



Royal Commission
into Violence, Abuse, Neglect and Exploitation
of People with Disability

Research Report

Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation

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Glossary

ABS	Australian Bureau of Statistics
AHRC	Australian Human Rights Commission
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
COAG	Council of Australian Governments
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
Cth.	Commonwealth of Australia
DDA	Disability Discrimination Act 1992 (Cth)
DPOs	Disabled People's Organisations
DRC	Disability Royal Commission
ECT	Electroconvulsive therapy
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
GA	General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention in the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDC	International Disability Caucus (IDC)
MDGs	Millennium Development Goals
NDIS	National Disability Insurance Scheme
NDS	National Disability Strategy
NGOs	Non-Government Organisations
NPM	National Preventative Mechanism
NSW	New South Wales
OECD	Organisation for Economic Co-operation and Development
OPCAT	Optional Protocol to the Convention Against Torture
OPCRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
TOR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Persons
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNTS	United Nations Treaty Series
UPIAS	Union of Physically Impaired Against Segregation
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
WCG	World Conference on Racism
WPA	World Programme of Action concerning Disabled Persons

1 Introduction

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) commissioned the Social Policy Research Centre (SPRC) at the University of New South Wales (UNSW) to undertake the research, critical analysis and preparation of this report. The method used to prepare this report is presented in Appendix A.

The aim of the report is to describe the international human rights context in which the Royal Commission operates. The Royal Commission has been established with Terms of Reference that explicitly recognise the obligations contained in the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD).

¹ These Terms of Reference recognise that Australia has ratified the CRPD and is obliged to give effect to it, including ensuring that people with disability² are free from violence, abuse, neglect and exploitation.³

There has been evidence for many years about the unacceptable levels of all forms of violence, abuse, neglect and exploitation against people with disability, which led to the campaign for the Royal Commission, outlined in Section 2 of this report. This campaign can be understood in the context of the broader experience of inequality, discrimination and segregation that has defined the lives of people with disability, and is described in Section 3.

The experience of inequality, discrimination and segregation was the catalyst and the frame of reference for the emergence of the disability rights movement in the 1960s and 1970s. Section 4 outlines the critical role of this movement in the formulation of a new conceptualisation of disability, now known as the social model of disability. This social model formed the basis for critical disability analysis and concerted disability advocacy over many years, and was central to the push for the development of a human rights convention on disability.

Section 5 outlines the failures of existing international human rights law prior to the CRPD, in addressing the inequality, discrimination and segregation experienced by people with disability. These failures were based on the prevailing medical model of disability, which framed disability as an individual deficit, a deviation from bodily, cognitive and mental norms that requires care, treatment and protection. This ableist normative standard was the basis for limiting or denying the human rights of people with disability.

Section 6 outlines how the CRPD was negotiated and the central role of people with disability through their representative organisations in these negotiations. It explores the complexity and challenges for Member States of the United Nations (UN) and the disability movement in achieving consensus around the significant conceptual

shift that was being proposed and debated, at the same time as confronting the inaccessibility of UN infrastructure, facilities and processes.

The CRPD is a binding human rights treaty that establishes normative standards and principles for international human rights law. Australia is legally obliged under international law to ensure that the CRPD is implemented throughout the country by the Commonwealth, States and Territories in their areas of responsibility. In Section 7, the core elements of the CRPD and its dynamic nature are outlined. It explains the link between the human rights model of disability inherent to the CRPD, and a new concept of equality – transformative equality – that provides the roadmap for social transformation.

Section 8 examines the application of human rights in the context of violence, abuse, neglect and exploitation experienced by people with disability. It focuses on how existing law, policy and practice frameworks enable this violence, abuse, neglect and exploitation.

The implementation of the CRPD is critical to fulfilling the right of people with disability to be free from all forms of violence, abuse, neglect and exploitation. The social transformation required by the CRPD provides the foundation to assist the Royal Commission to conduct its investigations, make findings and determine recommendations.

2 Overview

The CRPD provides the most contemporary and holistic application of human rights and fundamental freedoms to people with disability. As part of the suite of human rights treaties⁴, it informs the elaboration of human rights more generally.

The development of the CRPD was achieved after decades of disability rights activism to bring about a fundamental shift away from the conception that people with disability embody deficits that require systems of care, treatment and protection. The exclusion of people with disability from the development and implementation of law, policy and practice, in favour of the views of medical experts, service providers and professionals, has been reflected in the development of international law that attempted to confer rights upon people with disability but failed to remove the social welfare and medical response to disability. This is elaborated further in Section 5 below.

With the adoption of the CRPD by the United Nations (UN) in December 2006, the community of nations rejected the ‘view of persons with disabilities as objects of charity, medical treatment and social protection’ and affirmed persons with disability as ‘subjects of rights, able to claim those rights as active members of society’.⁵

The CRPD negotiations are viewed as unprecedented in having involved the highest level of civil society participation of any human rights treaty.⁶ As outlined in Section 6, through the active involvement of Disabled People's Organisations (DPOs)⁷ and other civil society allies, the motto of the disability rights movement – 'Nothing About Us, Without Us' – was evident in both the CRPD negotiation process as well as the agreed final text.

Australia's implementation of the CRPD is central to the Terms of Reference of the Royal Commission, which are contained in the Commonwealth Letters Patent signed by the Governor General on 4 April 2019.⁸ These Terms of Reference state:

Australia has international 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.⁹

People with disability, their DPOs, disability representative organisations and allies, campaigned extensively and over many years at both domestic and international levels for the establishment of the Royal Commission.¹⁰ This campaigning was in response to the lack of comprehensive action and protections to address the significantly high prevalence of all forms of violence, abuse, neglect and exploitation experienced by people with disability.¹¹ Anti-discrimination legislation, disability action plans, reporting, protective and regulatory bodies, and the justice system at all levels of government, have not been able to adequately prevent, respond to or provide redress for this violence.¹² In addition, there has been little to no recognition that law, policy and practice frameworks allow for forms of violence against people with disability, which legitimises acts of violence as care, treatment and protection.¹³

In 2015, these campaign efforts led to the establishment of the Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander peoples with disability, and culturally and linguistically diverse people with disability (the Senate Inquiry).¹⁴ Recommendation 1 from that Senate Inquiry was to establish a Royal Commission.¹⁵

However, it was not until 2019, and after further concerted campaigning, that the Royal Commission was finally established by the Australian Government.

3 Inequality, discrimination and segregation

From the 1960s to the present day, the disability rights movement has continuously exposed the significant levels of inequality, discrimination and segregation experienced by people with disability.

In 2005, just prior to the adoption of the CRPD, Goggin and Newell published *Disability in Australia – Exposing a Social Apartheid*.¹⁶ In this book, they draw on the ‘shameful realities of the everyday lives’ of people with disability and state:

Did not we as members of Australian society ‘deal’ with disability back in 1981, the International Year of Disabled Persons, the year when we supposedly broke down the barriers? Yes, this was a watershed for understanding of disability in Australian society; yet a little over twenty years later not much has changed. Whatever the activity or realm of social life, people with disability endure a certain form of apartheid – one that no-one will name.¹⁷

The use of the term ‘apartheid’ aimed to jar ‘the unconscious, deeply held and often cherished views and power relations structuring disability in Australia’, and denoted the ‘special places, practices and accommodations that mark a line not to be crossed between “normal” and “disabled”’.¹⁸

Goggin and Newell also connected the term ‘apartheid’ to the:

...appalling race relations of our own country, where our Indigenous peoples are oppressed in so many ways, stemming from the invasion of the continent, and their negation as human beings... Out of the practices of colonisation has arisen the situation where in so many ways our Indigenous people are subject to much higher rates of disability and early death compared with non-indigenous Australians.¹⁹

In 2008, following Australia’s ratification of the CRPD, the Australian Government undertook an extensive national consultation with people with disability to inform the development of the *National Disability Strategy 2010–2020* (NDS).²⁰ The NDS is the mechanism for coordinated action to implement the CRPD by Australian governments. In 2009, the report from these consultations, *Shut Out: The Experience of People with Disabilities and their Families in Australia* was published.²¹ This report confirmed that ‘...many Australians with disabilities... are still experiencing systemic disadvantage’²² and that ‘[d]iscrimination and exclusion are frustrating features of daily life’.²³ It concluded that:

People with disabilities want to bring about a transformation of their lives. They want their human rights recognised and realised. They want the things that everyone else in the community takes for granted. They want somewhere to live, a job, better health care, a good education, a chance to enjoy the company of friends and family, to go to the footy and to go to the movies. They want the chance to participate meaningfully in the life of the community.²⁴

In 2013, and again in 2019, Australia appeared before the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) for its initial and periodic reviews of CRPD implementation. DPOs, disability representative organisations and civil society participated in both review processes by preparing their own reports, called ‘shadow reports’, and appearing before the CRPD Committee to represent

the views of people with disability in Australia.²⁵ Both the 2013 and 2019 Shadow Reports highlight significant levels of inequality, discrimination and segregation in daily life experienced by people with disability.²⁶

Little changed in the six years between each shadow report. The 2019 Shadow Report, *Disability Rights Now 2019*, acknowledged:

...positive reforms that Australia has initiated since its first review in 2013, particularly implementation of the National Disability Insurance Scheme (NDIS) and the establishment of the Royal Commission into exploitation, violence and abuse of people with disability. However, people with disability still experience poverty, disadvantage and human rights violations, and this is particularly acute for Indigenous peoples and communities.²⁷

In the context of violence, abuse, neglect and exploitation experienced by people with disability, both reports highlighted grave and systemic human rights violations such as denial of legal capacity; the high prevalence of all forms of violence, forced sterilisation and medical interventions for people with disability and intersex people; forced treatments and restrictive practices in a broad range of settings; compulsory detention in mental health facilities and residential institutions; and indefinite detention in prisons.²⁸

During the September 2019 review hearing before the CRPD Committee – referred to as a ‘constructive dialogue’ – a number of CRPD Committee members explicitly stated that the situation in Australia did not appear to have changed in the six years following its initial review in 2013.²⁹ The Australian Disability Discrimination Commissioner³⁰ made a similar point to the CRPD Committee during the review, highlighting several areas of human rights concern that had been raised in the 2013 review but had largely not been addressed at all, including the denial of legal capacity, forced sterilisation, indefinite detention of people with disability without conviction, segregated education, high unemployment rates, and failure to implement the NDS.³¹ The CRPD Committee’s 2019 concluding observations, or recommendations to Australia, reiterated many of the recommendations it made following its 2013 review.³²

Current evidence shows that Australia ranks poorly on the employment and poverty indicators of the Organisation for Economic Co-operation and Development (OECD), with people with disability only half as likely to be employed as people without disability, while around 45% of people with disability live near or below the poverty line – more than double the OECD average.³³ The evidence demonstrates the significant prevalence of violence, abuse, neglect and exploitation frequently experienced by people with disability.³⁴ For several years, the highest complaint area for the Australian Human Rights Commission (AHRC) has been under the *Disability Discrimination Act 1992* (Cth) (DDA).³⁵ Despite Australia’s ratification of the CRPD, people with disability continue to be segregated in specialised forms of accommodation, education and employment and are subjected to substitute

decision-making regimes through guardianship, financial management and mental health laws.³⁶

The ongoing reality of inequality, discrimination and segregation is exemplified by comments made at the first public sitting of the Royal Commission on 16 September 2019. Commissioner Andrea Mason, a Ngaanyatjarra and Karonie woman from Central Australia, stated that she had been told that:

First Nations people with disability have a lived experience that they describe as a type of apartheid. They have experienced times of exclusion, invisibility and being at the edge of our society. They are often not afforded the equality of respect and access to opportunities that other non-disabled Australians expect as their ordinary right to receive.³⁷

Commissioner Mason noted that non-Indigenous people with disability also described their life circumstances as ‘a system of apartheid’, and that this is ‘a point of reference from which we want to understand and depart from towards a different future’.³⁸

The disability rights movement in Australia has driven important policy and legislative reform with the aim of acknowledging the rights of people with disability, combating discrimination, closing institutions, providing adequate services and supports, and facilitating equal participation in society. While this has facilitated some incremental changes for people with disability, it has not led to the social transformation required by the CRPD.

4 Conceptual shift in understanding disability

A contemporary conceptualisation of disability has its roots in the political activism of the disability rights movement of the 1960s and 1970s. Although not as well-known or documented as the broader civil rights and social justice movements that were active at this time, the demands of the disability rights movement were substantially the same – an end to inequality, discrimination and segregation.³⁹ People with disability began to form their own organisations, or DPOs, and actively campaign and protest against service systems, medical professionals and social institutions that kept them ‘captives of care’⁴⁰; that confined them in ‘special’ institutions, schools and workplace settings; that dismissed their views in favour of experts and professionals; that made them vulnerable to violence, abuse, neglect and exploitation; and that overall kept them dependent, powerless and segregated from society.

The campaign of the disability rights movement was, and still is, a rejection of the medical model of disability, which conceptualises disability as a deficit located in the individual – a deviation from bodily, cognitive and mental norms that requires a range of medical and expert interventions to diagnose, treat and cure.⁴¹ In not

meeting the normative standard of human being, people with disability are viewed as different, as exceptions, as other, requiring care, treatment and protection within social welfare and health regimes as a way of dealing with their 'special' needs.

The disability rights movement in the United Kingdom (UK), through the Union of Physically Impaired Against Segregation (UPIAS)⁴², began the challenge against the medical model by asserting that:

...disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.⁴³

In this view, disability is not an inherent deficit within the individual, but is a socially imposed form of oppression. UPIAS saw its aim as focusing on ending this oppression by demanding State support be directed towards the independence, participation and autonomy of people with disability:

The Union aims to have all segregated facilities for physically impaired people replaced by arrangements for us to participate fully in society. These arrangements must include the necessary financial, medical, technical, educational and other help required from the State to enable us to gain the maximum possible independence in daily living activities, to achieve mobility, to undertake productive work, and to live where and how we choose with full control over our lives.⁴⁴

The correlation to apartheid in South Africa was influential in the 1960s and 1970s for understanding the oppressive power relations inherent to the medical model of disability. A leading member of UPIAS, Vic Finkelstein who was influenced by his earlier involvement in the anti-apartheid movement in South Africa, has reflected on the parallels between the segregation inherent in the apartheid system of oppression and the 'systematic segregation of disabled people' in the UK.⁴⁵ He noted that the 'experience of oppression under apartheid played a much greater role in the emergence of the social model of disability than has so far been recognised and acknowledged'.⁴⁶

The view that disability was a socially constructed form of oppression was refined and formalised over a number of years by disability activists and academics into what became known as the social model of disability in the early 1980s.⁴⁷ The social model of disability was embraced by the disability rights movement which mobilised political action globally against inequality, discrimination and segregation. The emergence of the Independent Living Movement in North America, and later in many other countries, actively rejected the medicalisation of people with disability, their institutionalisation and segregation from all aspects of society.⁴⁸ In Australia, the pioneers of the contemporary disability rights movement were pushing to be freed from institutions⁴⁹, to control their own lives and to end the social, attitudinal and environmental barriers that excluded people with disability from participating equally in society.⁵⁰

There was also a growing self-advocacy movement of people with intellectual disability, which began in Sweden in the late 1960s⁵¹ and grew internationally, that focused on people with intellectual disability speaking up for themselves or others on issues that affected them.⁵² Although not explicitly acknowledging the social model of disability, the anti-psychiatry movement, or user and survivor movement, was a reaction to the medicalised approach to mental health, which included involuntary detention, coercive and forced treatment, that often had long-term adverse effects.⁵³ The violence, abuse, neglect and exploitation that was being exposed in the mental health system was also a recognised reality within large disability residential institutions, as well as the many institutions that housed both people with intellectual and cognitive disability, and people with psychosocial disability.⁵⁴

The social model of disability has dominated both critical disability studies and disability rights advocacy for over 40 years. In the social model, the concepts of impairment and disability are different. Impairment is not viewed as individual deficit but as a personal characteristic that is one aspect of human diversity. Disability is the result of the way that society responds to impairment, with this response resulting in inequality, discrimination and segregation. It is society that disables or oppresses people with impairments by excluding them from dominant social institutions and arrangements.⁵⁵ In other words, it is not individual impairment itself that underpins inequality, discrimination and segregation, but the response to impairment that establishes specialised legal, policy and practice frameworks to provide care, treatment and protection.

