

**Submission to the Australian Government, Attorney-General's Department,
Disability Discrimination Section****On the Possible Ratification of the United Nations Convention on the Rights of
Persons with Disabilities (CRPD)**

This submission stresses that it is important for Australia to ratify the CRPD. It first addresses some core justifications for ratifying and implementing the CRPD that have been raised during the drafting process of the CRPD and after its adoption. This will be supplemented by an outline of the international and national consequences of Australia ratifying the CRPD, including some views on the legal, economic, environmental, social and cultural effects of ratification.

Why is the ratification of the CRPD important and what will be Australia's international standing following ratification?

- **large-scale human rights violations have taken place**

The experience of discrimination, exclusion and stigmatisation of persons with disabilities has demonstrated that large-scale human rights violations of persons with disabilities are a reality.

- **symbolic value**

The ratification of the CRPD sends a clear message that disability is a human rights issue and recognises that a response to human rights violations is necessary.

- **visibility and awareness-raising**

Disability rights groups successfully lobbied for a disability specific convention because existing human rights instruments have not been applied sufficiently to persons with disabilities. The CRPD draws attention to the rights of those with disabilities and combats stereotypes, prejudices and harmful practices. It also promotes awareness of the capabilities and contributions of persons with disabilities.

- **clarification**

The CRPD was set up to clarify and amplify already existing human rights, rather than to establish fundamentally new ones. It sets out in a potentially legally binding document what basic human rights protection means in the context of disability. The text of the CRPD contains a lengthy formulation which clarifies the measures that should be taken to assure integration, respect and non-discrimination of person with disabilities.

- **comprehensive, experience-based document**

The CRPD is the result of intense debate on how to address on-going human rights breaches in the field of disability. It addresses the connection between disability, exclusion, poverty, lack of education, unemployment and health. Drawing upon the participation of disability rights groups in the drafting process, the text of the CRPD pays respect to the experiences and suggestions of the persons the convention is about. It forms a comprehensive document on how to achieve, at least progressively, integration and human rights protection for persons with disabilities in countries of different political, legal, economic, social, and cultural background.

- **speedy realisation of human rights**

The CRPD is not yet in force. At the time of writing, only seventeen countries have ratified the CRPD while twenty ratifications are necessary to enable the CRPD to enter into force. If Australia ratifies the CRPD speedily, Australia can take credit for strongly supporting the early realisation of the human rights of persons with disabilities.

- **international credibility**

Australia supported the drafting of the CRPD. Non-ratification or ratification with crucial limitations would be contradictory to this support and reflect negatively upon Australia's human rights commitments.

- **international accountability**

The CRPD, when in force, will be one of the core international human rights instruments with legally binding force and will be monitored by a specific body. Ratification would reflect positively on Australia's human rights commitments.

- **international cooperation**

Ratification will facilitate international cooperation in support of national efforts for realising the purpose and objectives of the CRPD through exchanging and sharing information, experiences, training programmes and practices as to how to achieve human rights protection for people with disabilities effectively and realistically.

- **monitoring**

Australia will have to report to the UN about the circumstances of people with disabilities. It will need to collect data and submit regular, comprehensive reports to the Committee on the Rights of Persons with Disabilities on measures taken to give effect to the obligations of the CRPD. This data will be a valuable resource for facilitating the improvement of the situation for persons with disabilities.

- **monitoring body**

The Committee on the Rights of Persons with Disabilities will receive regular reports from State Parties and consider suggestions and general recommendations. It will consist of twelve to eighteen members. Early ratification will enable Australia to elect the members of the first Committee.

What will be the domestic consequences following Australia's ratification of the CRPD, in particular regarding its legal, economic, environmental, social and cultural effects?

- **national compliance**

National laws and policies complying with the CRPD provides a quick and effective means of ensuring the non-discrimination, participation and inclusion of persons with disabilities. The detailed provisions of the CRPD, on-going international cooperation and monitoring will all give guidance as to how to achieve human rights protection of persons with disabilities to the maximum extent possible. This guidance can assist the development, conceptualisation and implementation of national laws, policies, professional guidelines and training programmes.

- **progressive International Law development**

The CRPD supplements provisions of the International Bill of Rights, and it is beneficial to follow a consistent interpretation and application of international human rights.

International human rights protection in Australia has been increasingly evolving. International human rights treaties can serve as an authoritative reference point for the development of the common law, the interpretation of ambiguous or conflicting statutory provisions, or the development and interpretation of human rights legislation such as the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).¹

- **social integration**

The CRPD renounces welfare politics; it does not enforce disabled persons' need for welfare and help. Rather, it aims to achieve integration in which society itself adapts to facilitate disabled persons' participation in society to the fullest extent possible. Integration also requires the systematic combating of stigmatisation and marginalisation of persons with disabilities.

