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Dear President

**Australian Law Reform Commission Discussion Paper 81**

Thank you for the opportunity to comment on the Australian Law Reform Commission's Discussion Paper 81 on *Equality, Capacity and Disability in Commonwealth Laws*.

We very much welcome the discussion paper and the depth of the analysis provided by the Commission. We particularly welcome the Commission's attempt to formulate guidelines for representative and supported decision-making. However, there are two particular proposals on which we wish to comment formally, namely proposals 2-1 and 7-8.

**Proposal 2-1**

Proposal 2-1 is for the Australian Government to 'review the Interpretative Declaration in relation to article 12 of the *United Nations Convention on the Rights of Persons with Disabilities* with a view to withdrawing it.'

The Department considers that this focus on the Interpretative Declaration is unhelpful, as of itself the United Nations Convention on the Rights of Persons with Disabilities has no effect in domestic law in the absence of laws or policies adopted by the Australian Parliament. Rather than focus on what rights Australia might have at international law, we are of the view that the focus of the inquiry should be what laws or policies will actually apply to people in Australia. In this regard, whilst the Department acknowledges that 'substituted decision-making' is to be avoided wherever possible, reality dictates that on occasion the exercise of such a power will be required. In much the same way that a doctor may need to operate on an unconscious person to save their life the Department is of the view that there will be instances where ascertaining the views of a person will not be possible.

This view was recognised by the Senate Community Affairs References Committee in their report on *Involuntary or Coerced Sterilisation of People with Disabilities in Australia*.<sup>1</sup> In such circumstances the Committee was of the view that a blanket prohibition on certain types of medical

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<sup>1</sup> Senate Community Affairs References Committee, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013).

treatment would potentially deny the rights of persons with disabilities to access all available medical support on an equal basis with persons without a disability. To quote from the Committee

The views of United Nations committees and officials, as conveyed by submitters to the inquiry, clearly articulate the need to eliminate discrimination. Some members of the international community indicated that there is no place for sterilisation to occur without the consent of persons concerned. However, as many submitters to this inquiry recognised, direction from the international community about how best to support persons without capacity to consent is not clear. As the committee has considered in chapter 3, and will go on to consider further in chapter 5, supported decision-making is not only appropriate but is necessary to support the dignity and rights of persons with disabilities. The committee expects that, with appropriate supported decision-making, there will be very few Australians who altogether lack decision-making capacity. However, the rights of persons without decision-making capacity are no less valuable and no less valid. The rights of this minority require support and defence.

An outright ban of non-therapeutic sterilisation procedures without consent potentially denies the rights of persons with disabilities to access all available medical support on an equal basis with persons without a disability. It is a 'one size fits all' solution to a complex problem. An outright ban removes the focus from the needs and interests of the individual, placing it instead on generic notions of what is best for persons with disabilities as an homogenous group. On balance, the committee does not agree that Australia's laws, including relevant court and tribunal procedures, should be unable to consider the circumstances of individuals. Flexibility in strictly limited circumstances may help to ensure that all appropriate support is provided to people with a disability.<sup>2</sup>

That there may be instances where ascertaining the views of a person will not be possible seems to be also acknowledged by the Commission in its discussion of 'representative decision making' and 'supported decision-making'. To quote, for example, from paragraph 3.37 of the Discussion Paper:<sup>3</sup>

By including such a threshold the ALRC acknowledges that there are times when a person may need to be appointed to act for another, beyond supporting a person who remains as the primary decision-maker. The ALRC has chosen a new term to reflect the role of the person appointed, to embody the model being proposed in this Discussion Paper. By choosing the word 'representative' the ALRC seeks to signal that the role is not as a 'substitute' for the person who requires support. Whatever the understanding of the concept of 'substitute decision-maker', the ALRC considers that it is better to create some distance from any controversy surrounding this usage and to find a new term.