In asserting a social model of disability, the disability rights movement challenged the legal, policy and practice frameworks that were developed by medical experts, service providers and professionals without involvement of the views and expertise of people with disability themselves. The exclusion of people with disability from the political process, from social institutions, and from policy development and decision-making processes, led to demands from people with disability to be included in all matters affecting them and to have control over their own lives. In the 1990s, this demand for direct representation became encapsulated by the now universal motto of the disability rights movement, 'Nothing About Us, Without Us'.⁵⁶

As discussed further in Section 5 below, at the international level, the social model of disability and the motto, 'Nothing About Us, Without Us', were critical points of reference within the disability rights campaign for a standalone treaty on the rights of persons with disability, as well as being influential within the CRPD negotiations and the final adopted treaty.⁵⁷ Prior to the CRPD, people with disability received limited benefit from international human rights treaties. The non-binding, or 'soft law' declarations – the 1971 *Declaration on the Rights of Mentally Retarded Persons*⁵⁸ and the 1975 *Declaration on the Rights of Disabled Persons*⁵⁹ – did state that persons with disability are subjects of international human rights law, but did this largely within the context of the medical model of disability. The disability rights movement argued that a binding international human rights treaty was essential to

outlining a normative framework for applying existing human rights to the issues and concerns of people with disability as understood in the context of the social model.⁶⁰

The social model was the catalyst for the shift in how disability is conceptualised, which has led to the translation of human rights in the context of disability embodied within the CRPD. While the CRPD is based on the social model of disability, it goes further by codifying a human rights model of disability.⁶¹ As outlined by Degener⁶², the CRPD recognises disability as a social construct, but also ‘values impairment as part of human diversity and human dignity’⁶³, and it is this focus on the inherent dignity of the human being where the CRPD goes beyond the social model of disability.⁶⁴

Human dignity is the ultimate foundation of all human rights and freedoms⁶⁵, described by Quinn and Degener as the ‘anchor norm of human rights’.⁶⁶ More than any other human rights treaty, the concept of human dignity is recognised numerous times in the CRPD, including in the Preamble, the purpose, the general principles and within various articles.⁶⁷ Degener asserts that:

...whereas the social model merely explains disability, the human rights model encompasses the values of disability policy that acknowledges the human dignity of disabled persons. Only the human rights model can explain why human rights do not require absence of impairment.⁶⁸

As human dignity is integral to the human rights model of disability, the CRPD makes it explicitly clear ‘that impairment does not derogate human dignity nor does it encroach upon the disabled person’s status as a rights-bearer’.⁶⁹ The concept of human dignity itself includes impairment as a valued individual attribute⁷⁰, and this completely refutes and dismantles the normative standard that is the foundation of the medical model of disability.

It has been over a decade since the adoption of the CRPD, but the disability rights movement continues to fight for the social transformation that is its promise. The conceptualisation of disability as an individual deficit, and the normative standard of the medical model is now commonly referred to as ‘ableism’. The ableist norm is generally internalised and seems benign;⁷¹ is often unstated, and appears natural and neutral.⁷² Ableism is still entrenched in contemporary legal, policy and practice frameworks which continue to segregate people with disability from the general population – in special schools, special institutions and accommodation arrangements, segregated employment, segregated transport systems, special access arrangements, special sporting events – and deny their autonomy through the removal of legal capacity, through compulsory financial management, compulsory mental health detention and treatment, and indefinite detention through justice diversion provisions.⁷³ The evidence⁷⁴ demonstrates that segregated and parallel systems enable exploitation, violence and abuse, and so a human rights response to this evidence requires measures to dismantle these systems and to undertake structural and systemic reforms to adhere to the CRPD.⁷⁵

Contemporary law, policy and practice frameworks have not made the conceptual shift that impairment is a valued part of human diversity and dignity, and that disability is socially constructed. This is critical to understanding the failure of frameworks to prevent, respond and provide redress for violence, abuse, neglect and exploitation. The devalued perceptions of people with disability in need of care, protection and treatment are not challenged and the 'special' segregated social arrangements and service systems that these frameworks establish are not problematised but normalised. While the focus remains on fixing or reforming existing systems that are built on ableism, the necessary social transformation required by the CRPD is not understood or realised.

5 From welfare to human rights

The exclusion of people with disability from policy discourse, research and high-level decision-making processes has meant that, like domestic governments, UN human rights bodies and intergovernmental processes had little grounding in the lived experience of people with disability and saw disability through a very narrow medical model lens.⁷⁶ This has meant there has been very little traction beyond care, treatment and protection in international efforts to address the inequality, discrimination and segregation experienced by people with disability. Both domestic and international law has traditionally addressed disability within the context of social security, welfare, health or guardianship legislation, with people with disability being depicted as objects of welfare, health and charity programs rather than subjects with legal rights.⁷⁷

Influenced by the disability rights movement, international human rights law slowly began to recognise disability as a fundamental human rights issue from the early 1970s.⁷⁸ Although the subject of disability formed part of international human rights instruments, commentators have remarked that prior to the CRPD, disability was an invisible element of binding international human rights law.⁷⁹ Disability is not identified as an area of concern in the founding international human rights instruments: the *International Bill of Rights* made up of the *Universal Declaration of Human Rights* (1948) (UDHR)⁸⁰, the *International Covenant on Civil and Political Rights* (1966) (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR).

Disability is first raised within a binding instrument as a substantive area of concern in the *Convention on the Rights of the Child* (1989) (CRC).⁸¹ In the CRC, article 23 focuses specifically on children with disability, and disability is incorporated into the scope of non-discrimination.⁸² However, article 23 relies on a medical model approach as it sets out obligations focused on the 'special care' children with disability require in relation to their 'special needs'.⁸³ In addition, obligations in relation to children with disability have often been interpreted to be limited to article

23, rather than States Parties⁸⁴ recognising that all CRC obligations apply equally to all children, including those with disability.⁸⁵

There had been some incremental attempts to address the inequality experienced by people with disability through treaty body jurisprudence. While the Human Rights Committee did not elaborate on the application of ICCPR to people with disability, it did clarify in its 1989 *General comment No. 18: Non-discrimination* that the right to equality and non-discrimination in ICCPR not only includes formal equality but also includes substantive equality.⁸⁶ This was particularly important for people with disability as it recognised that just treating people the same to achieve formal equality does not necessarily ensure equitable outcomes and equality of opportunities, or substantive equality.

In its 1991 *General recommendation No. 18: Disabled women*, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) raised the need for States Parties to provide specific information in periodic reports on measures taken to ensure equality for women with disability, including special measures to ensure 'equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life'.⁸⁷

In 1994, the Committee on Economic, Social and Cultural Rights (CESCR Committee) elaborated, in its *General comment No. 5: Persons with disabilities*, that while ICESCR does not explicitly refer to disability, it still encompasses discrimination on the ground of disability.⁸⁸ This was the first UN document to define disability-based discrimination:

For the purposes of the Covenant, 'disability-based discrimination' may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.⁸⁹

However, in and of themselves, these aspects of international human rights law achieved very little in improving recognition and respect of the human rights of people with disability.⁹⁰ The normative standard of the medical model of disability embedded in the international human rights framework made it challenging to interpret and apply human rights to the inequality, discrimination and segregation experienced by people with disability.

This is also the case with international non-binding, or 'soft law' instruments, which is where most developments towards disability rights occurred. This is exemplified by the UN General Assembly adoption of the *Declaration on the Rights of Mentally Retarded Persons (1971)* and the *Declaration on the Rights of Disabled Persons (1975)*. While these Declarations were explicit that people with disability were subjects of international human rights law, they were still couched in the

understanding of disability as individual deficit, and they legitimised segregation through specialised services and institutions.⁹¹

The focus of disability within international intergovernmental work was through policy and program frameworks. In 1976, the UN General Assembly proclaimed 1981 as the International Year of Disabled Persons, with the theme of 'full participation'.⁹² Although the aim of the year was to promote the breaking down of barriers to participation, there was also a patronising and medical focus on 'helping disabled persons in their physical and psychological adjustment to society' and on 'effective measures for the prevention of disability'.⁹³

In 1982, the UN adopted the *World Programme of Action concerning Disabled Persons* (WPA).⁹⁴ The WPA established as one of its goals the equalisation of opportunities for people with disability, which aimed to ensure that all aspects of society are made accessible to all, including housing, transport, health services, education and employment opportunities, the built and cultural environments, and sports and recreation.⁹⁵ This initiated the shift from the medical model of disability to the social model, with a focus on the removal of societal barriers to achieve rights and equality.

In 1984, the UN Commission on Human Rights sought a comprehensive study on the relationship between human rights and disability. A Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities was appointed to conduct the study; in 1993, the report from this study – *Human Rights and Disability* – was released.⁹⁶ The Special Rapporteur's research provided overwhelming evidence that people with disability experienced significant levels of inequality, discrimination and segregation, and found that disability is a human rights issue – as such, the UN must integrate disability into its work.⁹⁷

In 1991, the General Assembly adopted the *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (the Principles).⁹⁸ Developed by the Office of the High Commissioner for Human Rights, the Principles aimed to ensure standards for mental health care and to protect people with psychosocial disability from human rights abuses, such as excessive restraint and seclusion, sterilisation on the grounds of mental illness, psychosurgery and other irreversible treatments.⁹⁹ However, the Principles provided no transformative objectives to move beyond care, treatment and protection, maintaining the medical model of disability at its core. The Principles were denounced on this basis, particularly among psychosocial disability¹⁰⁰ user groups, and there were ongoing calls for the Principles to be revoked.¹⁰¹

Following the report by the Special Rapporteur, and to compensate for the lack of international human rights law on disability¹⁰², the General Assembly adopted the non-binding *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (Standard Rules) in 1993.¹⁰³ The Standard Rules built on the WPA, making explicit statements about the rights of people with disability, the

need to incorporate a disability perspective into policy, and the need to plan societies that promote an accessible environment and ensure equal opportunity.

However, the *Standard Rules* still focus on medical treatment and the prevention of impairment as preconditions for equal participation.¹⁰⁴ The Standard Rules maintain a focus on disability as an individual deficit rather than recognising impairment as one aspect of human diversity.

The international non-binding or 'soft law' instruments, and policy and program frameworks, still retained a social welfare and medical focus. They were unable to successfully prosecute a broader transformative objective through recognition that disability is a social construct whereas impairment is an aspect of human diversity and dignity.

There had been proposed resolutions to introduce a binding human rights convention on disability, sponsored by Italy in 1982 and 1987 and Sweden in 1989.¹⁰⁵ However, these proposals were unsuccessful for a number of reasons; at the time, the human rights treaty system was struggling to meet its monitoring functions and States viewed another treaty as creating an unnecessary reporting burden when people with disability were already protected by existing human rights treaties.¹⁰⁶ In addition, the proposals were based on a non-discrimination model that would develop a definition of disability discrimination and apply it to all human rights and fundamental freedoms, relying largely on negative rights and obligations of non-interference¹⁰⁷ and providing little prescriptive or normative content to assist States to meet obligations.¹⁰⁸

The successful catalyst for a human rights convention on disability came from a response to the formulation by the UN to the *Millennium Development Goals* (MDGs)¹⁰⁹ in 2000, which aimed to halve global extreme poverty by 2015.¹¹⁰ Although people with disability had been recognised as being among the 'poorest of the poor', and there was acknowledgement of the cyclical relationship between disability and poverty¹¹¹, the MDGs did not identify disability as a specific target or as a subject area among the eight goals adopted.¹¹²

This omission caused significant concern, particularly among DPOs and development organisations, and influenced Mexico to campaign for a mandate to develop a human rights convention on disability. The campaign included a September 2001 call for a disability convention at the World Conference on Racism (WCR), which became part of the Declaration, known as the Durban Declaration from the WCR.¹¹³ This Declaration invited the General Assembly to:

...consider elaborating an integral and comprehensive international convention to protect and promote the rights and dignity of disabled people, including, especially, provisions that address the discriminatory practices and treatment affecting them.¹¹⁴

While the Durban Declaration framed a potential convention in terms of discrimination, Mexico took a social development approach to presenting a resolution for a convention at the General Assembly in December 2001.¹¹⁵ This approach acknowledged the omission of disability from the MDGs and recognised that efforts to implement the WPA had not been sufficient ‘to promote the full and effective participation by and opportunities for persons with disabilities in economic, social, cultural and political life’.¹¹⁶ This was a more persuasive argument than previous resolutions for a discrimination-focused convention, particularly for developing countries and transitioning economies keen to increase global development efforts.¹¹⁷ As a consequence, developing countries largely sponsored the resolution to the General Assembly.¹¹⁸

The General Assembly adopted *Resolution 56/168 Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities* by consensus and without the need for a vote.¹¹⁹

6 Negotiating the CRPD

6.1 Nothing about us, without us

The resolution for a disability convention established an Ad Hoc Committee of the General Assembly to consider proposals for the convention. The Ad Hoc Committee was open to all Member States¹²⁰ of the General Assembly; UN agencies, human rights treaty bodies, the Special Rapporteur on disability, and intergovernmental and non-governmental organisations, and national human rights institutions were invited to make contributions to the Ad Hoc Committee’s work in line with accepted UN practice.¹²¹

The accepted practice of the UN allowed non-governmental organisations (NGOs) to be observers in the open plenary sessions of UN meetings, to make statements but not formally participate in the negotiations, and to have their material available to Member States although this material did not form part of the official documentation. However, as noted above, the exclusion of people with disability from UN human rights processes and mechanisms meant that the UN had to both accept its lack of expertise in the lived experience of people with disability, and that its practices and infrastructure were discriminatory resulting in the exclusion and marginalisation of people with disability.

In April 2002, the Commission on Human Rights¹²² passed a resolution encouraging the Ad Hoc Committee ‘to adopt working methods which allow for full participation by relevant non-governmental organisations in its deliberations’.¹²³ On 23 July 2002, the General Assembly adopted a resolution that allowed NGOs to be accredited to the Ad Hoc Committee in order to facilitate their participation in its work.¹²⁴ At the same session, the General Assembly agreed a formal decision¹²⁵ to facilitate the

participation of people with disability in the Ad Hoc Committee by adapting procedures that could include:

- (a) The facilitation of entry into United Nations premises by individuals serving as guides, personal assistants or interpreters for persons with disabilities;
- (b) The holding of meetings in those United Nations conference rooms that are better equipped to facilitate that participation of persons with mobility-related and other physical disabilities;
- (c) The adoption of a practice whereby documents distributed in the course of one meeting or shortly in advance of a meeting will not be discussed before the next scheduled meeting, thereby affording persons with visual disabilities sufficient time to convert those documents into a format readable by them;
- (d) The adoption, to the extent necessary and possible, of measures to enable persons with hearing disabilities to participate in the deliberations of the Ad Hoc Committee.¹²⁶

The resolution and decision by the General Assembly were unprecedented in facilitating the participation of NGOs, particularly people with disability and DPOs in the work of the UN through Ad Hoc Committees. The General Assembly made it clear that these arrangements only applied to the Ad Hoc Committee considering the disability convention and 'in no way create a precedent for other ad hoc committees of the General Assembly'.¹²⁷

At the first Ad Hoc Committee meeting from 29 July to 9 August 2002, the modalities or working methods were decided. The working methods consolidated the participation of accredited NGOs, allowing them to attend all public meetings of the Ad Hoc Committee, to make statements, receive official documents and make their material available to Ad Hoc Committee members. The working methods also directed NGOs to select spokespersons 'on a balanced and transparent basis, taking into account equitable geographical representation and the diversity' of NGOs.¹²⁸ This led to the formation of the International Disability Caucus (IDC), made up of the international, regional and national NGOs, primarily DPOs that were accredited to the Ad Hoc Committee. As the numbers of accredited NGOs and DPOs grew over the eight sessions of the Ad Hoc Committee, the membership of the Caucus grew to more than 70 organisations.¹²⁹

From the very first Ad Hoc Committee session, and as the participation of people with disability increased over successive sessions, the negotiations were an educative process for the Ad Hoc Committee members as the reality of inequality, discrimination and segregation experienced by people with disability played out in the UN conference room and UN facilities for all Member States to witness. Despite the General Assembly resolution and decision, and the Ad Hoc Committee working methods, the environment and processes were largely inaccessible to people with

disability. This severely restricted the participation of people with disability who were faced with inaccessible documentation, fixed seating arrangements, limited circulation space to move about the room, limited access to the fixed seating, limited access to microphones and ear pieces to hear language translation, no Braille or tactile signage, no sign language interpretation, no accessible toilets, and inaccessible security screening arrangements.¹³⁰ Here was a system that had tried to address the rights of people with disability through various negotiated binding and non-binding instruments and mechanisms, that was now visibly confronted with the reality of inequality, discrimination and segregation experienced by people with disability.

