



**Submission: "Article 12 of the CRPD – The right to equal recognition before the law"**

**September 2009**

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## **Introduction**

NSW Disability Discrimination Legal Centre Inc (DDLC) provides this written submission to the Day of General Discussion on “Article 12 of the CRPD – The right to equal recognition before the law” on behalf of the (Australian) National Association of Community Legal Centres (NACLC).

### **(Australian) National Association of Community Legal Centres (NACLC)**

The National Association of Community Legal Centres (NACLC) is the association of state community legal centre organisations in Australia. NACLC represents 200 Community Legal Centres across Australia. NACLC is established for the public charitable purposes of assisting disadvantaged and marginalised people in the Australian community to obtain access to legal services by, including but not limited to:

- supporting and assisting community legal centres to provide these services;
- providing a national forum for community legal centres;
- developing and coordinating national community legal centres policy; and
- advancing the interests of community legal centres within Australia.

### **NSW Disability Discrimination Legal Centre Inc (DDLC)**

The NSW DDLC was set up in 1994 to help people with disability to use disability discrimination laws. Our role is to provide accurate and easy to comprehend advice to people with disability in NSW who want to make a complaint of disability discrimination. We give free legal advice, run disability discrimination cases and represent people with cases of disability discrimination.

The NSW DDLC aims for a society where people will be able to participate in all aspects of life through the:

- removal of barriers;
- elimination of discrimination;
- empowerment of people with disabilities;
- promotion of awareness; and
- ability to exercise rights.

DDLC's objectives are:

- To promote community awareness of the potential to use discrimination laws to advance the rights of people with disabilities;
- To provide legal services for people with disabilities, their associates and representative organisations, who have been discriminated against;
- To ensure the effective participation of people with disabilities in the management and operation of the Centre;
- To reform laws and change policies, practices and community attitudes that discriminate against people with disabilities;
- To develop and be involved in appropriate networks; and
- To maintain the necessary infrastructures and administration systems in order to further the Centre's aims and objectives.

### **The legal contents of the right to equal recognition before the law**

#### **Construction of legal capacity;**

This Article *reaffirms* the right of all persons with disability to equal recognition before the law, but applies it to the specific circumstances faced by people with disability. There are two dimensions to the right, *legal personality* and *capacity to act*. Legal personality is the legal status an individual derives by virtue of being human on whom the legal system confers rights and imposes duties. The capacity to act is the ability to exercise these rights and perform these duties. According to John Chipman Gray, "the technical legal meaning of a 'person' is a subject of rights and duties."<sup>1</sup>

Paragraph 1 of the Article makes it clear that all persons, including all persons with disability, are recognised in all situations as persons with rights and duties under the law. Paragraphs 2 and 3 of the Article are concerned with the issue of *capacity to act*. They require State Parties to ensure that people with disability receive the support they need to exercise their legal capacity on an equal basis with others in all aspects of their lives. The term *equal basis with others*, means that rights are conferred through personhood (by virtue of being a human being) and the capacity to act is conferred by a State, so the equal basis with others relates to statutory provisions and includes

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<sup>1</sup> John Chipman Gray, *The Nature and Sources of the Law* (Roland Gray ed., MacMillan 1921) cited in Legal Theory Lexicon 027: Personhood  
[http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/03/legal\\_theory\\_le\\_2.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_2.html)

recognition of age-related differences in capacity to act in relation to children and young persons. The emphasis in these paragraphs is on supported decision-making which is assisting the person to make a decision personally, rather than substitute decision-making (someone else making a decision on behalf of the person). However, the Article permits the continued operation of guardianship-type arrangements.

Paragraph 4 sets out minimum safeguards against abuse that State Parties are required to institute in relation to supported decision-making (including substitute decision-making) of any kind. These safeguards include an obligation that the support provider respect the rights, will and preferences of the person being supported, and that the type of support is proportionate to the person's needs (that is, it is the least restrictive necessary). Support must also be individualised, and free from conflict of interest and undue influence. Support arrangements must also be subject to regular review by an independent and impartial authority.

Paragraph 5 of the Article focuses on the right of persons with disability to own and inherit property and to have equal access to financial credit. It provides that persons with disability cannot be deprived of their property without a proper lawful reason. Paragraph 5 is expressed as subject to other provisions of the Article, which means that persons with disability are entitled to receive support to manage their financial affairs, and any such support must be subject to safeguards against abuse.

