cannot be deprived of their liberty arbitrarily, and that ‘the existence of a disability shall in no case justify a deprivation of liberty.’

Marianne Schulze explains:

This is a crucial provision as firstly it deals with the very delicate questions surrounding the deprivation [of liberty] based on the perceived danger of a person to themselves or others. Secondly, the need to ensure that nobody shall be deprived of her or his liberty based on disability is one of the core ‘musts’ in ensuring meaningful equality of persons with disabilities.

Article 14(2) considers the situation where persons with disabilities are incarcerated in prisons or psychiatric hospitals. It requires that they be treated humanely ‘in accordance with the principles of international human rights law’ and in accordance with the principles of the CRPD, including the provision of reasonable accommodation.

A useful illustration of the requirement to accord persons with disabilities reasonable accommodation in prisons is X v Argentina which was decided by the CRPD Committee in 2014. X complained of his mistreatment in prison. When incarcerated, X underwent spinal surgery and a plate was incorrectly inserted at the cervical level. Subsequently he suffered a stroke and attended a daily rehabilitation program for some time. However, his prison cell was unsuitable given his disabilities; the bathroom was too small to accommodate his wheelchair which meant he required assistance to toilet and shower. And he developed bedsores as his mattress was unsuitable.

The CRPD Committee held that these conditions violated article 14(2) because there was no reasonable accommodation of his disabilities. It was further held that the failure to enable X to access the bathroom and other prison areas breached the right to accessibility pursuant to article 9 of the CRPD. Finally, it was held that the mistreatment also infringed article 17 because it violated his bodily integrity.

The CRPD has made no comment on whether Australia complies with article 14(2), and thus it is not possible in this paper to assess Australia’s compliance. This does suggest that research needs to be undertaken to determine whether or not Australia is providing reasonable accommodation to Australians with disabilities in detention.
The Doctrine of Unfitness to Plead

Under Australia’s network of criminal laws, where a person is accused of a crime, the courts have discretion to determine that the person is unfit to plead to the charge. This usually occurs because the court determines that the person cannot understand the nature of the charge or the proceedings. Put another way, lack of comprehension is seen to make trials unfair which is something which the law does not tolerate. Sometimes, where a person with disabilities is charged with a crime and held to be unfit to plead, special hearings take place to test the strength of the evidence against the person. Where a person is found to be unfit to plead, the judge or magistrate usually has the power to order that the person be detained, but only upon the grounds that the person is a danger to themselves or to others. Most of Australia’s diversion regimes do require the periodic review of persons who are detained owing to their unfitness to plead.\textsuperscript{353}

In September 2015, the CRPD Committee promulgated guidelines on the interpretation of article 14.\textsuperscript{354} Guideline 6 which is relevant to detention after findings of unfitness to plead, provides as follows:

There are still practices in which States parties allow for the deprivation of liberty on the grounds of actual or perceived impairment.\textsuperscript{355} In this regard the Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or others […] The Committee has established that declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant. The Committee has also called for States parties to remove those declarations from the criminal justice system. The Committee has recommended that “all persons with disabilities who have been accused of crimes and […] detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation,”\textsuperscript{356} as well as procedural accommodations to ensure fair trial and due process.\textsuperscript{357}

Thus as interpreted, article 14 does not permit the detention of persons with disabilities, where the grounds of disability is combined with other grounds relating to danger to other persons.
The Doctrine of Not Guilty Owing to Mental Impairment

Under Australia’s network of Federal, State and Territory criminal laws, a defendant in a criminal trial may obtain a special verdict of not guilty owing to her or his mental impairment. There are two ways which may lead to a special verdict, either the mental illness defence or automatism defence. This doctrine is covered in detail in criminal law texts. It will simply suffice to make brief comments as follows.

The mental illness defence is perhaps better known as the defence of insanity. The modern doctrine of insanity arose when Daniel M’Naghten was acquitted of the murder of the private secretary of the English Prime Minister. In M’Naghten’s case in 1843, the House of Lords laid down the elements of the defence of insanity in what have become known as the M’Naghten rules. Put briefly, while the prosecution must prove all of the elements of a crime beyond reasonable doubt, including that the impugned act was voluntary, it is open to the defendant to raise the defence of insanity. To obtain a special verdict of acquittal on the grounds of insanity, psychiatric evidence must establish, on a balance of probabilities, that the defendant suffered from a mental impairment at the time the crime was committed. To succeed, the evidence must show that the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know what he was doing was wrong.

In earlier times, the defence of insanity was often utilised to save defendants from offenses which carried the death penalty. At the present time, it appears that the defence of mental illness is relied on less by defence counsel. Where it is held that the defendant is not guilty owing to a mental impairment, she or he will be detained in the same manner as those who have been found to be unfit to plead.

In R v Falconer decided by the High Court of Australia in 1990, Mason CJ, Brennan and McHugh JJ pithily described the two types of automatism when they wrote:

The foundation for the inference that an act done by an apparently conscious actor is willed or voluntary can be removed by evidence that the actor was not of sound mind or was insane when the act was done, but there are some cases where an act can be shown to be unwilled when it is done by an actor of sound mind. To take some obvious examples: if the act be a reflex action following a painful stimulus or if it be a spastic movement, an inference that the act was willed or voluntary would not be drawn though the actor be of sound mind when the act is done.
The automatism defence operates to negate that the impugned act of the defendant was voluntary which, for most crimes, is a necessary element needing to be established by the Crown beyond reasonable doubt. A well-known illustration of automatism is where a car drives into a swarm of bees which cause the body of the driver to spasm. In these circumstances, the driver cannot be held to be found guilty of dangerous driving as she or he were not in voluntary control of their hands and feet. In these circumstances, the defendant would be completely acquitted. These types of acquittals do not concern us here. However, the automatism defence may also arise when the defendant has no control over their acts or conduct owing to a mental impairment. The defence operates similarly to the precepts in the M’Naghten rules. If the defence’s evidence is accepted, this means that the prosecution has been unable to establish that the acts or conduct were voluntary. A special verdict of not guilty on the grounds of mental impairment will be the result. In almost all instances, this will lead to the detention of the defendant.

In light of article 12, 13 and 14 of the CRPD several scholars have argued that the mental illness and automatism defences should be done away with and that accordingly various criminal law doctrines should be recast. The rationale is that retaining these defences is discriminatory, given that their functions are necessarily based on the presence of intellectual disability and the assumption that such disabilities impair capacity and reasoning. The danger of this approach could be that abolition of these defences may disadvantage some defendants. It is clear that issues concerning mental impairment and criminal responsibility in Australia’s network of criminal laws require further research and re-examination.

**CRPD Committee Jurisprudence**

An illustrative instance of the unfit to plead doctrine came before the CRPD Committee in 2016 in *Noble v Australia*. The facts are detailed, however, for present purposes the salient points are as follows. In 2001, Mr Noble, a First Nations man with cognitive disabilities, was charged in Western Australia with several sexual offences against two children. In 2003, the District Court of Western Australia held that owing to his cognitive disability Mr Noble was unfit to plead to these charges. A custody order was made under mental health legislation, and he was sent to a correctional centre. He was eventually released in 2012. Had he pleaded and been adjudged guilty, it appears that any custodial sentence would have been far less than the decade which he spent in prison.
The CRPD Committee held that the Western Australian mental health legislation was discriminatory against persons with cognitive and/or psychosocial disabilities and violated article 5(1) and (2) of the CRPD.369 Once a person was found to be unfit to plead, she or he could be imprisoned for an indefinite amount of time. The CRPD Committee further held that in not permitting Mr Noble to plead, he was unable to be assisted to exercise his legal capacity and to plead not guilty and to test the evidence. This amounted to violations of articles 12 and 13 of the CRPD.370 Most critically for our purposes however, was the finding of the CRPD Committee that as Mr Noble was deprived of liberty owing to his disability, there was a contravention of article 14 of the CRPD.371

Since Mr Noble’s release, reforms of Western Australian mental health law are under way.

In October 2019, the CRPD Committee upheld two further complaints relating to the unfitness to plead laws of the Northern Territory. The decisions are Leo v Australia372 and Doolan v Australia.373 The facts and CRPD Committee comments and recommendations in these two matters are broadly similar. It is significant however that the CRPD Committee received two complaints pertaining to a single legislative provision.

Mr Leo is a First Nations man with cognitive disabilities. In 2007 he was living with a family member in Alice Springs, however, he did not always take his medication. Mr Leo was charged with assaulting a woman and was indicted before the Supreme Court of the Northern Territory. The judge held pursuant to provisions of part II.A of the Criminal Code that he was unfit to stand trial and subsequently he was placed under a custodial supervision order. As there was no alternative accommodation available Mr Leo was sent to the high security section of the Alice Springs Correctional Centre where he remained until 2013 when he was transferred to a secure care facility. In 2016 he was relocated to a community residence where he lives alone. In total Mr Leo spent five years and 10 months in custody, which is nearly six times the custodial sentence he would serve if he had been convicted of the offences with which he was charged.374

Mr Doolan is also a First Nations man with intellectual and psychosocial disabilities from the Northern Territory. As a result of acts during a psychotic episode Mr Doolan was charged with common assault and property damage in circumstances of aggravation; his experience after being deemed unfit to stand trial was almost identical to that of Mr Leo.
Overall, Mr Doolan spent four years and nine months custody in prison which is almost five times the amount he would have served had he been convicted of his crimes.\textsuperscript{375}

The CRPD Committee held that as the provisions of part II.A of the Northern Territory Criminal Code applied only to persons with cognitive and/or intellectual disabilities, they were discriminatory and contrary to article 5 of the CRPD which seeks to ensure every person has ‘equal benefit of the law’.\textsuperscript{376} The Committee further held that in not enabling Mr Leo and Mr Doolan to plead, articles 12 and 13 were breached. The author’s deprivation of liberty was also contrary to article 14 and the CRPD Committee remarked:

The author’s detention decided on the basis of assessment by the State party’s authorities of potential consequences of his intellectual disability, in the absence of any criminal conviction, convert[ed] his disability into the core cause of his detention… the authors detention amounts to a violation of article 14(1) (b) of the Convention, according to which the existence of a disability shall in no case justify a deprivation of liberty.\textsuperscript{377}

Finally, the CRPD Committee held that both men were in custody for an indefinite duration, were housed with convicted persons and received involuntary treatment, all of which amounted to a breach of article 15 of the CRPD.\textsuperscript{378} In other words, at the very least, the conduct was degrading.

**The CRPD Committee's Assessment of Australia's Compliance**

It is clear that Australia’s unfitness to plead regimes are in non-compliance with article 13 and also with article 14 of the CRPD because the inability to access justice and to be deprived of liberty on grounds of disability often go hand in hand. It is also clear that the unfitness to plead regimes impact greatly upon First Nations Australian’s. Although they make up approximately 2\% of Australia’s population, they represent approximately 22\% of the prison population.\textsuperscript{379}

In its Concluding Observations on Australia’s first report in 2013, the CRPD Committee recommended Australia to:

Ensure that all persons with disabilities who are accused of crimes and are currently detained in jails and institutions without a trial are promptly allowed to defend themselves against criminal charges and are provided with required support and accommodation to facilitate their effective participation ... The Committee recommends that the State party, as a matter of urgency ends the
unwarranted use of prisons for the management of un-convicted persons with disabilities, with a focus on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention.\textsuperscript{380}

In the 2016 Universal Periodic Report to the Human Rights Council Australia made a voluntary commitment to improve the way the criminal justice system treats people with cognitive disability who are unfit to plead or found not guilty by reason of mental impairment.\textsuperscript{381} In 2016 Australian Governments tabled the Draft \textit{National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment} (National Principles).\textsuperscript{382}

The National Principles were developed by a cross-jurisdictional working group on the treatment of people unfit to plead or found not guilty by reason of mental impairment. As is explained in its preamble, these national principles:

\begin{quote}
\textnormal{[R]ecognise the rights of persons with cognitive or mental health impairment and seek to identify safeguards throughout legal processes and during the period in which a person who is unfit to plead or not guilty by reason of cognitive or mental health impairment is subject to orders. Equally, the principles recognise the need to ensure community safety, the prevention of harm to others, and the rights of victims. The potential for the criminal justice system to assist persons with cognitive or mental health impairment prior to any finding the person is either unfit to plead, of unsound mind, or not guilty, such as through early intervention, prevention and diversionary programmes or referrals to health and community service providers, is acknowledged.}\textsuperscript{383}
\end{quote}

In its Combined Second and Third Periodic Reports in 2018,\textsuperscript{384} Australia updated the CRPD Committee on its review of unfitness to plead and diversions into detention regimes. The Government of Australia wrote as follows:

\begin{quote}
Australia is committed to ensuring that no one in Australia is deprived of their liberty on the basis of their disability. However, Australia recognises that there are particular challenges in relation to the treatment of persons with mental impairment in both the health and criminal justice context. This is an area of ongoing review and reform.

In 2015 a cross-jurisdictional working group was established on the treatment of people with cognitive disability or mental impairment unfit to plead or found not guilty by reason of mental impairment. The working group undertook to collate and analyse data across jurisdictions on fitness to stand trial, the defence of mental impairment and interstate forensic transfers. The working group also undertook to develop [the National Principles]
\end{quote}
The draft National Principles recognise the rights of persons with cognitive or mental health impairments and seek to identify safeguards throughout the legal process and periods where a person is subject to orders.

In June 2018, the Council of Attorneys-General considered a revised version of the draft National Principles and agreed to deliberate further at its next meeting in 2018.385

In the 2019 constructive dialogue with the CRPD Committee, the Shadow Report from Australia’s Disabled Person’s Organisations 386 made the following comment about the lack of progress with these draft National Principles:

There are at least 100 people detained across Australia without conviction in prisons, psychiatric units and forensic detention services under mental impairment legislation. These people are predominately First Nations, have cognitive and/or psychosocial impairment, cultural communication barriers and/or hearing loss.387

As of August 2019 all states and territories aside from South Australia have endorsed the National Principles.388 It is now up to each individual jurisdiction to amend or implement legislation, policies and procedures to realise the principles. The Australian Government has committed to reviewing the National Principles in five years, in consultation with state and territory jurisdictions, to ensure they remain relevant and continue to represent best practice.389

The National Principles declare that individual personal case management plans should be developed for persons found unfit to plead; ‘outlining clinical oversight, treatment and care, support services, and pathways towards less restrictive arrangements.’390 Put plainly, the National Principles do not seek to abolish the doctrine of unfitness to plead. Instead, they seek the establishment of processes to treat persons with cognitive or intellectual disabilities and to move them from prisons or psychiatric institutions back into the community.

In its 2019 Concluding Observations, The CRPD Committee recommended that Australia abolish the doctrine of unfitness to plead. The CRPD Committee explained that all forms of detention on the grounds of disability should end. It urged Australia to:

(a) Repeal any law and policy and cease any practice or custom that enables deprivation of liberty on the basis of impairment, and forced medical interventions on persons with disabilities, particularly First Nations persons with disabilities;
(b) Implement the recommendations from the 2016 Senate Inquiry Report into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia. 391

(c) End committing persons with disabilities to custody and to indefinite terms or to terms longer than those imposed in criminal convictions;

(d) Collect data on the number of persons indefinitely detained and a number of cases on an annual basis, disaggregated by nature of offence, time of detention, disability, Aboriginal and other origin, sex, age and jurisdiction, with the aim to review their detention;

(e) End the practice of detaining and restraining children with disabilities in any settings. 392

In a thoughtful article, Anna Arstein-Kerslake, Piers Gooding, Louis Andrews and Bernadette McSherry examine how criminal trials may proceed where unfitness to plead is abolished, 393 and are involved in a further program of research in this area. 394 They argue that persons with cognitive, psychosocial or communication disabilities should be given appropriate supports to enable them to exercise their legal capacity as defendants in criminal trials.

They also turn to the more difficult matter of what to do when supports fail, writing:

There may be times in which supports are not enough. The right to a fair trial would be compromised in common law adversarial systems if the individual were forced to go ahead with the proceedings when he or she was not able to participate, even with the provision of supports tailored to the individual. In such a case, in order to maintain compliance with the CRPD, the law’s response must not be unfitness to plead findings as they currently exist. Instead, a system should exist where the individual is not denied his or her legal capacity to participate in the trial, but is instead provided with an advocate who has responsibility for interpreting the will and preference of the individual to the best of that person’s ability and to convey that to the court and the relevant professionals involved with the trial process. 395

What is clear is that after appropriate consultations, the National Principles should be implemented to assist persons who are unfit to plead. These humane processes comply with article 14(2) of the CRPD. However, it is suggested that more research is needed to determine how Australia can abolish the unfitness to plead rule, and yet at one and the same time proceed with criminal trials where persons with disabilities either have supports or advocacy assistance.
Articles 15, 16, & 17 Humane Treatment

This segment examines the following cluster of closely related Articles under the banner of humane treatment: 396

**Article 15** – Freedom of Torture or Cruel, Inhuman or Degrading Treatment or Punishment

**Article 16** – Freedom from Exploitation, Violence and Abuse

**Article 17** – Protecting the Integrity of the Person

Article 14 was discussed in the previous segment and analysis focused on the doctrine of unfitness to plead. Article 14 is also concerned with the liberty and security of persons with disabilities which is the foundation of humane treatment because much inhumane treatment, including torture, abuse, violence and exploitation occurs in closed environments and private homes. In other words, much inhumane treatment is meted out in prisons, psychiatric hospitals, and other institutions where persons with disabilities are housed.

**Understanding Article 15 Torture**

Article 15 prohibits torture and other cruel, inhuman, or degrading treatment or punishments.397 The infliction of torture is also a criminal offence under Commonwealth Law.398

In 1984, the United Nations General Assembly adopted *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).399 In CAT, torture is defined in part as meaning:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him ... information or a confession, punishing him for an act he ... has committed ... or intimidating or coercing him ... or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.400

This is a somewhat narrow definition which limits torture to specific sets of circumstances. As Kanter explains, four elements must be present to constitute torture under the CAT; 1) the action must cause severe mental or physical pain or suffering, 2)
be done with that intent, 3) with a specific purpose and 4) performed by State actors or at least with the acquiescence of the State.\textsuperscript{401}

The second sentence of article 15 (1) prohibits medical or scientific experimentations on persons without their free and full consent. Article 15 (2) requires ratifying countries to take all effective measures to prevent persons with disability from being subject to torture or cruel, inhumane, order grading treatment. Thus, for example, in X \textit{v} Tanzania (in which Mr X, a person with albinism, was attacked by two men who cut off his left arm at the elbow),\textsuperscript{402} the CRPD Committee held the Tanzanian government in violation of article 15 for failing to take action to investigate and prosecute assaults against people with albinism, who are subject to violent prejudice.

A more complex issue is what acts or omissions can constitute inhuman or degrading treatment or punishment? A curial decision which illustrates how persons with disabilities may suffer inhuman or degrading treatment is \textit{Price v The United Kingdom} which was decided by the European Court of Human Rights in 2001.\textsuperscript{403} Ms Price was a thalidomide survivor. Due to phocomelia, her arms and legs were very short and she also had problems with her kidneys. At a local court proceeding where Ms Price refused to answer questions, the Judge jailed her for several days for contempt. Her first night was in a police station cell where the wooden bed and mattress were not appropriate for her disability and she was forced to sleep in her wheelchair. The toilet in her cell was not accessible. The next day, Ms Price was transferred to a women’s prison where she was placed in the health unit. The Court found that on at least one occasion, she was lifted onto the toilet by male warders.

Ms Price brought proceedings in the European Court of Human Rights, asserting that her mistreatment was contrary to article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).\textsuperscript{404} There is a close parallel between article 3 and article 15(1) of the CRPD. Ms Price was successful before the European Court of Human Rights which held that there was no intention to humiliate her. However, confining Ms Price in these conditions constituted degrading treatment contrary to article 3 of the ECHR.\textsuperscript{405}

Had this type of case come before the CRPD Committee, the degrading conduct of the police and prison authorities would have constituted breaches of article 15. It is further
suggested that there was also a failure to grant Ms Price reasonable accommodation, contrary to article 14(2). Finally, it is arguable that the impugned conduct could also be characterised as abuse bringing into play article 16 of the CRPD. This decision shows the overlap in this cluster of articles from 14 to 17 of the CRPD.

The previous segment on unfitness to plead discussed the case of *Noble v Australia* in which a First Nations person with cognitive disability was imprisoned without trial. There is no need to repeat the details here, but pertinent to the present discussion is that the CRPD Committee held that his detention and the violent assaults which he suffered amounted to inhuman and degrading treatment contrary to article 15. The CRPD Committee wrote that:

> [T]he Committee emphasizes that States parties are in a special position to safeguard the rights of persons deprived of their liberty owing to the extent of the control that they exercise over those persons… In this context, State party authorities must pay special attention to the particular needs and possible vulnerability of the person concerned, including because of his or her disability. In the present case, the Committee notes the author’s allegations that he was subjected to frequent acts of violence and abuse, that his disability prevented him from protecting himself against such acts, and that the State party authorities did not take any measures to sanction or prevent them or to protect the author therefrom. … Taking into account the irreparable psychological effects that indefinite detention may have on the detained person, the Committee considers that the indefinite detention to which he was subjected amounts to inhuman and degrading treatment. The Committee therefore considers that the indefinite character of the author’s detention and the repeated acts of violence to which he was subjected during his detention amount to a violation of article 15 of the Convention by the State party.

As was also recounted in the previous section, in October 2019 the CRPD Committee upheld two further complaints relating to the unfitness to plead laws of the Northern Territory. The decisions are *Leo v Australia* and *Doolan v Australia*. It is not necessary to re-state the facts in these matters, it suffices to record that the CRPD Committee found that both complainants had received degrading treatment contrary to article 15. Both men were in custody for an indefinite duration, were housed with convicted persons and received involuntary treatment.

It does appear that not all involuntary admissions into psychiatric hospitals or other medical or social institutions will constitute inhuman or degrading treatment as much will depend upon the nature of the treatment and the duration of the incarceration.
In 2002, the United Nations General Assembly adopted the *Optional Protocol to the Convention against Torture* (OPCAT)\(^{412}\) which came into force in 2006.\(^{413}\) Article 1 of OPCAT sets out its purpose of establishing a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, to prevent torture and other cruel, inhuman or degrading treatment or punishment. OPCAT broadly defines deprivation of liberty to cover prisons, immigration detention centres and psychiatric hospitals.\(^{414}\)

OPCAT establishes an elected Subcommittee\(^ {415}\) whose mandate is to visit places of detention, and to make recommendations “concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.”\(^ {416}\)

Australia acceded to OPCAT on 21 December 2017. This meant that Australia was required to establish a National Preventive Mechanism (NPM) consisting of one or several visiting bodies to enter prisons, immigration detention centres and psychiatric hospitals\(^ {417}\) for the purpose of strengthening the protection of persons who are deprived of liberty against torture and other cruel, inhuman or degrading treatment or punishment.\(^ {418}\) Australia designated the Commonwealth Ombudsman as Australia’s NPM together with similar State and Territory bodies.\(^ {419}\)

**Understanding Article 16 Freedom from Exploitation, Violence and Abuse**

In November 2015, the Australian Senate Community Affairs Reference Committee (ASCARC) handed down its report into violence, abuse and neglect against persons with disabilities in institutional and residential settings.\(^ {420}\) It catalogued in some detail the violence, abuse and neglect of persons with disabilities. In April 2019, the Government acceded to the first recommendation of this Senate report by establishing the Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disabilities. As article 16 seeks to end these types of violence, it is a pivotal article in this report.\(^ {421}\)

Article 16 (1) requires governments to:
Take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.\textsuperscript{422}

This provision recognises that violence and abuse perpetrated against persons with disabilities occurs in both institutions and private domestic settings. By noting the gender-based aspects of violence and abuse, it also makes clear that violence, including sexual violence, has a greater prevalence and a more severe impact upon women and girls with disabilities than on men with disabilities. In fact, throughout the world women and girls with disabilities, and especially those with cognitive, psychosocial, or communication disabilities, are vulnerable to assaults and sexual assaults in institutional settings and even at home.\textsuperscript{423}

Article 16 (2) exhorts ratifying nations to ensure that appropriate forms of gender and age-sensitive information and assistance and support is given to persons with disabilities and their families and caregivers.\textsuperscript{424} Furthermore, information must also be given on how to avoid, recognize and report instances of exploitation, violence and abuse.\textsuperscript{425}

Article 16 also requires that all disability facilities and programs are independently monitored,\textsuperscript{426} that victims are assisted in their recovery and social re-integration,\textsuperscript{427} and that transgressions are identified and investigated, and that perpetrators are prosecuted.\textsuperscript{428}

In September 2016, the CRPD Committee published its third General Comment titled ‘Article 6 Women and Girls with Disabilities’.\textsuperscript{429} The General Comment listed the types of violence which women and girls with disabilities may encounter. These acts include:

Women who acquire a disability as a consequence of violence, physical force; economic coercion; trafficking, deception; misinformation; abandonment; the absence of free and informed consent and legal compulsion; neglect, including the withholding or denying access to medication; removing or controlling communication aids or refusal of assistance to communicate; denying personal mobility and accessibility such as removing or destroying accessibility features such as ramps, or assistive devices such as a white cane or mobility devices such as a wheelchair, refusal of caregivers to assist with daily living such as bathing, menstrual and/or sanitation management, dressing and eating, thus denying the right to live independently and freedom from degrading treatment; denial of food or water, or threat of any of these acts; bullying, verbal abuse and ridicule on the grounds of disability causing fear by intimidation; harming or threatening to harm, removing or killing pets or
assistance dogs, or destroying objects; psychological manipulation; and controlling behaviours involving restricting face-to-face or virtual access to family, friends or others.430

Understanding Article 17 Protecting the Integrity of the Person

Article 17 says that ‘every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others’.431

As noted in the introductory segment, article 17 is one of the three articles on which Australia placed an interpretive declaration when it ratified the CRPD in 2008. The relevant portion of the interpretive declaration reads:

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.432

This interpretive declaration not only impacts on article 17, but it also operates to enable involuntary admissions to mental health institutions which would otherwise be contrary to article 14 and even article 15.