Following the first session of the Ad Hoc Committee, the General Assembly passed a further resolution to establish a voluntary fund to provide financial support to NGOs, particularly from least developed countries, and to strengthen efforts to increase accessibility for people with disability to UN facilities and documentation.¹³¹ Over time, there were increasing steps to address accessibility for people with disability within the UN to facilitate greater participation, including the introduction of sign language interpretation, information in Braille, digital formats, more accessible screening arrangements, and the removal of some fixed seating - although this segregated people using wheelchairs to the back row of the conference room.

While vastly improved, addressing the inaccessibility of facilities, documentation and processes of the UN remains an ongoing process.¹³²

6.2 Decision for a convention

Although the General Assembly had reached agreement to consider proposals for a convention following the adoption of resolution 56/168, fundamental to the first two Ad Hoc Committee sessions was consideration of whether there should be a convention at all. There was a degree of reluctance and objection to the need for another human rights instrument from a number of Member States, including Australia.¹³³ Australia, like others, favoured a minimalist response, arguing the scheduling or appending of 'a protocol or annex to one of the existing core human rights treaties would provide more effective protection'¹³⁴, that it would "close gaps" in existing instruments and would avoid the duplication of existing rights and a proliferation of additional reporting mechanisms'.¹³⁵

As discussed earlier in Section 5, this failed to acknowledge the paternalistic and limiting social welfare focus of the two 'soft law' declarations, and the fact that the binding human rights treaties had done little to improve the recognition and respect for the human rights of people with disability. This approach would entrench the outdated medical model of disability within binding international law.

A consensus on developing a convention started to emerge by the end of the second session of the Ad Hoc Committee in June 2003.¹³⁶ The main outcome of the

second session was the formation of a Working Group to draft negotiating text for a convention.¹³⁷ The Working Group was made up of 27 government representatives from the five UN regions, 12 NGO representatives, especially from DPOs, and a representative from a national human rights institution.¹³⁸

The inclusion of DPOs in the Working Group was another significant and unique decision that acknowledged the central role that people with disability needed to play in the negotiations. People with disability became equal participants in the drafting process for the Convention – this was unprecedented in treaty negotiation processes and embedded the recognition of the expertise of people with disability and the importance of their lived experience. It introduced to Member States the importance of ‘Nothing About Us, Without Us’ and the practical application of this concept in framing the draft text. It also reflected the social model of disability in ensuring that people with disability were valued, active participants in decision-making processes about their lives, rather than passive recipients of care, treatment and protection.

The Working Group met for two weeks in January 2004¹³⁹ and developed the Working Group draft text.¹⁴⁰ This draft¹⁴¹ became the principle text that was the subject of negotiations for subsequent Ad Hoc Committee sessions until the sixth session. For the seventh session in January 2006, the Chair of the Ad Hoc Committee provided a consolidated draft text¹⁴² with an accompanying explanatory memorandum with a view to finalising the Convention at the eighth session in August 2006. The final text was agreed and adopted by the General Assembly on 6 December 2006.

6.3 Reaching consensus

There was a degree of compromise made by Member States to reach a consensus on the negotiated text. Compromise is inherent for the development of all international law including human rights law, all democratic parliamentary processes to develop domestic law, as well as all contractual negotiations.

At the third session, the Chair of the Ad Hoc Committee allocated facilitator roles to various Member States for each article of the Convention. The facilitator’s role was to lead the negotiations and develop formulations of draft text based on plenary and informal discussions for consideration by Member States. Negotiations took place in formal plenary sessions and in informal working groups. While the formal sessions were documented and daily summaries were recorded of these sessions¹⁴³, there was no documentation for the informal working groups.

During the negotiations, Member States had to make decisions around the proposals put forward for the text of the Convention, and these decisions were guided by the positions of their governments as well as existing international human rights law. To achieve consensus, Member States would sometimes need to

concede on points and accept a compromise, but ultimately the Convention text was adopted by consensus.

DPOs brought to the negotiating table a demand for significant social transformation framed around a new conceptualisation of disability that challenged many existing social and legal frameworks, such as guardianship, mental health laws and segregated service systems. This meant that the negotiation process was as much an educative process as it was a negotiation between Member States.

It was also an educative process for members of the IDC, many of whom had not participated in UN meetings, and certainly not in UN negotiating processes. For some, there were also weaknesses in understanding cross-disability perspectives and how human rights applied broadly to cover all people with disability. For others, there were more challenging transformative elements of discussion that required resolution within the IDC.¹⁴⁴

The key concepts that were more challenging for Member States were those that required a dramatic reframing of how Member States respond to, and implement human rights principles and apply them to people with disability. The foundations of long-held legal doctrines have derived from Western legal philosophy that enshrines a normative standard of the autonomous rational human being¹⁴⁵; this is reflected in the UDHR which states in article 1:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.¹⁴⁶

International human rights law applies to all individuals based on their humanness; however, the prevalent medical model frames disability as individual deficit, defining people with disability as lacking reason and conscience, and thus as an exception to humanness. This is the basis for limiting or diminishing the human rights of people with disability.

The challenge for Member States was to understand that disability is an interaction between impairment and social structures¹⁴⁷, that individual impairment is part of human diversity and human dignity¹⁴⁸, and thus human rights principles and standards apply universally to all people.

The application of international human rights law to people with disability was particularly complex for Member States in relation to the concepts of autonomy (discussed in Section 6.3.1) and full inclusion in society (Section 6.3.2).¹⁴⁹

6.3.1 Autonomy

In relation to autonomy, Member States were particularly challenged by the application of the universal recognition of legal capacity and equality before the law to people with disability on an equal basis with others.

Equality before the law is guaranteed in article 6 of the UDHR – ‘Everyone has the right to recognition everywhere as a person before the law’¹⁵⁰, and article 12 of the ICCPR – ‘Everyone shall have the right to recognition everywhere as a person before the law’.¹⁵¹

Article 12 of the CRPD *Equal recognition before the law*¹⁵² is viewed as critical to the exercise of all other human rights.¹⁵³ Central to equality before the law is legal capacity, or the ability to hold rights and the ability to exercise those rights. The exercise of legal capacity has most commonly been denied to people with disability in legal systems worldwide, but this denial has also been applied to other groups, particularly women and ethnic minorities.¹⁵⁴

The historical denial of the exercise of legal capacity for women, as for people with disability, was largely based on the normative standard within the legal philosophy of the autonomous rational human being.¹⁵⁵ As for people with disability, ‘femaleness’ was constructed as falling outside of this normative standard. Rationality was considered beyond ‘femaleness’ and women were viewed as other.¹⁵⁶ This denial or limitation of legal capacity meant that women, particularly following marriage, were unable to enter into contracts, administer property or exercise rights in the justice system¹⁵⁷, with husbands exercising legal capacity on their behalf.¹⁵⁸ CEDAW refuted the normative standard by explicitly outlining in article 15 that ‘States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity’.¹⁵⁹

Legal capacity is instrumental to personhood.¹⁶⁰ It gives rise to individual agency that ‘enables people to sculpt their own lives, to open up zones of personal freedom and interactions’.¹⁶¹

Personhood and making one’s own choices are about the minutiae of daily life – what to wear, what to eat, what time to get up – as well as more significant life decisions – such as deciding who to vote for, deciding who, when and if to marry, choosing where to live, consenting to medical treatment, entering into contracts, deciding whether to have children and how many, and managing personal finances.

The denial of legal capacity is a denial of personhood. As Quinn has pointed out in the context of this denial:

...there are some human beings who, whilst being human, are not persons. So where is the line between those humans that are persons and those who are not? In a way substitute-decision making is a symptom of civil death – of the surrender of the personhood of one person to another.¹⁶²

The recognition that people with disability are able to exercise legal capacity on an equal basis with others is a recognition of their personhood and underpins the shift from a medical to a human rights model.

During the negotiations, Member States had to recognise that their established law, policy and practice frameworks denied or limited legal capacity for people with disability on the basis that people with disability are incapable of exercising legal rights and duties, that they need protection, and they need decisions to be made for them in their best interests. While noting that the Convention should recognise equality before the law and the legal capacity of people with disability, many Member States continued to articulate deficit views about the degree and quality of impairment that impacted on decision-making ability, noting for example that the Convention 'should also accommodate exceptional situations where [people with disability] are adjudicated to be incompetent and unable to exercise their legal rights'.¹⁶³ Systems of substitute decision-making and legal mechanisms to deem lack of capacity were still viewed as being necessary to protect those people with disability who were viewed as incapable and to protect the integrity of legal decisions.

The arguments made by Member States demonstrated that the concept of legal capacity was continually conflated with the concept of mental capacity, or the individual capacity to make decisions. Legal capacity is an inherent right of all people, while mental capacity recognises that people, including people with disability, will have different decision-making skills that will vary depending on their circumstances and may require individualised support to assist this decision-making. Perceived or actual impairment of mental capacity is not a justification for the denial of legal capacity, but rather a recognition of the potential need for support to exercise legal capacity.¹⁶⁴

The negotiations were about grappling with the application of this right to autonomy for people with disability, when it had previously not been seen as being applicable to people with disability. DPOs continually highlighted that the failure to recognise legal capacity and 'the fundamental right to make decisions with support has resulted in institutionalisation, forced sterilisation and countless human rights infractions for [people with disability] all over the world'¹⁶⁵, and has often led to a denial of 'the right to own property, to marry, to inherit, to sign contracts, to hold bank accounts, to sign documents, or even to vote in public elections'.¹⁶⁶

At the seventh session, the Chair of the Ad Hoc Committee provided his draft text, based on the discussions over previous sessions, in order to streamline the process and bridge different positions.¹⁶⁷ In relation to equal recognition before the law, the Chair noted that all Member States needed to be flexible and be prepared to resolve differences, 'bearing in mind that guardianship or substitute decision-making for persons with disabilities has led to many injustices in the past'.¹⁶⁸

The final agreed text of CRPD article 12, *Equal recognition before the law*, reflects the text of CEDAW and states that 'States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.¹⁶⁹ In so doing, article 12 refutes the ableism inherent in law, policy and practice that denies or limits the exercise of legal capacity based on impairment. While article 12 is emblematic of the conceptual shift from the medical to human rights model of disability, Member States continue to grapple with this complex reform area and the practical application of this right to people with disability, as discussed further in Section 8.

One aspect of the social transformation required by the CRPD requires embedding impairment, as a recognised part of human diversity and dignity, in new, legal frameworks that apply to everyone equally, that establish supported decision-making mechanisms and that allow for the legal integrity of decision-making, consent and contractual arrangements to be maintained without denying human rights to people with disability.

6.3.2 Full inclusion in society

The core struggle of the disability rights movement was largely to overcome the segregation of people with disability through specialised approaches to individual 'deficit'. The DPOs brought this struggle to the negotiation process. As discussed in Section 4, the disability rights movement had drawn on the reality of the apartheid system of oppression to formulate the social model of disability. Segregation underpinned the claim of the disability rights movement for a social transformation that would establish full inclusion in society. The UN had legitimised this segregation through the international human rights law that preceded the CRPD, law which was paternalistic and reflected a medical model of disability that required specialised services and institutions.

The majority of Member States had to confront their established parallel systems and exclusionary practices that segregated and isolated people with disability from society, and confront the accepted methods of providing care, treatment and protection. These pervasive systems are still evident today, and cover every aspect of civil, political, economic, social and cultural rights, including education, health, housing, transport, family life, culture and leisure, justice, political participation and the exercise of legal capacity. Confronting segregation was integral to all articles within the CRPD negotiations. The concept of segregation in the negotiations was most apparent in the areas of the right to live independently and be included in the community (discussed next in Section 6.3.2.1), and the right to education (discussed in Section 6.3.2.2 below).¹⁷⁰

6.3.2.1 Right to live independently and be included in the community

For many DPOs during the negotiations, deinstitutionalisation was a critical issue. Segregation and the denial of autonomy are central to the nature of institutions. Institutions deny the autonomy to choose where to live and with whom to live, deny autonomy in daily decision-making, and isolate and segregate people with disability from the community.

The focus of negotiations for DPOs was not on segregation per se, but rather on the combination of segregation and lack of autonomy in the concept of living independently and being included in the community. Member States were more comfortable with the concept of independent living and the intent of this, but many did not understand the nuance of it.

For many Member States, people with disability were forced to live in institutions – throughout their life course – in order to receive support and services for daily living; this subjected residents to strict routines and decision-making imposed by the staff and administrators of the institution. While most Member States still maintained institutional care, others had made policy shifts to deinstitutionalisation resulting in the closure of larger residential institutions and relocation of individuals to smaller institutional group homes and supported accommodation arrangements.

Many developing country Member States did not have a system of residential institutions, with most people with disability living with their families. However, many people with disability living with their families were often confined to the family home and locked away from the community.

The denial of autonomy, integral to institutions or the family home, establishes the dependency of people with disability on service systems or their families. The link between higher risks of violence, abuse, neglect and exploitation of people with disability and closed settings, such as institutions and family homes, was well recognised and accepted by Member States and the IDC during the negotiations.¹⁷¹ Leading up to, and during the negotiations, there were a number of exposés of appalling living conditions and treatment in orphanages, disability institutions and mental health facilities worldwide, including descriptions and images of children and adults tied to beds, sedated and malnourished.¹⁷²

While Member States accepted that institutions were not in line with human rights standards, this view was often understood within the context of large-scale institutions rather than smaller group homes or within the family home. Member States continued to present views to qualify people's ability to live in the community or in non-institutional settings¹⁷³, and continued to object to an unqualified guarantee that people with disability should not be forced to live in institutions or any other living arrangements.¹⁷⁴

There was lack of recognition that independent living was not only about buildings and settings, but also about ‘not losing personal choice and autonomy as a result of the imposition of certain life and living arrangements’¹⁷⁵, recognising this could happen in group homes, family homes and other settings.

The final agreed text for article 19, *Living independently and being included in the community*, is a response to the experience of segregation in institutions, family homes and other closed settings, but it is as much about individual choice, security and being a participating member of the community on an equal basis with others as it is about the bricks and mortar of housing. It is ‘one of the widest ranging and most intersectional articles of the Convention and has to be considered as integral to the full implementation of the Convention’.¹⁷⁶ It is the ultimate translation of existing international human rights law into the disability context. The working group draft text draws on article 29 of the UDHR – ‘Everyone has duties to the community in which alone the free and full development of his personality is possible’¹⁷⁷ – as well as the foundational right to liberty of movement and freedom to choose one’s residence (derived from article 12 of ICCPR), and the right to an adequate standard of living (derived from article 11 of ICESCR). These foundational rights are central to other international human rights treaties, such as ICERD¹⁷⁸, CEDAW¹⁷⁹ and CRC¹⁸⁰, and became central to the final agreed text of the CRPD.

Within the CRPD, these rights apply to the autonomy of people with disability to freely choose where and with whom they live, and to receive the supports they need to ‘prevent isolation and segregation from the community’.¹⁸¹ It is directed to the elimination of segregated and socially isolated living arrangements that people with disability are forced or obliged to live, which diminishes everyday life activities, including family relations, social contacts, work options, economic independence, educational advancement, and cultural connections.