Whatever the term, and the Department welcomes the Commission's efforts to develop a model of 'representative decision-making,' some scope is required for decision making where the views of a person can not be ascertained. To this end it does seem important that it remain clear that the *United Nations Convention on the Rights of Persons with Disabilities* does allow scope for decisions to be made in such instances. To this end we thought that it would be of assistance to set out our understanding of article 12 of that treaty, which in our view incorporates two distinct ideas: recognition before the law; and legal capacity.

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<sup>2</sup> Senate Community Affairs References Committee, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013) at paragraphs 4.36-4.37.

<sup>3</sup> See also paragraphs 3.72-3.74, 3.82-3.87 and 4.12-4.13.

## *Principles of treaty interpretation and article 12*

International law principles for the interpretation of treaty obligations are set out in the *Vienna Convention on the Law of Treaties*,<sup>4</sup> which provides in article 31 that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'. Where there is ambiguity in the meaning of a treaty, article 32 provides that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion'.

The terms of the Convention indicate that both 'supported' and 'substituted decision-making' are envisaged within article 12. The article contains a separate paragraph directed to 'supported' and 'substituted decision-making'. Article 12(3) relates to the provision of support to persons with disabilities, where required, to exercise their legal capacity. Article 12(4) relates more broadly to both 'supported' and 'substituted decision-making', requiring that appropriate and effective safeguards be in place in order to prevent abuse.

To the extent that there is any ambiguity in the meaning of article 12, reference may be had to the preparatory work to the convention. The preparatory work indicates that, despite differing views on the scope of article 12, it was understood that 'substituted decision-making' could fall within its scope. Notably, at the Seventh Session of the Ad Hoc Committee, during which article 12 was extensively discussed, the Chair was asked for clarification and an explanation of the concept of 'legal capacity', and responded in the following terms:

The Chair understood the term to mean all persons, including PWD [persons with disabilities], have the same legal rights and responsibilities, and the same capacities before the law. Article 12 states that PWD are in the same situation in that respect as other persons, however in some circumstances they may require support in exercising that legal capacity. There may also be circumstances for which states may wish to provide for substituted decision-making, an area that has been extensively discussed...<sup>5</sup>

Additionally, a number of interpretative declarations made by States on ratifying the Convention reflect the understanding that the Convention does not prohibit 'substituted decision making', but rather permits 'substituted decision-making' in certain limited circumstances and subject to appropriate safeguards.<sup>6</sup>

Subsequent evidence of States' understanding of the meaning of article 12 is found in the submissions from States Parties in response to the Committee's draft *General comment on Article 12: Equal recognition before the law*. A number of these submissions clearly state an understanding that article 12 permits 'substituted decision-making'.<sup>7</sup>

<sup>4</sup> *Vienna Convention on the Law of Treaties* 1155 UNTS 331.

<sup>5</sup> Seventh Session of the Ad Hoc Committee, Chair.

<sup>6</sup> In addition to Australia's interpretative declaration, see, for example, Norway's Declaration; Estonia's Declaration; and Canada's Declaration and reservation.

<sup>7</sup> *Draft General Comment No. 1 on Article 12 of the Convention on the Rights of Persons with Disabilities – submission by the Norwegian Government; Contribution by the Federal Republic of Germany: German Statement on the Draft General Comment on Article 12 CRPD; New Zealand submission on draft general comment on Article 12: Equal recognition before the law; Commentaire de la France sur le projet d'observations générales du Comité des droits des personnes handicapées, relatif à l'article 12 de la Convention relative aux droits des personnes handicapées; Response from the Government of Denmark with regards to Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law; Views of the Australian Government on the draft General Comment by the Committee on the Rights of Persons with Disabilities regarding Article 12 of the Convention – Equal Recognition before the Law.*

### *General Comment No. 1*

As noted in the Discussion Paper, the Committee finalised its General Comment relating to article 12 in April 2014. General Comments are not binding on States Parties but are taken into consideration by Australia in interpreting its international human rights obligations. General Comments are also not an authoritative source of interpretation of the meaning of the terms of the Convention, in the way that the preparatory work to the Convention is. Rather, the views set out in General Comments of the Committee are intended to promote further implementation of the Convention and to assist States Parties in fulfilling their obligations, as stated by Rule 47 of the Committee's Rules of Procedure.