### ***Presumption of Legal Capacity***

The legal principle is that an adult must be presumed to have legal capacity. This was supported by McHugh J in the Australian High Court case of *Re Marion's Case*, where he stated:

“The common law accepts that a person has rights of control and self-determination in respect of his or her own body which other persons must respect. Those rights can be altered with the consent of the person concerned. Thus, the legal requirement of consent to bodily interference protects the autonomy and dignity of the individual and limits the power of others to interfere with that person's body.”<sup>2</sup>

The three stage competency test is outlined by Thorpe J in *Re C*<sup>3</sup>. According to Thorpe J, the person

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<sup>2</sup> (2002) 175 CLR 218 at 309-310.

<sup>3</sup> (1994) Fam 31 at 35 cited in Andrew Hockton, *The Law of Consent to Medical Treatment* (2002) p.7.

must be able to comprehend and retain the relevant information, believe it and weigh it in the balance so as to arrive at a choice. The person must also be able to communicate their decision.

We recognise that some people with severe disabilities at some points in time do not have the capacity to make a decision independently. It is important to recognise that people may be able to make decisions about some areas of their lives at some points in time. Therefore, there needs to be mechanisms for supported and substitute decision making in order to protect the human rights of these individuals when they are unable to make a decision independently. All efforts must be made to facilitate supported decision-making where a person does not have the capacity to make a decision independently. Substitute decision-making must be a measure of last resort and have limitations and safeguards as outlined below.

**Recommendation 1**

We submit that Article 12 be interpreted by the State Parties to recognise that some people with severe disabilities at some points in time do not have the capacity to make a decision independently.

**iii) Supported and Substituted Decision Making**

Upon ratification, Australia made an interpretative declaration in regards to Article 12 of the CRPD. Australia declared that “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.”<sup>4</sup>

This position is validated by the Vienna Convention on the Laws of Treaties (VCLT). In accordance with paragraph 1, Article 31 of VCLT provides:

“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 the light of its object and purpose.”

However, the wording of Article 12 of CRPD is somewhat ambiguous in that it does not explicitly state the measures to be taken to support an individual in exercising their legal capacity. Consequently, Article 32 of VCLT, allows for supplementary means of interpretation, “including the preparatory work of the treaty and the circumstances of its conclusion, in

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<sup>4</sup> UN Enable, [Declarations and Reservations](http://www.un.org/disabilities/default.asp?id=475) <http://www.un.org/disabilities/default.asp?id=475>

order to confirm the meaning resulting from the application of article 31”, or in circumstances where interpretation in accordance to Article 31 “leaves the meaning ambiguous or obscure”.

The Chair’s draft text states:

“Persons with disabilities who experience difficulty in asserting their rights, understanding information presented to them or articulating or communicating their choices have a right to be provided with advocacy assistance and other reasonable accommodation with the aim of giving effect to the person's own decisions”.<sup>5</sup>

The Chair’s text states “where States Parties provide for a procedure, which shall be established by law, for the appointment of personal representation as a matter of last resort, such a law shall provide appropriate safeguards, including regular review of the appointment of and decisions made by the personal representative by a competent, impartial and independent tribunal. The appointment and conduct of the personal representative shall be guided by principles consistent with this Convention and international human rights law.”<sup>6</sup> Therefore, this validates Australia’s position on Article 12.

**a) Practical measures necessary to implement the obligation to promote the right to equal recognition before the law**

**i) The challenges of the effective implementation of the obligations arising under Article 12**

One of the challenges of the effective implementation of the obligations arising under Article 12 is educating the community, service providers and professionals that people with disability have equal recognition before the law.

It will be necessary to ensure that the impartial authority or judicial body determining legal capacity has the right skill set and sufficient understanding and empathy for people with disability to enable them to make decisions which are in the best interests of the person with disability and that their decisions are not clouded by third parties.

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<sup>5</sup> December 2003

<sup>6</sup> October 2005

Another challenge is the lack of effective monitoring mechanisms to ensure the welfare of people with disability who require supported or substitute decision-making. The States' human rights bodies should be given the power to monitor and intervene in decisions made by the impartial authority or judicial body.