The CRPD Committee's Assessment of Australia's Compliance

Australia’s interpretive declaration concerning article 17 when read together with its interpretive declaration on article 12, narrows the protection given to persons with disabilities under articles 14, 15 and 17. In its 2013433 and 2019434 Concluding Observations, the CRPD Committee recommended that Australia withdraw its interpretive declaration with respect to articles 12, 17 and 18 of the CRPD, However, the Australian Government has not accepted this recommendation.

Under Australian mental health legislation,435 involuntary treatment orders (ITOS) may be made against persons with cognitive and/or psychosocial disabilities. These types of orders are known as ‘restrictive practices’ and may lead to the detention of persons with cognitive and/or psychosocial disabilities in psychiatric hospitals or other institutions. ITOS may also take the form of Community Treatment Orders (CTOS) which control
persons with disabilities in their community activities. ITOS enable persons to be
detained, to be administered medication, and in specific and defined circumstances, to be
controlled by restraints and to be placed in seclusion. Restraints can be chemical in
nature through the administration of drugs or physical in nature, for example through the
use of cage or net beds. In 2018, it appears that there were significant numbers of ITOS,
although required reporting varied between jurisdictions. ITOS may be reviewed by
relevant tribunals. Lastly, it should be noted that these laws often disproportionately
impact First Nations people with cognitive and/or psychosocial disabilities because of the
lack of services and facilities available to assist them with their mental health.

In its 2013 and 2019 Concluding Observations, the CRPD Committee urged Australia
to repeal provisions allowing for the involuntary detention of persons with disabilities in
psychiatric hospitals, and to abolish the use of medical interventions and restrictive
practices. After all, detention practices run contrary to article 14, while the use of
restraints can constitute inhuman and/or degrading behaviour forbidden by article 15.

In 2016, The ASCARC handed down its report into the indefinite detention of persons
with cognitive and/or psychosocial disabilities. Most of the recommendations pertained
to persons with disabilities being caught up in criminal proceedings and diversionary
programs. However, the Senate Committee recommended that the Federal, State and
Territory governments work towards a consistent approach to the use of compulsory
treatment orders. However, this recommendation has not been progressed.

In 2017, legislation was enacted to establish the National Disability Insurance Scheme
(NDIS) Quality and Safeguards Commission which is empowered to deal with
complaints under the NDIS and monitor the use of restrictive practices. What is required,
it is suggested, is a national body to oversee and to minimise the use of all restrictive
practices in Australia. In its report to the CRPD Committee before Australia’s 2019
Constructive Dialogue, the Australian Human Rights Commission (AHRC) recommended
that mental health laws be reviewed which relate to hospitalisation and committal to
mental-health facilities, to the administration of drugs and to the making of CTOS.
Such a review should ensure that these laws have a human rights focus and uphold the
human rights and inherent dignity of persons with cognitive and psychosocial disabilities.
It is appreciated that these laws are complex and cannot be wound back instantaneously. However, at the very least, it is recommended that the Australian, State and Territory governments review the laws governing ITOS and CTOS to bring them into line with articles 14, 15 and 17 of the CRPD.

The Australian Government has allocated money and resources to deal with violence, abuse and neglect of persons with disabilities. This Royal Commission and the recommendations flowing from its reports, will undoubtedly play a role in addressing the concerns of article 16 and diminishing violence, abuse and neglect. Moreover, the NDIS Quality and Safeguards Commission is empowered to deal with complaints from NDIS participants against providers who engage in exploitative or degrading conduct.

In 2018, the AHRC released its report on ‘A Future without Violence’ which makes recommendations to eliminate violence in institutional settings. It is suggested that the Australian Government consider implementing these thoughtful recommendations.

Another key feature of CRPD Committee communications relates to non-therapeutic sterilisation. It is perhaps surprising to some that in present-day Australia, non-therapeutic sterilisation procedures can be carried out on persons with disabilities, and especially on women and girls with disabilities, without their full and free consent. Such procedures are clearly contrary to article 17 of the CRPD which upholds bodily integrity. Therapeutic sterilisations must be contrasted with non-therapeutic procedures. Where a sterilisation procedure is required, for example, to prevent the spread of cancer, this is a therapeutic operation. However, where sterilisations are performed to prevent pregnancy and are irreversible, they are clearly non-therapeutic. In Australia, few non-therapeutic sterilisations are carried out without the full and free consent of each patient, and the numbers are decreasing.

To eliminate the practice altogether, it is suggested that parents should not be allowed to give consent, The Supreme Court of Canada has gone one step further and held that the parens patriae inherent jurisdiction of superior courts cannot order a non-therapeutic sterilisation of a person without consent of the individual.

The Family Court of Australia has the power to order non-therapeutic sterilisation of children with disabilities provided that after the giving of evidence, the judge is satisfied that the operation is in the best interests of the child. Yet, several United Nations
Human Rights Committee, as well as the CRPD Committee in 2013 and 2019, have urged Australia to abolish the practice.448

In 2013, the ASCARC did hand down a report on the involuntary sterilisation of people with disabilities, but it failed to recommend the abolition of this practice.449

In its 2019 Concluding Observations, the CRPD Committee added that it was also concerned about irreversible surgical procedures performed on intersex children before they reached an age where they could give free consent.450

To conclude, it is recommended that as a matter of some urgency, the Australian, State and Territory governments amend their laws to forbid non-therapeutic sterilization procedures on girls and boys and on adults with disabilities without their full and free consent.
Article 18: Liberty of Movement and Nationality

Article 18 is an essential provision in the CRPD on account of the historical deprivation that persons with disabilities have faced in both liberty of movement and the right to a nationality, or to be officially recognised by their State. Even today as the commentators highlight, many persons with disabilities still face restriction in where they may travel and reside.451

The respective rights to freedom of movement and nationality are long-standing principles of international law, enshrined in both the Universal Declaration of Human Rights (UDHR)452 and the International Covenant on Civil and Political Rights (ICCPR).453 Acknowledging the importance of these rights, the CRPD has essentially re-stated these principles in article 18 to ensure that these rights flow to all persons with disabilities.

Generally speaking, Australia allows liberty of movement to its citizens and does not prevent Australian’s with disabilities from exiting or returning to the country. The area of contention rather lies in Australia’s migration and refugee programs.

Understanding Article 18

Paragraph (1) of article 18 requires ratifying nations to ‘…[R]ecognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others….’ The words ‘on an equal basis with others’ are significant because they prohibit any discrimination with respect to freedom of movement and nationality on grounds of disability.

Article 18(1) continues by providing that persons with disabilities have the right to acquire and change their nationality, and cannot be deprived of these rights arbitrarily or on the grounds of disability.454 Furthermore, their right to acquire documentation on nationality, such as birth certificates and passports, are similarly protected.455 Finally, persons with disabilities are free to leave any country, including their nation of citizenship,456 and cannot be prevented from entering their own country on grounds of disability.457

While article 18 does not expressly state that persons with disabilities have the right to emigrate to other countries, the phrases ‘freedom of movement’ and ‘on an equal basis
with others’ suggest that ratifying countries are prohibited from discriminating against migrants on the grounds of their disabilities.\textsuperscript{458}

This reading is reinforced when read with article 5, which makes it abundantly clear that all persons with disabilities are entitled to the equal protection under the law,\textsuperscript{459} and discrimination on the grounds of disability is prohibited.\textsuperscript{460} Similarly, article 4 of the CRPD sets forth a general obligation for ratifying countries to ‘… [M]odify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’.\textsuperscript{461} However, literature suggests a number of signatories retain restrictive immigration laws which discriminate against migrants on the grounds of their disabilities.\textsuperscript{462}

Article 18(2) provides that:

Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Importantly, article 18(2) mirrors article 7(1) of the \textit{Convention on the Rights of the Child} (CRC).\textsuperscript{463} The need for this paragraph becomes evident in circumstances where nations, especially in under resourced rural areas, children with disabilities may not be named or registered at birth, and so are often unable to seek the protection of the government.

\textbf{Australia’s Interpretive Declaration and the Health Requirement}

As noted in earlier chapters, when Australia ratified the CRPD in 2008, it made an interpretive declaration with respect to articles 12, 17 and 18 of the CRPD. With respect to article 18, the declaration establishes that Australia’s understanding is:

… [T]he Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia’s health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.\textsuperscript{464}

Before delving into this portion of Australia’s interpretive declaration, it is pertinent to appreciate that the protections of the CRPD are not limited to citizens or permanent residents of ratifying countries. As Mary Crock, Christine Ernst and Ron McCallum attest,
the CRPD protects all persons with disabilities within the territory of ratifying nations.\textsuperscript{465} As such, when dealing with applications from aspiring immigrants or determining refugee status, the CRPD prohibits discrimination on the grounds of disability.

As Ben Saul writes, the portion of Australia’s interpretive declaration concerning article 18 simply states well-known principles of international law, particularly that persons who are not nationals of a country do not have an automatic right to enter that country. That being said, international human rights and refugee law prevents countries from returning persons to places where they risk being persecuted or tortured.\textsuperscript{466}

Australia may specify health requirements for aspiring migrants, but only where such health requirements ‘… are based on legitimate, objective and reasonable criteria’ (emphasis added).

To this effect, Saul highlights that the UN Human Rights Committee recognises that '[n]ot all differentiation of treatment will constitute discrimination'.\textsuperscript{467} Reflecting on Australia’s 'Declaration' to the CRPD, he accepts that a migration health test may involve a degree of subjectivity and judgment, so long as legal criteria constrains political judgments.\textsuperscript{468}

Ever since the enactment of the \textit{Immigration (Restriction) Act 1901},\textsuperscript{469} the Australian Government has placed some form of health requirement on persons seeking to enter Australia. Many countries similarly maintain health requirements for permanent and temporary immigrants to prevent the spread of contagious disease, a timely example being the global border closures aimed to prevent the spread of COVID-19.

Contemporary Australian health requirements are contained in the \textit{Migration Regulations 1994 (Cth)}.\textsuperscript{470} Much has been written on their reach and scope.\textsuperscript{471} However, for the purposes of this analysis the following salient points are noted.

First, all migrants who come to Australia must comply with the health requirements dependant on the visa being sought. For example, short-stay tourists do not face extensive health requirements. In contrast, permanent immigrants may face quite stringent requirements.

Second, health requirements are designed to prevent the spread of infectious diseases and to minimise pressure on Australia’s health system. However, current health requirements do not differentiate between ‘disease’ and ‘impairment’, and thus, they do
not distinguish between persons suffering from infectious diseases and persons with disabilities.

Third, an aspiring migrant will be refused entry where her or his disability would impose a significant cost on the Australian community or prejudice access by Australian citizens to health or community care. As of 2019, the threshold for significant cost has been increased to 49,000 dollars (AUD) to be assessed over a ten year period. The original threshold was 40,000 dollars (AUD).

Fourth, existing health requirements do not consider any contributions which a person with disabilities would make if admitted into Australia.

Fifth, if a family member fails the health requirement due to disability, then consequently, the entire family will be refused entry into the country. For example, where a child’s disability fails the health requirements on the grounds of cost, the parents and siblings will also be refused entry. This raises the concern that families may be forced to separate to increase chances of successful migration into Australia.

Finally, the Minister is empowered with respect to some classes of visas to waive the health requirements.

The aforementioned points highlight the manner in which health requirements adversely impact persons with disabilities, especially the inability to offset against costs and the use of medical services. Further, the lack of structured consideration for the contributions of aspiring migrants deprives the Australian community of the benefits that come with including migrants with disabilities and/or their families. The 2010 report of the House of Representatives Joint Standing Committee on Migration (JSC), titled Enabling Australia, reveals a number of situations where persons with disabilities have been adversely affected by the health requirement. In particular, families with a child with disabilities are especially vulnerable to exclusion without redress. There have been recent changes to the operation of the health requirement policy, but the core resistance to migration involving persons with disabilities remains intact.

In the unlikely instance where persons with disabilities are admitted into Australia, many are unable to access social security benefits for a ten year period. Many migrants with disabilities, who would otherwise be eligible to receive the Disability Support Pension,
must wait ten years of qualifying residence, unless they acquired their disability when residing in Australia.

The Disability Discrimination Act (‘DDA’) does enable persons with disabilities to seek redress when they are discriminated against in the administration of a Commonwealth laws or programs, unless non-discrimination would cause an unjustifiable hardship. However, section 52 of the DDA exempts the Migration Act and its subordinate legislation from discrimination claims on the grounds of disability. As the Migration Regulations 1994 (Cth) is a form of subordinate legislation, the health requirement consequently falls within this exemption. That being said, section 52 does not appear to exempt administrative programs in migration from the reach of the DDA.

Ultimately, when considering the health requirements as they apply to persons with disabilities, Saul makes it a point to highlight that:

…. Australia’s health test would likely exclude from Australia a glittering array of talented foreigners with disabilities or serious illnesses, from Stephen Hawking to John F Kennedy to Franklin D Roosevelt. … It also excludes many less well-known persons with disabilities who are capable of making considerable social and economic contributions to enriching Australian life. The current health test is constructed and operates in a blunt and arbitrary fashion which is not well tailored to the requirements of international human rights law, nor respectful of basic human dignity.

The CRPD Committee’s Assessment of Australia's Compliance

In its Concluding Observations in September 2013, the CRPD Committee requested Australia review and withdraw its interpretive declaration, making no additional comment concerning article 18. In its Combined Second and Third Periodic Reports of September 2018, the Australian Government continued to defend the health requirement and the exemption set out in section 52 of the DDA.

In their shadow report titled Disability Rights Now 2019, Australia’s disability organisations criticised the health requirement stating:

Almost all visa applicants must satisfy the health requirement in order to be granted a visa, which has been found to indirectly discriminate against people with disability. Migration law and processes treat people with disability solely as a cost burden. Children or family members with disability are considered as a health risk preventing the child or family from migrating or remaining in Australia.
After Australia’s Second Constructive Dialogue in September 2019, the CRPD Committee persisted in its request for Australia to review and withdraw its interpretive declaration. This concern flowed through to the recommendations concerning article 18 made in the Concluding Observations of October 2019. Specifically, the Committee recommended that Australia:

a) Review and amend migration laws and policies to ensure persons with disabilities do not face discrimination in any of the formalities and procedures relating to migration and asylum, especially remove the exemption in the Disability Discrimination Act 1992 to certain provisions of the Migration Act;
b) Remove the 10-year qualifying period for migrants to access the Age and Disability Support Pensions …

Furthermore, the CRPD Committee made added recommendations concerning the transfer of refugees from Nauru and Papua New Guinea, and to establish minimum health requirements for immigration detention centres. These recommendations reach beyond article 18 and will not be discussed in this chapter.

Considering the above, it is questionable whether Australia is fully complying with article 18 of the CRPD with respect to immigration and related processes. While Australia contends that the interpretive declaration of article 18 is simply declaratory of existing principles of international law, it is already established that migrants do not have an unfettered right to enter Australia, and that Australia may differentiate between aspiring migrants and its citizens if based on the costs and capacity of Australia’s health system. With this in mind, the declaration could be viewed as unnecessary, and Australia should strongly consider repealing this portion of its interpretive declaration.

The health requirement raises further layers of complexity. As explained previously, health criteria accords with international law so long as it is legitimate, reasonable and objective. However, the previous section reveals that the health requirement is a blunt instrument which adversely impacts on persons with disabilities. The existing criteria do not appear to be reasonable and objective, as originally noted in the JSCs Enabling Australia report.

The Australian Government would benefit by reviewing the health requirement as it applies to persons with disabilities to better align its criteria with the human rights of persons with disabilities. It is suggested that a review is undertaken on the
recommendations raised in the *Enabling Australia* report to determine the appropriateness of enacting any of its recommendations.

Although many of these recommendations are technical, and are better assessed in a review of the health requirement as it applies to persons with disabilities, several of the JSC’s recommendations are worthy of immediate implementation. For example, recommendation 2 asks:

… [T]o allow for the consideration of the social and economic contributions to Australia of a prospective migrant or a prospective migrant’s family in the overall assessment of a visa.\(^{490}\)

In other words, as well as assessing the costs to the health system, this would be balanced against the expected social and economic contributions of the aspiring migrant or of her or his family.

Similarly, recommendation 4 separates the assessment of diseases from the assessment of disabilities.\(^{491}\) Whereas, recommendation 14 seeks amendments to bestow power on officials to extend a waiver:

… [T]o offshore refugee visa applicants involving disability or health conditions on compelling and compassionate grounds…..Consideration should also be given to extended family members for the same treatment in the same circumstances.\(^{492}\)

It is worthwhile to recall that the CRPD Committee made two further recommendations in 2019: first, the Committee recommended that the section 52 exemption in the DDA be repealed,\(^{493}\) and second, Australia should remove the ten year residency rule for the receipt of social security for a pre-existing disability.\(^{494}\)

On the first point, the Australian Government should no longer exempt migration from the DDA. Article 5 of the CRPD provides that persons with disabilities are equal before the law and prohibits discrimination on the grounds of disability. Removal of the section 52 exemption would uphold the article 5 rights of persons with disabilities who are seeking to migrate to Australia.

Finally, although differentiation between citizens and persons with ten years residency is defensible under international law, when the social security system is next reviewed in its entirety, the operation of the ten year residency rule should be examined in greater detail.
It may be possible for the enactment of a discretion to grant Disability Support Pension to those who fall short of ten years residency, but who can establish special circumstances.
Article 19 Living Independently and Being Included in the Community

Article 19 outlines one of the key objectives of the CRPD, which is to guarantee the full and effective inclusion of people with disability in the community. To that end, it establishes the right of persons with disability to choose where, with whom and in what form they wish to live. Giuseppe Palmisano explains that the essence of article 19 is that it effects:

A profound shift of values in the context of disability, away from treating people with disabilities as objects of pity, to be managed or taken care of, towards treating them as human subjects and ‘equal citizens,’ deserving equal respect for equal rights.

The article overrides the old charitable model of disability, and in its place makes it clear that persons with disabilities have equal rights to live independently in the community and to be accepted by its members.

Since the late 19th Century (and even earlier in some countries), many persons with disabilities were housed in segregated institutions which separated them from their families and from the community. Persons with cognitive, psychosocial, developmental and communications difficulties bore the brunt of institutionalisation, although persons with physical and sensory disabilities were not immune from being placed in large residential settings, especially when they could not be accommodated by their families and where social security payments were unavailable.

Around the world, large residential institutions left women, girls and some men and boys with disabilities - and especially with cognitive and/or psychosocial disabilities - vulnerable to assault, including sexual assault and exploitation.

Understanding Article 19

Article 19 is a breakthrough provision because it seeks to dismantle the barriers precluding many persons with disabilities (and especially those with cognitive, psychosocial, developmental and communications disabilities) from living independently in the community.
The article obliges ratifying countries to recognise the rights of persons with disability to live in the community, and have choices equal to people without disability. Ratifying countries are required to ensure that people with disabilities are able to choose where and with whom to live, are able to access home and community services necessary to support living and inclusion in the community and are able to access general community services and facilities on an equal basis with others. 498

General Comment No. 5 499 explains the breadth and scope of the following key phrases: 500

a) **Independent living** means that individuals with disabilities are provided with all necessary means to enable them to exercise choice and control over their lives and make all decisions concerning their lives. Personal autonomy and self-determination are fundamental to independent living, including access to transport, information, communication and personal assistance, place of residence, daily routine, habits, decent employment, personal relationships, clothing, nutrition, hygiene and health care, religious activities, cultural activities and sexual and reproductive rights. These activities are linked to the development of a person’s identity and personality:

b) **Being included in the community** relates to the principle of full and effective inclusion and participation in society as enshrined in, among others, article 3 (c) of the Convention. It includes living a full social life and having access to all services offered to the public and to support services offered to persons with disabilities to enable them to be fully included and participate in all spheres of social life. …

c) **Independent living arrangements**. Both independent living and being included in the community refer to life settings outside residential institutions of all kinds. It is not “just” about living in a particular building or setting; it is, first and foremost, about not losing personal choice and autonomy as a result of the imposition of certain life and living arrangements. Neither large-scale institutions with more than a hundred residents nor smaller group homes with five to eight individuals, nor even individual homes can be called independent living arrangements if they have other defining elements of institutions or institutionalization. Although institutionalized settings can differ in size, name and set-up, there are certain defining elements, such as obligatory sharing of assistants with others and no or limited influence over whom one has to accept assistance from; isolation and segregation from independent life within the community; lack of control over day-to-day decisions; lack of choice over whom to live with; rigidity of routine irrespective of personal will and preferences; identical activities in the same place for a group of persons under a certain authority; a paternalistic approach in service provision; supervision of living arrangements; and usually also a disproportion in the number of persons with disabilities living in the same environment…
d) **Personal assistance** refers to person-directed/‘user-led’ human support available to a person with disability and is a tool for independent living. Although modes of personal assistance may vary, there are certain elements which distinguish it from other types of personal assistance, namely:

- (i) Funding for personal assistance must be provided on the basis of personalized criteria and take into account human rights standards for decent employment. …;
- (ii) The service must be controlled by the person with disability, meaning that he or she can either contract the service from a variety of providers or act as an employer. …;
- (iii) Personal assistance is a one-to-one relationship. Personal assistants must be recruited, trained and supervised by the person granted personal assistance. …;
- (iv) Self-management of service delivery. Persons with disabilities who require personal assistance can freely choose their degree of personal control over service delivery according to their life circumstances and preferences…

General Comment No. 5 clarifies and expounds upon the requirements specified in the three lettered paragraphs of article 19. In relation to paragraph (a) on choosing where and with whom to live, the General Comment explains that:

To choose and decide how, where and with whom to live is the central idea of the right to live independently and be included in the community. Individual choice, therefore, is not limited to the place of residence but includes all aspects of a person’s living arrangements: ….501

Article 19(b) is concerned with accessing support services. General Comment No. 5 explains to ratifying countries:

Individualized support services must be considered a right rather than a form of medical, social or charity care. For many persons with disabilities, access to a range of individualized support services is a precondition for independent living within the community.502

Article 19(c) is concerned with the requirement that persons with disabilities are able to access general services and facilities on an equal basis with others. In General Comment No. 5, the CRPD Committee gave a broad and appropriate interpretation of general community services. The Committee wrote that:

Services and facilities mentioned in this section of the article are non-disability-specific support services and facilities for the general population in the community. They cover a wide range of services, such as housing, public libraries, hospitals, schools, transport, shops, markets, museums, the Internet, social media and similar facilities and services.503

When detailing the obligations of ratifying countries, the General Comment was required to determine whether the doctrine of progressive realisation applied to article 19 and
especially to its three paragraphs. The CRPD Committee wrote that the obligations of ratifying countries:

... [R]eflect the nature of human rights as either absolute and immediately applicable (civil and political rights) or progressively applicable (economic, social and cultural rights). Article 19 (a), the right to choose one’s residence and where, how and with whom to live, is immediately applicable as it is a civil and political right. Article 19 (b), the right to access individualized, assessed support services, is an economic, social and cultural right. Article 19 (c), the right to access service facilities, is an economic, social and cultural right ... Progressive realization entails the immediate obligation to design and adopt concrete strategies, plans of action and resources to develop support services as well as making existing, as well as new, general services inclusive for persons with disabilities.504

In truth, the accessibility of general community services in article 19(c) appears, depending on specific services, to have elements of civil, political, economic, social and cultural rights. In other words this paragraph appears to straddle the divide between civil and political rights and economic social and cultural rights. Be that as it may, ratifying countries are required to make general services accessible to persons with disabilities without discrimination.