The CRPD Committee has observed that there is ‘a gap between the goals and spirit of article 19 and the scope of its implementation’.¹⁸² While Member States agreed to the final text in article 19 of the CRPD, many States Parties, including Australia, continue to remain invested in group home settings as the predominant form of accommodation and support for people with disability, rather than recognise the transformative deinstitutionalisation that is required by the CRPD to facilitate autonomy and full inclusion in society.

6.3.2.2 Right to education

One of the most contentious areas of negotiation, both for Member States and some DPOs, was in relation to the application of the right to education in the context of disability. It was acknowledged that many people with disability are denied an education, or are educated in isolation from their siblings and peers, and are generally in receipt of inferior education. For some DPOs, segregated schools were viewed as a form of apartheid.¹⁸³ There was strong agreement that education should

not focus on community welfare, therapy and care, but be provided within an educational environment with equal educational standards.

However, a number of Member States wanted to retain the status quo of providing education for people with disability in special schools or special classes within mainstream schools. Largely, this was because it was difficult to conceive of an education system that could genuinely provide the support required to include people with disability in mainstream schools, particularly in light of the perceived resource implications of doing so.¹⁸⁴

Member States were supported in this view by DPOs representing the Blind, Deaf and Deafblind communities.¹⁸⁵ These DPOs argued that segregated education was essential to ensure equality in language and literacy instruction, to build cultural relationships with peers, and develop necessary life skills. They argued that mainstream classes had failed in these areas with many Blind, Deaf and Deafblind children moving into adulthood without the necessary skills to communicate effectively and realise their potential.¹⁸⁶ This view was not universal among DPOs and the IDC.¹⁸⁷

Ultimately, the key issue of debate was focused on the right to choose between special and mainstream schools, and this continued throughout the negotiations and ‘intensively over three days at the Sixth Session with more than 110 interventions from Member States and NGO delegations’.¹⁸⁸

The right to inclusive education had been articulated in the Standard Rules with recognition that the existence of special education is only acceptable where mainstream education is not sufficiently developed to ensure children with disability can be included.¹⁸⁹ The Standard Rules reflects the standard of compliance for economic, social and cultural rights, that of progressive realisation. In this context, it means that ‘special education is considered as part of the progressive realisation of the goal of inclusive education within the general education system’.¹⁹⁰

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) also made an explicit call on all governments to ‘adopt as a matter of law or policy the principle of inclusive education’ in the *UNESCO Salamanca Statement and Framework for Action on Special Needs Education (1994)* (Salamanca Statement).¹⁹¹

The jurisprudence of the CRC also provided support for inclusive education. In 1997, the Committee on the Rights of the Child (CRC Committee) held a day of General Discussion on the rights of children with disability. The CRC Committee concluded that the compulsory segregation of children with disability ‘for care, treatment or education’ is not compatible with the CRC.¹⁹²

The existing international norms enabled the principle of inclusive education to be incorporated into the draft text of the Convention. However, the issue of the right to

choose special education systems became the main focus of debate.¹⁹³ These debates drew from guarantees provided in article 26 of the UDHR whereby 'parents have a prior right to choose the kind of education that shall be given to their children'.¹⁹⁴ This is restated in ICESCR article 13(3) which requires States Parties to:

...have respect for the liberty of parents... 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.¹⁹⁵

Although this right was directed at parents' right to choose private and or religious education for their children, this was presented in the Convention negotiations as a parents' right to choose a 'state-established education setting based on disability'.¹⁹⁶ However, as Kayess points out, this claim was misguided.¹⁹⁷ First, ICESCR article 13(3) is specific to a limited right of parents to choose alternative private schools that meet the objective of enabling education that conforms with their religious and moral convictions.¹⁹⁸ It does not require States Parties to fund and provide these alternative private schools. According to the *Hague Recommendations Regarding the Education Rights of National Minorities*, 'persons belonging to national minorities ... have the right to establish and manage their own private educational institutions'.¹⁹⁹ Second, the standards of equality and non-discrimination in international human rights law do not permit discrimination on the basis of disability; 'legitimising a system of parallel, segregated education'²⁰⁰ for people with disability would have been a direct contravention of UN treaty body jurisprudence.²⁰¹ It would have allowed a 'separate but equal' principle, similar to segregated education, on the basis of race that had been found discriminatory by the US Supreme Court in 1954, by permitting 'the segregation of persons with disabilities from the general public education system'.²⁰² This is discussed further in Section 7.

The final text brings together the provision of an inclusive education system in environments that maximise both academic and human potential. It does not guarantee a right to choose based on impairment as such a guarantee is not supported by international law, as outlined above. It provides a framework to ensure mainstream education provides for 'human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity'.²⁰³ The requirement for education to be provided in 'environments that maximise academic and social development, consistent with the goal of full inclusion'²⁰⁴ requires States Parties to embed impairment within the normative educational policy so that the narrowly defined educational structures that exclude people with disability or limit their potential can be transformed.

6.4 The dynamic nature of the CRPD

The final adopted text of the CRPD was settled by consensus, which means that Member States reached agreement to the standards and principles articulated in the adopted text. Once adopted, a Member State has the choice to sign and ratify the CRPD. Once it ratifies (or accedes), the Member State becomes a State Party to the CRPD, accepting a binding international obligation owed to other State Parties to implement the provisions of the CRPD.

The CRPD is not static, but reflects the nature of all international law, which is progressively adapted to address new situations and realities over time. Central to the dynamic nature of the core human rights conventions is the establishment of Treaty Bodies or Committees to monitor the implementation of each convention by States Parties. The principle '*pacta sunt servanda*' (agreements must be kept) applies and States Parties are assumed to take their obligation seriously and must be 'performed by them in good faith'.²⁰⁵ This means that the relevant obligations are to be respected and are intended to be taken seriously.²⁰⁶

States Parties' actions in meeting their CRPD obligations is monitored through periodic States Reports and other mechanisms of the CRPD Committee. The CRPD Committee is comprised of elected independent experts in the field of human rights and disability. Its' jurisdiction and work are governed by provisions in the CRPD²⁰⁷, along with the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (Optional Protocol)²⁰⁸ and reference to the *Vienna Convention on the Law of Treaties* (1969).²⁰⁹

Through its jurisprudence, the CRPD Committee develops the body of international human rights law so that it is able to respond to society's changing contexts. As an international instrument the text of the treaty needs to be broad and flexible to be able to be applied in different jurisdictions, and not be time-locked so as to be responsive to emerging knowledge and trends. The broad language of the CRPD allows flexibility in its interpretation and its adaptability to new issues and understandings. It also lies in the power of the CRPD Committee to articulate the meaning of the CRPD provisions in relation to those issues.

The CEDAW Committee has described CEDAW as 'a dynamic instrument' that evolves and develops substantive international law 'through progressive thinking to the clarification and understanding of the substantive content of the Convention's articles and the specific nature of discrimination... and the instruments for combating such discrimination'.²¹⁰ Like the CEDAW Committee, and all other Treaty Bodies, the CRPD Committee's jurisprudence is 'informed by the concerns of human rights advocates who put these issues on the international agenda and stimulated the Committee to respond to them'²¹¹ and to state practice that has been driven by such advocacy.

Since the adoption of the CRPD in 2006, the jurisprudence of the CRPD Committee has substantially clarified and elaborated on many of the rights that Member States found complex and challenging during the negotiation process. There are now seven General Comments to comprehensively guide States Parties on their obligations in relation to article 12, *Equal recognition before the law*; article 9, *Accessibility*; article 6, *Women with disabilities*; article 24, *Education*; article 19, *Living independently and being included in the community*; article 5, *Equality and non-discrimination*; article 4.3 and 33.3, *Participation with persons with disabilities in the implementation and monitoring of the Convention*.²¹² There is also a guideline on article 14, *Liberty and security of person*.²¹³

The CRPD Committee has also undertaken numerous periodic reviews of States Parties on their implementation of the CRPD, and provided Concluding Observations, or recommendations following these reviews to guide States Parties on their implementation. Australia has received two sets of Concluding Observations to guide implementation, one in 2013 and one 2019²¹⁴, although as previously discussed in Section 3, there has been little to no implementation of these recommendations.

CRPD Committee decisions from its individual complaint process, called ‘individual communications’²¹⁵, and reports from inquiries into specific concerns within States Parties, also contribute to the interpretation of the substantive content of the CRPD.²¹⁶ The CRPD Committee has provided its views, or recommendations to Australia following examination of several individual communications from people with disability in Australia. In relation to violence, abuse, neglect and exploitation, there has been several individual communications where the CRPD Committee has recommended a number of individual and systemic actions to address the indefinite detention without conviction of a number of First Nations people with disability in Australian gaols. In these cases, the CRPD Committee found that there were violations of article 5, *Equality and non-discrimination*; article 12, *Equal recognition before the law*; article 13, *Access to justice*; article 14, *Liberty and security of person*; and article 15, *Freedom from torture or cruel, inhuman or degrading treatment or punishment*.²¹⁷ The CRPD Committee recommended actions to address these violations, and these actions included addressing other obligations under article 19, *Living independently and being included in the community*; article 25, *Health*; article 26, *Habilitation and rehabilitation*; and article 28, *Adequate standard of living*. The recommendations from these individual communications have not been implemented. As noted in Section 3, during the 2019 constructive dialogue, the CRPD Committee expressed its serious concerns about lack of actions to implement its previous recommendations in relation to indefinite detention without conviction, including those made in these individual communications.²¹⁸

The application of the normative content of the Convention into law, policy and practice by States Parties has also contributed to the shift in understanding how the rights of persons with disability can be fulfilled to achieve the necessary social transformation required. For example, in relation to article 12, *Equal recognition*

before the law, Peru, Costa Rica and Columbia have reformed their systems and laws in relation to legal capacity to implement supported decision-making regimes instead of substitute decision-making for people with disability.²¹⁹

As a specialist treaty, the CRPD creates a new normative framework that supersedes previous international human rights law as applied to disability. It is the standard for other human rights treaty bodies and mechanisms to use in applying human rights to people with disability.

For example, recent UN periodic reviews of Australia under other treaties – including ICCPR, ICESCR, CAT, ICERD, CEDAW and CRC – have all addressed issues concerning people with disability. The recommendations from these reviews have been consistent with recommendations from the CRPD Committee in addressing violence against women with disability; forced sterilisation and forced medical interventions; indefinite detention without conviction in gaols and juvenile justice; the collection of disaggregated data; forced treatment, violence, restrictive practices and maltreatment in a range of settings; health disparities; mental health; inclusive education; unemployment and poverty; discriminatory migration laws; freedom of expression and accessible information; and voting and political participation.

The UN Human Rights Council has undertaken a Universal Periodic Review (UPR)²²⁰ of the human rights situation in Australia in 2011 and 2015, and has provided a large number of recommendations to address the situation of people with disability in Australia that reflect CRPD Committee jurisprudence.²²¹

The work of UN Special Rapporteurs and Independent Experts²²² have also elaborated on human rights in the context of disability. For example, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Torture) has prepared two reports on the situation of people with disability in the context of the anti-torture framework²²³; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Health) has prepared a report and a number of statements that call for a paradigm shift in mental health systems to make them human rights compliant.²²⁴

Over the past 15 years of CRPD implementation, through the work of the CRPD Committee, the practice of States Parties and other UN treaty bodies and mechanisms, the normative content of international human rights law has been refined, expanded and elaborated.

7 Roadmap for social transformation

The CRPD is a binding human rights treaty that establishes normative standards and principles outlining the obligations of States Parties for implementation. One of the six thematic instruments of the core human rights treaties, the CRPD is a

specialist instrument articulating legal norms and standards and international law. As a specialist treaty, the CRPD frames the body of existing international human rights law as it pertains to people with disability.

Based on the legal doctrine *lex specialis* (special law), the normative standards established by the CRPD supersede previous human rights treaties and jurisprudence relating to people with disability.²²⁵ Like other thematic instruments, the CRPD articulates the principle of equality and the legal standard of non-discrimination, and sets out a normative legal framework.

The CRPD provides a roadmap for social transformation that is the foundation for the reform of law, policy and practice. The social transformation required by the CRPD involves moving away from specialised systems based on disability and dismantling the power relations that underpin ableism. Much of the law, policy and practice reform that has taken place since the 1960s has been based on reform within existing systems, but these existing specialised systems are structured on the understanding of disability as an individual deficit, so the removal of barriers within existing systems will not provide the change required. Reform within systems fails to address ableism as it leaves in place the existing power relations in an attempt to manage policy failures.

To address the reality of inequality, discrimination and segregation of people with disability, law, policy and practice needs to embed the human rights model of disability where impairment is part of human diversity and human dignity. The human rights model of disability can be linked to what Degener argues is a new equality concept in international human rights law, 'which can be categorised as transformative equality'.²²⁶

7.1 Transformative equality

The CRPD includes formal equality, substantive equality and transformative equality. Formal equality is commonly understood as equal treatment, and it combats direct discrimination on the basis of disability and legal impediments to rights. It is about treating people the same regardless of personal characteristics in that laws, policy and practice are neutral in their application. However, it can fail to recognise difference and can result in unequal outcomes. Substantive equality recognises the need for different treatment for people with disability because it recognises that the same treatment can produce unequal outcomes, or indirect discrimination. It is about discrimination within law, policy and practice, and the removal of this discrimination to ensure inclusion of people with disability. It aims to respect and accommodate difference by removing the detriment but not the difference itself.²²⁷ Transformative equality is about changing 'these structures and systems with a variety of positive measures'²²⁸ to dismantle existing power relationships. In this sense, transformative equality can be viewed as addressing the underlying power relations that underpin ableism; it is about States Parties taking

positive measures to dismantle existing normative frameworks underpinned by ableism. The human rights model of disability is linked with transformative equality 'in that it provides the roadmap for change'.²²⁹

The CRPD is based on this new model of transformative equality,²³⁰ which contains the following elements:

- (a) a fair redistributive dimension to address socioeconomic disadvantages;
- (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
- (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
- (d) an accommodating dimension to make space for difference as a matter of human dignity.²³¹

The CRPD is a hybrid instrument in that it blends civil and political rights and economic, social and cultural rights, not just within the Convention but within its' articles. This combination of rights across the CRPD and within articles is central to the concept of transformative equality. Within a disability context, this combination becomes critical to respect, protect and fulfil²³² the human rights of people with disability. Traditional accounts of civil and political rights often portray them as rights of non-interference, which means that States Parties need to respect these rights and not interfere with their enjoyment by individuals.²³³ Economic, social and cultural rights have traditionally been portrayed as primarily involving obligations on States to take positive measures to protect and fulfill the enjoyment of these rights by individuals.²³⁴ The traditional distinction between these rights in international human rights law has long been criticised and 'is artificial in a disability context' and reflects the ableism 'that infects traditional human rights paradigms'.²³⁵ Increasingly, the traditional distinctions between civil and political rights and economic, social and cultural rights are being discarded.²³⁶ It is now recognised that States Parties need to implement a range of positive economic, social and cultural measures across all civil and political rights to ensure all human rights and fundamental freedoms are fully realised.

For example, the right to life is traditionally understood as a civil and political right that has required States Parties to refrain from interfering with an individual's enjoyment of this right, such as enacting laws to prohibit homicide and prohibit the death penalty. For people with disability, the right to life can only be realised if States Parties implement positive measures, such as the provision of personal care programs; equal access to healthcare; accessible and inclusive cancer screening programs; accessible gender- and age-specific violence prevention and response

programs; safety standards for accessible transport; and accessible infrastructure to facilitate safety in wayfinding.²³⁷

As a roadmap for social transformation, the CRPD has several important dimensions. It has an important symbolic status: it clearly places people with disability within the ambit of international human rights, thus establishing people with disability as visible rights' holders. The CRPD is in essence a charter of rights for people with disability. It is also a development instrument: providing a framework for achieving the advancement of people with disability and the development and transformation of societies through the pursuit of disability inclusion and transformative equality. The CRPD further provides a framework for public policy analysis and development, and a tool for advocacy and activism around issues of equality, discrimination and segregation. Finally, of course, it is a legally normative instrument: an international treaty that formally binds those States which have become parties to it, to carry out the obligations contained in the CRPD to eliminate discrimination against people with disability and to take measures for social transformation.²³⁸

7.2 Interpretative matrix

The CRPD can be understood as an interpretative matrix. It contains the interrelated and intersecting components that are the basis for analysing the normative human rights standard required for compliance. It is the toolkit to apply the human rights model of disability, to advance transformative equality and to achieve social transformation.

