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Emne: VS: Input to query on Article 12 Convention on the Rights of Persons with Disabilities - Danish Question [SEC=UNCLASSIFIED]
Vedhæftede filer: VS: Note Verbale from the Royal Danish Embassy; Attachment A - Australia's Declaration - Convention on the Rights of Persons with Disabilities.docx; Attachment B - Australia's Submission to the Committee on the Rights of Persons with Disabilities - Draft General Comment No. 1 on Article 12.pdf

'Australia takes a different view from the Committee on the Rights of Persons with Disabilities ('the Committee') on the interpretation of article 12 of the Convention on the Rights of Persons with Disabilities ('CRPD'). Australia's view is that both 'supported' and 'substituted' decision-making are envisaged within article 12. Australia acknowledges the importance of supported decision-making where this is possible, but considers that the CRPD does not preclude any and all substituted decision-making.

Australia considers that substituted decision-making may be necessary in limited circumstances as a last resort to ensure, for example, that persons with disabilities are not denied access to proper medical treatment because of an inability to access or communicate their needs or preferences. Such decisions should only be made on behalf of others in exceptional circumstances - where this is necessary, as a last resort, and subject to safeguards.

The Committee has taken the view, in its General Comment No. 1 on 'Article 12: Equal recognition before the law', that retention of substituted decision-making is not sufficient to comply with Article 12. The Committee's view is not supported by the text of the Convention, nor by States' understanding of the meaning of the text of Article 12, as reflected in the Convention's preparatory work. Additionally, a number of interpretive declarations made by States (including Australia's, see **Attachment A**) 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. Subsequent evidence of States' understanding of the meaning of article 12 is found in the submissions from States Parties (including Australia's, see **Attachment B**) in response to the Committee's draft General Comment No. 1 on 'Article 12: Equal recognition before the law'. A number of these submissions clearly state an understanding that article 12 permits substituted decision-making.

At the domestic level, supported decision-making is an emerging area. A report by the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, recommended development of National Decision Making Principles to guide law reform. The Government is considering these recommendations and engaging with relevant stakeholders to deepen its understanding of these issues – many of which are also being considered through state and territory reviews of guardianship regimes. The Australian Law Reform Commission is currently holding an inquiry into 'elder abuse' which will also be relevant in this area as the recommendations of its earlier report will be considered in the context of older people with impaired decision-making ability. These recommendations will be closely considered by Government. The final reporting date for this inquiry is May 2017.

In 2015 the Government made amendments to the *My Health Records Act 2012* to reflect the Law Reform Commission's recommendations in the area of representative decision making. Section 7A of the Act is now a model clause for representative decision-making schemes which will be considered as a precedent for all future Commonwealth legislative amendments involving obligations of the representative decision-makers of persons with a disability. The amendments shifted the duty of authorised representatives from being required to act in the 'best interests' of an individual, to a duty to give effect to the 'will and preferences' of the individual. '

Regards

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Australia's Declaration**Convention on the Rights of Persons with Disabilities**

Australia recognizes that persons with disability 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;

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;

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the 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.

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

1. The Australian Government (Australia) presents its compliments to the United Nations Committee on the Rights of Persons with Disabilities (the Committee), and has the honour to refer to the Committee's call for submissions on the draft General Comment on Article 12 of the Convention – Equal Recognition before the Law.
2. Australia commends the Committee for its initiative in preparing the draft General Comment. Australia is a longstanding party to the Convention on the Rights of Persons with Disabilities (the Convention) and its Optional Protocol, and is firmly committed to upholding its obligations.
3. Australia makes the following preliminary observations on the draft General Comment, noting that these preliminary observations are not exhaustive and do not include comments on all aspects of the draft General Comment. Australia would be grateful for the opportunity to provide further comments on the draft General Comment, along with other stakeholders, as it is developed.
4. Australia welcomes the Committee's efforts to provide valuable guidance to States. However, Australia considers that such guidance should be clearly differentiated from legally binding obligations. Australia believes that in some places, the comments in the draft General Comment purport to extend the responsibilities of States beyond the legal obligations in the text of the Convention. Australia suggests that the draft General Comment would benefit from a more detailed consideration of existing legal obligations of States under the Convention itself. Australia therefore invites the Committee to clarify the statements in the draft General Comment regarding the scope of the legal obligations of State Parties under the Convention.