While General Comment No. 5 details the meets and bounds of article 19, it appears to say little about the adoption of various strategies by ratifying countries to transition to independent living and full acceptance in the community. However, there is interesting available material on implementing article 19 in the Nordic countries,505 and the use of the European Union Structural Fund mechanism to assist with enabling people with disabilities to live independently and to be fully accepted in their communities.506

**CRPD Committee Article 19 Jurisprudence**

*MH v Sweden* 507 was the first complaint under the CRPD’s Optional Protocol to come before the CRPD Committee in April 2012. In brief, Ms M H had a chronic connective tissue disorder (Ehlers-Danlos Syndrome) that resulted in her being unable to walk, and have difficulty sitting and lying down. Ms M H asked the local planning authority for permission to build an indoor hydrotherapy pool on 45 square metres of her land because hydrotherapy was her only method of rehabilitation. Owing to the progress of the disease, she was unable to travel to obtain hydrotherapy in an external pool. The local planning authority refused her permission. There were a series of appeals up to the Swedish
Administrative Court of Appeal, which refused permission to build the pool. Ms M H brought a complaint to the CRPD Committee, arguing that the refusal of planning permission breached several articles of the CRPD.

The CRPD Committee upheld her complaint because the refusal of planning permission amounted to discrimination, including refusal of reasonable accommodation, under article 5(1) and (3). This discrimination adversely affected access to health and rehabilitation contrary to articles 25 and 26 of the CRPD. The CRPD Committee stated that:

… [T]he State party’s competent authorities, when considering her application for permission to build a hydrotherapy pool that would meet her rehabilitation needs, failed to apply the principle of proportionality and weigh her interests in using the plot of land that she owns for the construction of the hydrotherapy pool against the general interest in preserving the area in question in strict compliance with the development plan. It further notes the State party’s argument that the Planning and Building Act is applied equally to all, whether the person has a disability or not, and that the Act contains no clauses that would indirectly lead to discrimination against persons with disabilities.

…The Committee observes that a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different.

…In the present case, the information before the Committee shows that the author’s health condition is critical and access to a hydrotherapy pool at home is essential and an effective – in this case the only effective – means to meet her health needs. Appropriate modification and adjustments would thus require a departure from the development plan, in order to allow the building of a hydrotherapy pool. The Committee notes that the State party has not indicated that this departure would impose a ‘disproportionate or undue burden’. In this connection, the Committee notes that the Planning and Building Act allows for departure from the development plan, and that it can thus accommodate, when necessary in a particular case, an application for reasonable accommodation aimed at ensuring to persons with disabilities the enjoyment or exercise of all human rights on an equal basis with others and without any discrimination.508

The importance of this decision is that the CRPD Committee further held that article 19(b) of the CRPD had been breached by the Swedish authorities. The CRPD Committee wrote:

… [I]n the absence of an indoor hydrotherapy pool at home, she will eventually have to enter a specialized health-care institution, and that the State party did not refute the author’s allegations. In
this regard, the Committee recalls the provision in article 19(b) of the Convention, which requires States parties to take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of their equal right to live and participate in their communities by ensuring that persons with disabilities “have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community”. The rejection of the author’s application for a building permit has deprived her of access to hydrotherapy, the only option that could support her living and inclusion in the community.\textsuperscript{509}

The second decision is \textit{D.R v Australia}\textsuperscript{510} which was handed down by the CRPD Committee in April 2017. Mr D.R was born in 1961, however, he has a mental and intellectual disability arising from an acquired brain injury. In 1998 he began living at Queensland’s Jacana Acquired Brain Injury Centre which is under the auspices of Queensland Health, and hence the State Government of Queensland. He sought rehabilitation in order to enable him to transition back into the community. In 2000, Mr D.R was advised by the medical staff that his rehabilitation program would conclude as he was ready to transition back into the community. Before he would be permitted to leave, appropriate accommodation and disability services would have to be made available. However, despite the efforts of the medical staff who applied to Queensland Government departments, he was still living in the centre when his complaint to the CRPD Committee was lodged in August 2013.

In his complaint to the CRPD Committee, Mr D.R asserted that his rights under articles 14, 18, 19, 22, 26 and 28 of the CRPD had been violated. In relation to article 19, his institutionalisation at Jacana was a violation because it prevented him from living independently in his place of choice, and had him trapped in a medically oriented residential setting rather than being included in the community.\textsuperscript{511}

Ultimately, the CRPD Committee dismissed the complaint, not because Mr DR’s concerns were invalid, but because he had not yet appealed his case to the federal courts — Under Article 2(d) of the Optional Protocol, applicants can only bring complaints to the CRPD Committee when they have exhausted any internal remedies which are open to them.\textsuperscript{512} Nevertheless, the facts of the case demonstrate that his article 19 rights had been violated. The failure of the Government of Queensland to provide accommodation and appropriate disability services amounted to significant breaches of article 19 of the CRPD.
These two decisions are illustrations of the breadth of article 19 of the CRPD which places significant requirements upon ratifying countries to develop and implement strategies to enable all persons with disabilities to live independently and to be fully accepted in the community.

**The CRPD Committee's Assessment of Australia's Compliance**

During the latter decades of the twentieth century, Australian State and Territory governments began various deinstitutionalization programs. Prompted by concerns about the inhumanity of institutions, deinstitutionalisation followed a series of inquiries and reports that documented shocking conditions experienced by people with disability, as well as financial and other inefficiencies.\(^{513}\) The purpose of deinstitutionalisation was to pull down large residential premises and to replace them with housing in the community, which often meant the building of group homes of various sizes and dimensions.\(^{514}\)

While deinstitutionalization in Australia has led to the closure of most (but not all) large residential institutions housing people with disability, the situations of many persons is far from ideal. As the recent interim report of the Royal Commission into Aged Care notes, more than 6000 younger people, the majority with a disability, are still accommodated in aged care nursing homes because no other residential settings are available.\(^{515}\)

The process of deinstitutionalisation has also been far from perfect. After its first Constructive Dialogue with the CRPD Committee in September 2013, there was concern about the aftermath of Australia’s deinstitutionalisation program. The Concluding Observations stated that:

> The Committee is concerned that despite the policy to close large residential centres, new initiatives replicate institutional living arrangements, and many persons with disabilities are still compelled to live in residential institutions in order to receive disability support.

> The Committee encourages the State party to develop and implement a national framework for the closure of residential institutions and allocate the resources necessary for support services that would enable persons with disabilities to live in their communities.\(^{516}\)

In its Combined Second and Third Periodic Reports to the CRPD Committee of September 2018,\(^{517}\) Australia detailed its efforts to comply with article 19 of the CRPD.
Australia frankly admitted that there is no national framework for the closure of residential institutions. In most states and territories all large residential institutions have been closed. However, in 2018 in NSW, 320 persons remained living in three large residential institutions, though arrangements are being made to ultimately close them. The NDIS is assisting with independent living through its provision of reasonable and necessary disability supports.

The combined report gave the following data on persons with disabilities who require assistance with accommodation:

The majority of housing options for persons with disabilities in Australia comprises a mix of independent living and shared living arrangements in private residences and group homes. In 2015-16, there were 331,817 disability service users, with information on residential settings available for 287,568 of these users. Of these, 80.7 per cent (232,005) were living in private residences in the community and 5.2 per cent (14,812) were living in domestic-scale supported living facilities such as group homes. A further 2.8 per cent (8,046) were living in supported accommodation facilities with the remaining 11.4 per cent (32,705) living in various other settings.

These figures are perhaps optimistic. Group homes come in various configurations and sizes, and it is not always apparent that particular group homes are compliant with article 19 in providing for true independent living leading and full acceptance of people with disability in the community. In the shadow report from Australia’s disabled person’s organisations of July 2019, the Australian Government’s slowness to provide appropriate housing and to transition people with disabilities into the community was commented upon as follows:

More than 5.2% of people with disability live in shared accommodation such as group homes, with a further 2.8% living in supported accommodation facilities. Many people with disability, including NDIS participants are forced to live in institutions, residential, congregate care, and aged care facilities in order to receive social and personal care supports. Access to appropriate, available, accessible and affordable housing remains a major issue for people with disability, becoming more evident with the roll out of the NDIS. It is estimated that 35,000 to 55,000 NDIS participants will not have their housing needs met in the first decade of the scheme.

In its report of July 2019 to the CRPD Committee, the Australian Human Rights Commission was concerned about the lack of appropriate and accessible housing in Australia, which severely limits the choices available to people with disability. It even identifies the limits of the NDIS, noting that:
The NDIS rules and operational guidelines for specialist disability accommodation (SDA) provide for the building of: (i) group homes—houses that accommodate four to five long-term residents and (ii) in limited circumstances, larger dwellings that house more than five long-term residents. The Commission is concerned that the SDA framework facilitates and encourages the establishment of residential institutions and will result in people having to live in particular living arrangements to access NDIS supports.528

The second constructive dialogue between the CRPD Committee and Australia was held on 12 and 13 September 2019. In its subsequent Concluding Observations529 the CRPD Committee made the following recommendations on Australia’s compliance with article 19:

a) Develop a national framework for the closure of all disability-specific residential institutions, and the prevention of trans-institutionalisation including addressing how persons with disabilities not eligible for the NDIS can be supported to transition to live independently in the community;

b) Increase the range, affordability and accessibility of public and social housing for persons with disabilities, including by implementing a quota for accessible social housing and by developing regulations and standards to guarantee the progressive application of universal design principles in accessible housing;

c) Revise the Younger People in Residential Aged Care—Action Plan to ensure that no person aged under 65 years should enter or live in residential aged care by 2025.530

It is suggested that at the very least, the Federal, State and Territory Governments must establish a plan to immediately close any remaining large residential institutions and to ensure that within a reasonable time, all present and future housing needs and attendant services are available and comply with article 19 of the CRPD.
Article 20 Personal Mobility

Understanding Article 20

In article 20, the CRPD introduced a new requirement of personal mobility into international human rights law. Without personal mobility, many persons with disabilities will find it virtually impossible to obtain education, to work and to participate in community activities.531

Article 20 of the CRPD requires ratifying countries to ‘[T]ake effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities’.532 It then requires states to ensure people with disability can access mobility aids, devices, assistive technologies, and forms of live assistance of their choice at an affordable cost, and that necessary training be provided in the use of such aids.

There is a wide variety of available mobility aids, devices and assistive technologies, including various types of wheelchairs, prosthetics (such as artificial limbs),533 walking frames, white canes and mobility apps on mobile phones. The words ‘forms of live assistance’ refer to guide dogs and other assistance animals, while ‘intermediaries’ include guides for persons with vision impairments and sign interpreters.

To understand the responsibilities of governments with respect to article 20, it is appropriate to turn to the general obligations on countries which are set forth in article 4 of the CRPD. In particular, article 4 requires nations ‘to adopt all appropriate legislative, administrative and other measures for the implementation’ of article 20.534 The general obligations also exhort countries:

To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.535
The CRPD Committee’s Assessment of Australia’s Compliance

In its Initial Report to the CRPD Committee of December 2010, the Australian Government outlined the aids and equipment programs of the States and Territories which are funded in accordance with the National Disability Agreement. These programs include the provision of mobility devices such as wheelchairs.

In the CRPD Committee’s 2013 Concluding Observations to Australia, there was no comment on article 20. Under the CRPD Committee’s Simplified Reporting process, in 2017 the Committee sent the Australian Government a list of issues to be answered in Australia’s Combined Second and Third Periodic Reports. The CRPD Committee did not ask a question about article 20, and hence in the Combined Second and Third Periodic Reports of September 2018, Australia did not give any details on the implementation of article 20.

However, in the shadow or alternative report by Australia’s disabled person’s organisations titled Disability Rights Now article 20 was discussed. The shadow or alternative report stated:

Whilst First Nations people with disability in remote areas accessing the NDIS may be able to source aids and equipment, there is no recognition of the broader structural obstacles that can preclude use of such equipment, such as inaccessible houses, lack of footpaths, lack of services and isolation.

In its Concluding Observations published after Australia’s second Constructive Dialogue held in September 2019, the CRPD Committee did note article 20. It was concerned about the structural problems facing persons with disabilities in rural areas, and especially First Nation persons with disabilities in obtaining usable mobility aids and equipment. The CRPD Committee recommended that the Australian Government:

…[I]n partnership with First Nations persons with disabilities, their representative organizations and communities, develop locally relevant solutions to address the underlying structural obstacles that can preclude the use of aids and equipment in First Nations communities and/or remote areas.

In 2013, the National Disability Insurance Scheme was established. Although the scheme is not free from problems, it has enabled many persons with disabilities to obtain mobility aids and other equipment. Of course, the size and geography of Australia mean
that there is still a lack of infrastructure like accessible housing and level footpaths in rural
and remote areas which does impact upon First Nations persons with disabilities.\textsuperscript{547}
However, from the available evidence it is fair to conclude that the Australian government
is in compliance with article 20 of the CRPD.
Article 21 Freedom of Expression and Opinion, and Access to Information

Article 21 is concerned with two intertwined rights or precepts. First, is the right of freedom of expression and opinion, and second, the right for persons with disabilities to access information. Persons with disabilities, especially those with sensory or cognitive disabilities, have traditionally had difficulties in accessing information in appropriate formats. For example, as blind and visually impaired persons usually cannot access print, to obtain information they require formats like braille, large print, and screen reading technologies. Without full access to information, it is more difficult to hold and to express opinions which require the receipt of information in their formulation. This is why article 21 is of such importance to persons with disabilities.548

Freedom of expression and opinion are long-standing rights in international law. Article 19 of the Universal Declaration of Human Rights of 1948 (UDHR) enshrines the rights of freedom of opinion and expression. Interestingly, article 19 also encompasses the right ‘…to seek, receive and impart information …’

Article 19 of the International Covenant on Civil and Political Rights of 1966 (ICCPR) declares that persons have the right to hold opinions.549 Article 19(2) details the rights of freedom of expression and information which include ‘… freedom to seek, receive and impart information and ideas of all kinds…either orally, in writing or in print, in the form of art, or through any other media …’550

Understanding Article 21

Article 21 requires ratifying countries to:

….T]ake all appropriate measures to ensure that persons with disabilities can 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, as defined in article 2 of the present Convention …551

Article 2 defines ‘communication’ and ‘language’:

**Communication**; includes in 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.

**Language**: includes spoken and signed languages and other forms of non-spoken languages.\(^{552}\)

Article 21 contains five lettered paragraphs setting out a non-exhaustive list of appropriate measures to be taken by signatory nations. They must ensure that:

- a) public information is provided in accessible formats and technologies without additional cost;
- b) in official interactions, there must be acceptance and facilitation of the use of sign languages, of Braille and of augmentative and alternative forms of communication;
- c) private entities which provide information to the public are to be urged to utilise accessible formats;
- d) the mass media is encouraged to make their services available to persons with disabilities; and
- e) the use of sign languages be recognised and promoted.\(^{553}\)

Article 4 of the CRPD sets out general obligations for countries. Article 4(1) (g) is relevant to article 21 because it requires nations with the capacity so to do, to undertake research and development of new technologies, ‘… including information and communication technologies …’.\(^{554}\)

As was noted in the General Comment on Article 9, there is an intersection between articles 9 and 21.\(^{555}\) While article 9 is concerned with accessibility generally, including access to information, the focus of article 21 is on freedom of expression, opinion and the availability of information. However, without access to information, it is near impossible for persons with disabilities to formulate workable opinions.

**The CRPD Committee's Assessment of Australia's Compliance**

In its Initial Report of December 2010, the Australian Government enumerated how it was complying with article 21. The Initial Report noted the work of the Government to make more information accessible, including website accessibility, it’s captioning of government information, and its print disability services program.\(^{556}\)

After Australia’s first Constructive Dialogue in September 2013, the CRPD Committee commented on article 21 in its Concluding Observations.\(^{557}\) It recommended that Auslan be made one of Australia’s national languages, and that funding be increased to produce information in accessible formats.\(^{558}\)
In its Combined Second and Third Periodic Reports of 2018, the Australian Government recounted that Australia does not have a national language, but that a number of languages, such as Auslan are widely recognised. While this is true enough, recognition of Auslan needs to be elevated to that of an official language so that persons are able to sign when interacting with governments and agencies.

The Australian Government detailed its work in making online services accessible including the National Relay Service (NRS) which allows deaf or hard of hearing persons to access standard telephones, the funding of the print disability services program, the increase in television program captioning services, and the examination of audio-captioning services for television broadcasts.

In the 2019 report from Australia’s disabled person’s organisations titled Disability Rights Now, it was suggested that Auslan be made an official language, and that information and communication standards be established to ensure full accessibility.

In July 2019, the Australian Human Rights Commission forwarded its report to the CRPD Committee, noting that persons with disabilities still cannot access information on a level playing field. It recommended to increase captioning targets for online channels and videos, to mandate that 10% of television programs be audio-described, to cooperate with the States and Territories to ensure that all information about changes in laws and policies be made fully accessible and that the my.gov website comply with web content accessibility guidelines.

After Australia’s second Constructive Dialogue of September 2019, the CRPD Committee recommended that Australia:

> … [D]evelop plain language law requiring government agencies to use clear communication and develop legally-binding Information and Communication Standards so that information, particularly all information about significant changes to laws, policies, systems and obligations, is provided in accessible modes, means and formats … [And] promote and support the use of sign language (Auslan) and take steps to ensure the availability of qualified sign language interpreters.

It is clear that since Australia ratified the CRPD in mid-2008, the Government has made efforts to make information more accessible to persons with disabilities.

In relation to the use of Auslan, after the CRPD Committee recommended in 2013 that it be made one of Australia’s national languages, it decided to take a more nuanced
approach in its 2019 Concluding Observations. It recommended that the use of Auslan be promoted and that the number of sign interpreters be increased (an example of how this could be achieved would be teaching at least basic Auslan in all schools).\textsuperscript{567} It is suggested that Australia should adopt this recommendation which will make the usefulness and availability of Auslan more widespread in the nation.

It is further suggested that Australia examine the feasibility of specifying information and communications standards to make information more accessible to persons with disabilities.

Finally, it is recognised that work has been undertaken with respect to the captioning and to the audio-description of television programs. It is hoped that this work will continue in order to make television programs more accessible to persons with sensory disabilities.
Article 22: Respect for Privacy

The ability to control information, particularly knowledge of disability status, is essential for persons with disabilities to maintain autonomy and reduce the risk of discrimination or stigmatisation. To accomplish this feat, article 22 establishes a right to prevent arbitrary or unlawful interference with communications. Put simply, it protects a person with disability’s ‘private sphere’ from uninvited intervention by either States or other persons.568

Understanding Article 22

In its earliest drafting the CRPD’s reference to the right to privacy was contained in a larger article that primarily concerned the protection of home and family of persons with disabilities.569 The eventual separation of the rights to home and family and the right of privacy was led by delegations desiring to model the treatment of privacy matters akin to other human rights treaties.570 Commentators suggest that the adoption of language used by article 17 of the International Covenant on Civil and Political Rights (ICCPR)571 informs both the scope and content of the CRPD’s right to privacy.572

Apart from the inclusion of an additional paragraph that would ultimately become article 22(2), the draft article passed with minimal debate from delegates, and was later characterised as a ‘non-discussion’ by the Chair of the seventh session of the Ad Hoc Committee.573 This lack of discussion around the article may speak to a broader lack of contention in the challenges raised by State compliance.

Article 22(1) begins with a mandate for State parties not to interfere in the private sphere of persons with disabilities. The article implies a robust coverage that extends to reach the needs of persons with disabilities where general privacy protections are insufficient,574 and creates positive obligations to ensure protection of persons with disabilities.575 Its scope includes both ‘correspondence’ and ‘communications,’ to highlight a forward-facing embrace of digital communications.576 Moreover, States are considered to be obliged to provide legislation that furthers the achievement of this right.577

The wording ‘arbitrary or unlawful interference’ provides an understanding that the right to privacy is not absolute and an infringement on privacy is permissible under international law, as long as it is done for a legitimate purpose and complies with or arises from...
legislation. There is the further caveat that in order to be deemed a legitimate purpose it must align with any and all relevant CRPD articles.

The phrase ‘honour and reputation’ imports notions from ICCPR article 17, proposing that States are left to define these concept of ‘honour’ and ‘reputation’ in light of their own context. However, regardless of the conception, the State is then obliged to ensure an effective remedy if this right is breached. This aspect of the paragraph is arguably more important in the context of the CRPD, as persons with disabilities are considered ‘uniquely subject to reputational harm through societal stigma and State-sponsored segregation’, among other forms of differentiation.

Additionally, a second paragraph was included on the right of privacy for medical information. Article 22(2) guarantees States will ensure the confidentiality of personal and health-related data on ‘an equal basis with others’, so that the circumstances and manner in which information is shared should be comparable to those who do not have a disability. This paragraph attempts to disrupt the regular practice of institutions, such as the health sector, who often share the sensitive information of persons with disabilities without permission. The philosophy of this provision rightly protects persons with disabilities from stigmatisation in the areas of insurance and employment, who commonly request extensive medical information.

Considering the above, an emerging concern is whether the misuse of genetic information may also violate the privacy of persons with disabilities. To this end, some commentators consider genetic information to be the ‘most personal information of all’ and argue article 22 to imply coverage of genetic privacy. Such a reading is informed by the intentionally broad language of the CRPD that attempts to accommodate the inclusion of all persons with disabilities, ‘including those with putative disabilities and genetic predisposition to disability’.

D.R. v Australia would have provided an interesting decision regarding the appropriateness of conduct in group homes where privacy is limited due to staff and other residents. The State claimed the complainant’s high level of care was a contributing factor to the necessity of intrusions, raising issues of whether such conduct was ‘arbitrary’. However, the Committee was unable to consider the application of article 22 due to inadmissibility under Optional Protocol article 2(d). Similarly, another privacy-
related claim, *Boris Makarov v Lithuania*, was also deemed inadmissible and so jurisprudence is this area is limited.\(^{588}\)

**The CRPD Committee's Assessment of Australia's Compliance**

In the Initial Reports of 2010, the Australian Government referenced the *Privacy Act 1988 (Cth)*,\(^{589}\) which regulates information privacy in the Australian Government public sector and eligible entities in the private sector and the Australian Privacy Commissioner.\(^{590}\) Further, the submission pointed to State and Territory schemes, such as the *Health Records and Information Privacy Act 2002* (NSW), the *Information Act* (NT), and the *Health Records (Privacy and Access) Act 1997* (ACT), to indicate the fulfilment of article 22(2) on the management of health records.\(^{591}\) Limiting the inquiry on compliance to the Federal level, the *Privacy Act 1988* expressly includes disability in the interpretation of ‘health information’ and ‘health services’, suggesting compliance with article 22(2). The Committee appeared to have been convinced by Australian Government’s submission as article 22 was not discussed in the subsequent Concluding Observations.