The CRPD must be understood as the sum of its parts, with all its components interacting with one another rather than in isolation from one another. For example, the experience of violence, abuse, neglect and exploitation of people with disability cannot be analysed merely through article 16 of the CRPD *Freedom from exploitation, violence and abuse*. This is explored more fully in Section 8.

The interaction between components provides a holistic perspective by which the experience of people with disability can be comprehensively understood and areas of structural reform can be effectively identified. It provides a richer understanding of the breadth of scope incorporated within substantive articles because there are several components that need to be considered to meet the normative standard. It facilitates a deeper analysis and a more comprehensive response to substantive rights that assist in the social transformation. Components of the interpretative matrix are the building blocks to interpret and implement the CRPD to facilitate social transformation. These components are discussed in turn below.

7.2.1 Preamble

The CRPD comprises of a Preamble and 50 articles. The Preamble, like all treaty Preambles, provides ‘introductory statements that set out the treaties’ purpose, underlying philosophy, drafters’ intent and historical evolution’²³⁹. These elements facilitate the interpretation of the CRPD, particularly where more clarity and precision is required to understand the spirit and intent of articles.²⁴⁰ The Preamble comprises of 25 paragraphs (‘a’ to ‘y’) that places the CRPD within the suite of international human rights law embedding foundational principles of human dignity, worth and equality and the legal standard of non-discrimination.²⁴¹

Explicitly omitted from the Preamble were elements of existing ‘soft law’ on disability that are inconsistent with the objectives of the CRPD and were framed in the medical model of disability. This includes the *Declaration on the Rights of the Mentally Retarded* (1971), the *Declaration on the Rights of Disabled Persons* (1975), and the *UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (1991).²⁴²

7.2.2 Purpose

The purpose of the Convention is set out in Article 1, which clearly states:

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.²⁴³

This provision reaffirms the dignity of people with disability that underpins the human rights model of disability, acknowledging that impairment is part of human dignity and that people with disability are entitled to the human rights due all human beings.

The second paragraph of Article 1 scopes the class of persons to be covered by the CRPD. Drawing on the preambular paragraph (e), it explains the phenomena of disability, reflecting the social model by stating:

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.²⁴⁴

It does not define the class of persons covered by the CRPD, but provides an indicative and open-ended description that is not limited or confined by a definition of impairment. Article 1 states that ‘[p]ersons with disabilities *include* (emphasis added) those who have long-term physical, mental, intellectual or sensory impairments...’ [article 1], which allows the instrument to be dynamic, to adapt over time to respond to the ‘evolving’ nature of disability [preamble (e)], and to be culturally relevant. This reflects the arguments made by the IDC during the negotiations for coverage of all impairment groups, in contrast to several member States that argued for a binding definition based on so-called ‘traditional’ impairment

groups so as to avoid 'opening the floodgates'.²⁴⁵ These member States were concerned about the impact on domestic implementation of the CRPD if their obligations extended to a larger class of persons.²⁴⁶

There is a disconnect between the way the CRPD scopes the human rights model concepts of impairment and disability and the language used within the final text. As Kayess and French point out, entrenched in the CRPD is 'the contemporary conceptual confusion between impairment and disability'²⁴⁷, and fundamental to the social model is the distinction between 'impairment' and 'disability'. The CRPD elaborates this distinction in preambular paragraph (e); however, as Kayess and French conclude, the CRPD uses the term 'persons with disabilities' to mean 'persons with impairments', uses the term 'disabilities' in the title instead of 'disability', and uses 'disability' in particular articles when it means 'impairment'.²⁴⁸ This reflects the complexity in the negotiations for Member States and some IDC members around understanding and application of the social model of disability and shifting from the medical construction of disability as a diagnostic deficit to be cured, to the social construction of disability which views impairment as 'an infinitely various but universal feature of the human condition'.²⁴⁹

This conceptual complexity continues today, permeating the contemporary lexicon of policy makers, legislators, service systems as well as society in general. However, in interpreting and implementing the CRPD, it is critical that legislators, policy makers, and practitioners clearly grasp the fundamental difference between the concepts of 'impairment' and 'disability', regardless of the language used. This means ensuring that the right concept is applied to the terminology, despite the contradiction of terms.

7.2.3 General principles

For the first time in an international human rights treaty, the Convention contains in Article 3 a list of general principles (the Principles). The Principles aim to guide the social transformation required through implementation of the CRPD. The Principles underpin the interpretation of the substantive articles and provide guidance to member states for implementation.

The Principles derive from existing human rights law, and restated within the context of disability, make it explicit that all human rights and fundamental freedoms adopted by the community of nations apply equally to people with disability.

The Principles are:

- 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.²⁵⁰

Interpretation and implementation of the CRPD obligations must incorporate a recognition of the Principles set forth in Article 3 and be compatible with them.

For example, measures to implement article 16, *Freedom from exploitation, violence and abuse*, must be provided without discrimination. This would ensure: reasonable accommodation; autonomy and support to make decisions; inclusive measures responsive to the diversity of people with disability; age- and gender-specific measures; the provision of accessible information and responses; measures that are available and relevant to men and women; the participation of children consistent with their age and maturity on an equal basis with others.

7.2.4 Intersectionality

The human rights model of disability recognises 'that disability is one of several layers of identity'.²⁵¹ The CRPD recognises this, explicitly acknowledging different layers or intersections of identity, through Preamble paragraph (p):

Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple and 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.

Other international human rights treaties²⁵² have also recognised different layers of identity, but the CRPD is the first human rights treaty to explicitly and comprehensively address intersectional discrimination.²⁵³ Intersectional discrimination recognises the 'multidimensional layers of identities, statuses and life realities'²⁵⁴ that 'interact with each other at the same time in such a way as to be inseparable'.²⁵⁵ It acknowledges that people with disability do not experience discrimination as a homogenous group.²⁵⁶ The recognition of intersectional

discrimination, along with individual and structural discrimination, is addressed through the combination of formal, substantive and transformative equality.²⁵⁷

Along with Preamble paragraph (p), intersectional discrimination is specifically articulated for women and girls with disability, and children with disability, in the CRPD through the inclusion of article 6, *Women with disabilities* and article 7, *Children with disabilities*. Article 6 recognises ‘that women and girls with disabilities are subject to multiple discrimination’²⁵⁸, which Degener has stated establishes ‘the first binding intersectionality clause in a human rights treaty’.²⁵⁹

Article 6 and article 7 are cross-cutting articles that relate to all other articles of the CRPD, and it means that the issues and concerns of women and girls with disability and children with disability must be specifically included in all actions to implement the CRPD. There are also a number of articles that specifically reference ‘sex’, ‘gender’ and ‘age’ throughout the CRPD.²⁶⁰

Articles 6 and 7 ensure that the CRPD is not gender-neutral nor adult-focussed. For women and girls with disability, this is reinforced by Preamble paragraph (s) which emphasises, ‘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’.²⁶¹

Articles 6 and 7 are illustrative of intersectionality and not exhaustive.²⁶² While the CRPD does not contain specific articles for other identity or population groups, the Preamble paragraph (p) makes it clear that interpretation and implementation of the CRPD must recognise intersectionality broadly, including as it is described in the Royal Commission’s Terms of Reference in relation to:

...age, sex, gender, gender identity, sexual orientation, intersex status, ethnic origin or race, including the particular situation of Aboriginal and Torres Strait Islander and culturally and linguistically diverse people with disability.²⁶³

Other international human rights norms can provide additional guidance in the application of human rights in addressing intersectionality, including ICERD, CEDAW, CRC, the *UN Declaration on the Rights of Indigenous Persons* (UNDRIP)²⁶⁴, as well as other useful guidance material, such as the *Yogyakarta Principles*.²⁶⁵

For example, to address the situation of First Nations people with disability requires applying the standards contained in the UNDRIP to implement CRPD rights. The CRPD Preamble paragraph (p) clearly includes First Nations people with disability within the scope and purpose of the Convention to promote, protect and ensure the rights of all people with disability. Article 30 of the CRPD establishes for people with disability the ‘recognition and support of their cultural and linguistic identity’, reinforcing the need for States Parties to apply a cultural lens to the implementation of rights through laws, policy and practice. Guidance in this application to First Nations people with disability can come from the specific normative framework as

set out in UNDRIP, and other UN mechanisms, such as the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)²⁶⁶ and the Special Rapporteur on the Rights of Indigenous Peoples.²⁶⁷ CRPD and UNDRIP provide the binding normative framework and standards to implement all human rights and fundamental freedoms for First Nations people with disability.

7.2.5 Cross cutting articles

The CRPD sets out certain responsibilities of States Parties which are not related specifically to individual rights, but are important to ensure the full enjoyment of rights. These include:

Article 3 General principles

Article 4 General obligations

Article 5 Equality and non-discrimination

Article 6 Women with disabilities

Article 7 Children with disabilities

Article 8 Awareness-raising

Article 9 Accessibility

Article 11 Situations of risk and humanitarian emergencies

Article 13 Access to justice

Article 20 Personal mobility

Article 26 Habilitation and rehabilitation

Article 31 Statistics and data collection

Article 32 International cooperation

Article 33 National Implementation and monitoring

These articles are crosscutting. The interpretation of substantive rights²⁶⁸ requires the application of the cross-cutting articles to facilitate their implementation. In essence, with the exception of article 5, these articles do not accord an individual right to people with disability²⁶⁹ but require States Parties to understand the foundational principles for implementation (article 3) and to take positive measures

set out in each cross-cutting article to enable effective implementation of substantive rights. For example, people cannot live independently in the community (article 19) if they do not have access to aids and appliances to facilitate personal mobility (article 20), access to social skills and habilitation supports (article 26), and general access to social infrastructure such as transport, websites, social venues etc (article 4 and 9).

7.2.6 Substantive articles

The international human rights framework derives from the foundational instruments of the UN Charter (1946) and the UDHR. These instruments provide the agenda and principles for the development of the legal framework of international human rights law. UDHR sets out the human rights that apply to all people on the basis of their humanity; they are inherent to the dignity of every human being. These human rights include the individual or substantive rights, and the collective rights that are articulated in all other human rights instruments, including the CRPD.

All human rights are regarded as universal, inalienable, indivisible, interdependent and interrelated.²⁷⁰ This means that all human beings are entitled to them, and they cannot be taken away.²⁷¹ It means that human rights are all equal in status, the denial of one right impacts on the enjoyment of other rights, and the fulfilment of one right usually depends on the fulfilment of other rights.

This means that the interpretation and implementation of individual or substantive articles of the CRPD not only requires application of the cross-cutting articles, but also recognition of the interrelationship between substantive articles. For example, CRPD article 16, *Freedom from exploitation, violence and abuse*, will depend on fulfilment of other substantive rights, such as article 12, *Equal recognition before the law*; article 14, *Liberty and security of the person*; article 15, *Freedom from torture or cruel, inhuman or degrading treatment or punishment*; article 17, *Protecting the integrity of the person*; article 19, *Living independently and being included in the community*; article 22, *Respect for privacy*; article 23, *Respect for home and family*; article 28, *Adequate standard of living and social protection*; article, 25 *Health*; and article 30, *Participation in political and public life*.

7.2.7 Non-discrimination

Article 5, *Equality and non-discrimination*, reaffirms the principle of equality of people with disability and establishes the legal standard of non-discrimination. People with disability are equal in their humanness and subjects of rights; being subjects of rights they are of equal value and worth. This is central to the human rights model of disability, which places impairment within the concept of human dignity, recognising impairment as a valued aspect of humanness. All substantive rights are to be implemented without discrimination, making article 5 critical in the interpretation of all articles.

Article 5 restates the prohibition on discrimination that is the foundation of international human rights law. It expands the scope of the legal standard of non-discrimination by embedding a new element, denial of reasonable accommodation²⁷², that had not previously been included in substantive articles of international law instruments.²⁷³ Reasonable accommodation is the provision of individualised supports and is distinct from general accessibility measures found in article 4 *General Obligations* and article 9 *Accessibility*. It also provides through its definition in article 2 *Definitions*, the defence of ‘disproportionate or undue burden’²⁷⁴, which is equivalent to the unjustifiable hardship defence contained in the *Disability Discrimination Act 1992 (Cth)*²⁷⁵ and equivalent State and Territory anti-discrimination legislation.

It also requires States Parties to take ‘specific measures’ to accelerate de facto equality of people with disability.²⁷⁶ Specific measures are positive or affirmative measures that are usually temporary.²⁷⁷ However, specific measures ‘must not result in perpetuation of isolation, segregation, stereotyping, stigmatisation or otherwise discrimination against persons with disabilities’.²⁷⁸

This reflects the long-held position at international law that separate standards for certain groups, which has the effect of marginalising or denying the human rights of that group, should not be maintained. ICERD jurisprudence unequivocally ‘prohibits the maintenance of separate rights for different racial groups, a reference to the discredited “separate but equal”²⁷⁹ doctrine’.²⁸⁰ This is reinforced by ICESCR jurisprudence in General Comment No. 13 on the right to education²⁸¹, and in *Olmstead*²⁸² in relation to the right to live independently in the community. Together, this recognises segregation as *prima facie* discrimination.²⁸³

In its 2019 periodic report to the Committee under the CRPD, Australia argued that the CRPD Committee should ‘clarify that States Parties may offer education through specialist classes or schools consistently with article 24’²⁸⁴, on the basis that ICESCR provides for parental choice. This argument is based on the same misguided arguments used during the negotiations and outlined in Section 6 above. The maintenance of segregated special schools or specialist units within mainstream schools leads to a system based on the discredited ‘separate but equal’ doctrine and thus provides a discriminatory outcome.

7.2.8 Participation of people with disability

A major achievement for the CRPD is the way that it successfully integrates ongoing involvement with civil society, and in particular people with disability. CRPD is the first human rights treaty to thoroughly engage people with disability through their DPOs in the negotiations, and to include substantive provisions outlining on-going engagement with implementation and monitoring.²⁸⁵

Article 4(3) and article 33 (3) are critical obligations for States Parties to ensure the active participation of people with disability in public life.²⁸⁶ Article 4(3) enshrines the

obligation of States Parties to ‘closely consult and actively involve persons with disabilities, including children with disabilities, through their representative organisations’ in the development and implementation of laws and policies and other decision-making processes. Article 33(3) enshrines the obligation of States Parties to ensure the involvement and participation of people with disability in the monitoring process.

‘Representative organisations’ within these articles are understood as ‘those that are led, directed and governed by persons with disabilities’ or DPOs²⁸⁷, and should be distinguished from organisations ‘for’ people with disability, such as service providers, peak professional bodies and parent and carer groups.²⁸⁸

Together, these articles address the exclusion and marginalisation of people with disability and DPOs from the development of laws, policies and programs and other decision-making processes, which have so often been established on their behalf. These articles are a direct result of the unprecedented involvement and influence of people with disability through their DPOs in the CRPD negotiation process, and their embodiment of ‘Nothing About Us, Without Us’ within the CRPD. This articulates the recognition and participation elements that are critical for transformative equality. The CRPD Committee has stated that “[t]he effective and meaningful participation of persons with disabilities, through their representative organisations, is thus at the heart of the Convention”.²⁸⁹

Transformative equality leads to the recognition that people with disability need to be fully included and equal participants in all aspects of life along with all other members of society, leading to a new motto, ‘Nothing Without Us’, as coined by the Special Rapporteur on the Rights of Persons with Disabilities.²⁹⁰

8 Human rights and violence, abuse, neglect and exploitation

8.1 Human rights analysis

Previous international human rights instruments have not been able to penetrate to the specific forms of violence, abuse, neglect and exploitation experienced by people with disability, its intersectional dimensions, nor its prevalence and legitimacy in accepted law, policy and practice frameworks of States Parties.