Article 12 of the CRPD does not cover the situation where parents of children who have or are presumed to have decision-making disabilities automatically continue their guardianship role once the child turns 18. It does not state that parents are required to seek judicial review of the person's capacity and to be formally appointed as guardians. In Australia, there is no requirement for parents to seek judicial review of the person's capacity upon them turning 18 and to seek formal guardianship of the person. We are concerned about this because 18 is the age when people gain full capacity and failure to seek judicial review of the person's capacity once they become an adult is not in keeping with the legal principle of assumption of capacity.

Recommendation 2

A person's capacity must be judicially reviewed once they reach adulthood. If the judicial review body deems that the person requires supported or substitute decision making for certain decisions for some of the time, a formal guardian should be appointed.

Recommendation 3

We recommend that State Parties conduct an education campaign to inform the community, service providers and professionals that people with disability have equal recognition before the law.

**b) Implementation of the state obligation to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”;**

Given that one of the tests that determines whether a person has capacity to make a particular decision is whether they can communicate the decision. Therefore, State Parties should implement all methods articulated under Article 21 of the CRPD to enable people with disability to express their opinions. These include sign language, Braille, alternative and augmentative communication and all other accessible means of communication. For people with cognitive disabilities, the decision may need to be framed in plain language and/or the use of pictures or symbol in order to assist them to understand the facts and choices involved in the decision and their consequences. Further, any

formal assessment of a person's capacity should also include a comprehensive communication assessment.

Another support mechanism is the use of 'social interpreters' to support people with mental illness, autism spectrum disorder and intellectual disability in making decisions. The role of the social interpreter is to act as the mediator to the social world and facilitate interactions with others.<sup>7</sup> It is our position that this person should be independent of the family and service providers to avoid a conflict of interest.

These support mechanisms may be difficult for some States to implement due to the high cost involved.

**Recommendation 4**

We recommend that people with disability are provided with the supports to express their opinions as articulated in Article 21 of the CRPD and the utilization of independent, professional "social interpreters" to support people with mental illness, intellectual disability and autism spectrum disorder in making decisions.

**c) The role of the independent and impartial review authority under Article 12(4), and other possible safeguards.**

It is our position that the independent and impartial review authority should prevent appointed guardians from making decisions about significant life matters including experimental medical procedures and irreversible major invasive procedures, other than for life-saving purposes. These decisions should be referred to the independent and impartial authority. This is particularly important where the decision is primarily going to benefit the guardian, not the person with disability. The Australian case of *Re Marion*<sup>8</sup> involved the proposed sterilization of a girl with intellectual disability having a hysterectomy, the majority of the High Court decided the decision should be made by the court not the parents, to ensure that the decision was in her best interest. The American "Pillow Angel case" involving parents and doctors deciding to perform a hysterectomy, breast bud removal and the administration of high levels of estrogen on a six and a half year old girl

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<sup>7</sup> Charlotte Brownlow and Lindsay O'Dell, "Representations of autism: implications for community healthcare practice" *Community Practitioner* (July 2009)

<sup>8</sup> (1992) 175 CLR 218



with multiple disabilities in order to keep her small enough for her parents to continue to care for her as she got older. These procedures were performed without a court order. Following an investigation by the Washington Protection and Advocacy Association, the Washington Supreme Court held that a court order was required when parents seek to sterilize their children and adults with developmental disabilities<sup>9</sup>. Courts have also ruled that other invasive treatment should also be subjected to court orders, rendering other aspects of “Ashley’s Treatment” also illegal<sup>10</sup>.

It is essential that this kind of human rights abuse against people with disability does not occur again. To ensure this certain decisions, particularly those relating to sterilization, invasive irreversible medical treatment and participation in clinical trials must not be left in the hands of parents or other substitute decision-makers.

Recommendation 5

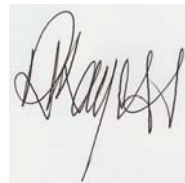
It is our position that the role of the independent and impartial authority should encompass making decisions about sterilization, invasive irreversible medical treatment and participation in clinical trials.



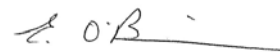
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<sup>9</sup>David R. Carlson and Deborah A. Dorfman, Investigative Report Regarding the “Ashley Treatment” (May 2007), p. 1

<sup>10</sup> Ibid, p. 1