Australia welcomed the Committee's efforts to provide valuable guidance to States through its General Comment No. 1. However, Australia considered that such guidance should be clearly differentiated from legally binding obligations and considered that in some places the comments made by the Committee purport to extend the responsibilities of States beyond the legal obligations contained in the text of the Convention.<sup>8</sup>

In particular, General Comment No. 1 states that retention of 'substituted decision-making' is not sufficient to comply with article 12. This view is not supported by the text of the Convention, or by States' understanding of the meaning of the text, as reflected in the Convention's preparatory work.

This view was included in the draft General Comment No. 1. In their comments on the draft, a number of States, including Australia, indicated their understanding that article 12 permits 'substituted decision-making' in certain circumstances. It is unfortunate that the Committee did not incorporate the views of States on the interpretation of the Convention, given the importance under international law of States' interpretation of their own obligations.

### *Australia's Interpretative Declaration*

The Discussion Paper addresses Australia's interpretative declaration with respect to article 12 at paragraphs 2.84-2.93. Australia's interpretative declaration was made at the time of Australia's ratification of the Convention to clarify Australia's understanding of article 12. The declaration clarifies that 'substituted decision-making' is permissible under the Convention, but only in certain limited circumstances and subject to certain safeguards.

Interpretative declarations do not purport to, or in fact, exclude or modify the legal effects of a State's obligations under a treaty. The International Law Commission sets out the definition and effect of an interpretative declaration in its Guide to Practice on Reservations to Treaties, which states that interpretative declarations simply purport 'to specify or clarify the meaning or scope of a treaty or of certain of its provisions'.<sup>9</sup>

Interpretative declarations are distinct from reservations, with which a State 'purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'. Australia's interpretative declaration does not itself have any legal impact on provision for 'supported' or 'substituted decision-making' arrangements or on the recognition of people with disability before the law and their ability to exercise legal capacity. The purpose of the interpretative declaration is to clarify the meaning of article 12 with respect to 'substituted decision-making'.

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<sup>8</sup> *Views of the Australian Government on the draft General Comment by the Committee on the Rights of Persons with Disabilities regarding Article 12 of the Convention – Equal Recognition before the Law.*

<sup>9</sup> International Law Commission, *Guide to Practice on Reservations to Treaties* (2011).

The National Interest Analysis accompanying the Convention when it was tabled in Parliament outlined Australia's understanding of the scope of article 12:

Article 12 does not prohibit 'substituted decision-making' arrangements that provide for decisions to be made on behalf of a person with disability where necessary, as a last resort and subject to the safeguards in article 12(4).<sup>10</sup>

In addition, the consideration of the Convention by the Joint Standing Committee on Treaties, which encompassed consideration of Australia making an interpretative declaration, is further relevant background. The Report of that Committee includes the following quotation from the Attorney-General's Department:

While Australia complies with the obligations in the Convention, several views have been expressed regarding the position of the Convention on 'substituted decision-making'. Hence, the it would appear important for Australia to maintain its interpretive declaration in order to clarify Australia's understanding of the Convention and the ability for decisions to be made (with appropriate safeguards) in those instances where it is genuinely not possible to ascertain the views of a person.<sup>11</sup>

Evidence provided to the Committee during its hearings on the Convention provides further background to the interpretative declaration. The introduction from the Attorney-General's Department stated:

During the process of consultations a number of views were expressed about the position in the convention on substituted decision-making as well as compulsory treatment. Having regard to those views, the government proposes to make declarations setting out Australia's understanding of its ability to continue with its existing practices on substituted decision-making and compulsory treatment. The making of such declarations was also recommended by the majority of the disability sector organisations that were represented in the AFDO coordinated submission.<sup>12</sup>

This was further elaborated during the hearing before the Joint Standing Committee on Treaties as follows:

We take the view that article 12 does contemplate substituted decision-making because the text of article 12(3) itself requires state parties to take appropriate measures to provide people with disability access to support they may need to exercise their legal capacity. We consider that it does not prohibit substituted decision-making as long as there are arrangements that apply where necessary so that it is used as a last resort and it is also subject to safeguards as specified in article 12(4) of the convention as well. Our view is that the convention itself takes into account the fact that substituted decision-making is an issue that needs to be dealt with and, as long as there are appropriate safeguards in place to ensure that those decisions can be reviewed, it is appropriate to have that there. We take the view that Australia complies with those arrangements, that we have those appropriate safeguards at a state and territory level through the mental health acts and the guardianship tribunals as well to ensure that where a substituted decision is made on behalf of people with a disability it is made in an appropriate way, as a last resort and with appropriate checks and balances in place.

<sup>10</sup> National Interest Analysis, para. 17.

<sup>11</sup> Joint Standing Committee on Treaties, *Report 95: Treaties tabled on 4 June, 17 June, 25 June and 26 August 2008*, Additional information provided by the Attorney-General's Department, 22 July 2008, para. 2.9.

<sup>12</sup> Joint Standing Committee on Treaties, transcript, 16 July 2008.

I also note that, as to AFDO's coordinated submission, the majority of the disability sector organisations contributed to that process and recommended that a declaration be made to clarify that issue. It was an issue that was in contention in the negotiation of the convention. The approach that the Australian government is taking effectively reflects the interpretation that the chair of those negotiation processes also took, that effectively substituted decision making had a role to play but we need to also make sure that there are appropriate safeguards in place.<sup>13</sup>

Subsequently, the effect of Australia's interpretative declaration has also been outlined in Australia's Initial Report to the Committee on the Rights of Persons with Disabilities:

Australia strongly supports the right of persons with disabilities to legal capacity. In some cases, persons with cognitive or decision-making disabilities may require support in exercising that capacity. In Australia, substituted decision-making will only be used as a measure of last resort where such arrangements are considered necessary, and are subject to safeguards in accordance with article 12(4). For example, substituted decision-making may be necessary as a last resort to ensure that persons with disabilities are not denied access to proper medical treatment because of an inability to assess or communicate their needs and preferences. Australia's interpretive declaration in relation to article 12 of the Convention sets out the Government's understanding of our obligations under this article.<sup>14</sup>

Australia's interpretative declaration continues to reflect Australia's understanding of article 12. It plays an important role, particularly in light of the expansive views expressed by the Committee in General Comment 1, in preserving Australia's understanding of the obligations that it has accepted under the Convention.

The declaration also plays an important role with respect to Australia's obligations under the Optional Protocol to the Convention, under which Australia has agreed that individuals may make complaints to the Committee regarding violations of their rights under the Convention. The Optional Protocol entered into force for Australia on 20 September 2009 and since this time a number of complaints have been made against Australia under this mechanism. It is important that where Australia receives complaints alleging violations of article 12, Australia is able to respond to these complaints on the basis of its understanding of the obligations that it has accepted under the Convention.

#### *Other international instruments*

For completeness we note that the discussion paper also refers to a number of other international instruments in paragraphs 2.14-2.16. In this regard we would note that the International Covenant on Civil and Political Rights, particularly article 6 on the inherent right to life, seems particularly relevant. While the Discussion Paper acknowledges the importance of that Convention, it does not address article 6. Under that article, in cases of medical emergency where a person is unable to consent to treatment, it is permissible to provide such treatment where this is necessary for life-saving purposes. Thus, where any person loses consciousness in an accident and requires urgent medical treatment to save their life, such treatment should be provided despite the person's inability to consent. In the Australian Government's view, this principle applies equally to persons with

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<sup>13</sup> Joint Standing Committee on Treaties, transcript, 16 July 2008.

<sup>14</sup> Committee on the Rights of Persons with Disabilities, *Initial reports submitted by States parties under article 35 of the Convention: Australia* (CRPD/C/AUS/1, 7 June 2012), para. 55.

disabilities, and an interpretation of article 12 which excludes any substituted decision-making is incompatible with this principle in international law.