Matters of privacy were not referred to in the Combined Second and Third Periodic Reports from Australia or the CRPD Committees Concluding Observations.

The only reference to privacy in Australia was raised by the Committee Co-Rapporteur for Australia in September 2019. The Co-Rapporteur asked Australian delegates to explain how the Federal Government would guarantee the right to privacy for persons with disabilities in institutional settings, such as group homes.\(^{592}\) The responses from the delegation did not appear to provide a direct response,\(^ {593}\) signalling a potential line of future inquiry for the Committee.

*Attorney-General v Kereopa (No 3)*\(^ {594}\) is the only domestic judicial decision to expressly consider the state of CRPD article 22 in the common law. The facts concern a young man with an intellectual disability facing a non-publication order. His solicitors contended that his name should not be released on account of a supposed breach of his fundamental rights under CRPD article 22. However, Hulme J noted that Counsel did not identify whether the CRPD was incorporated into the New South Wales jurisdiction.\(^ {595}\) In addition, Counsel’s submissions did not offer guidance on how it might apply as a matter
of law. Ultimately, Hulme J decided not to engage in any ‘development of common law’.  

**Conclusion**

Respect for privacy is a right which facilitates the achievement of autonomy and control for persons with disability. It is decidedly a non-contentious point for State members, and Australia appears to have demonstrated to the CRPD Committee compliance with article 22. The area of genetic privacy remains an area which may only develop in importance over time, potentially culminating in a concern to be posed by the CRPD Committee in future sessions. Similar concerns may exist on the achievement of privacy protections for those in institution-like arrangements, such as group homes, which have already been identified as an area of inquiry, as indicated by the CRPD Committee Experts.
Article 23 Respect for Home and the Family

Article 23 enshrines the rights of persons with disabilities to marry, parent, engage in sexual relations and fully participate in family life. In a number of past cultures, persons with disabilities were not entitled to enter into marriage, let alone to parent children. Put another way, many persons with disabilities were perceived as gender-neutral human beings. As Janos Fiala-Butora explains:

…[P]ersons with disabilities have long been subject to serious violations of their right to family life. The prevailing stereotype has considered persons with disabilities asexual, which has led to the denial of their sexual autonomy. Coupled with the fact that sex is a taboo subject in many cultures, access to sexual life and partnership has been full of obstacles for many persons with disabilities, especially those living in institutions.

The right to marry and the protection of the family have been guaranteed in a series of United Nations declarations and treaties. However, it was not until the 1993 United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Standard Rules) that marriage and family life were recognised as also pertaining to persons with disabilities. Although the Standard Rules are non-binding, Rule 9 exhorts countries to:

…[P]romote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood.

Understanding Article 23

Article 23 is a lengthy provision. Its essence is captured in paragraph 1 which mandates that ratifying nations:

…[S]hall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others …

Then follow three lettered paragraphs requiring countries to recognise and ensure the rights of all persons with disabilities, including children with disabilities:

(a) To marry and to found a family on the basis of free and full consent;
(b) To decide freely and responsibly on the number and spacing of their children and to receive reproductive and family planning information and education; and
Article 23(2) mandates that in adoption, wardship and guardianship proceedings, the rights and responsibilities of persons with disabilities be recognised, but that in all proceedings the ‘best interests of the child be paramount.’ Furthermore, countries shall ‘…render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.’

Article 23(3) provides that children with disabilities ‘… have equal rights with respect to family life’. However:

…[T]o prevent concealment, abandonment, neglect and segregation of children with disabilities, [countries] shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

Article 23(4) makes it clear that children with or without disabilities shall not be separated from their parents, whether or not they are persons with disabilities, unless separation is via judicially reviewable procedures, and where ‘… such separation is necessary for the best interests of the child.’ In any event, no child shall be ‘… separated from parents on the basis of a disability of either the child or one or both of the parents.’

Finally, article 23(5) says that where the family is unable to care for a child with disabilities, alternative care must be arranged with the wider family, or in the community, but in a family setting.

Australia does not discriminate against persons with disabilities who wish to marry, provided they are adults and can comprehend that they are entering into a marriage with another person. Under section 23B of the Marriage Act 1961 (Marriage Act), a marriage entered into after the coming into force of amending legislation in 1985 will be void where:

…[T]he consent of either of the parties is not a real consent because that party did not understand the nature and effect of the marriage ceremony.

The English case of Park v Park has been cited on a number of occasions by Australian Courts because of its common law statement on what is required for a valid consent to marriage. The Court said:
A mere comprehension of the words of the promises exchanged at a ceremony of marriage is not sufficient to establish … consent to the marriage at the time. … . The parties must also be capable of understanding the nature of the contract into which they are entering free from the influence of morbid delusions on the subject. 607

A recent illustration is the 2018 decision of the Family Court of Australia in *Jarman v Perriam*. 608 The marriage took place in 2016. The wife who was aged in her fifties, sought an order of nullity because she suffered from Bipolar Affective Disorder. In her affidavit she deposed that she did not consent because she did not understand the nature and effect of the marriage ceremony. The Court made an order that the marriage was void. As is demonstrated by this decision, in most instances it will be the husband or the wife who will seek to contest the validity of a marriage on the grounds of lack of consent.

**The CRPD Committee's Assessment of Australia's Compliance**

It does appear that the main issues confronting persons with disabilities in Australia is the care of children and the reproductive rights of persons with disabilities.

In its 2010 Initial Report, the Australian Government detailed programs for parents and carers of children with disabilities. 609 No mention was made of any assistance to parents with disabilities. However, the commencement of the National Disability Insurance Scheme in 2013 assists parents with disabilities who are scheme participants.

The Concluding Observations of the CRPD Committee after Australia's first Constructive Dialogue in 2013 did not mention article 23. 610 Under the CRPD Committee's Simplified Reporting process, in 2017 the Committee sent the Australian Government a list of issues to be answered in Australia’s Combined Second and Third Periodic Report. 611 The CRPD Committee did not ask a question about article 23, and hence in its Combined Second and Third Periodic Reports, 612 Australia did not give any details on the implementation of this provision.

The issue was raised in the July 2019 shadow or alternative report, where Australia’s Disabled Persons Organisations wrote that:

> A parent with disability in Australia is up to ten times more likely than other parents to have a child removed from their care, often on the basis of parental disability rather than evidence of neglect or abuse. 613
The shadow report added that women and LGBTIQ+ with disabilities ‘… experience significant discrimination in accessing assisted reproductive technologies.’

In its 2019 Concluding Observations published after Australia’s second Constructive Dialogue, the Committee took account of what was said in the shadow report. The Committee made several recommendations, First, that Australia ‘ensure no separation of children from parents on the basis of the disability of either the child or one or both of the parents,’ and second, that Australia ‘ensure that women with disabilities and LGBTIQ+ persons with disabilities have equal access to assisted reproductive technologies.’

From the available evidence, Australia is complying with article 23 of the CRPD. Of course, as is the case with every article, improvements can be made. It is suggested that more research should be undertaken into the problems confronting parents with disabilities and how they can receive better support. Similarly, if women with disabilities and LGBTIQ+ persons are finding it difficult to access reproductive technologies, steps should be taken to enable access.
Article 24 Education

Until the closing years of the 18th Century, most children with disabilities did not receive any form of education. The education which existed two centuries ago mostly consisted of schools for deaf and blind children and was confined to developed nations. It is still the case in poorer parts of our world that many girls and boys with disabilities do not receive any formal education. Education has always been a way to lift persons out of poverty, and this is no less true for persons with disabilities as it is for the entire community.

As the United Nations Committee on Economic, Social and Cultural Rights put it in 1999:

… [E]ducation is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.  

The right to education is found in earlier human rights declarations and treaties, but it took some time before the right of children with disabilities to be educated was recognised.

 Earlier Human Rights Declarations and Treaties and Education

Although early human rights treaties did declare that education is a right, it took some time to include persons with disabilities as bearers of the right to education. It was not until the CRPD came into force in 2008 that inclusive education for persons with disabilities was recognised in international human rights law. In her scholarly work, Professor Arlene S. Kanter has examined the path to inclusive education in detail, however, for our purposes the following account will suffice.

Education has been recognised as an important right, certainly since the 1945 establishment of the United Nations. This right to education was enshrined in
international human rights law in 1948 in the first United Nations human rights declaration. On 10 December of that year, the General Assembly of the United Nations adopted and proclaimed the *Universal Declaration of Human Rights* (UDHR). Article 26 says that ‘everyone has the right to education.’

The 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR), spells out this right in a little more detail. Article 13 provides that everyone has the right to education. However, article 13(3) obliges ratifying countries to:

... have respect for the liberty of parents and, when applicable, guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

This paragraph does not mention children with disabilities and special schools because this issue was not contemplated by the drafters. Its primary purpose appears, to me, to permit parents and guardians to send their children to religious schools not run by governments, provided they comply with legal educational standards.

In 1999, the Committee on Economic, Social and Cultural Rights published a General Comment on article 13 of the ICESCR. The General Comment stated that article 13(3) has two elements. The first is that ratifying countries must ‘...respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.’ The second element upholds ‘...the liberty of parents and guardians to choose other than public schools for their children ...’ provided the schools conform to the nation’s minimum educational standards.

As would be expected, article 28 of the *Convention on the Rights of the Child* (CRC) of 1989, provides for the ‘... right of the child to education ...’ However, the CRC was also the first United Nations Convention to mention children with disabilities. In article 23, it is recognised that a child with disabilities ‘...should enjoy a full and decent life...’ and goes on to provide that a child with disabilities must receive:

... training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development ...
Article 23 of the CRC is now outdated and takes no account of theoretical and political developments from the social model of disability. While it does require care be given to people with disability, it does not mandate that they receive inclusive education.

It was not until the 1990s that the push for inclusive education gained traction. In 1993 the United Nations elevated integrated over separated education, adopting the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which set forth the principle of:

... [E]qual primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings. They should ensure that the education of persons with disabilities is an integral part of the educational system.

In June 1994, the United Nations Economic, Social and Cultural Organisation (UNESCO) released the ‘Salamanca Statement and Framework for Action on Special Needs Education’ (Salamanca Statement) which made it clear that all children with special needs should receive education. The gist of the Salamanca Statement was that children with disabilities should be educated in mainstream schools.

Understanding Article 24

Article 24 exhorts ratifying countries to ensure that children and persons with disabilities are able to access inclusive education, that is, education alongside other children and persons. Put another way, inclusive education means that children with disabilities learn alongside other children in the same classrooms. To facilitate this education, it is necessary to support children with disabilities through the employment of special resource and support teachers.

Article 24 is the longest article in the CRPD. It is recommended that it be read in its entirety to gain a full understanding of its depth and breadth. Paragraph (1) says that countries ‘... shall ensure an inclusive education system at all levels...’ Paragraph 2 substantiates inclusive education stating ‘in realizing this right, States Parties shall ensure that...:

a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

c) Reasonable accommodation of the individual's requirements is provided;

d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion."631

Article 24(2) outlaws the exclusion of persons with disabilities from educational institutions. It prohibits discrimination on the grounds of disability and requires educational bodies to provide reasonable accommodation having regard to the individual requirements of students.

Article 24 does not mention special schools, that is, schools where children with disabilities are segregated from mainstream children. However, it does note the necessity of learning Braille 632 and sign language 633 and ensuring:

… [T]hat the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.634

It is important to appreciate the limitations inherent in article 24. While it mandates inclusive education, it does not mention children with disabilities doing some or all of their education in special classrooms in mainstream schools. Given the extensive lobbying which occurred when article 24 was being drafted,635 it is surprising that article 24 says nothing at all about specialist schools.

In order to set forth its view of the breadth and scope of article 24, in October 2016 the CRPD Committee published its fourth General Comment titled ‘Right to Inclusive Education’.636 The Committee expressed its view of inclusive education in the following lengthy passage:

Inclusive education is to be understood as:

a) A fundamental human right of all learners. Notably, education is the right of the individual learner, and not, in the case of children, the right of a parent or caregiver. Parental responsibilities in this regard are subordinate to the rights of the child.
b) A principle that values the well-being of all students, respects their inherent dignity and autonomy, acknowledges individual requirements and ability to effectively be included in and contribute to society.

c) A means of realizing other human rights. It is the primary means by which persons with disabilities can lift themselves out of poverty, obtain the means to participate fully in their communities, and be safeguarded from exploitation.637

It is also the primary means through which to achieve inclusive societies, since it is a key mechanism to lift children with disabilities out of poverty and to contribute to the building of inclusive societies.

General Comments from United Nations human rights treaty bodies like the CRPD Committee are necessarily written at a high level of abstraction, since a short General Comment cannot hope to deal with each and every situation in ratifying nations throughout the world. However, it is clear that where a ratifying country establishes or finances special schools where children with disabilities are segregated from mainstream children, such programs are counter to the ethos embodied in the General Comment. On the other hand, where children with disabilities in mainstream schools also attend some special classes or programs, for example teaching braille or sign language, this would be compatible with article 24 and with the General Comment.

In most developed countries, specialist schools for children with disabilities sit alongside mainstream schools which accommodate children with disabilities. In Australia, approximately 90% of children with disabilities are enrolled in mainstream schools, but substantial numbers are educated in segregated settings.638 As Tom Shakespeare shows, a binary classification between specialist schools on the one hand and mainstream schools on the other is antithetical to long-term social integration.639 The advantages of special education — i.e. that it is targeted to the needs of individual children — can be accommodated in mainstream schools. Children with disabilities who are enrolled in mainstream schools may attend specialist classes in separate classrooms for some time during the school week, so that all children get the best of both worlds. Integration is beneficial for all children, including those without disability, who get the benefit of exposure to the diversity inherent to disability.
The CRPD Committee's Assessment of Australia's Compliance

In its Concluding Observations on Australia’s Initial Report to the CRPD Committee the CRPD Committee was concerned that:

… [S]tudents with disabilities continue to be placed in special schools and that many of those who are in regular schools are largely confined to special classes or units. … [And] that secondary school completion rates for students with disabilities are about half those for people without disability.

The CRPD Committee recommended that Australia:

Increases its efforts to provide reasonable accommodation … Conducts research into the effectiveness of current education inclusion policies … [and] sets targets to increase participation and completion rates by students with disabilities in all levels of education and training.

In its Combined Second and Third Periodic Reports of 1 September 2018, the Government of Australia articulated a divergent view from that expressed in the CRPD Committee’s General Comment on the Right to Inclusive Education. The Government of Australia highlighted the parental right to choose either education in a special and segregated school, or inclusive education for their child. The Australian Government wrote as follows:

In respect of the Committee’s comments urging States Parties to ‘achieve a transfer of resources from segregated to inclusive environments’, Australia’s view is that a State Party will meet its obligations under Article 24 through an education system that allows for funding of different education modalities so students with disability are able to participate in a range of education options including enrolment in mainstream classes in mainstream schools with additional support, specialist classes or units in mainstream schools and specialist schools. A range of education options ensure that the best interests of the student are a primary consideration.

Australia specifically notes that Articles 13(3) and (4) of ICESCR provide for the liberty of parents and guardians to choose schools for their children provided that educational institutions meet certain minimum standards and the educational objectives in Article 13(1). Accordingly, Australia suggests that the Committee clarify that States Parties may offer education through specialist classes or schools consistently with Article 24.

As is clear in the Combined Second and Third Periodic Reports, the Federal, State and Territory governments are supporting students with disabilities in primary, secondary and in tertiary education. This support extends to both segregated special schools and to schools offering inclusive education.
The Australian Government’s view on specialist schools has been challenged by the Australian Alliance for Inclusive Education (the Alliance). In its submission, the Alliance takes issue with Australia’s view that specialist schools comply with article 24 of the CRPD Committee. Their submission says of the Australian government’s position:

In essence, it treats segregated education options as being a question of parental choice akin to enrolling a child in a faith-based school or a school with a particular education philosophy – it does not recognise that segregation is a systemically inferior and discriminatory education system rather than a modality within an educationally appropriate system.

After Australia’s second Constructive Dialogue in September 2019, the CRPD Committee made several recommendations to Australia on article 24. Interestingly, the Committee prefaced its recommendations by referring to goal 4.1 and 4.5 of the Sustainable Development Goals (SDGS) which form part of the post-2015 development agenda. The SDGS were adopted by the General Assembly of the United Nations on 25 September 2015. Goal 4 of the SDGS requires all nations to ‘ensure inclusive and equitable quality education and promote lifelong learning’. Paragraph 4.1 provides that by 2030, countries must ensure that all children complete free, equitable and quality primary and secondary education. Goal 4.5 which is more relevant to Australia, requires countries by 2030 to:

… [E]liminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, First Nations peoples and children in vulnerable situations.

After referring to these paragraphs of the SDGS, the CRPD Committee recommended that Australia conduct a robust review of the disability standards for education, in consultation with persons with disabilities and their organisations. Furthermore, that a national action plan for inclusive education be developed. The Committee further recommended that Australia:

… [A]ddress the increasing rate of segregation, seclusion and isolation, lack of age appropriate settings for students with disabilities, in particular Aboriginal and Torres Strait Islanders, at all levels and redirect adequate resources to a nationwide inclusive education system for all students. [And that it] Expand the collection of data on students with disabilities, and especially on educational attainment and completion levels, suspension and on “…expulsion rates and the use of restrictive practices and bullying.
Articles 25 and 26 Health, Habilitation and Rehabilitation

Article 25 of the CRPD is titled ‘Health’, while the title of article 26 is ‘Habilitation and Rehabilitation’. As both provisions cover health and wellness, in this segment it is appropriate to examine them together. Health, habilitation and rehabilitation are significant issues for persons with disabilities because many suffer from health problems due to their impairments. Habilitation arises when persons who are born with a disability receive treatment and training, whereas rehabilitation covers persons who have acquired a disability later in life. The 2011 World Health Organisation and World Bank ‘World Report on Disability’ surveyed the plight of persons with disabilities around the globe. From the report, it is clear that one of the biggest problems confronting persons with disability is access to all levels of health care.654

The Universal Declaration of Human Rights (UDHR), and more importantly article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) detail the right to health.655 In its General Comment on article 12 of the ICESCR of 2000, the Committee on Economic, Social and Cultural Rights wrote that:

Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.656

Interestingly, rehabilitation, especially the rehabilitation of victims of war, has its origins in international humanitarian law.657 The 1989 Convention on the Rights of the Child (CRC) exhorts countries to uphold their obligations under international humanitarian law to protect children.658 In the employment context, the International Labour Organisation has also dealt with the rehabilitation of persons with disabilities.659

The provision throughout the world of adequate health and rehabilitation services is a pressing problem. The Sustainable Development Goals (SDGS) were adopted by the General Assembly of the United Nations on 25 September 2015 660 as part of the post-2015 agenda. Goal 3 seeks to improve world health outcomes by 2030.

The importance of articles 25661 and 26662 of the CRPD is that they focus upon the highest attainable standards of health and of rehabilitation for persons with disabilities.
Understanding Articles 25 and 26

Article 25 obliges ratifying countries to ‘… recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.’ It then continues by setting out a list in six lettered paragraphs, the wording is a little repetitive. In summary, the list requires nations to take all appropriate measures to ensure that persons with disabilities are able to access health services including rehabilitation facilities which are gender-sensitive and which:

a) Provide the same range, quality and standard of programs as others receive, including sexual and reproductive programmes;
b) Provide health services specifically because of disabilities, including early identification and services to minimize and prevent further disabilities;
c) Provide health services in urban and rural communities;
d) Train health professionals through ethical standards which comprehend free and informed consent and to recognise the human rights and dignity of persons with disabilities;
e) Prohibit discrimination by private insurers; and to
f) Prevent discriminatory denial of health care and services on the basis of disability.

In summary form, article 26(1) requires nations to make available to persons with disabilities comprehensive habilitation and rehabilitation services, and to take effective and appropriate measures ‘…to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.’ Article 26 paragraph 2 requires training of staff, while the third and final paragraph relates to the promotion and use of assistive devices.

There is an interesting contrast between article 25 and 26. While article 25 gives persons with disabilities the right to the highest attainable standard of health, the obligations under article 26 to establish comprehensive systems of habilitation and rehabilitation are placed upon governments.

The CRPD Committee's Assessment of Australia's Compliance

Australia has a well-developed health system when compared with most nations. Australia’s National Disability Strategy makes ‘Health and Wellbeing’ one of its six
It is clear that Australia faces significant challenges in treating mental health and its size means is an obstacle to bringing health services to remote areas, especially to First Nations communities.

One individual complaint before the CRPD Committee concerned health and rehabilitation in a developed country. In the segment on article 19 of the CRPD, *M H v Sweden* was analysed in some detail. It will be recalled that Ms M H had a chronic connective tissue disorder, Ehlers-Danlos Syndrome, which resulted in her being unable to walk, and have difficulty sitting and lying down. Ms M H asked the local planning authority for permission to build an indoor hydrotherapy pool because hydrotherapy was her only method of rehabilitation. However, planning permission was refused and so she complained to the CRPD Committee.

The Committee held that article 5 of the CRPD relating to equality and non-discrimination had been contravened. This discrimination ‘… adversely affected the author’s access, as a person with disability, to the health care and rehabilitation required for her specific health condition.’ Therefore, articles 25 and 26 were also breached.

In its Initial Report of 2010, Australia detailed its health and rehabilitation programs for persons with disabilities. In its 2013 Concluding Observations after Australia’s first Constructive Dialogue, the CRPD Committee made no comment on article 25. However, in relation to article 26, it regretted that in its view Australia’s programs of habilitation and rehabilitation were based on the medical model and lacked a human rights basis. This does appear to be somewhat harsh. The CRPD Committee recommended that Australia establish ‘…a framework for the protection of persons with disabilities from imposed habilitation and rehabilitation services without free and informed consent.’

Under the CRPD Committee’s Simplified Reporting process, in 2017 the Committee sent the Australian Government a list of issues to be answered in Australia’s second and third combined periodic report. Issue 4 asked Australia for information about the National Disability Insurance Scheme (NDIS). Although the NDIS does not cover the general health services provided by the States and Territories, it does assist the wellbeing of persons with disabilities and it does support elements of individual habilitation and rehabilitation services. Therefore, in Australia’s Combined Second and Third Periodic
Reports, details on the NDIS were given. The Combined Report also set forth further material on Australia’s health programs for persons with disabilities.

In response to the CRPD Committee criticism that Australia’s habilitation and rehabilitation services operated under the old medical model, the combined report countered that the services were underpinned by a human rights model backed up by State and Federal anti-discrimination legislation.

In its July 2019 report to the CRPD Committee, the Australian Human Rights Commission made several recommendations concerning health, habilitation and rehabilitation. Recommendation 52 sums up the problems which Australia faces in the field of health. The recommendation is that:

… [T]he Australian Government work with State and Territory governments to develop an action plan to ensure:

a) all people with disability have access, on an equal basis with others, to affordable, accessible, quality and culturally sensitive health services, including sexual and reproductive health and mental health services, with particular consideration of people in rural and remote areas and Aboriginal and Torres Strait Islander peoples with disability

b) all health care services and programmes are based on a human rights approach to disability, are non-discriminatory and seek informed consent prior to any medical treatment

c) health-care practitioners are provided with training on the human rights-based approach to disability to enhance their capacity to provide accessible, quality health care to people with disability.

Recommendation 53 is that Australia redoubles its efforts to achieve the Closing the Gap targets for First Nations people in the field of health.