- **environmental integration**

Australia already follows a policy to facilitate access to premises used by the public and to public transport for persons with disabilities. Improvements will be necessary, subject to the principle of progressive realisation.

- **integration into the workforce and education system**

Compliance with the CRPD will require efforts to integrate persons with disabilities into the workforce and education system. Subsidies or funding to employers and education providers may be necessary, but Australia will also economically benefit from integrating persons with disability into employment and independent living.

¹ Both statutes explicitly refer to United Nations treaties to which Australia is a party as tools for interpretation.

- **safeguards for growing aging population**

The CRPD addresses disability and a large part of Australian society will, at least at some stage in their lives, experience disability, particularly when our aging population is taken into account.

What will the impact of Australia ratifying the CRPD be on existing laws?

The main legal impact will be on national disability discrimination legislation, disability services legislation, mental health legislation and guardianship legislation. In these areas, legislation already exists. Existing legislation will need to be adjusted and constantly re-assessed in order to comply with the CRPD. However, the current state of law should not delay ratification.

- **disability discrimination legislation**

Compliance with the CRPD is, to some degree, assured by the *Disability Discrimination Act 1992 (Cth)*. In compliance with the CRPD, this Act supports the idea that disability is a broadly defined and evolving concept. It addresses the public as well as private sector, aims to achieve integration and includes an individual complaints procedure. It provides protection against discrimination on the ground of disability and specifically addresses discrimination in the following areas:

- employment,
- education,
- access to premises,
- provision of goods, services and facilities,
- accommodation,
- activities of clubs and associations,
- sport
- and the administration of Commonwealth Government laws and programmes.

It falls short, however, on certain services that affect a broad range of people, such as the repair, maintenance or upgrading of a road, as these services are provided to the community as a whole. With the focus on a complaints procedure, it has been slow to bring about systematic change. Also, the *Disability Discrimination Act 1992* allows complaints only about persons to whom a certain relationship exists, such as an employer, a union member or a service provider. However, the *Disability Discrimination Act 1992* also allows for the development and implementation of Disability Standards and Disability Action Plans that can address systematic change. Disability Standards have increasingly been utilised to remove systematic barriers.

- **disability services legislation**

The *Disability Services Act 1986 (Cth)* does not contain rights that persons with disabilities can enforce individually. Rather, the disability services legislation

focuses on standards of service provision and their funding. Thus, the disability service legislation is limited in providing efficient human rights protection.

- **mental health legislation**

The human rights protection of persons with mental illness has been under significant revision since the early 1990s. Progressive philosophies in respect to human rights and mental health are contained in new mental health legislation as well as in recent policy documents. As human rights protection of persons with mental illness still falls short, the Commonwealth Government recently increased funding to mental health services and research.

Two core topics should be addressed:

- supported decision-making

The text of the CRPD promotes supported decision-making but it does not prohibit substituted decision-making. Its reference to “measures that relate to the exercise of legal capacity” actually indicates that substituted decision-making may take place.

Any reservations regarding Article 12 should be omitted because a reservation to allow substituted decision-making in certain circumstances could significantly undermine the application of Article 12.

- involuntary treatment

The Mental Health laws of the States and Territories allow for involuntary treatment of mentally ill persons in certain circumstances, though under varying requirements throughout the different jurisdictions.

Though controversially discussed during its drafting process, Article 17 which deals with the integrity of a person does not explicitly prohibit forced involuntary treatment. It leaves open the question as to whether involuntary treatment is justified. Its formulation does not provide a new human rights standard on protecting the integrity of the person.

Reservations regarding Article 17 should be omitted. In particular, Australia should not seek to reserve a right to allow involuntary treatment in certain circumstances. An overcautious approach towards Article 17 could undermine its meaning.

In both cases, reservations could directly undermine the objectives of articles 12 and 17 or facilitate a broadly interpreted exception. Should Australia include a reservation on certain circumstances in which it allows for substituted decision-making or involuntary forced treatment, Australia runs the risk of weakening two core provisions of the CRPD on mental health. Substituted decision-making and involuntary forced treatment should be used as a last resort only. What that means should be constantly scrutinised in light of international human rights protection and of how other countries achieve compliance with Articles 12 and 17.. This concern must be raised, especially given recent findings of overuse of compulsion in mental health care and treatment, as for example reported in the Select Committee on Mental Health’s First Report on a National Approach to Mental Health – From Crisis to Community (2006).

- **Guardianship legislation**

The Guardianship legislation must recognise a sliding scale of decision-making and be subjected to regular, impartial and professional review.

References:

Mabo v Queensland (No. 2) (1992) 175 CLR 1.

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273.

Royal Women's Hospital v Medical Practitioners Board (Vic) [2006] VSCA 85.

The Senate - Select Committee on Mental Health, *A National Approach to Mental Health - From Crisis to Community, First Report* (Commonwealth of Australia, 2006).