The Discussion Paper also refers to the Universal Declaration on Human Rights. It is noted that the Declaration is a non-binding declaration. While many of the principles in the Declaration may have now become part of customary international law, this instrument does not have the same status at international law as, for example, the Convention itself.

### **Proposal 7-8**

Proposal 7-8 is for section 13 of the *Evidence Act 1995* to be amended to provide that a court may take the availability of communication and other support into account in assessing whether a witness is competent to give evidence. The Department notes that there are three tests of competency contained in section 13 of the Evidence Act:

- (a) a general test of competency in subsection 13(1) that all witnesses must satisfy (a person is competent to give evidence about a fact if they have the capacity to understand a question about a fact)
- (b) a test for competency to give sworn evidence in subsection 13(3) (a person who is competent to give evidence about a fact, is competent to give sworn evidence about a fact if the person has capacity to understand that they are under an obligation to give truthful evidence), and
- (c) a test for competency to give unsworn evidence in subsections (4)-(5) (a person who is not competent to give sworn evidence, may give unsworn evidence after being informed by the court about the importance of telling the truth and certain other matters set out in subsection(5)).

The concern expressed by the Commission appears to be directed at the test for giving *sworn* evidence in sub-section 13(3) – that is, that the assistance and support available to persons is taken into consideration in assessing competence to give sworn evidence. In particular paragraph 7.115 of the discussion paper states that the wording of subsection 13(3):

implies that a person's lack of capacity may be overcome by forms of support or assistance being provided to them in giving evidence. The ALRC proposes that the Evidence Act...should expressly provide that competence must be determined in the context of the available support.

The Department notes that it is important that the tests for competency in section 13 are considered as a whole with reference to the Explanatory Memorandum for the *Evidence Amendment Act 2008*, which inserted the current section 13 into the Evidence Act.

The test of general competency in subsection 13(1) provides that a person is not competent (for any reason including mental, intellectual or physical disability) to give sworn or unsworn evidence about a fact if the person lacks the capacity to understand, or to give an answer that can be understood, to a question about the fact, and that incapacity cannot be overcome. As provided in the Explanatory Memorandum, '(w)hen considering whether incapacity can be overcome, the court should consider alternative communication methods or support depending on the needs of the individual witness. The note to the provision makes a cross reference to sections 30 and 31 of the Act which provide examples of assistance that may be provided'. The Explanatory Memorandum

goes on to give an example that if a person had a hearing disability, the incapacity to understand a fact could be overcome by the use of a sign language interpreter, providing a hearing induction loop, allowing evidence in narrative form or providing captioning. The revised test of general competence moves away from the 'truth and lies' distinction and focuses instead on the ability of the witness to comprehend and communicate.

Subsection 13(3) provides that a person is not competent to give sworn evidence if he or she does not have the capacity to understand that he or she is under an obligation to give truthful evidence. If, by the operation of the test in subsection 13(3), a person is competent to give evidence but is unable to give sworn evidence, subsection 13(4) provides that the person may still give unsworn evidence about a fact. The Explanatory Memorandum notes that this provision:

will allow young children and others (for example, adults with intellectual disability) to give unsworn evidence even though they do not understand or cannot adequately explain concepts such as 'truth'. It is up to the court to determine the weight to be given to unsworn evidence.

Further, subsection 13(8) provides that the court may have recourse to expert assistance when determining if a person is competent to give evidence. The Explanatory Memorandum provides an example that this provision could be used by the court to identify any alternative communication methods or support needs which could facilitate the giving of evidence by a person with a disability.

The amendments to section 13 in 2008 were a result of recommendations by the ALRC, the New South Wales Law Reform Commission and the Victorian Law Reform Commission in their report Uniform Evidence Law Report in 2005. The amendments were intended to enhance participation of witnesses and to ensure that relevant information was before the court.

Read as a whole, general competency must be determined in the context of the available support or assistance. This test applies to all witnesses. Accordingly, the Department considers that section 13, as currently drafted, should be sufficiently broad to address the ALRC's concerns.

Please do not hesitate to contact us if you wish to discuss any of the comments provided.

Yours sincerely

  
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