In its 2019 Concluding Observations, the CRPD Committee made recommendations concerning article 25, but made no comment on article 26. The Committee was concerned:

…about significantly poorer health and access to information and to adequate, affordable and accessible health services and equipment for persons with disabilities and children with disabilities, particularly for persons with disabilities living in remote areas, First Nations persons with disabilities, persons with intellectual or psychosocial disabilities, persons with disabilities living in institutions, children and women with disabilities, compared to the general population.
It will be recalled that goal 3 of the SDGS covers health and wellbeing. The Committee recommended that Australia make greater efforts to meet targets 3.7 and 3.8 which concern universal access to sexual and reproductive health care, and to universal health care coverage especially to children and First Nations People. The Committee also highlighted the need for medical practitioners to receive appropriate training. From what has been written above, it is clear that Australia is complying with articles 25 and 26 of the CRPD. The NDIS is a big step forward supporting the wellbeing of persons with disabilities. However, as the Australian Human Rights Commission noted in its recommendations, there are still significant problems to be overcome. They concern the provision of health services to remote areas; ensuring that First Nations peoples can access adequate health care; improving mental health services and facilities; providing medical services in First Nations Languages and with sign interpreters; and training medical staff about the needs of persons with disabilities.
Article 27 Right To Work

Throughout history, most persons with disabilities have lived in poverty because they were prevented from obtaining remunerated work. In most of the world, disability is synonymous with poverty. In the main, this is because so many disabled persons are unable to access employment to provide for themselves and their families.

The 2011 World Health Organisation and World Bank World Report on Disability (World Report) cited several factors that influence labour market outcomes which affect the employment of persons with disabilities. These factors included ‘productivity differentials, labour market imperfections related to discrimination and prejudice, and disincentives created by disability benefit systems’. 682

The high rates of unemployment among persons with disabilities remains a significant international issue. In 2013, the United Nations Human Rights Council passed a resolution stating that it was ‘… [D]eeply concerned that many persons with disabilities in all regions continue to face significant obstacles in exercising their right to work on an equal basis with others’. 683

Right to work and International Human Rights Instruments

Earlier United Nations human rights instruments note that people have a right to work, however, no mention was made of persons with disabilities. The Universal Declaration of Human Rights (UDHR) of 1948 provides that persons have the right to work; to just and favourable remuneration; to equal pay without discrimination; and the right to join trade unions. 684

The International Covenant on Economic Social and Cultural Rights (ICESCR) of 1966 also prescribes a right to work 685 and additional detail covering vocational guidance and training, adequate remuneration, safe and healthy working conditions, holidays, equal pay for women, and the right to join trade unions which shall be permitted to undertake strike action. 686

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 is interesting because throughout history women have been
discriminated against and on occasions have been excluded from various forms of work. The opening words of article 11(1) seek to prohibit discrimination of this type and provide:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights …

Then follows a list covering, amongst other matters, the right to promotion, to job security, to training, equal pay for work of equal value, to healthy working conditions, to social security benefits and leave, and maternity leave with pay or with comparative social security benefits.687

In 1994, upon request from the United Nations General Assembly and the Commission on Human Rights,688 the Committee on Economic Social and Cultural Rights (CESCR) which monitors the implementation of the ICESCR, wrote General Comment No. 5 titled ‘Persons with Disabilities’.689 The CESCR Committee appreciated that the ICESCR does not expressly mention persons with disabilities, however determined that, when read with the UDHR, the protections given by the ICESCR should extend to persons with disabilities.690

In relation to the right to work embodied in article 6(1) of the ICESCR, the General Comment provided that:

The “right of everyone to the opportunity to gain his living by work which he freely chooses or accepts” … is not realized where the only real opportunity open to disabled workers is to work in so-called “sheltered” facilities under sub-standard conditions. Arrangements whereby persons with a certain category of disability are effectively confined to certain occupations or to the production of certain goods may violate this right. Similarly… “Therapeutical treatment” in institutions which amounts to forced labour is also incompatible with the Covenant.691

The International Labour Organisation and Workers with Disabilities

The International Labour Organisation (ILO) was founded one hundred years ago in 1919 as an offshoot of the Treaty of Versailles. Throughout its century of endeavours, the ILO has sought to improve the pay and conditions of workers. However, it was not until 1983 that the ILO expressly turned its attention to workers with disabilities when it enacted the Vocational Rehabilitation and Employment (Disabled Persons) Convention (VHEDPC).692
This should be read together with the VHEDPC’s accompanying recommendation No.168 of 1983. The United Nations designated 1981 as the International Year of Persons with Disabilities. In part, this designation led the ILO to pass the VHEPDC. While its language to our present ears is somewhat old fashioned, the VHEPDC does prohibit discrimination in employment of persons with disabilities.

The most forthright and therefore the most interesting document of the ILO concerning persons with disabilities is the ILO Code of Practice ‘Managing Disability in The Workplace’ which was finalised and unanimously adopted at a meeting of experts in Geneva in 2001. Like the CRPD, the Code of Practice adopts the social model of disability. It aims to assist employers in initiating strategies to manage disability-related issues in workplaces. It explicitly recognises the business case for employing workers with disabilities.

In recent years, the ILO has encouraged the employment of persons with disabilities in its Global and Business and Disability Network. It comprises multinational enterprises, employer associations and disability organisations, and it encourages the increased employment of persons with disabilities throughout the world.

Understanding Article 27

Article 27 of the CRPD is a lengthy provision, however, from its opening words its essence is plain. It obliges governments to prevent discrimination in employment and also to make places of work inclusive and fully accessible to persons with disabilities. As Dr Marianne Schulze put it, ‘employment for persons with disabilities is essentially a non-discrimination and an accessibility issue.’

Article 27 requires ratifying countries to implement programs to facilitate the undertaking of work in the open labour market by persons with disabilities. It obliges governments to ‘safeguard and promote the realisation of the right to work’, and recognises that the right to work is a fundamental right and one which is to be enjoyed by persons with disabilities on an equal basis with others.

Full enjoyment of the right to work includes the right to the opportunity to gain a living by work freely chosen or accepted in the labour market, and to a work environment that is open, inclusive and accessible to persons with disabilities. Article 27 requires freedom of
access to the open labour market, as well as just and favourable conditions of work. Recognised forms of work include self-employment whilst education and vocational training are promoted as paths towards full employment.

Article 27(1) stresses the importance of legislative frameworks in protecting the right to work. It specifically refers to legislation as a means of taking “appropriate steps”, and sets out in subparagraphs (a) to (k), a non-exhaustive series of steps that countries should take. Legislation is essential to many of these steps, such as the prohibition of discrimination on the basis of disability with regard to all matters concerning all forms of employment.

**Reasonable Accommodation and Employment**

Article 27(1) (a), which must be read together with article 5, specifically requires the provision of reasonable accommodation in the workplace. This is because while article 27(1)(a) prohibits discrimination on the grounds of disability in all forms of employment, article 5(2) to (4) not only prohibit all forms of discrimination, but permit the implementation of reasonable accommodation measures to promote equality and to eliminate discrimination.

Reasonable accommodation measures are essential if persons with disabilities are to obtain employment in the open labour market. For example, a reasonable accommodation measure would be to provide an accessible toilet to enable persons who use wheelchairs to operate in the workplace.

In 2018, the CRPD Committee publicised its General Comment No. 6 on Equality and Non-Discrimination.698 The General comment examined how reasonable accommodation measures promote equality and eliminate discrimination and discussed how the prohibition of discrimination in article 5 operates in tandem with article 27. The General Comment recommends that countries prohibit discrimination in employment; ensure reasonable accommodation; and facilitate the transition from segregated work environments to the open labour market.699 The General Comment further recommends that nations should ensure that in segregated employment environments ‘… [P]ersons with disabilities are paid no less than the minimum wage and do not lose the benefit of disability allowances when they start work’.700
The statement on wages and benefits requires a nuanced approach. Rates of wages, when coupled with disability social security benefits and job subsidies, is a complex field.

The wording of the definition of reasonable accommodation means that modifications and adjustments will only be compliant where they do not impose a disproportionate or undue burden. In the field of employment, where workplace measures do impose a burden which is either undue or disproportionate, an employer will not be required to undertake them because they will go beyond what ‘reasonable accommodation’ requires.

An illustrative decision from the CRPD Committee on this point is *Jungelin v Sweden*. Ms Jungelin is visually impaired and, in 2006, she applied for a position with the Swedish Social Insurance Agency as an assessor/investigator of sickness benefit and sickness compensation applications. The agency refused her application because, after investigation, the agency took the view that its computer systems could not be adapted either for braille or synthetic speech outputs. Many of the paper documents were handwritten, and these would have to be read to Ms Jungelin.

The Swedish Equality Ombudsman took the agency to the Swedish labour court, arguing that it had discriminated against Ms Jungelin by failing to accord to her reasonable support and adaptation measures. The Labour Court unanimously dismissed the application. The judges held that the suggested adaptation and support measures of altering the computer systems, and employing a person to read the handwritten documents were, in all of the circumstances, not reasonable.

In dismissing the complaint, the CRPD Committee held that the assessment by the Swedish Labour Court was thorough and objective, and that it was open to the Court to find that the suggested support and adaptation measures would constitute an undue burden for the agency.

This decision shows that the duty of reasonable accommodation as expressed in the CRPD is not absolute. Employers are only required to make accommodations if, and to the extent, that those accommodations are reasonable.

Australia does have a comprehensive network of Federal, State and Territory laws prohibiting discrimination against persons with disabilities, including discrimination in employment. They all contain ‘reasonable accommodation’ requirements, however,
their wordings differ from one another. Under the Australian *Disability Discrimination Act 1992* (DDA), for example, the words ‘reasonable adjustments’ and ‘unjustifiable hardship’ are used. The relatively recent decision of Justice Mortimer in the Federal Court of Australia case *Watts v Australian Postal Commission* is of interest. Justice Mortimer held that the range of adjustments required by the DDA for a worker to enable them to perform their role is largely open-ended and is driven by the individual’s needs, technological change and the particular circumstances.

In giving a broad interpretation to reasonable adjustments, her Honour appreciated that this concept and her interpretation derived from article 2 of the CRPD, on which, Mortimer J said:

> [A]lthough the phrase chosen by the Parliament [reasonable adjustments] is slightly different [from the reasonable accommodation phrase used in the CRPD], it is clear that these amendments were made in pursuance of Australia’s international obligations under the Convention. If there is a constructional choice … [an interpretation] which is consistent with those obligations should be preferred, insofar as the texts and context otherwise allow.

**Programs to Increase the Employment of Persons with Disabilities**

In Australia, persons with disabilities have low levels of employment. Even when they are in work, many are employed on a part-time basis in low paying positions which keep them at the bottom of the labour market pyramid.

When measuring levels of employment, economists use the labour force participation rate. The rate measures those persons between the ages of 16 and 64 who are in employment or who are actively seeking work. As is shown in the Australian Human Rights Commission 2016 *Willing to Work* report and in the 2015 survey of the Australian Bureau of Statistics, the labour force participation rate for people with disability was 53.4%, whereas the labour force participation rate for persons without disabilities was 83.2%. Despite recent government programs, these figures have remained fairly constant over the last twenty years. For example, in 2012, the labour force participation rate for persons with disabilities was 52.8%. In 2015, only 27.0% of persons with disabilities in the workforce held full-time positions, whereas 53.8% of typical participants held full-time positions.
For persons with profound limitations, including intellectual and/or psychosocial disabilities, the figures are bleaker. In 2015, only 25% of these persons were in the workforce.\(^7_{13}\)

It is difficult to make international comparisons as methods of counting vary from one nation to another. However, a 2010 OECD discussion paper stated that Australia ranked 21\(^{st}\) out of 29 OECD countries in employment for persons with disabilities.\(^7_{14}\) From my experience, I would put Australia a little higher at about 16\(^{th}\) or 17\(^{th}\) of the 29 OECD countries under study. Nevertheless, given Australia’s good world economic position, this low level of disability employment is unimpressive.

The 2011 report by the Productivity Commission titled ‘Disability Care and Support’,\(^7_{15}\) gave birth to the National Disability Insurance Scheme (NDIS). In this report, it was predicted that a cumulative $43 billion improvement in Australia’s gross domestic product over the period 2011-2021 would occur if the unemployment and labour force participation rates between persons with and without disabilities were reduced by one third. The year 2021 is not far ahead, and no significant improvements have been made in the labour force participation rates of persons with disabilities.\(^7_{16}\)

The Governments of Australia have established programs to increase the employment of persons with disabilities. In 2010, the Australian government introduced its National Disability Strategy 2010-2020 (NDS),\(^7_{17}\) one goal of which is to ‘increase access to employment opportunities as a key to improving economic security and personal wellbeing for people with disability’.\(^7_{18}\) In relation to employment, the NDS notes:

> [T]he vast majority of people with disability can and do want to work and be as financially independent as possible, but employment is one critical area where Australia is lagging behind other countries.\(^7_{19}\)

Australia has also implemented a National Mental Health and Employment Disability Strategy,\(^7_{20}\) which aims to increase the employment of persons with disabilities, promote social inclusion and improve economic productivity.

Australia permits Australian Disability Enterprises (ADEs) which were formerly known as ‘sheltered workshops’, to operate systems of segregated employment for persons with disabilities. They are often run by non-profit organisations that offer work exclusively to persons with disabilities. In 2015, there were around 194 ADEs in Australia, most of
which just break even or run at a loss.\textsuperscript{721} The work completed by employees of ADEs is low-skilled, and primarily involves simple manufacturing or assembling. In that respect, ADEs compete with cheap overseas labour and prison labour.

ADEs are segregated workplaces which are only open to persons with disabilities, and often only to persons with cognitive and related disabilities. ADEs almost always employ persons with disabilities on a modified wage system. In truth, the word “modified” means reduced, in a manner calculated by (purported) reference to a person’s productivity, as compared to the productivity of a person without a disability.\textsuperscript{722}

‘Sheltered workshops’, to give them their international name, have a long history in Australia, in Europe and in North America. Proponents of ADEs argue that they fulfil a legitimate purpose of giving work to persons with disabilities who would never obtain employment in the open labour market. Ultimately, however, ADEs serve to strengthen the divide between persons with and without disabilities.

Article 27 on the right to work does not mention ADEs at all.\textsuperscript{723} However, article 27 does require ratifying countries to enable persons with disabilities to ‘… gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.’\textsuperscript{724}

It is not only in ADEs that persons with disabilities can have their entitlements reduced because of their disability. Other industrial instruments (such as other modern awards, enterprise awards and enterprise agreements) can also propagate modified wage systems in the open labour market. While there is a general prohibition on those instruments containing ‘discriminatory’\textsuperscript{725} terms, terms that discriminate against ‘all employees with a disability, or a class of employees with a disability’ are expressly allowed.\textsuperscript{726} Thus, modern awards can contain provisions for a “Supported Wage System” which pays employees a percentage of the relevant minimum pay rate in their award based on their assessed capacity. For a person’s wage to be reduced in this way, they must meet the impairment criteria for receipt of a Disability Support Pension\textsuperscript{727} and;

\[ \text{[Be] unable to perform the range of duties to the competence level required of an employee within the class of work for which the employee is engaged because of the effects of a disability on their productive capacity} \textsuperscript{728} \]
The CRPD Committee's Assessment of Australia's Compliance

Australia’s first Constructive Dialogue with the CRPD Committee took place in September 2013. In its Concluding Observations, the CRPD Committee commended Australia on its National Disability Strategy which amongst other matters, seeks to increase the employment of persons with disabilities. However, the Committee recommended that ADEs no longer use the Business Services Wage Assessment Tool which was then applicable. It was further recommended that the Supported Wage System be changed to secure the right assessment of employees with disabilities. Finally, that initiatives be taken to increase the employment of women with disabilities.

In its Combined Second and Third Periodic Reports of September 2018, the Government of Australia gave further details on its initiatives to increase the employment of persons with disabilities. In 2015, the Australian government established a taskforce to review the disability employment system and to develop a new disability employment framework. However, the Australian Human Rights Commission (AHRC) in its report to the CRPD Committee for Australia’s second constructive dialogue, expressed discontentment with Australia’s efforts to establish a new disability employment framework. The AHRC wrote that ‘…. the status of this framework is unclear, and the Commission is concerned that the development of the Framework has halted.’

In its 2019 Concluding Observations, the CRPD Committee made several recommendations with respect to article 27. First, it was recommended that Australia ‘…develop a national disability employment strategy that incorporates the recommendations from the ‘Willing to Work Inquiry’ [by the Australian Human Rights Commission] and contains targeted gender-sensitive measures’.

Second, the Committee recommended that Australia:

- Undertake a comprehensive review of [ADEs] to adhere to Article 27 of the Convention and provide services to transition of persons with disabilities from sheltered employment into open inclusive and accessible forms of employment, ensuring equal remuneration for work for equal value.

And, finally, it was recommended that Australia address the systemic and structural barriers faced by women, First Nations people and cultural and linguistically diverse persons with disabilities who are seeking employment in the open labour market.
In conclusion, Australia is complying with article 27 of the CRPD, even though its employment programs have not succeeded in altering the labour force participation rate of persons with disabilities. Given Australia’s low rate of employment for persons with disabilities, much more must be done to improve open labour market outcomes. It is further suggested that the Government continue to establish pathways to transition employees of ADEs into the open labour market. Ultimately, what remains is a change of attitudes towards persons with disabilities in the workforce by employers, employees and the general community.
Article 28 Adequate Standard Of Living and Social Protection

Article 28 of the CRPD is an important provision because it endeavours to lift persons with disabilities out of poverty. It will be recalled from the previous segment on article 27 that The joint World Health Organisation and World Bank Report on disability of 2011, explained that in most of the world, disability is synonymous with poverty. In the main, this is because so many disabled persons are unable to access employment to provide for themselves and their families. Article 28 does not harken back to the old medical or charitable models of disability. Rather, it recognises that persons with disabilities do possess, together with other persons, the right to an adequate standard of living and social protection. Previous international human rights instruments have dealt with living standards and social security, but none of these provisions contain the detail of article 28.

Many Australians with disabilities lead economically insecure lives and have difficulties accessing housing and other amenities. In 2011, all Australian governments endorsed the National Disability Strategy 2010-2020 (NDS) which is designed to assist persons with disabilities. Pillars 3 and 4 of the NDS are ‘Economic Security’ and ‘Personal and Community Support’.

Understanding Article 28

As Marco Fasciglione notes, the content of article 28 is two tiered. Article 28(1) recognises the right to an adequate standard of living, while article 28(2) establishes the right to social protection free from discrimination.

Article 28 is a lengthy provision. For present purposes, article 28(1) spells out the requirements of an adequate standard of living as including ‘...adequate food, clothing and housing, ... and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.’ While article 28(2) details the right to social protection without discrimination as including access to: clean water, appropriate and affordable services, devices and other assistance for disability-related needs, social protection and poverty reduction programmes and where
necessary, assistance with disability-related expenses relating to public housing, retirement benefits and programs.\textsuperscript{747}

\textbf{The CRPD Committee's Assessment of Australia's Compliance}

In its 2010 Initial Report to the CRPD Committee,\textsuperscript{748} the Australian Government recognised that many persons with disabilities who are unable to obtain remunerated work rely on social security benefits to survive. The Government wrote that:\textsuperscript{749}

\begin{quote}
Many persons with disabilities rely on government income support as a sole or main source of income. In 2006, government pensions and allowances were the principal income source for 57\% of working-age persons with severe or profound core activity limitations, 42\% of persons with specific limitations or restrictions of any severity, and 11\% of persons without limitations or restrictions.\textsuperscript{750}
\end{quote}

The report detailed the qualifications for the Disability Support Pension, various monetary allowances and carer allowances and payments.\textsuperscript{751}

In its Concluding Observations after Australia’s first Constructive Dialogue, the CRPD Committee commended Australia on establishing the National Disability Insurance Scheme (NDIS),\textsuperscript{752} however, the Committee did not comment on article 28. In its list of issues which the CRPD Committee forwarded to Australia in 2017 as part of the simplified reporting process, it sought information on article 28. The CRPD Committee asked about the extent to which disability specific measures are mainstreamed into poverty and homeless reduction strategies, especially with respect to women, children, First Nations people and persons with intellectual and psychosocial disabilities.\textsuperscript{753}

In its Combined Second and Third Periodic Reports of September 2018, the Government of Australia detailed various Federal and related State programs on social security and allowances, income support, and on preventing homelessness and domestic violence.\textsuperscript{754}

In its 2019 Concluding Observations published after Australia’s second Constructive Dialogue, the CRPD Committee did not comment on article 28.

In conclusion, with the establishment of the NDIS and with its various social protection programs, Australia is in compliance with article 28 of the CRPD. This does not mean that there are no longer any issues facing persons with disabilities concerning their
standard of living and social protection. It is clear that many First Nations people with disabilities live in poverty and many persons with intellectual and/or psychosocial disabilities do not have an adequate standard of living. One reason for the establishment of the Royal Commission is to inquire into violence, abuse, neglect and exploitation of people with disability and to make appropriate recommendations, some of which will hopefully help address these outstanding issues.
Article 29 Participation in Political and Public Life

Introduction

The 1948 *Universal Declaration of Human Rights* (UDHR) gives people the right to participate in the government of their nation.\(^{755}\) Article 25 of the 1966 *International Covenant on Civil and Political Rights* (ICCPR) spells out this right in more detail. The basic position is that citizens have the right to take part in political affairs and to vote and stand in periodic elections.\(^{756}\) In relation to the rights to vote and to take part in political affairs, none of these declarations, covenants and conventions make exceptions for persons with cognitive and/or psychosocial disabilities. Given these long accepted rights, it may appear strange that the CRPD has an article concerned with the participation of persons with disabilities in political and public life. However, as Rachele Cera writes:

> …[P]ersons with disabilities have been deprived of their role in society either through exclusionary legal provisions or due to inaccessible procedures and facilities. As a consequence, persons with disabilities have been absent from the political environment and the issue of disability rights and duties has been relegated to the private sphere.\(^{757}\)

A number of countries, including Australia,\(^{758}\) do not permit many persons with cognitive and/or psychosocial disabilities to vote in elections. Australia’s exclusionary provisions disqualifying persons ‘of unsound mind’ from being placed on the electoral roll will be discussed here together with suggested reforms. In the segment on article 13 concerning access to justice, the jurisprudence of the CRPD Committee on the refusal of some Australian States to allow deaf persons to sit on juries was discussed. As was there noted, these refusals also breached article 29(b). It is not necessary to repeat this analysis here. Accordingly, in what follows discussion will be limited to the right to vote by persons with cognitive and/or psychosocial disabilities and to the accessibility of polling stations and of means and methods of voting.

Understanding Article 29

Article 29 requires ratifying countries to guarantee to persons with disabilities ‘… political rights and the opportunity to enjoy them on an equal basis with others’.\(^{759}\) To secure this right, countries must:
...[E]nsure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives.\textsuperscript{760}

Article 29(a) continues by mandating that voting procedures, facilities and materials are appropriate and accessible, that voting is by secret ballot that persons with disabilities may stand for public offices that the use of new technologies is facilitated and that upon request a chosen person may assist a person with disabilities to vote.\textsuperscript{761}

Article 29(b) requires countries to ‘promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others...’ Paragraph (b) proceeds by encouraging persons with disabilities to participate in public affairs by joining non-governmental organisations, including political parties, and by becoming members of ‘...organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.’\textsuperscript{762}

**Article 29 and the Jurisprudence of the CRPD Committee**

In 2013, the CRPD Committee upheld the right to vote of persons with cognitive and/or psychosocial disabilities in *Zsolt v Hungary*.\textsuperscript{763} Zsolt and five other persons with intellectual disabilities who were under guardianship, through their counsel complained to the CRPD Committee that Hungarian law deprived them of their right to vote in elections contrary to article 29. To fully grasp the issues in this matter, it is necessary to note the earlier holding in *Alajos Kiss v Hungary* which was decided by the European Court of Human Rights in 2010.\textsuperscript{764} The Applicant there was diagnosed with ‘manic depression’ and brought proceedings because under the Hungarian Constitution, his name was removed from the voting register once he was placed under partial guardianship. This was because all persons under partial or total guardianship at the time lost the right to vote in Hungarian elections. The European Court held that his right to vote under the *European Convention on Human Rights* had been violated.\textsuperscript{765} The court noted that countries have some leeway/ margin of appreciation as it is referred to in international law, in determining who shall and who shall not be entitled to vote. However, the European court held that it could not countenance that ‘...an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation.’\textsuperscript{766}
In other words, the blanket denial of the right to vote without more, could not be justified as a method of protecting the integrity of the electoral process.