Shortly after the CRPD came into force in May 2008, the Special Rapporteur on Torture submitted a report to the General Assembly²⁹¹ that applied the ‘further authoritative guidance’ of the CRPD to the anti-torture framework.²⁹² The Special Rapporteur found that people with disability in a range of institutions and settings, including family homes, are frequently subjected to practices that constitute violence, abuse, neglect and exploitation, and ‘remain invisible or are being justified,

and are not recognised as torture or other cruel, inhuman or degrading treatment or punishment' (torture and ill-treatment).²⁹³

In his study, the Special Rapporteur largely applied key interdependent and interrelated substantive articles of the CRPD that, in combination, are the starting point for a human rights analysis of violence, abuse, neglect and exploitation. These articles are:

Article 12 Equal recognition before the law

Article 14 Liberty and security of the person

Article 15 Freedom from 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 12 is fundamental to the realisation of all civil, political, economic, social and cultural rights. As noted in Section 6, article 12 is essential to the autonomy of people with disability, which is the first foundational Principle of the CRPD.²⁹⁴

Article 12 affirms that 'all persons with disabilities have full legal capacity'.²⁹⁵ The CRPD is explicit that legal capacity applies universally to all people and that this principle must be upheld for people with disability on an equal basis with others. However, legal capacity is often denied or limited to people with disability through legal, policy and practice frameworks, and this has significant adverse consequences for the enjoyment of human rights under all other articles in the CRPD. The following examples highlight the effect of the denial of legal capacity in facilitating the denial of the rights contained in articles 14, 15, 16 and 17, and their interrelationship with all other human rights and fundamental freedoms:

a) In relation to article 14, denial of legal capacity can result in the detention of people with disability in mental health, aged care, or disability institutions and other facilities without the consent of the person with disability or with the consent of a substitute decision-maker. Detention in prisons, juvenile justice and forensic mental health facilities is often as a result of 'unfit to plead' or 'incapacity to be found criminally responsible' legal provisions that do not comply with article 12. These forms of detention constitute arbitrary deprivation of liberty and contravene the provisions of both article 12 and article 14.²⁹⁶ Articles 12 and 14 are also 'central to the implementation of article 19 on the right to live independently and be included in the community'²⁹⁷, so non-compliance with articles 12 and 14 will involve a violation of article 19, with these violations directly undermining the anti-torture framework.²⁹⁸

b) Forced detention in a range of institutions, facilities and settings often leads to individual incidences of violence, abuse, neglect and exploitation and to medical interventions, behaviour management, restrictive practices and other ‘treatments’ that are applied to people with disability without their consent or with the consent of a substitute decision-maker. These practices violate the security of people with disability, the right to be free from exploitation, violence and abuse, and deny the right to provide free and informed consent in contravention of articles 12, 14, 16 and article 25, *Health*.

c) Forced treatment applied by medical, health, education, behaviour management professionals, family members, support staff and others – whether in institutions or in the community – are also contraventions of articles 12, 15, 16 and 17. States Parties are obliged to end policies and repeal legal provisions that allow for forced treatment of any kind.

d) People with disability who experience violence, abuse, neglect and exploitation are often unable to seek or be afforded justice because of a denial of or limitations on their legal capacity. Guardians, support workers and service providers may make decisions to not refer matters to the police or to not proceed through the justice system. People with disability may not be believed or viewed as credible witnesses, and there may not be gender, age or culturally appropriate procedural and communication accommodations to facilitate participation in the justice system. These are violations of articles 12, 16 and article 6, *Women with disabilities*, article 7, *Children with disabilities*, and article 13, *Access to Justice*.

e) Decisions that impact on the physical and mental integrity of the person may ‘only be taken with the free and informed consent of the person concerned’.²⁹⁹ However, the mental health system can subject people with psychosocial disability to invasive and irreversible medical interventions, such as electroconvulsive therapy (ECT) without their consent, contravening articles 12, 15, 17 and 25. Many people with disability, particularly women and girls with disability and intersex people, can be subjected to forced sterilisation, forced contraception, forced abortions and other medical interventions that impact on their reproductive health and autonomy³⁰⁰, and bodily integrity, in contravention of articles 6, 7, 12, 15, 16, 17, 25 and article 23 *Respect for home and the family*.

Articles 12, 14, 15, 16 and 17 provide the key human rights standards to expose violence, abuse, neglect and exploitation, and, in their most egregious form, torture and ill-treatment within the law, policy and practice frameworks of care, treatment and protection. Underpinned by ableism, these law, policy and practice frameworks have hidden individual, systemic and legal forms of violence, abuse, neglect and exploitation. This has meant that these experiences are sanitised, normalised and legitimised within the language of care, treatment and protection.

Reforms of these frameworks have often not questioned the legitimacy of practices that, for example, allow for substitute decision-making; the application of behaviour

management practices, such as restrictive practices; the involuntary detention and treatment of people with disability; the placement of people with disability in institutional settings, including group homes; and medical interventions performed for the 'best interests' of the person without their personal consent. Many of these practices constitute legal violence, in that they can be applied lawfully to people with disability with no recourse or redress.³⁰¹ Violence, abuse, neglect and exploitation, including where it constitutes torture and ill-treatment, are downplayed as 'service incidents', 'administrative infringements', 'treatment and therapeutic interventions', 'workplace training matters', or 'behaviour management'³⁰², rather than criminal acts or human rights violations.

The CRPD Committee has provided guidance to States Parties on implementation of the CRPD in its seven General Comments, in its Guidelines on article 14, in its Concluding Observations to States Parties, and in decisions on individual communications, many of which address the interrelationship between articles 12, 14, 15, 16 and 17.

In the 2019 Concluding Observations provided to Australia, the CRPD Committee reiterated many concerns raised previously in the 2013 Concluding Observations, and made a number of further recommendations including that Australia should:

- repeal laws, policies and practices that deny or diminish legal capacity and implement a nationally consistent supported decision-making framework³⁰³;
- repeal laws and policies that allow for a deprivation of liberty on the basis of impairment and that allow for forced medical interventions, including ECT³⁰⁴;
- end the indefinite detention of people with disability and implement recommendations from previous parliamentary inquiries into indefinite detention, particularly for First Nations people with disability³⁰⁵;
- end the practice of detaining and restraining children with disability in all settings³⁰⁶;
- establish a nationally consistent legislative and administrative framework for the elimination of restrictive practices and protection from the use of psychotropic medications, physical restraints and seclusion³⁰⁷;
- introduce measures to protect people with disability from abuse in juvenile justice and adult gaols;³⁰⁸
- ensure that DPOs can effectively engage in the establishment of the National Preventive Mechanism (NPM) under the Optional Protocol to the Convention against Torture (OPCAT)³⁰⁹;
- establish a national oversight, complaint and redress mechanism for all people with disability who have experienced violence, abuse, neglect and exploitation in

all settings, and not just for participants of the National Disability Insurance Scheme (NDIS)³¹⁰;

- ensure gender and age sensitive services to address gender-based violence³¹¹;
- adopt legislation prohibiting forced sterilisation of children and adults with disability, and prohibiting forced contraception and forced abortion³¹²; and
- prohibit unnecessary, invasive and irreversible medical interventions on intersex children before the age of consent.³¹³

8.2 Human rights interpretation

While in combination articles 12, 14, 15, 16 and 17 provide the focal point to expose violence, abuse, neglect and exploitation, the interpretative matrix provides the components to identify the nuance, complexity and depth of the experience of people with disability. Using the CRPD to examine violence, abuse, neglect and exploitation in particular areas or systems, such as education, living arrangements, health and employment, cannot be reduced to understanding the provisions of one or two CRPD articles.

The interpretative matrix enables a comprehensive interrogation of the experience of violence, abuse, neglect and exploitation to assist States Parties to expose the mechanisms and elements of law, policy and practice frameworks that enable these human rights violations, and to identify the measures and standards that need to be implemented to achieve compliance.

For example, an examination of violence, abuse, neglect and exploitation in the context of education (article 24) should recognise that:

- segregated education in special schools or special classes in mainstream schools is discrimination (article 5);
- the application of restrictive practices in schools is a form of violence (article 16) and in many cases may constitute torture and ill-treatment (article 15);
- some forms of bullying and harassment against children with disability (articles 7 and 16) could also constitute gender based violence (articles 6 and 16), racism or other forms of intersectional discrimination (preamble (p) and article 5);
- children and adults with disability should be actively involved in the development of anti-violence and anti-bullying policies and programs within the education system (articles 4(3)); and

- educational opportunities should be provided for children with disability to develop their decision-making skills (article 12) and their knowledge about the right to bodily integrity (article 17), and the right to be free from violence, abuse, neglect and exploitation (article 16).

8.3 Interpretative declarations

The jurisprudence of the CRPD Committee, and increasingly other UN treaty bodies and mechanisms, have elaborated on the specific context and forms of violence, abuse, neglect and exploitation experienced by people with disability. Aside from the reports of the Special Rapporteur on Torture, there have been reports from the Special Rapporteur on Health and the Special Rapporteur on the Rights of Persons with Disabilities; general comments and concluding observations from other UN treaty bodies, particularly the CEDAW Committee, the CRC Committee, the ICESCR Committee and the Human Rights Committee; and recommendations from the Human Rights Council following Australia's 2011 and 2015 UPR. This jurisprudence forms part of the normative content for the legal standard established by the CRPD, and provides further guidance to States Parties on CRPD interpretation and compliance.

A significant barrier to the necessary reform of law, policy and practice frameworks is the interpretative declarations³¹⁴ on CRPD articles 12³¹⁵ and 17³¹⁶ made by Australia when it ratified the CRPD. An interpretative declaration is a unilateral statement made by a State Party to clarify how a specific article or articles is interpreted by that State Party at a given time. It does not seek to modify the legal effect of a treaty.³¹⁷

Jurisprudence on specific issues and articles is elaborated by the CRPD Committee progressively, with a view to guiding implementation. This is premised on States Parties engaging with the CRPD Committee, which is the objective of the periodic reporting process and the constructive dialogue. The dynamic nature of the CRPD and the evolving concept of disability means that continual monitoring and review of obligations is necessary so that States are not fixed or static in their approach to implementation of the CRPD. However, despite the jurisprudence elaborated over several years to provide authoritative guidance on implementation of articles 12 and 17, and despite recommendations by the CRPD Committee for Australia to withdraw its interpretative declarations³¹⁸, Australia continues to retain them. This has meant that Australia's interpretative declarations restrict implementation of the CRPD, prevent reform, and allow for human rights violations including the denial of legal capacity, arbitrary and indefinite detention, and forced treatments and medical interventions.³¹⁹

For example, the CRPD Committee has recommended to Australia to repeal its laws, policies and practices that deny or diminish the legal capacity of people with disability, and to shift from substitute decision-making to supported decision-making

systems. In its most recent periodic report on CRPD implementation to the UN, Australia noted that some State and Territory measures recognise supported decision-making, but consistent with its interpretative declaration on article 12, Australia reiterated that it understands the CRPD to allow 'for fully supported or substitute decision-making where necessary, as a last resort and subject to safeguards'.³²⁰ Australia's interpretative declaration on article 12 impacts on its implementation of other UN recommendations, such as the recommendations from numerous UN treaty bodies and mechanisms over the past decades that have called on Australia to end the practice of forced sterilisation, particularly for women and girls with disability.³²¹ The Special Rapporteur on Torture has stated that 'Forced sterilisation is an act of violence, a form of social control, and a violation of the right to be free from torture and cruel, inhuman, or degrading treatment or punishment'.³²² Australia has consistently maintained, including in its most recent periodic report on the CRPD, that sterilisation that is 'non-therapeutic, invasive and irreversible' can be authorised by the Family Court 'in the absence of valid consent'.³²³ In relation to article 17, Australia reiterated in its most recent periodic report on the CRPD that it understands its compliance as allowing 'compulsory assistance or treatment where necessary, as a last resort and subject to safeguards'.³²⁴ This allows Australia to continue to allow medical treatment, including invasive and irreversible treatments such as ECT, without 'free, prior and informed consent if the person does not have capacity and the treatment to be provided is the least restrictive method'.³²⁵

Despite the concluding observations from the CRPD Committee, Australia cannot meet its obligations while it continues to rely on the interpretative declarations. The continued reliance on the interpretative declarations to support existing legal, policy and practice frameworks that do not adhere to the CRPD, and a failure to withdraw these interpretative declarations, suggests they could be in fact 'conditional declarations'.³²⁶ If the declarations are conditional, in that Australia only wants to be bound to the CRPD if its interpretation is viewed as compliant, then Australia is seeking to modify the legal effect of article 12 and article 17 of the CRPD, which means that these interpretative declarations could be viewed as operating as de facto reservations.³²⁷

The interpretative declarations are tools that support the legal, policy and practice framework underpinned by ableism and these tools enable violence, abuse, neglect and exploitation. During the 2019 constructive dialogue, the CRPD Committee reiterated its concerns regarding the negative impact on social transformation of the interpretative declarations, and stressed that the withdrawal of these interpretative declarations was an urgent measure that Australia needed to take.³²⁸

9 Conclusion

The CRPD is the roadmap for the social transformation required to end the inequality, discrimination and segregation that are the enablers of the violence, abuse, neglect and exploitation experienced by people with disability. As noted by Commissioner Mason from the Royal Commission, this is the point of reference that Australia needs to leave behind in creating a new future for people with disability. The roadmap forms the foundation to assist the Royal Commission to conduct its investigations, make findings and determine recommendations.

This will require embracing the legal and policy standards provided by the CRPD to make the conceptual shift that impairment is a valued part of human diversity and human dignity, that disability is socially constructed, and that transformative equality is required to dismantle underlying power relations in law, policy and practice frameworks. If the focus continues to be on fixing, reforming or maintaining existing systems that are built on ableism, the necessary social transformation required by the CRPD will never be understood or realised.

The interpretative matrix of the CRPD, the CRPD Committee jurisprudence, and the jurisprudence of other UN human rights treaty bodies and mechanisms, provide the interpretative and implementation guidance for Australia to develop the nationally consistent, comprehensive plan of action required to transition from ableist law, policy and practice frameworks to ones that respect, protect, and fulfil the rights of people with disability. This will require accepting the critical importance of the human rights normative framework and making concerted efforts to implement UN recommendations. This includes identifying concrete measures, realistic timeframes, appropriate resources, and measurable outcomes that penetrate across government and jurisdictional responsibilities.

The motto – ‘Nothing About Us, Without Us’ – needs to be central to this endeavour, with people with disability and DPOs involved as valued partners in full recognition of the integral role played by the disability movement in changing the human rights normative standards for people with disability and in negotiating the CRPD. The social transformation needs to include the recognition that impairment is valued as part of human diversity and human dignity, and therefore people with disability are critical to all aspects of life, leading to a new motto, ‘Nothing Without Us’.

Appendix A Method

The report is informed by a review of national and international primary materials relating to the CRPD and other human rights mechanisms and academic literature; a contextual and legal analysis of international law and policy that inform and underpin the principles advanced by the CRPD; and a review and analysis of UN archives to chart the development of the CRPD, in many cases drawing on the authors' own personal archives. The report also draws on the lead author's experience and observations during the negotiations and subsequent meetings of the parties to the Convention. The draft report has been peer reviewed as part of the DRCs quality assurance process and in line with academic practice.

Document review

The review examined national and international primary materials relating to the CRPD and other human rights mechanisms, supplemented with both academic literature and other published materials. The review included sources from the disciplines of social movements, law (specifically human rights law), social policy, and health.

The review was conducted using relevant databases and catalogues, with publications identified from a number of high-profile disability and/or human rights journals. The review included documents available in English from the 1970s to current.

Contextual analysis

In addition to a review of the academic literature, further analysis was undertaken drawing on international law, social and public policy that informed and underpins the principles advanced by the CRPD. Similar to a grey literature review, the contextual analysis reviewed other publications, legislation and case law that informed the development and ongoing implementation of the CRPD.

The review that informed the contextual analysis used similar search strategies to the literature review above, conducted via a Google search and the UN Human Rights Treaty body databases. A snowballing technique was also used, searching the citations in high profile disability reports to ensure the search was comprehensive.