Introduction

5. Australia welcomes the Committee's initiative to clarify the scope of States Parties' obligations under article 12 of the Convention.¹ Australia notes the Committee's perception of a general failure on the part of States Parties to recognise that the human rights-based model of disability implies a shift from the substitute decision-making

¹ Draft General Comment, para. 3.

paradigm to one that is based on supported decision-making.² Australia also notes the Committee's view that article 12 'affirms a permanent presumption that all persons with disabilities have full legal capacity'.³ Australia acknowledges the importance of supporting decision-making where this is possible, but considers that a human rights-based model of disability does not preclude all substituted decision-making. Such decisions should only be made on behalf of others where this is necessary, as a last resort, and subject to safeguards.

6. Further, it is important to observe the difference between equality before the law in article 12(1) and the right to legal capacity in article 12(2), particularly given that the right in article 16 on which article 12(1) is based relates to formal equality to be a person before the law as opposed to capacity to act. We refer the Committee to the travaux préparatoires of the International Covenant on Civil and Political Rights ('ICCPR') and Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*.⁴ We also refer the Committee to the travaux préparatoires of the Convention, and particularly discussions held during the seventh session in 2006.
7. In the introductory comments, the draft General Comment refers to the African Charter of Human and Peoples Rights and the American Convention on Human Rights in relation to the existence of a right to equality before the law in other international and regional human rights treaties.⁵ Australia notes that the relevance of these regional instruments to the interpretation of the Convention is limited.

Normative content of article 12

8. Australia welcomes the Committee's discussion of the definition of 'legal capacity' and of the precise meaning of the subparagraphs that form article 12. The discussion of article 12(1) and (4) is particularly helpful.
9. In relation to article 12(3), Australia does not consider that this provision places an obligation on States to refrain from any denial of legal capacity, and instead to provide access to the support that may be necessary to make decisions of legal effect,⁶

² Draft General Comment, para. 3.

³ Draft General Comment, para. 8.

⁴ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd Revised Edition, 2005), pp. 369-371.

⁵ Draft General Comment, para. 6.

⁶ Draft General Comment, para. 14.

or that support should never amount to substituted decision-making.⁷ This characterisation of article 12(3) as never permitting substituted decision-making does not acknowledge situations where no amount of support will assist, such as where a person may have a severe cognitive or psychiatric impairment and is unable to understand, make or communicate a decision. It is unfortunate that the complexities of this issue are not acknowledged and discussed in the current draft. This is discussed in further detail below in relation to the obligations of States Parties.

10. Australia acknowledges the Committee's statements that '[a]t all times, including during crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected'.⁸ Australia is concerned, however, that in some circumstances, adopting such an approach may result in people with disability being denied medical treatment, particularly psychiatric treatment, if they do not have the capacity to consent and support is not sufficient to assist. Australia has noted in its Initial Report to the Committee and its most recent appearance in 2013 that '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 access or communicate their needs or preferences'.⁹
11. Australia reiterates its position that under article 6 of the ICCPR, in cases of medical emergency where a person is not able to consent to treatment, it is permissible to provide such treatment where this is necessary for life-saving purposes. Thus, for example, where any person loses consciousness in a car accident and needs urgent medical treatment to save their life, such treatment should be provided despite the person's inability to consent. Australia considers the same principle to be relevant to persons with disabilities, and that the exclusion of any form of substituted decision-making in relation to persons with disabilities would be incompatible with these other international human rights obligations.
12. Australia considers that particular care should be exercised by psychiatric professionals to use the least invasive treatment possible and to seek consent as soon as a person is able to give or refuse it.

⁷ Draft General Comment, para. 15.

⁸ Draft General Comment, para. 16.

⁹ Initial reports submitted by States parties under article 35 of the Convention: Australia (CRPD/C/AUS/1, 7 June 2012), p. 15.