Therefore, after the Kiss Case, the Hungarian Constitution was amended. While persons like Zsolt and his applicant colleagues still lost their right to vote when placed under guardianship, it was open to them to make individual applications to a court to have their right to vote restored. They could apply to have a judge assess whether or not they had the capacity to vote. However, the law did not set out any tests to be applied to determine whether or not a person possessed the capacity to vote. In Zsolt v Hungary, the CRPD Committee held that this process contravened article 29 of the CRPD. After noting that article 29 does give all persons with disabilities the right to vote, the Committee stated that article 29:

… [D]oes not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, an exclusion of the right to vote on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention.767

The Committee added that under article 12 of the CRPD, countries are required to assist persons with disabilities to exercise their legal capacity, including their right to vote. The Committee commented upon the Hungarian individualised court assessment process of capacity and wrote that:

This measure cannot be purported to be legitimate. Nor is it proportional to the objective to preserve the integrity of the State party’s political system. The Committee recalls that, under article 29 of the Convention, the State party is required to adapt its voting procedures, by ensuring that they are “appropriate, accessible, and easy to understand and use”, and allowing, where necessary, assistance in voting upon request of the person with disability. It is by so doing that the State party will ensure that persons with intellectual disability cast a competent vote, on an equal basis with others, while guaranteeing the secrecy of the vote.768

In 2018, the CRPD Committee decided Fiona Given v Australia769 which concerned voting by secret ballot. Ms Fiona Given has cerebral palsy, she has limited muscle control and no speech. Ms Given uses an electric wheelchair for mobility, together with an electronic synthetic speech generating device for communication. She wished to vote by secret ballot at the 2013 federal election for the House of Representatives and the Senate. Under the Electoral Act 1918 (Electoral Act), blind and visually impaired persons may use
electronic voting systems via telephones or computers.\textsuperscript{770} Electoral officials may allow a person to assist persons with disabilities to fill in ballot papers, or may assist persons themselves.\textsuperscript{771} As Ms Given is neither blind or vision impaired, she is unable to vote electronically. Ms Given complained to the CRPD Committee that she was unable to express her vote by secret ballot without another person knowing of her choice. In other words, she argued that electronic voting should have been made available to her. The Committee noted Australia’s argument that Ms Given:

\begin{quote}
\ldots[H]ad the possibility to choose the support person of her choice to cast her vote. However, it also notes that none of the options available to the author in the 2013 federal election could have enabled her to exercise her right to vote in the way she wanted, namely without having to reveal her political choice to the person accompanying her.\textsuperscript{772}
\end{quote}

As blind and visually impaired persons had been using electronic voting systems for several years, the CRPD Committee held that Ms Given’s article 29 right to vote by secret ballot had been violated.\textsuperscript{773}

**Australia’s Exclusionary Rule for Persons of Unsound Mind**

Under section 93 of the *Electoral Act*, persons of unsound mind cannot have their names placed upon the electoral roll.\textsuperscript{774}

Section 93(8) A person who:

- a) By reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; or
- b) Has been convicted of treason or treachery and has not been pardoned; is not entitled to have his or her name placed or retained on any Roll or to vote at any Senate election or House of Representatives election.

Several of the State electoral statutes also exclude persons of unsound mind from the franchise.\textsuperscript{775}

It is necessary to appreciate that unlike almost all other democratic nations, Australia operates compulsory voting mechanisms. Under section 245 of the *Electoral Act*, persons whose names appear on the electoral roll are compelled to vote in elections or to pay a fine, unless they have a valid and sufficient reason for failing to vote. It does appear that family members of persons with cognitive and/or psychosocial disabilities, often lodge objections
with the Electoral Commissioner to the names of their relatives with cognitive and/or psychosocial disabilities being placed on the electoral roll on the grounds that they are of unsound mind. Objections must attach a medical certificate from a doctor who has examined the person. If an objection is sustained, the person’s name will be taken off the electoral roll. This means that the person so excluded will not be fined for failing to vote at elections.

In 2007, five justices of the High Court of Australia commented upon section 93(8) (a) of the Electoral Act however, only Justice Heydon discussed its validity. In Roach v Electoral Commissioner, which was concerned with the voting rights of prisoners, Chief Justice Gleeson commented that ‘the rationale for excluding persons of unsound mind is obvious, although the application of the criterion of exclusion may be imprecise, and could be contentious in some cases.’ Justices Gummow, Kirby and Crennan opined that:

Two of these groups singled out for exclusion in this way by s 93 are those incapable of understanding the nature and significance of enrolment and voting, by reason of unsoundness of mind, and those convicted of treason and treachery and not pardoned...

Justice Heydon also examined the validity and need for this provision when he wrote that:

Paragraph (a) of s 93(8) of the Electoral Act disentitles those who are incapable of understanding the nature and significance of enrolment and voting because they are of unsound mind. That provision plainly is valid. It limits the exercise of the franchise, but does so for an end apt to protect the integrity of the electoral process. That end, plainly enough, is consistent and compatible with the maintenance of the system of representative government.

In 2014, the Australian Law Reform Commission (ALRC) published its report titled ‘Equality, Capacity and Disability in Commonwealth Laws’. The ALRC recommended that the unsound mind provisions in the Electoral Act be repealed. This repeal would enable all persons with disabilities to vote in elections. Without more, however, this would mean that if persons with cognitive and/or psychosocial disabilities did not vote they could be fine. Therefore, the ALRC recommended that section 245 of the Electoral Act be amended to provide that:

[II]t is a ‘valid and sufficient reason’ for not voting if a person cannot: (a) understand information relevant to voting at the particular election; (b) retain that information for a sufficient period to make a voting decision; (c) use or weigh that information as part of the process of voting; or (d) communicate their vote in some way.
The ALRC recommended that similar amendments be made to those State statutes which contain unsound mind provisions.\(^{785}\)

It will be recalled that in *Roach v Electoral Commissioner*\(^{786}\) Justice Heydon said that the unsound mind provision was valid because it upheld the integrity of the electoral process. In its report, the ALRC addressed this perspective and wrote:

> In upholding universal suffrage for persons with disability, the ALRC recognises concerns about maintaining the integrity of the electoral system, especially in the context of compulsory voting. That is, there may be concern about the ‘harm that may be caused by votes cast by persons who are not able to understand the nature and significance of voting’. However, in practice, no test is conducted when a person seeks to enrol or vote.\(^{787}\)

The ALRC added:

> There is no evidence that reform to remove the unsound mind provisions would cause any new problems with regard to the integrity of the electoral system, undue influence or fraud.\(^{788}\)

In Australia, no such capacity tests are placed on other groups of citizens such as the elderly.

### The CRPD Committee's Assessment of Australia's Compliance

In its Concluding Observations of 2013 and 2019, the CRPD Committee requested Australia to abolish the unsound mind provisions and to enable persons with cognitive and/or psychosocial disabilities to vote.\(^{789}\) In both Concluding Observations, the Committee also recommended that Australia ensure that all aspects of voting, including voting by secret ballot be made fully accessible to all persons with disabilities.\(^{790}\)

In its 2019 report to the CRPD Committee, the Australian Human Rights Commission commended the Australian Electoral Commission and its Disability Advisory Committee for making the electoral system more accessible and inclusionary for people with disabilities.\(^{791}\) However, it did recommend that Australia adopt the recommendations of the Australian Law Reform Commission and repeal the unsound mind provisions from Australia’s federal and State electoral statutes.\(^{792}\)

In conclusion, Australia has made significant efforts in making the electoral process more accessible and more inclusionary for persons with disabilities. It is suggested that the
electronic voting system which is available to blind and vision impaired voters, be open to all persons with disabilities who require this technology to cast a vote by secret ballot. As yet, Australia has not repealed the unsound mind provisions which are not in compliance with article 29 of the CRPD and currently these provisions prevent many persons with cognitive and/or psychosocial disabilities from casting votes in federal and State elections.
Article 30: Participation in Cultural Life, Recreation, Leisure and Sport

Persons with disabilities obviously engage in leisure and recreation, as do other members of society. To this end, article 30 of the CRPD upholds the rights of persons with disabilities to participate in a broad range of activities in the fields of culture, sport and recreation.793

Article 30(1) requires ratifying countries to ‘… recognize the right of persons with disabilities to take part on an equal basis with others in cultural life’794. Nations must take all appropriate measures to ensure that persons with disabilities enjoy access in accessible formats to cultural materials, television programmes, films, theatre and other cultural activities. Persons with disabilities must also enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and monuments and sites of national cultural importance.

Article 30(2) requires that persons with disabilities are able ‘…to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.’795

Article 30(3) seeks to ensure in accordance with international law, that intellectual property laws such as copyright provisions ‘…do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.’796

The recognition of the specific cultural and linguistic identities of persons with disabilities, including sign languages and deaf culture are protected by article 30(4).797

Finally, article 30(5) obliges countries to take measures to ‘… enable persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities’798 Nations should encourage the participation of persons with disabilities in mainstream sporting activities at all levels, and persons with disabilities should be given the opportunity to ‘… organize, develop and participate in disability-specific sporting and recreational activities’, including the provision of instruction and training’.799
Lastly, children with disabilities should have ‘… equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system.’

**The CRPD Committee's Assessment of Australia's Compliance**

In its initial 2010 report to the CRPD Committee, the Australian Government detailed its efforts under article 30. It noted the National Arts and Disability Strategy; making cultural institutions accessible and it discussed domestic exceptions to copyright law making more books accessible to blind and vision impaired persons.

In its 2013 Concluding Observations after Australia’s first Constructive Dialogue with the CRPD Committee, no comment was made on article 30.

In its list of issues which the CRPD Committee forwarded to Australia in 2017, no questions were asked about article 30, and therefore, Australia’s Combined Second and Third Periodic Reports of 2018 contains no information specifically on article 30.

In its 2019 Concluding Observations, the CRPD Committee did discuss implementing the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty).* It also recommended that Australia make greater efforts to enable persons with disabilities, including children with disabilities to participate in cultural life, recreation, leisure and sport.

The Marrakesh Treaty requires a few words of explanation. Australia’s domestic copyright laws do enable books to be produced in accessible formats such as audio, Braille and large print for blind and vision impaired persons. Books in accessible formats published in other countries could not be imported into Australia without specific agreements. On 27 June 2013 in Marrakesh Morocco, at a meeting of the member states of the World Intellectual Property Organisation (WIPO), the Marrakesh Treaty was adopted. The treaty is detailed, but in brief it enables books in accessible formats to be imported from other countries for the use by print handicapped persons.
In 2016, Australia was amongst the first twenty countries to sign up to the Marrakesh Treaty, and in the following year the Australian Parliament enacted legislation to implement the treaty.\textsuperscript{806}

Of course, there is a role for the Australian Government in promoting the provision of titles in accessible formats by Australian and foreign publishers. The Marrakesh Treaty is a big step forward in enhancing the human rights of persons with disabilities with print handicaps to access educational and recreational materials from treaty participating nations.

While there is always more to do to assist persons with disabilities, it is clear that Australia is complying with article 30 of the CRPD.
Article 31 Statistics and Data Collection

None of the other human rights treaties directly require the collection of statistics and other data.\(^{807}\) However, certainly in the past, detailed statistics were not kept on persons with disabilities. Without statistical and related information it is not possible to measure the implementation of treaties and of programs. As Dr Marianne Schulze notes, ‘The main purpose of Article 31 is the creation of tools assisting the assessment of the Convention’s implementation.’\(^{808}\)

Article 31(1) requests ratifying countries to ‘… collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention’.\(^{809}\) In collecting information, nations must comply with legal requirements so as to ‘…ensure confidentiality and respect for the privacy of persons with disabilities’.\(^{810}\) Internationally accepted norms must be observed to comply with human rights precepts and ethical principles.

Importantly, paragraph 2 of article 31 says that:

\[
\text{The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of [country’s] obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.}\]

Finally, article 31(3) makes it clear that it is the responsibility of countries to disseminate statistics and to make them accessible.

In many of its Concluding Observations, the CRPD Committee has exhorted countries to gather more detailed statistics, disaggregated by sex on a range of outcomes. However, the collection of such statistics is a somewhat daunting task.

There are difficulties in obtaining accurate statistics and data concerning persons with disabilities. This is because disabilities and impairments vary greatly, and many persons do not wish to self-identify as persons with disabilities. In some cultures where persons with disabilities are stigmatised, many disabilities are concealed.

The most innovative approach to gathering disability specific statistics has been accomplished by what has become known as the Washington Group. These statisticians first met in Washington DC in 2002. It has pioneered the use of statistical methods of
measuring disability in countries and in various aspects of life. The Washington Group is well-known for developing an internationally comparable general disability measure to be included in national census forms. It comprises six functional questions concerning difficulties in walking, remembering, seeing and hearing. This is what may be best described as a functional approach to disability. 812

In the Asia-Pacific region, the United Nations Economic and Social Council for Asia and the Pacific (ESCAP) launched in 2012 what has become known as the Incheon Strategy to ‘Make the Right Real’ for persons with disabilities in Asia and the Pacific. The Strategy contains 10 regionally agreed-to disability-specific development goals, together with 27 targets and 62 indicators which enable the measurement of progress within nations and throughout the region.

As part of the post-2015 development agenda, on 25 September 2015, the General Assembly of the United Nations adopted the Sustainable Development Goals (SDGS). 813 The 17 Sustainable Development goals and the 169 targets to be achieved by 2030 are another important measurement tool. In recent Concluding Observations, the CRPD Committee has noted the role of the SDGS and their targets to improve the lives of persons with disabilities.

For both the Incheon Strategy and the SDGS, what is required is the collection of disaggregated statistics to enable governments and planners to determine whether or not various targets have been achieved.

The CRPD Committee's Assessment of Australia’s Compliance

In its 2010 report to the CRPD Committee, Australia detailed the role of the Australian Bureau of Statistics (ABS), which contains statistical information from its Survey of Disabilities and Carers (SDAC). 814

After Australia’s first Constructive Dialogue in September 2013, the CRPD Committee published its Concluding Observations. The Committee was concerned about the low level of disaggregated data, and that there was little data about women and girls and First Nations people with disabilities. 815 The CRPD Committee recommended that Australia:
... [D]evelops nationally consistent measures for data collection and public reporting of disaggregated data across the full range of obligations contained in the Convention, and that all data be disaggregated by age, gender, type of disability, place of residence and cultural background. It further recommends that the State party commissions and funds a comprehensive assessment of the situation of girls and women with disability, in order to establish a baseline of disaggregated data against which future progress towards the Convention can be measured.816

In its Combined Second and Third Periodic Reports to the CRPD Committee of 2018, the Australian Government gave further details on the statistics collected by Australia’s governments. These measures include the National Health survey, data on school students with disabilities, the Australian Census of population and housing, and the National Aboriginal and Torres Strait Islander Health Survey.817

Australia’s report also noted the National Research Organisation on Women’s Safety (NROWS) which is jointly funded by the Federal and State governments which undertakes research.818

In its 2019 Concluding Observations, the CRPD Committee recommended that Australia:

...[I]n conjunction with the Office of the National Data Commissioner, develop a national disability data framework to ensure appropriate, nationally consistent measures for the collection and public reporting of disaggregated data across the full range of obligations contained in the Convention, especially with regard to women, children and Indigenous persons with disabilities.819

In conclusion, Australia has made significant efforts to increase statistical information on people with disabilities. Of course, more can always be achieved. However, Australia is in compliance with article 31 of the CRPD.
Article 32 International Cooperation

International cooperation is mentioned in several international human rights treaties.\(^{820}\) However, article 32 of the CRPD is the only detailed article in all of the covenants and conventions which is solely devoted to international cooperation and development. It is essential to appreciate that 80\% of persons with disabilities reside in developing countries, with most living in conditions of poverty. This is why international cooperation and development are of such importance to the global community of persons with disabilities.\(^{821}\)

In the previous segment on article 31, it was noted that in 2015 as part of the post-2015 development agenda, the Sustainable Development Goals (SDGS) were adopted. These 17 goals and the 169 targets are squarely aimed at international cooperation.

As Rosemary Kayess opines, the importance of article 32 of the CRPD is that it facilitate ‘…unilateral and multilateral resource transfer including; aid, information, best practice, scientific knowledge, technical assistance and technologies’.\(^{822}\)

As a developed nation, Australia has an important role in international cooperation and development, especially in Asia and the Pacific.

Understanding Article 32

Article 32(1) provides that signatory countries:

\[\text{\ldots [R]ecognize the importance of international cooperation … in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities.}\(^{823}\)\]

Paragraph 1 then sets out a non-exhaustive list of measures as follows:

- Ensuring that international development programs are inclusive and accessible;
- Supporting capacity-building through training programmes and best practices;
- Facilitating cooperation and access to scientific and technical knowledge; and
- Providing technical and economic assistance, including the sharing of assistive technologies.\(^{824}\)
Paragraph 2 of article 32 is a saving provision. Activities under article 32 do not diminish the requirements of ratifying countries to fulfil their obligations under the CRPD.

### The CRPD Committee's Assessment of Australia's Compliance

In its Initial Report to the CRPD Committee in 2010, the Australian Government noted AusAid’s foreign aid program titled *Development for All: Towards a Disability-Inclusive Program 2009-2014* (Development for All). As Kristen Pratt shows, this program was co-designed by persons with disabilities and their organisations in the Asia-Pacific region. Consultations with persons with disabilities was a part of the program and Development for All represented the first occasion in which an AusAid program focused expressly on persons with disabilities.

In its Concluding Observations after Australia’s first Constructive Dialogue in September 2013, the CRPD Committee commended Australia ‘…for its international cooperation programmes supporting disability-inclusive development which increases access to education, employment, health services and law and justice.’

In its Combined Second and Third Periodic Reports of 2018, the Australian Government noted its successor disability foreign aid program titled *Development for All 2015–2020: Strategy for Strengthening Disability-Inclusive Development in Australia’s Aid Program*. It further noted that the program was currently being reviewed by the Office of Development Effectiveness. In November 2018, the review was completed and published. The report noted that Australia has made progress in making its various aid programs more inclusive for people with disabilities. The report made a series of recommendations to increase inclusion. One area is building the capacity of disabled person’s organisations (DPOS) in receiving nations to ensure greater inclusion.

In the report from the Australian Human Rights Commission of July 2019, it was suggested that further improvements could be made to make Australia’s Development for All foreign aid program fully inclusive for persons with disabilities.

In its 2019 Concluding Observations, having regard to the report from the Australian Human Rights Commission, the CRPD Committee recommended that Australia adopt measures to ensure the full participation of persons with disabilities and their
organisations in its foreign aid program. The Committee added that Australia should better align its foreign aid programs with the 2015-2030 development agenda of the United Nations.  

In conclusion, it is clear that Australia is complying with article 32 of the CRPD. It is hoped that Australia does better to align its foreign aid programs with the 2015-2030 development agenda to ensure progress and coordination across the globe.
Article 33 and Article 4(3) Monitoring and Consulting

Introduction

Article 33 requires nations to establish machinery to both implement and to monitor the CRPD. Article 4 sets out general obligations, and article 4(3) requires countries to closely consult persons with disabilities about legislation and policies to implement the CRPD. These are novel and interesting provisions which prescribe procedures involving persons with disabilities in implementing and in monitoring the Convention. They adhere to the motto of the disability movement ‘Nothing about Us without Us’. In the past, persons with disabilities were often not consulted about policies and practices affecting their daily living. The 1993 United Nations Standard Rules do exhort countries to recognise the rights of disabled person’s organisations (DPOs) to represent persons with disabilities. The successful drafting of the CRPD was in large part due to the work done by persons with disabilities and DPOs which were known as civil society. Therefore, it was recognised that persons with disabilities and DPOs have an enduring role in both implementing and in monitoring the CRPD.

In its 2018 General Comment No. 7 on Article 33, the CRPD Committee explained that ‘article 33 should be read and understood as supplementing article 4(3).’ Therefore, both articles shall be examined here.

Understanding Article 4(3)

Article 4 paragraph 3 says:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

Put succinctly, article 4(3) requires countries to consult with DPOs as representatives of persons with disabilities on measures concerning persons with disabilities or on implementing the CRPD.
Understanding Article 33

Article 33 is headed ‘National Implementation and Monitoring’. It is an unusual provision in a human rights treaty. After all, monitoring of covenants and conventions is one of the tasks of their treaty body committees. The CRPD Committee is empowered to monitor the implementation of the Convention in ratifying countries which have, by being parties, agreed to report to the Committee and to participate in constructive dialogues.\(^{839}\)

However, article 33 focuses upon establishing machinery for national monitoring of the Convention in each ratifying country. Shortly after the CRPD came into force in May 2008, given the novelty of article 33, the Office of the High Commissioner for Human Rights prepared a thematic study on this provision for the Human Rights Council setting out the monitoring plans of several nations.\(^{840}\) Now that the CRPD has been in force for more than a decade, countries are engaging in national monitoring of the Convention.

Article 33 contains three distinctive paragraphs; paragraph 1 requires ratifying countries, ‘in accordance with their system of organization’ to:

\[
\text{[D]esignate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.}^{841}\]

This paragraph gives each country some leeway in fulfilling its requirements. One or more governmental focal points, that is, a responsible body in government, must be designated in accordance with each nation’s system of organisation. The paragraph does not prescribe in any detail the role of these focal points, other than that they be part of the Governmental structure. The establishment of a coordination mechanism is not mandatory, provided due consideration is given to the pros and cons of this type of mechanism.

Paragraph 2 of article 33 requires nations, ‘in accordance with their legal and administrative systems’ to:

\[
\text{[M]aintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention.}^{842}\]
Again, countries have some discretion because they can designate existing independent mechanisms like National Human Rights Institutions (NHRIS) to monitor the implementation of the Convention. Paragraph 2 also enables Nations to establish new bodies to become independent mechanisms however when establishing or designating an independent mechanism, regard must be had to the Paris Principles which apply to NHRIS.

The Paris Principles require a few words of explanation.843 In 1991, an international workshop was held in Paris, which adopted the Principles relating to the Status of National Human Rights Institutions which became known as the Paris Principles. In 1993, they were adopted by the United Nations. Anna-Elina Pohjolainen explains that:

The primary requirement set by the Paris Principles is that national institutions be official state-funded bodies which derive their mandate and powers from a constitutional or a legislative text and have a specific competence to promote and protect human rights.844

The Australian Human Rights Commission (AHRC) has a designation which means that it fully complies with the Paris Principles.

Finally, article 33 paragraph 3 simply says that ‘civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.’845

**The CRPD Committee's Assessment of Australia's Compliance of Article 4(3)**

In its Initial Report to the CRPD Committee of 2010 when discussing general obligations,846 the Australian Government noted that it had established a National People with Disabilities and Carer Council to provide advice on the implementation of a National Disability Strategy (NDS).847 The Council did include in its membership persons with disabilities.848 The report gave no further information about article 4 paragraph 3 of the CRPD.

In its 2013 Concluding Observations, the CRPD Committee simply said that Australia should:

… [I]n partnership with persons with disabilities through their representative organisations, including children with disabilities, establish engagement mechanisms for ensuring meaningful participation in the development and implementation of legislation and policies to implement the Convention.849
In its Combined Second and Third Periodic Reports of 2018, the Australian Government noted its funding of Disability Representative Organisations of which DPOs were included, and that they had the capacity to undertake domestic monitoring of the CRPD. This funding without more, does not bring Australia into compliance with article 4(3) of the CRPD.

The 2019 report of the AHRC recommended that:

The Australian Government establish permanent consultation mechanisms and develop best practice guidelines for the active engagement of people with disability and their representative organisations in policy development, implementation and monitoring activities relating to the CRPD.