As before, the review was limited to sources publicly available in English from the period the 1970s to current.

Examples of contextual data include:

- Documents relating to the Disability Royal Commission
- Statements by representative organisations
- Australian Commonwealth Senate Inquiries, NSW Ombudsman Reports

- Media
- UN Treaty Body jurisprudence
- UN publications
- Case law (individual communications).

Archival research and analysis to chart the development of the CRPD

The researchers accessed the archives of the UN Ad Hoc Committee on the CRPD to review daily summaries, government interventions and NGO contributions from the period 2002 to 2006. This includes publicly available information, as well as drawing on personal archives and experiences from the negotiation process (the latter references as observations). Examples of archival material include:

- Statements made at Ad Hoc Committee meetings
- Proposals made to the Ad Hoc Committee
- Reports of the special rapporteur
- Media releases.

Drawing on this data, the researchers were able to chart the development of the CRPD through the drafting and negotiation process.

Analysis and reporting

The research team presented a draft of this report to the Disability Royal Commission on 26th March 2020. As part of its internal quality assurance processes, the report was subject to peer review that includes review by the Research Director, external peer review, and review by the Commissioners.

The research team addressed comments and queries identified by the peer review process and the Commission, and this report is the final output from this process.

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- ² This report uses the singular term 'disability' rather than the plural 'disabilities' to adhere to the human rights model of disability which is discussed throughout the report; and uses the more common term 'people' instead of the specific legal use of 'persons' used in the CRPD. The use of the term 'people with disability' is widely accepted in the Australian policy context.
- ³ In particular, see CRPD article 14, *Liberty and security of the person*; article 15, *Freedom from 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*.
- ⁴ Australia has ratified seven of the nine core international human rights treaties: *International Covenant on Civil and Political Rights* (ICCPR); *International Covenant on Economic, Social and Cultural Rights* (ICESCR); *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD); *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); *Convention on the Rights of the Child* (CRC); and *Convention on the Rights of Persons with Disabilities* (CRPD).
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⁵⁰ See for example Graeme Innes, 'PWD: past, present and future' (Speech, 16 July 2011) <<https://pwd.org.au/about-us/our-history/our-30th-anniversary/graeme-innes-30th-anniversary-speech/>>; Joan Hume, 'Where it all began and the Birth of the Disability Rights Movement in Australia'

(Speech, 16 July 2011) <<https://pwd.org.au/about-us/our-history/our-30th-anniversary/joan-hume-30th-anniversary-speech/>>; 'Defiant Lives' (Fertile Films 2017) <<https://iview.abc.net.au/show/defiant-lives>>.

⁵¹ SelfAdvocateNet, 'History of the Self-Advocate Movement' (Web Page) <<https://selfadvocatenet.com/our-history/>>.

⁵² In Australia, Reinforce, a self-advocacy organisation run by and for people with intellectual disability started in 1981 in Victoria <<http://reinforce.org.au/about-reinforce/>>.

⁵³ 'Origins of the c/s/x movement' (Mind Freedom International, 2019) <<https://mindfreedom.org/kb/voices-for-choices/origins-of-the-c-s-x-movement-voices-for-choices/>>; Merinda Epstein, 'The Consumer Movement in Australia – A memoir of an old campaigner' (June 2013) *Our Consumer Place* <<https://www.ourcommunity.com.au/files/OCP/HistoryOfConsumerMovement.pdf>>.

⁵⁴ See for example, Sobsey, D., *Violence and Abuse in the Lives of People with Disabilities. The End of Silent Acceptance?* (Paul H. Brookes Publishing Co, Baltimore, 1994); Chenoweth, L., 'Invisible Acts: Violence Against Women With Disabilities', in *Australian Disability Review* (1993) pp. 22-28; Conway, R. F., Bergin, L. and Thornton, K., *Abuse and adults with intellectual disability living in residential services* (National Council on Intellectual Disability, 1996).

⁵⁵ Kayess, R. & Smith, B. (2017) 'Human Rights Charters and Disability', in Colin Campbell (ed) *Australian Charters of Rights a Decade on*. Federation Press. pp 5–6.

⁵⁶ James I. Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press, 1998).

⁵⁷ See for example, Kayess, R. and French, P. 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008); and White, J. and Young, K. (2008), 'Nothing About Us Without Us – securing the Disability Rights Convention' in *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security* edited by Jody Williams, Stephen D. Goose, Mary Wareham.

⁵⁸ General Assembly, *Declaration on the Rights of Mentally Retarded Persons*, UN Doc A/RES/2856 (1971).

⁵⁹ General Assembly, *Declaration on the Rights of Disabled Persons*, UN Doc A/RES/3447 (1975).

⁶⁰ See for example, Disabled Peoples' International (DPI), 'Position Paper Regarding a New International Human Rights Convention for Disabled People', February 2003 <<https://www.un.org/esa/socdev/enable/rights/contrib-dpi.htm>>; European Disability Forum, 'The EDF Contribution to the Second Ad Hoc Committee to consider proposals for a United Nations Convention to Protect and Promote the Rights of Persons with Disabilities', May 2003 <<https://www.un.org/esa/socdev/enable/rights/contrib-edfvision.htm>>; International Disability Alliance (IDA), 'Towards a UN Disability Convention: Statement for 2nd Ad Hoc Committee Session', 2 March 2003, <<https://www.un.org/esa/socdev/enable/rights/contrib-ida.htm>>.

⁶¹ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 3.

⁶² While this report focuses on impairment as part of human dignity, Degener posits six propositions to explain how the human rights model of disability differs from the social model of disability.

⁶³ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 8.

⁶⁴ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 8.

⁶⁵ Phillip French, *Human Rights Indicators for People with Disability: A resource for disability activists and policy makers*, Queensland Advocacy Incorporated, p. 37.

⁶⁶ Gerard Quinn and Theresia Degener, *Human Rights and Disability*, New York and Geneva: United Nations, (2002) p.14.

⁶⁷ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 8.

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- ⁶⁸ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 3.
- ⁶⁹ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 8.
- ⁷⁰ Degener argues that the human rights model of disability encompasses the lived reality of impairment, and therefore addresses the critiques of the social model and its omission of the experience of impairment. Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, pp 6–8. See also, Kayess and French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, pp 7–8.
- ⁷¹ Fiona Kumari Campbell, 'Exploring internalised ableism using critical race theory', *Disability and Society*, (2008) 23 (2), p. 151.
- ⁷² Martha Minow, *Making All the Difference: Inclusion, exclusion, and American Law* (Cornell University Press, 1990), Chapter 2, pp 70–76.
- ⁷³ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, pp 1–34.
- ⁷⁴ Senate Community Affairs References Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, 25 November 2015, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report>.
- ⁷⁵ Statement of Rosemary Kayess, written evidence to the Disability Royal Commission, Public Hearing, Melbourne, 6 December 2019.
- ⁷⁶ Simi Linton, *Claiming Disability: Knowledge and Identity* (NYU Press, 1998), Chapter 3.
- ⁷⁷ Quinn, G. and Degener, T. (2002) *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability*. UN, New York and Geneva, p. 1.
- ⁷⁸ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8. See also Degener, T. & Quinn, G. (2002) *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability*. UN, New York and Geneva.
- ⁷⁹ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008), p. 8.
- ⁸⁰ Due to its adoption and application throughout the world, the *Universal Declaration of Human Rights* has come to form part of customary international law and is now considered binding in nature.
- ⁸¹ United Nations, *Convention on the Rights of the Child* (CRC) Treaty Series , vol. 1577, p. 3 (entered into force 2 September 1990), article 2.
- ⁸² Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, p. 12.
- ⁸³ CRC article 23(2).
- ⁸⁴ States Parties are member States of the UN that have ratified particular treaties or conventions, in this case the CRC.
- ⁸⁵ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, pp 14–15.
- ⁸⁶ Human Rights Committee, *General Comment No. 18: Non-Discrimination* (1989) HRI/GEN/1/Rev 8, p. 185, especially at para 10.
- ⁸⁷ Committee on the Elimination of Discrimination against Women, *General recommendation No. 18: Disabled women*, tenth session, contained in UN Doc A/46/38 (1991).

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- ⁸⁸ Committee on Economic, Social and Cultural Rights, *General comment No. 5: Persons with Disabilities*, Eleventh session, contained in UN Doc E/1995/22 (1994).
- ⁸⁹ Committee on Economic, Social and Cultural Rights, *General comment No. 5: Persons with Disabilities*, Eleventh session, contained in UN Doc E/1995/22 (1994) para 15.
- ⁹⁰ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, p. 16.
- ⁹¹ See for example article 4 of the *Declaration on the Rights of Mentally Retarded Persons* that continues to provide qualified support for institutional accommodation for persons with disability; and article 1 of the *Declaration on the Rights of Disabled Persons* that incorporates an individual deficit conceptualisation of disability.
- ⁹² General Assembly, UN Doc A/RES/31/123.
- ⁹³ General Assembly, UN Doc A/RES/31/123.
- ⁹⁴ General Assembly, *World Programme of Action Concerning Disabled Persons* (1982) A/RES/37/52.
- ⁹⁵ General Assembly, *World Programme of Action Concerning Disabled Persons* (1982) A/RES/37/52, para 12.
- ⁹⁶ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and Disabled Persons: Report by Special Rapporteur, Leandro Despouy*, UN Doc E/CN.4/Sub.2/1991/31 (1993) <<http://www.un.org/esa/socdev/enable/dispaperdes0.htm>>.
- ⁹⁷ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, p. 18.
- ⁹⁸ Office of the High Commissioner for Human Rights, *Principles for the protection of persons with mental illness and the improvement of mental health care*, Adopted by General Assembly resolution 46/119 of 17 December 1991 <https://www.who.int/mental_health/policy/en/UN_Resolution_on_protection_of_persons_with_mental_illness.pdf>.
- ⁹⁹ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, p. 18.
- ¹⁰⁰ The term 'psychosocial disability' was developed during the CRPD negotiations in order to shift from the medical model terminology of 'mental illness' to a social model recognition of the interaction between psychological and social and cultural components of disability. See World Network of Users and Survivors of Psychiatry, *Implementation Manual for the United Nations Convention on the Rights of Persons with Disabilities* (February 2008), p. 9. <https://www.wnusp.net/documents/WNUSP_CRPD_Manual.pdf>
- ¹⁰¹ World Users and Survivors of Psychiatry, Position paper, <<http://www.wnusp.net/index.php/position-paper-on-principles-for-the-protection-of-persons-with-mental-illness.html>>.
- ¹⁰² See for example, Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8; T Degener, 'Disabled Persons and Human Rights: The Legal Framework,' in *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*. T. Degener & Y. Koster-Dreese, (eds), Dordrecht, Boston; London: Martinus Nijhoff Publishers, 1995, pp 9–39; B. Lindqvist, 'Standard Rules in the Disability Field – A New United Nations Instrument,' in T. Degener and Y. Koster-Dreese (eds), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, Dordrecht, Boston; London: Martinus Nijhoff Publishers (1995), pp 63–68.
- ¹⁰³ General Assembly Resolution 48/96, UN GAOR, 48th Sess., Supp. No 49, Annex at 202–11, UN Doc A/RES/48/96.
- ¹⁰⁴ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, p.19.
- ¹⁰⁵ Proposals were sponsored by Italy in 1982 and 1897 and by Sweden in 1989; see Degener, T. & Quinn, G. (2002) *Human Rights and Disability: The current use and future*

potential of United Nations human rights instruments in the context of disability. UN, New York and Geneva, p. 30.

¹⁰⁶ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8; see Fifty-Fourth Session of The Commission On Human Rights (16 March–24 April 1998) Statement on Behalf of Australia, Canada and New Zealand on Improving the Functioning of the Human Rights Treaty Bodies. Item 14c, Improving The Functioning Of The Human Rights Treaty Bodies; also, General Assembly, 'Report of an international meeting of experts on the theme of treaty body reform', UN Doc: A/58/123. This meeting was held at Malbun, Liechtenstein, from 4–7 May 2003, and was organised jointly by the Office of the United Nations High Commissioner for Human Rights and the Government of Liechtenstein.

¹⁰⁷ This is reflective of the approach of ICERD, which sets out the elements of racial discrimination and applies this to existing human rights and fundamental freedoms. It requires States to remove discriminatory laws based on race and to respect the human rights of all people.

¹⁰⁸ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, pp 18–19.

¹⁰⁹ General Assembly, *United Nations Millennium Declaration*, 55th session, agenda item 60 (b), UN Doc A/RES/55/2 (18 September 2000) <<https://undocs.org/A/RES/55/2>>.

¹¹⁰ See for example, Annan, K (2000) *We the Peoples: The Role of the United Nations in the 21st Century*, United Nations < https://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf >.

¹¹¹ Shaun Grech, 'Disability and Poverty: Complex Interactions and Critical Reframings' in S. Grech, K. Soldatic (eds), *Disability in the Global South*, Springer International Publishing Switzerland (2016), p. 219.

¹¹² Millennium Development Goals < <https://www.un.org/millenniumgoals/>>.

¹¹³ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, UN Doc A/CONF189/12
https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.189_12.pdf.

¹¹⁴ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, UN Doc A/CONF 189/12
https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.189_12.pdf. Chapter I, para. 180.

¹¹⁵ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, p. 17.

¹¹⁶ *Resolution 56/168 Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities*, adopted on the report of the Third Committee A/56/583/Add.2, 19 December 2001, <<http://www.un.org/esa/socdev/enable/disA56168e1.htm>>.

¹¹⁷ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, pp 20–21.

¹¹⁸ The sponsors of *Resolution 56/168 Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities* were Bolivia, Chile, Columbia, Congo, Costa Rica, Cuba, Democratic Republic of the Congo, Dominican Republic, Ecuador, El Salvador, Guatemala, Jamaica, Mexico, Morocco, Nicaragua, Panama, Philippines, Sierra Leone, South Africa and Uruguay, UN Doc A/RES/56/168, 26 February 2002.

¹¹⁹ General Assembly, *Resolution 56/168 Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities*, adopted on the report of the Third Committee A/56/583/Add.2, 19 December 2001, <<http://www.un.org/esa/socdev/enable/disA56168e1.htm>>.

¹²⁰ Member States are those governments that are members of the UN.

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- ¹²¹ General Assembly, *Resolution 56/168 Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities*.
- ¹²² The Commission on Human Rights was renamed the Human Rights Council by the General Assembly in March 2006.
- ¹²³ Commission on Human Rights, 58th session, resolution 2002/61 para 15.
- ¹²⁴ General Assembly, *Accreditation and participation of non-governmental organisations in the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/RES/56/510 (23 July 2002).
- ¹²⁵ Decisions have the same status as resolutions, but their content is focused on procedural matters of the UN.
- ¹²⁶ General Assembly, *Participation of persons with disabilities in the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, Fifty-sixth session, Agenda items 8 and 119 (b), UN Doc Decision 56/474 (23 July 2002).
- ¹²⁷ General Assembly, *Accreditation and participation of non-governmental organisations in the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/RES/56/510 (23 July 2002).
- ¹²⁸ General Assembly, *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, A/57/357, Part IV <<https://www.un.org/esa/socdev/enable/rights/adhoca57357e.htm>>.
- ¹²⁹ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, footnote 10, p. 2.
- ¹³⁰ Evidence from the author, Rosemary Kayess.
- ¹³¹ General Assembly, *Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities*, UN Doc: A/RES/57/229 (18 December 2002).
- ¹³² Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 2; also, *United Nations Disability Inclusion Strategy* (2019) <https://www.un.org/en/content/disabilitystrategy/assets/documentation/UN_Disability_Inclusion_Strategy_english.pdf>.
- ¹³³ CRPD Negotiations daily summaries and contributions: Australian Delegation, *Statement*, second session, agenda item 5, Ad Hoc Committee of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Persons with Disabilities, 16 to 27 June 2003 <<https://www.un.org/esa/socdev/enable/rights/contrib-australia.htm>>.
- ¹³⁴ CRPD Negotiations daily summaries and contributions: Australian Delegation, *Statement*, second session, agenda item 5, Ad Hoc Committee of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Persons with Disabilities, 16–27 June 2003 <<https://www.un.org/esa/socdev/enable/rights/contrib-australia.htm>>.
- ¹³⁵ CRPD Negotiations daily summaries and contributions: Australian Delegation, *Statement*, second session, agenda item 5, the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Persons with Disabilities, 16–27 June 2003 <<https://www.un.org/esa/socdev/enable/rights/contrib-australia.htm>>.
- ¹³⁶ Australia did not agree to the development of a disability convention until October 2003.
- ¹³⁷ Ad Hoc Committee, *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/58/118 & Corr.1 (New York, 16–27 June 2003), part IV, item 15.