Obligations of States Parties

13. Australia welcomes the Committee's consideration of the obligations of States Parties in giving effect to article 12. However, Australia is concerned that the draft General Comment characterises the entirety of article 12 in absolute terms, stating that article 12 places on States 'an absolute obligation to provide access to support for the exercise of legal capacity'.¹⁰
14. This view is also reflected in the draft General Comment's characterisation of capacity. The Committee states that 'an individual's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) can never be the basis for a denial of legal capacity or of any of the rights in Article 12'¹¹ and that 'Article 12 does not permit perceived or actual deficits in mental capacity to be used as justification for denying legal capacity'.¹²
15. The language of article 12 itself is not expressed in the same absolute terms. Article 12(3) provides that 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require...'. Australia does not consider this provision to require States to take any and all measures to provide access to support, which would exceed the 'reasonable accommodation' standard contained elsewhere in the Convention.
16. Australia considers that while it is important that the legal capacity of persons with disabilities is respected to the fullest extent possible, there are circumstances in which substituted decision-making may be the only available option. Australia considers that guidance from the Committee on the most human rights compatible approach in situations where a person does not have, either temporarily or permanently, the capacity to make or communicate a decision, would be useful to States Parties.
17. Australia welcomes the Committee's discussion seeking to elaborate elements of supported decision-making. However, Australia does not consider that compliance with article 12 is contingent upon following the elements of a supported decision-making regime, itemised at paragraph 25 of the draft General Comment. Accordingly, Australia considers that this information would more usefully be

¹⁰ Draft General Comment, para. 30.

¹¹ Draft General Comment, para. 9.

¹² Draft General Comment, para. 12.

presented as guidance to States in undertaking supported decision-making, for the circumstances in which this is possible.

18. In addition, Australia considers that it would be useful for the Committee to consider further the way in which the right to legal capacity operates in relation to children. This may inform the development of a useful framework for considering the operation of article 12 for persons unable to make or express their own decisions, and for ensuring that a person's will and preferences are taken into account in a substituted decision.
19. The draft General Comment refers to the right to equality before the law contained in article 16 of the ICCPR as a basis for the rights contained in article 12 applying as at the moment of ratification. This would mean that States Parties have an obligation to immediately realise the rights provided for in article 12, including the right to support in the exercise of legal capacity, with the doctrine of progressive realisation not being applicable.¹³ The draft General Comment also considers this forms the basis for no derogation from this right being permissible, even in times of public emergency.¹⁴
20. Australia considers that reliance on the relevant right in the ICCPR in this respect is appropriate only to the extent that the draft General Comment relates to article 12(1). The draft General Comment affirms that article 12 'does not provide additional rights to people with disabilities; it simply describes the specific elements required to ensure the right to equality before the law for people with disabilities on an equal basis with others'.¹⁵ However, it appears that in a number of respects the draft General Comment seeks to extend the scope of article 12 beyond that of existing expressions of both equality before the law and 'legal capacity' in international human rights law. The most significant example of this is the characterisation of article 12 as requiring supported decision-making and not permitting substituted decision-making in any circumstances.
21. The statement that there are no circumstances permissible in which a person may be deprived of the right to recognition as a person before the law, or to have this right limited, relates to article 16 of the ICCPR, rather than article 12 of the Convention. The ICCPR provides for this in article 4(2), which states that no derogation from that

¹³ Draft General Comment, para. 26.

¹⁴ Draft General Comment, para. 5.

¹⁵ Draft General Comment, para. 1.

right is permissible even in times of public emergency. The Convention does not contain a similar provision. However, Australia accepts that this is applicable in relation to article 12(1).

Relationship with other provisions of the Convention

22. Article 12 is closely linked and important to many other rights contained in the Convention, however, Australia queries the usefulness of this part in clarifying the relationship of article 12 with other provisions of the Convention. Regarding certain of the articles, such as access to justice (article 13), it is unclear from the draft General Comment where obligations under article 12 are considered to end and under article 13 to begin. Australia does not consider further clarity to be provided by the statement that '[p]ersons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals, in order to seek enforcement of their rights and obligations on an equal basis with others'.¹⁶

23. Australia also considers that parts of the discussion on the relationship of article 12 to other articles seek to elaborate the meaning of provisions of the Convention other than article 12. Australia does not consider this to be appropriate in a General Comment on article 12.

Implementation at the national level

24. With respect to implementation at the national level, Australia reiterates that article 12 does not require the abolition of all substituted decision-making regimes and mechanisms.¹⁷

25. Australia again thanks the Committee for the opportunity to comment on the draft General Comment on Article 12: Equal recognition before the law. Australia would welcome the opportunity to further consider and comment on the draft General Comment as it is developed. Australia reiterates its firm support for the work of the Committee and avails itself of this opportunity to renew to the Committee the assurances of its highest consideration.

¹⁶ Draft General Comment, para. 34.

¹⁷ Draft General Comment, para. 46.