For its part, the CRPD Committee recommended in its 2019 Concluding Observations that Australia:

… [E]stablish formal and permanent mechanisms to ensure the full and effective participation of persons with disabilities, including children with disabilities, through their representative organizations, in the development and implementation of legislation and policies to implement the Convention, ensuring adequate resources and provision of necessary supports. In particular, involve Aboriginal and Torres Strait Islander persons with disabilities and their representative organizations in all aspects of the design, implementation monitoring and evaluation of the Australian Government Plan to Improve Outcomes for Aboriginal and Torres Strait Islander People with Disability.

In conclusion, it is clear that Australia is not in compliance with article 4(3) of the CRPD. The Australian Parliament does not have a history of consultation, and in part this may explain the reluctance of politicians to engage in these sorts of arrangements. However, Australia has not established a permanent process to consult with DPOs as representatives of persons with disabilities on measures concerning persons with disabilities or on implementing the CRPD which is mandated by article 4(3).

**The CRPD Committee's Assessment of Australia's Compliance of Article 33**

In relation to national implementation and monitoring, Australia wrote in its 2010 report that the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs had been designated under article 33(1) of
the CRPD as joint focal points within Government. The NDS would establish a framework to monitor the implementation of the CRPD, and that the AHRC is the independent mechanism.

The CRPD Committee in its 2013 Concluding Observations did not find that persons with disabilities and DPOs were fully integrated into the monitoring processes pursuant to article 33 of the CRPD. It recommended that Australia bring its monitoring into line with article 33.

In its 2018 Combined Second and Third Periodic Report, Australia simply noted the work and independence of the Australian Human Rights Commission and made no further comment on its mechanisms for implementing and monitoring the CRPD under article 33 of the Convention.

The AHRC in its 2019 report was of the view that:

A clear coordination mechanism is needed to facilitate whole of Government action to implement the CRPD, including to monitor measures for implementation, develop further measures for implementation and to coordinate the ongoing processes for reporting under the CRPD.

To fulfil these functions, the AHRC recommended that Australia establish an Office of Disability Strategy within the Department of Prime Minister and Cabinet.

In its 2019 Concluding Observations, the CRPD Committee recommended that Australia should ensure that there are sufficient resources to implement the NDS. The Committee further recommended that the Australian Parliament amend legislation to ensure that the AHRC has the power to independently monitor the CRPD in accordance with article 33(2). It further recommended that a formal monitoring mechanism be established under the NDS. The CRPD Committee agreed that an Office of Disability Strategy ought to be established to ensure effective coordination. Finally, it was recommended that DPOs be granted sufficient resources to carry out their monitoring functions.

In conclusion, Australia has made efforts to comply with the national implementation and monitoring of the CRPD which is required by Article 33. However, it should go further by taking note of the recommendations of the AHRC and the CRPD Committee. In particular, the powers of the AHRC should be strengthened and sufficient resources be made available to enable appropriate monitoring of the CRPD.

Convention on the Rights of Persons with Disabilities

Preamble

The States Parties to the present Convention,

a) Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world

b) Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

c) Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,

d) Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, 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 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

f) Recognizing the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in
influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities,

g) **Emphasizing** the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,

h) **Recognizing also** that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

i) **Recognizing further** the diversity of persons with disabilities,

j) **Recognizing** the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

k) **Concerned** that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

l) **Recognizing** the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,

m) **Recognizing** the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,

n) **Recognizing** the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

o) **Considering** that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

p) **Concerned** about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,
q) **Recognizing** that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

r) **Recognizing** that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,

s) **Emphasizing** the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,

t) **Highlighting** the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities,

u) **Bearing in mind** that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,

v) **Recognizing** the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,

w) **Realizing** that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights,

x) **Convinced** that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

y) **Convinced** that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant
contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

*Have agreed* as follows:

**Article 1**

**Purpose**

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

**Article 2**

**Definitions**

For the purposes of the present Convention:

“Communication” includes 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;

“Language” includes spoken and signed languages and other forms of non-spoken languages;

“Discrimination on the basis of disability” means 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, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

“Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for
adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

**Article 3**

**General principles**

The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
(b) Non-discrimination;
(c) Full and effective participation and inclusion in society;
(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
(e) Equality of opportunity;
(f) Accessibility;
(g) Equality between men and women;
(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

**Article 4**

**General obligations**

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

(d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

(f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

(g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to
law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.
5. The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 5
Equality and non-discrimination
1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 6
Women with disabilities
1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.
2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 7
Children with disabilities
1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

**Article 8**

**Awareness-raising**

1. States Parties undertake to adopt immediate, effective and appropriate measures:

   (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

   (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

   (c) To promote awareness of the capabilities and contributions of persons with disabilities.

2. Measures to this end include:

   (a) Initiating and maintaining effective public awareness campaigns designed:

      (i) To nurture receptiveness to the rights of persons with disabilities;

      (ii) To promote positive perceptions and greater social awareness towards persons with disabilities;

      (iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

   (b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

   (c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

   (d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

**Article 9**

**Accessibility**

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to
transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

(a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
(b) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

(a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
(b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
(c) To provide training for stakeholders on accessibility issues facing persons with disabilities;
(d) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
(e) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
(f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
(g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
(h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 10
Right to life
States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11

Situations of risk and humanitarian emergencies
States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Article 12

Equal recognition before the law
1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities 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, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13
Access to justice
1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14
Liberty and security of person
1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
   (a) Enjoy the right to liberty and security of person;
   (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Article 15
Freedom from torture or cruel, inhuman or degrading treatment or punishment
1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.
2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16
Freedom from exploitation, violence and abuse
1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the
home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

**Article 17**

**Protecting the integrity of the person**

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

**Article 18**

**Liberty of movement and nationality**

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

   (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
(b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
(c) Are free to leave any country, including their own;
(d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Article 19

Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 20

Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:
(a) Facilitating the personal mobility of persons with disabilities in the manner and at the
time of their choice, and at affordable cost;

(b) Facilitating access by persons with disabilities to quality mobility aids, devices,
assistive technologies and forms of live assistance and intermediaries, including by
making them available at affordable cost;

(c) Providing training in mobility skills to persons with disabilities and to specialist staff
working with persons with disabilities;

(d) Encouraging entities that produce mobility aids, devices and assistive technologies to
take into account all aspects of mobility for persons with disabilities.

**Article 21**

**Freedom of expression and opinion, and access to information**

States Parties shall take all appropriate measures to ensure that persons with disabilities
can 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, as defined in article 2 of the present
Convention, including by:

(a) Providing information intended for the general public to persons with disabilities in
accessible formats and technologies appropriate to different kinds of disabilities in a
timely manner and without additional cost;

(b) Accepting and facilitating the use of sign languages, Braille, augmentative and
alternative communication, and all other accessible means, modes and formats of
communication of their choice by persons with disabilities in official interactions;

(c) Urging private entities that provide services to the general public, including through
the Internet, to provide information and services in accessible and usable formats for
persons with disabilities;

(d) Encouraging the mass media, including providers of information through the Internet,
to make their services accessible to persons with disabilities;

(e) Recognizing and promoting the use of sign languages.
Article 22

Respect for privacy

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Article 23

Respect for home and the family

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

(b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(c) Persons with disabilities, including children, retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate
assistance to persons with disabilities in the performance of their child-rearing responsibilities.

3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

Article 24

Education

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

   (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

   (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

   (c) Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:
(a) Persons with disabilities are not excluded from the general education system on the
basis of disability, and that children with disabilities are not excluded from free and
compulsory primary education, or from secondary education, on the basis of disability;

(b) Persons with disabilities can access an inclusive, quality and free primary education
and secondary education on an equal basis with others in the communities in which they
live;

(c) Reasonable accommodation of the individual's requirements is provided;

(d) Persons with disabilities receive the support required, within the general education
system, to facilitate their effective education;

(e) Effective individualized support measures are provided in environments that maximize
academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social
development skills to facilitate their full and equal participation in education and as
members of the community. To this end, States Parties shall take appropriate measures,
including:

(a) Facilitating the learning of Braille, alternative script, augmentative and alternative
modes, means and formats of communication and orientation and mobility skills, and
facilitating peer support and mentoring;

(b) Facilitating the learning of sign language and the promotion of the linguistic identity of
the deaf community;

(c) Ensuring that the education of persons, and in particular children, who are blind, deaf
or deafblind, is delivered in the most appropriate languages and modes and means of
communication for the individual, and in environments which maximize academic and
social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate
measures to employ teachers, including teachers with disabilities, who are qualified in
sign language and/or Braille, and to train professionals and staff who work at all levels of
education. Such training shall incorporate disability awareness and the use of appropriate
augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Article 25

Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

(a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

(c) Provide these health services as close as possible to people’s own communities, including in rural areas;

(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

(f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability

Article 26

Habilitation and rehabilitation

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

(a) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;

(b) Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Article 27

Work and employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely
chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

**Article 28**

**Adequate standard of living and social protection**

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

(a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

(b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

(c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability related expenses, including adequate training, counselling, financial assistance and respite care;

(d) To ensure access by persons with disabilities to public housing programmes;
To ensure equal access by persons with disabilities to retirement benefits and programmes.

**Article 29**

**Participation in political and public life**

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

(a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

(b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

(i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

(ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

**Article 30**
Participation in cultural life, recreation, leisure and sport

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

(a) Enjoy access to cultural materials in accessible formats;

(b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

(c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

(a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

(b) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;
(c) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

(d) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

(e) To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

Article 31

Statistics and data collection

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:

   (a) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;

   (b) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties’ obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

Article 32

International cooperation

1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard,
between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

(a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;

(b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;

(c) Facilitating cooperation in research and access to scientific and technical knowledge;

(d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

Article 33

National implementation and monitoring

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.
3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

**Article 34**

**Committee on the Rights of Persons with Disabilities**

1. There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as “the Committee”), which shall carry out the functions hereinafter provided.

2. The Committee shall consist, at the time of entry into force of the present Convention, of twelve experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members.

3. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. When nominating their candidates, States Parties are invited to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

4. The members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.

5. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The initial election shall be held no later than six months after the date of entry into force of the present Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties
inviting them to submit the nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

7. The members of the Committee shall be elected for a term of four years.

They shall be eligible for re-election once. However, the term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in paragraph 5 of this article.

8. The election of the six additional members of the Committee shall be held on the occasion of regular elections, in accordance with the relevant provisions of this article.

9. If a member of the Committee dies or resigns or declares that for any other cause she or he can no longer perform her or his duties, the State Party which nominated the member shall appoint another expert possessing the qualifications and meeting the requirements set out in the relevant provisions of this article, to serve for the remainder of the term.

10. The Committee shall establish its own rules of procedure.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention, and shall convene its initial meeting.

12. With the approval of the General Assembly of the United Nations, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee’s responsibilities.

13. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

**Article 35**
Reports by States Parties

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.

2. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

3. The Committee shall decide any guidelines applicable to the content of the reports.

4. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

5. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 36

Consideration of reports

1. Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned. The State Party may respond with any information it chooses to the Committee. The Committee may request further information from States Parties relevant to the implementation of the present Convention.

2. If a State Party is significantly overdue in the submission of a report, the Committee may notify the State Party concerned of the need to examine the implementation of the present Convention in that State Party, on the basis of reliable information available to the Committee, if the relevant report is not submitted within three months following the notification. The Committee shall invite the State Party concerned to participate in such
examination. Should the State Party respond by submitting the relevant report, the provisions of paragraph 1 of this article will apply?

3. The Secretary-General of the United Nations shall make available the reports to all States Parties.

4. States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.

5. The Committee shall transmit, as it may consider appropriate, to the specialized agencies, funds and programmes of the United Nations, and other competent bodies, reports from States Parties in order to address a request or indication of a need for technical advice or assistance contained therein, along with the Committee’s observations and recommendations, if any, on these requests or indications.

Article 37

Cooperation between States Parties and the Committee

1. Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate.

2. In its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation.

Article 38

Relationship of the Committee with other bodies

In order to foster the effective implementation of the present Convention and to encourage international cooperation in the field covered by the present Convention:

(a) The specialized agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the
scope of their respective mandates. The Committee may invite specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

Article 39

Report of the Committee

The Committee shall report every two years to the General Assembly and to the Economic and Social Council on its activities, and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

Article 40

Conference of States Parties

1. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention.

2. No later than six months after the entry into force of the present Convention, the Conference of States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General biennially or upon the decision of the Conference of States Parties.

Article 41

Depositary

The Secretary-General of the United Nations shall be the depositary of the present Convention.
Article 42

Signature

The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.

Article 43

Consent to be bound

The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention.

Article 44

Regional integration organizations

1. “Regional integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to “States Parties” in the present Convention shall apply to such organizations within the limits of their competence.

3. For the purposes of article 45, paragraph 1, and article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an
organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 45

Entry into force

1. The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the present Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 46

Reservations

1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 47

Amendments

1. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of this article which relates exclusively to articles 34, 38, 39 and 40 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

Article 48

Denunciation

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 49

Accessible format

The text of the present Convention shall be made available in accessible formats.

Article 50

Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic. IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.
Optional Protocol to the Convention on the Rights of Persons with Disabilities

The States Parties to the present Protocol have agreed as follows:

Article 1
1. A State Party to the present Protocol (“State Party”) recognizes the competence of the Committee on the Rights of Persons with Disabilities (“the Committee”) to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.
2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 2
The Committee shall consider a communication inadmissible when:
(a) The communication is anonymous;
(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;
(c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
(d) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
(e) It is manifestly ill-founded or not sufficiently substantiated; or when
(f) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 3
Subject to the provisions of article 2 of the present Protocol, the Committee shall bring any communications submitted to it confidentially to the attention of the State Party. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
Article 4
1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.
2. Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.

Article 5
The Committee shall hold closed meetings when examining communications under the present Protocol. After examining a communication, the Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

Article 6
1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned.
2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.
3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.
Article 7
1. The Committee may invite the State Party concerned to include in its report under article 35 of the Convention details of any measures taken in response to an inquiry conducted under article 6 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in article 6, paragraph 4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 8
Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 6 and 7.

Article 9
The Secretary-General of the United Nations shall be the depositary of the present Protocol.

Article 10
The present Protocol shall be open for signature by signatory States and regional integration organizations of the Convention at United Nations Headquarters in New York as of 30 March 2007.

Article 11
The present Protocol shall be subject to ratification by signatory States of the present Protocol which have ratified or acceded to the Convention. It shall be subject to formal confirmation by signatory regional integration organizations of the present Protocol which have formally confirmed or acceded to the Convention. It shall be open for accession by any State or regional integration organization which has ratified, formally confirmed or acceded to the Convention and which has not signed the Protocol.

Article 12
1. “Regional integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the Convention and the present Protocol. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the Convention and the present Protocol. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.
2. References to “States Parties” in the present Protocol shall apply to such organizations within the limits of their competence.

3. For the purposes of article 13, paragraph 1, and article 15, paragraph 2, of the present Protocol, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the meeting of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

**Article 13**

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the present Protocol after the deposit of the tenth such instrument, the Protocol shall enter into force on the thirtieth day after the deposit of its own such instrument.

**Article 14**

1. Reservations incompatible with the object and purpose of the present Protocol shall not be permitted.

2. Reservations may be withdrawn at any time.

**Article 15**

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary- General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

**Article 16**

A State Party may denounce the present Protocol by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

**Article 17**

The text of the present Protocol shall be made available in accessible formats.

**Article 18**

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Protocol shall be equally authentic. IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol.
References


3 For analysis of the CRPD, see:
   - Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (Eds) The UN Convention on the Rights of Persons with Disabilities: A Commentary, Oxford University Press, 2018

4 See:


6 Australia ratified the CRPD on 17 July 2008 and it came into force on 16 August 2008.

7 Other human rights treaties which Australia has ratified:

8 The Optional Protocol entered into force for Australia on 20 September 2009.


10 Dietrich v The Queen (1992) 177 CLR 292, 305 per Mason CJ and McHugh J. See further:
   - Nicholson v Knaggs [2009] VSC 64 Vickery J
   - Patrick’s Case [2011] VSC 327 Bell J


For a critique of the social model, see: Tom Shakespeare, *Disability Rights and Wrongs Revisited*, Routledge, 2017, ch.2.


These meetings are called Conferences of the State Parties.


**The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Australia, 10th sess, UN Doc CRPD/C/Aus/1, 3 December 2010**

**The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019**

**The Committee on the Rights of Persons with Disabilities, List of issues prior to the submission of the combined second and third periodic reports of Australia, 18th sess, UN Doc CRPD/C/AUS/QPR/2-3, 21 September 2017,**


The seven published General Comments relate to articles 5, 6, 9, 12, 19, 24 and 33 of the CRPD.


Examples:

- The Committee on the Rights of Persons with Disabilities, *Views; Communication No. 7/2012, 16th sess*, UN Doc CRPD/C/16/D/7/2012, (2 September 2016) (*Noble v Australia*).
- The Committee on the Rights of Persons with Disabilities, *Views; Communication No. 17/2013, 22nd sess*, UN Doc CRPD/C/22/D/17/2013 (30 August 2019) (*Leo v Australia*).
• The Committee on the Rights of Persons with Disabilities, Views; Communication No.18/2013, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (30 August 2019) (Doolan v Australia)
• The Committee on the Rights of Persons with Disabilities, Views; Communication No. 19/2014, 19th sess, UN Doc CRPD/C/19/D/19/2014 (16 February 2018) (Fiona Given v Australia)


For commentaries on article 5, see:

Further discussion on page 16


The Committee on the Rights of Persons with Disabilities, General Comment No.6 on equality and non-discrimination, 19th sess, UN Doc CRPD/C/GC/6, (6 April 2018) [25].

Racial Discrimination Act 1975 (Cth).

Sex Discrimination Act 1984 (Cth).


Age Discrimination Act 2004 (Cth).


For details, see:


Disability Discrimination Act 1992 (Cth) ss 4(1), 11 and 21B.

The Full Bench comprised Bromberg, Griffiths and Bromwich JJ.


The Committee on the Rights of Persons with Disabilities, General Comment No.6 on equality and non-discrimination, 19th sess, UN Doc CRPD/C/GC/6, (6 April 2018)

The Committee on the Rights of Persons with Disabilities, General Comment No.6 on equality and non-discrimination, 19th sess, UN Doc CRPD/C/GC/6, (6 April 2018) [19] footnote omitted.

The Committee on the Rights of Persons with Disabilities, General Comment No.6 on equality and non-discrimination, 19th sess, UN Doc CRPD/C/GC/6, (6 April 2018) [19].

The Committee on the Rights of Persons with Disabilities, General Comment No.6 on equality and non-discrimination, 19th sess, UN Doc CRPD/C/GC/6, (6 April 2018) [36].

The Committee on the Rights of Persons with Disabilities, General Comment No.6 on equality and non-discrimination, 19th sess, UN Doc CRPD/C/GC/6, (6 April 2018) [73(o)].
63 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019 [10(a)].
66 Human Rights and Anti-Discrimination Bill 2012 (Cth) [Draft]
68 See: The Committee on the Rights of Persons with Disabilities, General Comment No.6 on equality and non-discrimination, 19th sess, UN Doc CRPD/C/GC/6, (6 April 2018)
71 Maxworthy v Shaw [2010] FMCA 1014
72 The conduct complained of, occurred in February 2008. At the time of the Magistrate’s decision, the DDA and the SDA had been amended. The DDA was amended by the Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth); while the SDA was amended by several statutes, the latest being the Fair Work (State Referral and CONSEQUENTIAL and Other Amendments) Act 2009 (Cth).
73 Disability Discrimination Act 1992 (Cth) ss 5 (1).
74 Sex Discrimination Act 1984 (Cth) section 7A.
80 For commentaries on article 6, see
84 The Committee on the Rights of Persons with Disabilities, General Comment No.3 Women and Girls with Disabilities, UN Doc CRPD/C/GC/3 (25 November 2016) [7].
The Committee on the Rights of Persons with Disabilities, General Comment No.3 Women and Girls with Disabilities, UN Doc CRPD/C/GC/3 (25 November 2016) [13].


Attorney-General's Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [65]-[76].

The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [12].

The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019 [12(a)].

The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [12(b)].

For commentaries on article 7, see:


United Nation Committee on the Rights of the Child, General Comment No.14: The right of the child to have his or her best interests taken as a primary consideration, 62nd sess, UN Doc CRC/C/GC/14, (29 May 2013).

United Nation Committee on the Rights of the Child, General Comment No.14: The right of the child to have his or her best interests taken as a primary consideration, 62nd sess, UN Doc CRC/C/GC/14, (29 May 2013) [6].


114 Australia’s reports to, and the Concluding Observations of the CRC Committee are outside the scope of this report.


118 Attorney-General’s Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [81]-[84].

119 Attorney-General’s Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [77]-[80].

120 Attorney-General’s Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [89].

121 Attorney-General’s Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [95].


129 For commentaries on art 8, see:


132 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities , UN Doc CRPD/C/Aus/1, 3 December 2010

133 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities , UN Doc CRPD/C/Aus/1, 3 December 2010, [38]-[40].

134 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities , UN Doc CRPD/C/Aus/1, 3 December 2010, [41]; Awards were handed out on 3 December which is the International Day of Persons With Disabilities.

135 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities , UN Doc CRPD/C/Aus/1, 3 December 2010, [108].


144 For general commentaries on Article 9, see:


148 The Committee on the Rights of Persons with Disabilities, General Comment No.2, Article 9 Accessibility, 11th sess, UN Doc CRPD/C/GC/2, (22 May 2014)

149 The Committee on the Rights of Persons with Disabilities, General Comment No.2, Article 9 Accessibility, 11th sess, UN Doc CRPD/C/GC/2, (22 May 2014), [24]


Further reading on doctrine of progressive realisation:


151 The Committee on the Rights of Persons with Disabilities, General Comment No.2, Article 9 Accessibility, 11th sess, UN Doc CRPD/C/GC/2, (22 May 2014), [24]
152 The Committee on the Rights of Persons with Disabilities, Views; Communication No. 21/2014, 14th sess, UN Doc CRPD/C/14/D/21/2014 (21 August 2015) (F v Austria).
153 The Committee on the Rights of Persons with Disabilities, Views; Communication No. 1/2010, 9th sess, UN Doc CRPD/C/9/D/1/2010 (16 April 2013) (Nyusti and Takács v Hungary) Ron McCallum was a member of the CRPD Committee and participated in this decision.
154 Committee on the Rights of Persons with Disabilities, Views; Communication No.21/2014, 14th sess, UN Doc CRPD/C/14/D/21/2014 (21 August 2015) (F v Austria) [8.4]
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158 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [46-47]
160 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019 [17(a)]
162 Disability Standards for Accessible Public Transport 2002 (Cth)
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164 National Standards for Disability Services (Cth)
169 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [113]
170 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [113]-[116].
171 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [133]


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183 See,

• United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art 6(1);


184 The sterilisation and executions of persons with disabilities in Nazi Germany is one well-known example within living memory. For additional commentary on Article 10, see:


186 For comment on Article 10, see;


187 Ron McCallum Chaired this Constructive Dialogue.


189 The issue of selective terminations on the grounds of disability is beyond the scope of this paper. For a detailed international account, see Smitha Nizar, The Contradiction in Disability Law, Oxford University Press, 2016, esp. pp.123-128.


191 In 2016 amendments to the Canadian Criminal Code were made following the Supreme Court of Canada decision in Carter v Canada (Attorney-General) [2015] 1 SCR 331.

were unable to leave their houses unaided.

In the aftermath of the earthquake, Nagase Osamu at some risk to himself rescued persons with disabilities who

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221 Australian Department of Foreign Affairs and Trade is listed as a Partner on the Agenda for Humanity website <www.agendaforhumanity.org>.


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231 Department of Home Affairs, *National Disaster Risk Reduction Framework*, 2018


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253 The Committee on the Rights of Persons with Disabilities, General Comment No. 1; Article 12: equal recognition before the law, 11th sess, UN Doc CRPD/C/GC/1/, 19 May 2014, [27].

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The two primary legal families are Common law and Civil Law. The precepts of Islamic Law also operate in many countries.

see:


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311 Attorney-General's Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/AUS/2-3, 7 September 2018.
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313 Attorney-General's Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/AUS/2-3, 7 September 2018, [174].
315 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [26(b)].
316 For details on accessibility and the provision of information, see: Eilionoir Flynn, Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities, Routledge, 2016, ch.3.
319 Australia along with 96 other States are parties to the Optional Protocol to the CRPD. Each state Party has consented for individuals to take complaints directly to the CRPD Committee provided all the requirements in art 2 of the Protocol are met. The CRPD Committee considers submissions from both parties and provides a decision with recommendations.
320 The Committee on the Rights of Persons with Disabilities, Views; Communication no 30/2015, 18th sess, UN Doc CRPD/C/18/D/30/2015 (5 October 2015) (Makarov v Lithuania).
321 The Committee on the Rights of Persons with Disabilities, Views; Communication No. 30/2015, 18th sess, UN Doc CRPD/C/18/D/30/2015 (5 October 2015) (Makarov v Lithuania), p.6
322 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, art [26(c)].
326 See (all available online):
- Supreme Court of Western Australia, Equal Justice Bench Book, (2009) 1st ed, ch. 4 People with disabilities
- Supreme Court of Queensland, Equal Treatment Bench Book, (2016), ch. 11 Persons with disability
329 The Sherriff exercised discretionary powers under the Jury Act 1977 (NSW) s53B
The CRPD Committee found violations of articles 21 and 29 had been made out, see: The Committee on the Rights of Persons with Disabilities, Views; Communication No. 11/2013, 15th sess, UN Doc CRPD/V/15/d/11/2013, (01 April 2016), (Beasley v Australia), [9] – [10]

The Committee on the Rights of Persons with Disabilities, Views; Communication No. 13/2013, 15th sess, UN Doc CRPD/C/15/d/13/2013, (01 April 2016) (Lockrey v Australia)

The CRPD Committee also held that violations of articles 21 and 29 had been made out. See: The Committee on the Rights of Persons with Disabilities, Views; Communication No. 13/2013, 15th sess, UN Doc CRPD/C/15/d/13/2013, (01 April 2016) (Lockrey v Australia), [9] – [10]

For completeness see Lyons v Queensland [2016] HCA 38, where the High Court of Australia dismissed a discrimination claim from Ms Lyons when she was not provided with Auslan interpretation, primarily on the ground that no statutory provision enabled an Auslan interpreter to be in the jury-room during deliberations.

Jury Act 1977 (NSW) s14. Schedule 2 lists those who are ineligibility to serve as a juror.

The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019

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The Committee on the Rights of Persons with Disabilities, Views; Communication No. 8/2012, 11th sess, UN Doc CRPD/C/11/D/8/2012, (11 April 2014) (X v Argentina). Emeritus Professor Ron McCallum AO was a member of the CRPD Committee deciding the matter of X.

The Committee on the Rights of Persons with Disabilities, Views; Communication No. 8/2012, 11th sess, UN Doc CRPD/C/11/D/8/2012, (11 April 2014) (X v Argentina) [8.5]

individual impairment and social and material environment as described in Art. 1 UN CRPD. Disability is understood as the social effect of the interaction between condition which may or may not come with functional limitations of the body, mind or senses. Impairment differs from what is usually considered the norm. 


Impairment in these guidelines is understood as a physical, psycho-social, intellectual or sensory personal condition which may or may not come with functional limitations of the body, mind or senses. Impairment differs from what is usually considered the norm. Disability is understood as the social effect of the interaction between individual impairment and social and material environment as described in Art. 1 UN CRPD.


See:

- Arlie Loughnan, Manifest Madness Mental Incapacity in the Criminal Law, Oxford University Press, 2012, Ch 5-6, pp. 103-170.
- Lorraine Finlay and Tyrone Kirchengast, Criminal Law in Australia, 1st edn, LexisNexis, 2015, Ch 15 'Mental Impairment and Related Defences' pp.411-447.
- M’Naghten’s Case (1843) 10 Cl & F 200, (8 ER 718).

See:

- Tina Minkowitz, Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond, (2014) 23 (3) Griffith Law Review pp.434-466
- Christopher Slobogin, An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases, (2000) 86(6), Virginia Law Review, pp. 1199-1247

352 The Committee on the Rights of Persons with Disabilities, Views; Communication No. 8/2012, 11th sess, UN Doc CRPD/C/11/D/8/2012, (11 April 2014) (X v Argentina) [8.6]
355 Impairment in these guidelines is understood as a physical, psycho-social, intellectual or sensory personal condition which may or may not come with functional limitations of the body, mind or senses. Impairment differs from what is usually considered the norm. Disability is understood as the social effect of the interaction between individual impairment and social and material environment as described in Art. 1 UN CRPD.
Australia under article 35 of the Convention,

Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/2-3, 7 September 2018 [183]-[186].

Concluding Observations on the Second and Third

Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [28]


The further research program is: ‘Unfitness to Plead and Indefinite Detention of Persons with Cognitive Impairments: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community’


The Committee on the Rights of Persons with Disabilities, Views; Communication No.18/2013, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (30 August 2019) (Doolan v Australia) [2.6]

The Committee on the Rights of Persons with Disabilities, Views; Communication No.18/2013, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (30 August 2019) (Doolan v Australia) [4.11]

The Committee on the Rights of Persons with Disabilities, Views; Communication No.18/2013, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (30 August 2019) (Doolan v Australia) [8.8]

The Committee on the Rights of Persons with Disabilities, Views; Communication No.18/2013, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (30 August 2019) (Doolan v Australia) [8.10]

See:


Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/AUS/2-3, 7 September 2018

Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/AUS/2-3, 7 September 2018 [133]-[186].


Attorney-General’s Department, National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment (2016). Available online


Attorney-General’s Department, National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment (2016). Available online


Attorney-General’s Department, Commonwealth, Australia’s Universal Periodic Report to the Human Rights Council, UN Doc A/HRC/WG.6/23/AUS/1 (7 August 2015)

The Committee on the Rights of Persons with Disabilities, Views; Communication No.18/2013, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (30 August 2019) (Doolan v Australia) [8.8]

The Committee on the Rights of Persons with Disabilities, Views; Communication No.18/2013, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (30 August 2019) (Doolan v Australia) [8.10]

See:

funded by the National Disability Research and Development Grants administered by the New South Wales Family and Community Services Research and Data Working Group (RDWG NSW FACS).


398 See also: Antonio Marchesi, Article 15 Freedom from Torture, or Cruel or Inhuman or Degrading Treatment or Punishment in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (Eds), The United Nations Convention on the Rights of Persons with Disabilities, Springer International Publishing, 2017, ch.5


403 The Committee on the Rights of Persons with Disabilities, Views; Communication No. 22/2014, 22nd sess, UN Doc CRPD/C/18/D/22/2014 (18 August 2017) (X v Tanzania)

404 Price v United Kingdom, Judgment, Merits and Just Satisfaction, App No 33394/96, ECHR 2001-VII, [2001] ECHR 458


408 The Committee on the Rights of Persons with Disabilities, Views; Communication No. 7/2012, 16th sess, UN Doc CRPD/C/16/D/7/2012, (2 September 2016) (Noble v Australia)


410 Noble v Australia [8.9].

411 The Committee on the Rights of Persons with Disabilities, Views; Communication No.17/2013, 22nd sess, UN Doc CRPD/C/22/D/17/2013 (30 August 2019) (Leo v Australia),

412 The Committee on the Rights of Persons with Disabilities, Views; Communication No.18/2013, 22nd sess, UN Doc CRPD/C/22/D/18/2013 (30 August 2019) (Doolan v Australia)


414 United Nations General Assembly, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 57th sess, UN Doc A/RES/57/199, 9 January 2003


433 Details of this legislation are set out in: Attorney-General's Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/AUS/1, 3 December 2010, [89]-[94].


437 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Australia, 10th sess, UN Doc CRPD/C/AUS/CO/1, 21 October 2013, [34].


439 CRPD/C/AUS/CO/2-3, Concluding Observations on the Second and Third Combined Reports of Australia, 15 October 2019 [29]-[30].

For commentaries on article 18, see:


United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, art 13 (freedom of movement) & art 15 (nationality)


Lawrence Mute, ‘Article 18 Liberty of Movement and Nationality’, in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (Eds) The UN Convention on the Rights of Persons with Disabilities: A
Commentary, Oxford University Press, 2018, pp. 514-515 (details the restrictive laws of Paraguay, Korea, El Salvador, Qatar, Uganda and Uruguay.

463 United Nations General Assembly, Convention on the Rights of the Child, opened for signature 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, (entered into force 2 September 1990) art 7(1) provides ‘The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.’

464 Attorney-General's Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, Annex A.


469 Immigration (Restriction) Act 1901 (Cth).

470 Migration Regulations 1994 (Cth) Schedule 4. (These regulations were made under the Migration Act 1958 (Cth))

471 See:

- Mary Crock and Laurie Berg, Immigration, Refugees and Forced Migration, The Federation Press, 2011, ch.6;

472 Migration Regulations 1994 (Cth) Schedule 4, Public Interest Criteria 4005.


476 Social Security Act 1991 (Cth) section 94(1) (e) (ii). There can be exemptions to this. Refugees and holders of humanitarian visas generally have exemptions.

477 Social Security Act 1991 (Cth) section 94(1) (e) (i).

478 Disability Discrimination Act 1992 (Cth)

479 Disability Discrimination Act 1992 (Cth) s 29.

480 Disability Discrimination Act 1992 (Cth) s 21B.


484 Attorney-General's Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [234]-[242].


The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019 [6(b)].

The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019 [36(a)-(b)].

The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019 [36(c)-(d)].


The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [36(a)].

The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [36(b)].


See,


The Committee on the Rights of Persons with Disabilities, General Comment No.5 on living independently and being included in the community, UN Doc CRPD/C/GC/5 (27 October 2017)

The Committee on the Rights of Persons with Disabilities, General Comment No.5 on living independently and being included in the community, UN Doc CRPD/C/GC/5 (27 October 2017) [16].

The Committee on the Rights of Persons with Disabilities, General Comment No.5 on living independently and being included in the community, UN Doc CRPD/C/GC/5 (27 October 2017) [24].

The Committee on the Rights of Persons with Disabilities, General Comment No.5 on living independently and being included in the community, UN Doc CRPD/C/GC/5 (27 October 2017) [28].

The Committee on the Rights of Persons with Disabilities, General Comment No.5 on living independently and being included in the community, UN Doc CRPD/C/GC/5 (27 October 2017) [32].

The Committee on the Rights of Persons with Disabilities, General Comment No.5 on living independently and being included in the community, UN Doc CRPD/C/GC/5 (27 October 2017) [39].


The Committee on the Rights of Persons with Disabilities, Views; Communication No. 3/201, 7th sess, UN Doc CRPD/C/7/D/3/2011 (19 April 2012) (M H v Sweden)

Ron McCallum participated in this decision as the Chair of the CRPD Committee.
Australia under article 35 of the Convention,

Disabilities, the Rights of Persons with Disabilities


511 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [41]-[42].

512 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018

513 D T Richmond, Inquiry Into Health Services For The Psychiatrically Ill And Developmentally Disabled, NSW Department of Health report, March 1983


515 Much debate over the efficacy and appropriateness of group homes within and beyond Australia’s disability community is beyond the scope of this paper.

516 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [41]-[42].

517 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018

518 Disability support services refer to services provided under the National Disability Agreement 2015–16

519 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018 [246].


521 Disability support services refer to services provided under the National Disability Agreement 2015–16

522 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [248]-[249].


529 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019

530 For commentaries on article 20, see:

In an interesting note, Brown argues that artificial limbs should be regarded as body parts and not simply as mobility tools. Bayard Brown, ‘A Farewell to Arms (and Legs): The Legal Treatment of Artificial Limbs.’ (2013) vol.47(1), Columbia Journal of Law and Social Problems p.69


536 Attorney-General's Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities , UN Doc CRPD/C/Aus/1, 3 December 2010,

537 Attorney-General's Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [127]-[128].


539 The Committee on the Rights of Persons with Disabilities, List of issues prior to the submission of the combined second and third periodic reports of Australia, 18th sess, UN Doc CRPD/C/AUS/QPR/2-3, 21 September 2017

540 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019


546 National Disability Insurance Scheme Act 2013 (Cth).

547 There may also be financial issues which impact upon First Nations people seeking finance to obtain aids and equipment. See, Karen Soldatic, ‘Policy Mobilities of Exclusion: Implications of Australian Disability Pension Retraction for First Nations Australians’ (2018) vol.17(1) Social Policy And Society p.151

548 For commentaries on article 21, see:


555 The Committee on the Rights of Persons with Disabilities, General Comment No.2 Article 9: Accessibility, 11th sess 31, UN Doc CRPD/C/GC/2, (22 May 2014), [38].

556 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010 [130]-[134].

557 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010,
558 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [44].

559 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [249].

560 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [250]-[259]. Note that State and Territory programs are also noted in these paragraphs.


567 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019 [42]


The UN CRPD: An Assessment of Australia’s Level of Compliance| Page 224


588 See:

- The Committee on the Rights of Persons with Disabilities, Views; Communication No. 14/2013, 17th sess, UN Doc CRPD/C/17/D/ 14/2013 (24 March 2017) (D.R v Australia)
- The Committee on the Rights of Persons with Disabilities, Views; Communication No.30/2015, 18th sess, UN Doc CRPD/C/18/D/30/2015 (18 August 2017) (‘Boris Makarov v Lithuania’).


590 Attorney-General’s Department, Commonwealth, Australia's Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [134]

591 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [136]

592 Joseph Cannataci (Special Rapporteur), Response to the correspondence received from the Australian Government on 30 August 2018 in relation to the legislative gap identified in the protection of the right to privacy in Australia, UN Doc OL AUS 3/2019, (12 February 2019)

593 Joseph Cannataci (Special Rapporteur), Response to the correspondence received from the Australian Government on 30 August 2018 in relation to the legislative gap identified in the protection of the right to privacy in Australia, UN Doc OL AUS 3/2019, (12 February 2019)

594 Attorney-General v Kereopa (No 3) [2017] NSWSC 929

595 Attorney-General v Kereopa (No 3) [2017] NSWSC 929 [23].

596 Attorney-General v Kereopa (No 3) [2017] NSWSC 929 [24].

597 Attorney-General v Kereopa (No 3) [2017] NSWSC 929 [24].

598 Interestingly, neither sexual relations nor sexual intercourse are mentioned, but the wording of article 23 makes it clear that it encompasses persons with disabilities engaging in consensual sexual relations.


600 See:

- United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, art 16:


602 Commentary:


603 The issue of the sterilisation of persons with disabilities, especially of girls and women with disabilities was discussed in the segment on articles 15 to 17 of this report.

604 *Marriage Act 1961 (Cth)*, s23B(1)(d)(iii)

605 See *The Marriage Amendment Act 1985 (Cth)* which deleted the words ‘mentally incapable of understanding’. However, for marriages entered into between 1977 and the coming into force of the 1985 amendments, these old fashioned words still apply. See section 23(1) (d) (iii) of the *Marriage Act 1961 (Cth).*

606 In the *Estate of Park, Park v Park* [1954] p.89.

607 *In the Estate of Park, Park v Park* [1954] [89]

608 *Jarman v Perriam* [2018] FamCA 407

609 Attorney-General’s Department, Commonwealth, *Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities*, UN Doc CRPD/C/Aus/1, 3 December 2010, [138]


611 The Committee on the Rights of Persons with Disabilities, *List of issues prior to the submission of the combined second and third periodic reports of Australia*, 18th sess, UN Doc CRPD/C/AUS/QPR/2-3, 21 September 2017

612 Attorney-General’s Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018


615 The Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Second and Third Combined Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [44](a). It was further recommended that support mechanisms be put in place to support parents with disabilities, at [44](b)


623 United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (entered into force 3 January 1976), art 13(4) provides: ‘No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.’
624 The Committee on Economic and Social and Cultural Rights, General Comment No. 13: The Right to Education (article 13), 21st sess, UN Doc E/C.12/1999/10, 8 December 1999, [28].

625 Ibid. [29].


630 For commentaries on article 24 of the CRPD see:


635 See:

- Arlene S. Kanter, in Gauthier de Beco, Shivaun Quinlivan and Janet E Lord (Eds), The Right To Inclusive Education In International Human Rights Law, Cambridge University Press, 2019, pp.34-49;
- Rosemary Kayess, Drafting Article 24 of the Convention on the Rights of Persons with Disability, in Gauthier De Beco, Shivaun Quinlivan and Janet E Lord (Eds), The Right To Inclusive Education In International Human Rights Law, Cambridge University Press, 2019, ch.5

636 The Committee on the Rights of Persons with Disabilities, General Comment No.4: Article 24 Right to Inclusive Education, sess, UN Doc Crpd/c gc/4, (2 September 2016)

637 The Committee on Economic and Social and Cultural Rights, General Comment No.13: The Right to Education (article 13), 21st sess, UN Doc E/C.12/1999/10, 8 December 1999


640 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010


643 The Committee on the Rights of Persons with Disabilities, General Comment No.4: Article 24 Right to Inclusive Education, sess, UN Doc CRPD/C/GC/4, (2 September 2016)

644 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018 [278].

645 Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [262]-[279].

646 In July 2017, the Alliance wrote a submission on article 24 to the CRPD Committee. The Submission
states that the Alliance includes: People with disability, families, academic experts, educators, school principals, advocacy and other organisations and members of the community interested in supporting the right of every Australian student to access an inclusive education. See: Australian Alliance on Inclusive Education, Submission on Article 24 of the CRPD, July 2017, p.2.

647 Australian Alliance on Inclusive Education, Submission on Article 24 of the CRPD, July 2017, pp.5-6.


655 See:

- United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, art 25

656 Committee on Economic, Social and Cultural Rights, General Comment No. 14: Article 12 The right to the highest attainable standard of health, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000), [1].


659 International Labour Organisation, Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) and International Labour Organisation, Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No. 168)


661 For commentaries on article 25 see:


662 For commentaries on article 26 see:


667 Australia Government Department of Social Services, *National Disability Strategy 2010-2020*, report, November 2017, see: Outcome 6 Health And Wellbeing, p. 44


670 Attorney-General's Department, Commonwealth, *Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities*, UN Doc CRPD/C/Aus/1, 3 December 2010, [150]-[159].


674 National Disability Insurance Scheme Act 2013 (Cth) s34 (1) (f).

675 Attorney-General's Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018 [42]-[57].


679 Closing the Gap is a government strategy that aims to reduce disadvantage among Aboriginal and Torres Strait Islander people with respect to life expectancy, child mortality, access to early childhood education, educational achievement, and employment outcomes.


687 The Commission on Human Rights has been superseded by the Human Rights Council.


provisions. Redrafting may be required to clarify the position.

Dermatologists have greatly improved.

Recommendation, Convention, Sess, UN Doc E/1995/22 (9 December 1994), [21].

The Workplace: A Comparative Analysis of an Employer's Obligation to Accommodate a Worker's Disability

reasonable adjustments in Australia and in Canada, see: Emma Purdue, 'Scoping Reasonable Adjustments in


majority.

online <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4430.0main+features202015>


726 Fair Work Act 2009 (Cth) ss153 (1), 195(1).

727 Fair Work Act 2009 (Cth) s 195(3) (b).

728 Fair Work Act 2009 (Cth) clause 7.1(b).


734 Attorney-General’s Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018 [304].


737 Attorney-General’s Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [50(a)].

738 Attorney-General’s Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [50(b)].

739 Attorney-General’s Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention*, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [50](c).
September 2017, \[31\].


Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities , UN Doc CRPD/C/Aus/1, 3 December 2010

Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [172].


Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities , UN Doc CRPD/C/Aus/1, 3 December 2010, [173]-[176]

The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Australia, 10th sess, UN Doc CRPD/C/AUS/co/1, 21 October 2013, [6]. Note: at that time the NDIS was known as Disability Care Australia.

The Committee on the Rights of Persons with Disabilities, List of issues prior to the submission of the combined second and third periodic reports of Australia, 18th sess, UN Doc CRPD/C/AUS/QPR/2-3, 21 September 2017, [31].

Attorney-General’s Department, Commonwealth, Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention, UN Doc CRPD/C/Aus/2-3, 7 September 2018, [316]-[325].

United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, arts 20 and 21


Electoral Act 1918 (Cth), s293 (8).


763 The Committee on the Rights of Persons with Disabilities, Views; Communication No.4/2011, UN Doc CRPD/C/10/D/4/2011 (9 September 2013) (Zsolt v Hungary). Note: Ron McCallum participated in this decision as a member of the CRPD Committee.

764 European Court of Human Rights, Chamber judgment application no. 38832/06 (20 May 2010) (Alajos Kiss v Hungary)

765 The right to vote is set forth in Article 3 of Protocol No. 1 of The European Convention for the Protection of Human Rights and Fundamental Freedoms.

766 European Court of Human Rights, Chamber judgment application no. 38832/06 (20 May 2010) (Alajos Kiss v Hungary)

768 The CRPD Committee read the provision together with article 9, articles 4(1) and 5(2)

770 Electoral Act 1918 (Cth), Part XVB.

771 Electoral Act 1918 (Cth), s234.

772 The Committee on the Rights of Persons with Disabilities, Views; Communication No. 19/2014, 19th sess, UN Doc CRPD/C/19/D/19/2014 (16 February 2018) (Fiona Given v Australia)

774 For further details and efforts to reform the provision see: Jonathon Savery, 'Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights' (2015), vol.37, Sydney Law Review, p.287.

775 Parliamentary Electorates and Elections Act 1912 (NSW) s 25(a); Electoral Act 1907 (WA) s 18(1) (a); Electoral Act 1985 (SA) s 29(1) (iv).

776 Electoral Act 1918 (Cth) s114 (1A) and s118 (4).


778 Roach v Electoral Commissioner [2007] HCA 43 [9].

779 Roach v Electoral Commissioner [2007] HCA 43 [30].

780 Roach v Electoral Commissioner [2007] HCA 43 [88].


782 Electoral Act 1918 (Cth) s93 (8) (a) & s118 (4).


786 Roach v Electoral Commissioner [2007] HCA 43


Of Persons with Disabilities
the Rights of Persons with Disabilities
Convention on the Rights of Persons with Disabilities
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Women,


For commentaries see:


Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [186]-[190].

Articles 9 and 21 of the CRPD also raise issues of accessibility and access to information which were analysed in earlier segments.

WIPO, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled, opened for signature 28 June 2013, (entered into force 30 September 2016)

The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, 3 December 2010, [186]-[190].

For more information see:


Copyright Amendment (Disability Access and Other Measures) Act 2017 (Cth).

The Committee on the Elimination of Discrimination against Women has recognised the importance of gathering statistics to chart the progress of women. See: Committee On the Elimination of Discrimination against Women, General Recommendation 9, Statistical data concerning the situation of women, 8th sess, 1989.

For commentaries see:


For details, see:


Attorney-General’s Department, Commonwealth, *Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities*, UN Doc CRPD/C/Aus/1, 3 December 2010, [203]-[209]


See:


For commentaries on article32, see:


Attorney-General’s Department, Commonwealth, *Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities*, UN Doc CRPD/C/Aus/1, 3 December 2010, [206].

See:

827 AusAid has been subsumed into the Department of Foreign Affairs and Trade.
829 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [338].
830 Attorney-General’s Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [339].
833 The Committee on the Rights of Persons with Disabilities, Concluding Observations on the Second and Third Combined Reports of Australia, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, [60].
834 For commentaries on article 33, see:
835 For commentaries on article 4(3), see:
837 The Committee on the Rights of Persons with Disabilities, General Comment No 7, UN Doc CRPD/C/GC/7 (9 November 2018), [34].
847 Attorney-General's Department, Commonwealth, Australia’s Initial Report under the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/Aus/1, 3 December 2010, [27].
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