¹³⁸ Ad Hoc Committee, *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc A/58/118 & Corr.1 (New York, 16–27 June 2003), part IV, item 15.

¹³⁹ While the Australian Government was not a member of the Working Group, two Australians provided expertise – Professor Andrew Byrnes provided technical advice to the Working Group Chair, and Rosemary Kayess was a representative for the Rehabilitation International delegation on the Working Group.

¹⁴⁰ Working Group negotiations drew largely from two draft texts, one submitted by Mexico and another, known as the Bangkok Draft, was developed through the UN Economic and Social Commission for Asia and the Pacific (UNESCAP) with significant Australian participation, including from the Australian DPO, People with Disability Australia.

¹⁴¹ Report of the Working Group to the Ad Hoc Committee, UN Doc A/AC.265/2004/WG/1 (January 2004), Annex 1.

¹⁴² Letter dated 7 October 2005 from the Chairman to all members of the Committee, Seventh session, 16-27 January 2006, UN Doc A/AC.265/2006/1
<<https://www.un.org/esa/socdev/enable/rights/ahcchairletter7oct.htm>>.

¹⁴³ United Nations Department of Economic and Social Affairs, 'Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (Web Page)
<<https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html>>.

¹⁴⁴ Observation by author, Rosemary Kayess.

¹⁴⁵ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (1785).

¹⁴⁶ United Nations (1948), *Universal Declaration of Human Rights*, GA res. 217A (III), UN Doc A/810 at 71 (1948), article 1.

¹⁴⁷ This understanding is contained in the CRPD, preamble (e) and article 1, Purpose.

¹⁴⁸ This concept is contained in the CRPD, preamble (h), preamble (i), article 1, article 3(a) and article 3(d).

¹⁴⁹ These concepts are contained in the CRPD preamble (n) and form part of the underpinning principles of the CRPD, article 3(a) and (c).

¹⁵⁰ *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948), article 6.

¹⁵¹ ICCPR article 12.

¹⁵² CRPD article 12.

¹⁵³ Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) Article 12: Equal recognition before the law*, Eleventh session, UN Doc CRPD/C/GC/1 (19 May 2014), para 1.

¹⁵⁴ Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) Article 12: Equal recognition before the law*, Eleventh session, UN Doc CRPD/C/GC/1 (19 May 2014), para 8.

¹⁵⁵ See Genevieve Lloyd, *The Man of Reason – 'Male' and 'Female' in Western Philosophy* (University of Minnesota Press, 1984).

¹⁵⁶ See Genevieve Lloyd, *The Man of Reason – 'Male' and 'Female' in Western Philosophy* (University of Minnesota Press, 1984).

¹⁵⁷ Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) Article 12: Equal recognition before the law*, Eleventh session, UN Doc CRPD/C/GC/1 (19 May 2014), para 6.

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- ¹⁵⁸ This is an enduring concept of rationality that is still experienced by women today, for example, systems of male guardianship still exist in Saudi Arabia.
- ¹⁵⁹ *Convention on the Elimination of All Forms of Discrimination against Women*, article 15(2).
- ¹⁶⁰ G. Quinn, *Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD* (Concept Paper for the Harvard Law School Project on Disability Conference, Cambridge, 20 February 2010), p. 5.
- ¹⁶¹ Australian Human Rights Commission, 'Draft General Comment on Article 12 of the CRPD' (Submission to the UN Committee on the Rights of Persons with Disabilities, 28 February 2014), p. 5.
- ¹⁶² Gerard Quinn, *An Ideas Paper – 'Rethinking Personhood: New Directions in Legal Capacity Law & Policy.'* Or How to Put the 'Shift' back into 'Paradigm Shift', Centre for Disability Law & Policy, National University of Ireland, Galway Ireland, (29 April 2011), p. 11.
- ¹⁶³ Summary of views of Japan, *Daily summary of discussion at the fifth session, 25 January 2005* <<https://www.un.org/esa/socdev/enable/rights/ahc5sum25jan.htm>>.
- ¹⁶⁴ Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) article 12: Equal recognition before the law*, Eleventh session, UN Doc CRPD/C/GC/1 (19 May 2014), para 12–15.
- ¹⁶⁵ Summary of views of Disabled People's International, *Daily summary of discussions related to Article 9 Equal Recognition as a Person Before the Law*, 26 May 2004 <<https://www.un.org/esa/socdev/enable/rights/ahc3sum9.htm>>.
- ¹⁶⁶ Summary of views of World Blind Union, *Daily summary of discussions related to Article 9 Equal Recognition as a Person Before the Law*, 26 May 2004 <<https://www.un.org/esa/socdev/enable/rights/ahc3sum9.htm>>.
- ¹⁶⁷ Letter dated 7 October 2005 from the Chairman to all members of the Committee, seventh session, 16–27 January 2006, UN Doc A/AC.265/2006/1.
- ¹⁶⁸ Letter dated 7 October 2005 from the Chairman to all members of the Committee, seventh session, 16–27 January 2006, UN Doc A/AC.265/2006/1.
- ¹⁶⁹ CRPD article 12(2).
- ¹⁷⁰ The finalised text for these negotiations is contained in CRPD article 19, Living independently and being included in the community and in CRPD article 24, Education, and elaborated through *General comment No. 4 (2016) on the right to inclusive education* and *General comment No. 5 (2017) on living independently and being included in the community*.
- ¹⁷¹ For example, Landmine Survivors Network argued that the draft article on violence and abuse should make explicit reference to the higher risks for violence within 'institutionalisation and care-giving situations', *Daily summary related to Draft Article 12 Freedom from Violence and Abuse*, Volume 3 #8, 14 January 2004 <<https://www.un.org/esa/socdev/enable/rights/wgsuma12.htm>>.
- ¹⁷² For example, Occupy for Animals and The 'Making the Link' Study Group, 'The Infirm' (Web Page) *Suffering in Romania* <sufferinginromania.weebly.com/the-infirm.html>; Mental Disability Rights International, *Human Rights and Mental Health – Uruguay* (Mental Disability Rights International, 1995); Mental Disability Rights International, *Children in Russia's Institutions: Human Rights and Opportunities for Reform – Findings and Recommendations of a UNICEF Sponsored Fact-Finding Mission to the Russian Federation* (Mental Disability Rights International, 1999); Roger West & Joanna Quilty, *Suffer the children: the Hall for Children Report: Final Report of an Inquiry by the Community Services Commission into the Quality and Standard of Care at the Hall for Children, a Non-Governmental Residential Service for Children and Adults with Disabilities* (NSW Community Services Commission, 1997).
- ¹⁷³ For example, during the negotiations, Canada raised the view that 'While there should be a strong presumption of individual choice we "must not close door" to those hard situations where a balance is necessary', in 'Daily Summary related to Draft Article 15 Right to Live in and be Part of the

Community', Volume 3, #5, 9 January 2004
<<https://www.un.org/esa/socdev/enable/rights/wgsuma15.htm>>.

¹⁷⁴ Report of the Working Group to the Ad Hoc Committee, Draft Article 15 Living Independently and Being Included in the Community, UN Doc A/AC.265/2004/WG/1 (January 2004), Annex 1.
<<https://www.un.org/esa/socdev/enable/rights/ahcwgreporta15.htm>>.

¹⁷⁵ Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community*, UN Doc: CRPD/C/GC/5, para 16(c).

¹⁷⁶ Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community*, UN Doc: CRPD/C/GC/5, para 6.

¹⁷⁷ UDHR article 29.

¹⁷⁸ ICERD article 5(d)(i).

¹⁷⁹ CEDAW article 15(4).

¹⁸⁰ CRC article 9(1).

¹⁸¹ CRPD article 19(b).

¹⁸² Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community*, UN Doc: CRPD/C/GC/5, para 15.

¹⁸³ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 5.

¹⁸⁴ Observations by the author, Rosemary Kayess, who was the facilitator of article 24 negotiations.

¹⁸⁵ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, pp 10–11.

¹⁸⁶ For example, *Daily Summary related to Draft Article 17 Education*, Volume 3, #6, 12 January 2004 <<https://www.un.org/esa/socdev/enable/rights/wgsuma17.htm>>.

¹⁸⁷ See summary of interventions made by People with Disability and Inclusion International in Daily Summary of discussions related to Article 17 Education, Third Session of the Ad Hoc Committee, Volume 4, #5, 28 May 2004.
<<https://www.un.org/esa/socdev/enable/rights/ahc3sum17.htm>>.

¹⁸⁸ Kayess, R. & Green, J. (2016) 'Today's lesson is on diversity: A reflection on inclusive education' in E. Flynn & P. Blanck (eds) *A Research Companion on Disability Law*. London, New York Ashgate.

¹⁸⁹ Standard Rules on the Equalization of Opportunities for Persons with Disabilities A/RES48/96 of 20 December 1993, Rule 7(8).

¹⁹⁰ Kayess, R. & Green, J. (2016) 'Today's lesson is on diversity: A reflection on inclusive education' in E. Flynn & P. Blanck (eds) *A Research Companion on Disability Law*. London, New York Ashgate.

¹⁹¹ UNESCO Salamanca Statement and Framework for Action on Special Needs Education (1994) 3(b)
<<https://unesdoc.unesco.org/ark:/48223/pf0000098427>>.

¹⁹² Committee on the Rights of the Child, 'Children with Disabilities', CRC/C/66 (1998), Annex V, para.338(d)
<<https://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommandations/disabled.pdf>>.

¹⁹³ *Daily Summary related to Draft Article 17 Education*, Volume 3, #6, 12 January 2004. <<https://www.un.org/esa/socdev/enable/rights/wgsuma17.htm>>; Report of the Working Group to the Ad Hoc Committee, Draft Article 17 Education, UN Doc A/AC.265/2004/WG/1 (January 2004), Annex 1 <<https://www.un.org/esa/socdev/enable/rights/ahcwgreporta17.htm>>.

¹⁹⁴ UDHR article 26.

¹⁹⁵ ICESCR article 13(3).

¹⁹⁶ Kayess R (2019) 'Drafting Article 24 of the Convention on the Rights of Persons with Disabilities' in G. De Beco, S. Quinlivan, and J. Lord, (eds) *The Right to Inclusive Education in International Human Rights Law*. Cambridge University Press New York, p. 136.

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- ¹⁹⁹ High Commissioner on National Minorities, *The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note*, October 1996, Paragraph 8, <https://www.osce.org/files/f/documents/e/2/32180_0.pdf>.
- ²⁰⁰ Kayess R (2019) 'Drafting Article 24 of the Convention on the Rights of Persons with Disabilities' in G. De Beco, S. Quinlivan, and J. Lord, (eds) *The Right to Inclusive Education in International Human Rights Law*. Cambridge University Press New York, p.138.
- ²⁰¹ Committee on Economic, Social and Cultural Rights, *General Comment No 13, The right to education (art 13 of the Covenant)* (Twenty-first session, 1999), UN Doc E/2000/22 at 111 (2000) ('CESCR, General Comment No 13').
- ²⁰² Kayess R (2019) 'Drafting Article 24 of the Convention on the Rights of Persons with Disabilities' in G. De Beco, S. Quinlivan, and J. Lord, (eds) *The Right to Inclusive Education in International Human Rights Law*. Cambridge University Press New York, p.135.
- ²⁰³ CRPD article 24 (1)(a).
- ²⁰⁴ CRPD article 24 (2)(e).
- ²⁰⁵ *Vienna Convention on the Law of Treaties* (1969), United Nations, <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> article 26.
- ²⁰⁶ *Vienna Convention on the Law of Treaties* (1969), United Nations, <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> article 26.
- ²⁰⁷ Articles 34–39 of CRPD set out the rules governing the establishment and the program of work <<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>>
- ²⁰⁸ The optional protocol, a separate treaty, provides that States Parties to the protocol recognise the jurisdiction of the Committee, receive and consider communications (complaints) from individuals or groups, enquire into grave or systemic human rights violations, including undertaking State visits with the consent of the State concerned, <<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx>>.
- ²⁰⁹ *Vienna Convention on the Law of Treaties* (1969), United Nations, <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>, article 26.
- ²¹⁰ General recommendation No 25 (article 4, paragraph 1, of the Convention (temporary special measures)) (2004).
- ²¹¹ Andrew Byrnes, 'The Convention on the Elimination of All Forms of Discrimination against Women and the Committee on the Elimination of Discrimination against Women: Reflections on their role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform', *UNSW Law Research Series* No. 2010–17 SSRN: <<https://ssrn.com/abstract=1595490>>.
- ²¹² Committee on the Rights of Persons with Disabilities, General Comments No 1–7 <<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>>.
- ²¹³ Committee on the Rights of Persons with Disabilities, *Guidelines on the right to liberty and security of persons with disabilities* (see Annex to Bi-Annual Report A/72/55) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=A/72/55&Lang=en>.
- ²¹⁴ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013)*, tenth session, UN Doc CRPD/C/AUS/CO/1 (21 October 2013); Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and*

third periodic reports of Australia, twenty-second session, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019).

²¹⁵ For example, the Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 38/2016, Munir al Adam (represented by counsel, the European-Saudi Organisation for Human Rights and the Americans for Democracy and Human Rights in Bahrain)*, UN Doc CRPD/C/20/D/38/2016 (24 October 2018) <<https://juris.ohchr.org/Search/Details/2513>>.

²¹⁶ For example, the Committee on the Rights of Persons with Disabilities, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention*, UN Doc CRPD/C/15/4 (24 October 2017); Committee on the Rights of Persons with Disabilities, *Inquiry concerning Spain carried out by the Committee under article 6 of the Optional Protocol to the Convention*, UN Doc CRPD/C/20/3 (4 June 2018).

²¹⁷ Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012, Marlon James Noble (represented by counsel, Phillip French)*, UN Doc: CRPD/C/16/D/7/2012 (10 October 2016); Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 17/2013, Christopher Leo (represented by counsel, Phillip French and Mark Patrick)*, UN Doc: CRPD/C/22/D/17/2013 (18 October 2019); Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 18/2013 (Manuway (Kerry) Doolan represented by counsel, Phillip French and Mark Patrick)*, UN Doc: CRPD/C/22/D/18/2013 (30 August 2019).

²¹⁸ On 12 September 2019, during the constructive dialogue with Australia, CRPD Committee member Markus Schefer raised the issue of the lack of actions taken by Australia regarding the issue of indefinite detention of people with disability, especially First Nations people with disability, despite recommendations from individual communications and the 2013 Concluding Observations from Australia's initial review under the CRPD. See 'Consideration of Australia – 499th Meeting 22nd Session Committee on Rights of Persons with Disabilities', *The United Nations Live & On Demand*, UN Web TV, 12 September 2019, at 2 hours 53 mins.

²¹⁹ For example, Special Rapporteur on the Rights of Persons with Disabilities, 'Peru: Milestone disability reforms lead the way for other States, says UN expert' (Media Release, 4 September 2018) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23501&LangID=E>>; Special Rapporteur on the Rights of Persons with Disabilities and Independent Expert on the Enjoyment of all Human Rights by Older Persons, 'Supporting Autonomy and Independency of Older Persons with Disabilities' (Summary Note, Expert Group Meeting, 25–26 October 2017); Special Rapporteur on the Rights of Persons with Disabilities, 'UN expert welcomes legal capacity reform in Colombia to end guardianship regime' (Media Release, 29 August 2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24926&LangID=E>>.

²²⁰ Human Rights Council, Universal Periodic Review Australia <<https://www.ohchr.org/EN/HRBodies/UPR/Pages/AUindex.aspx>>.

²²¹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Australia*, UN Doc: A/HRC/17/10 (24 March 2011) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>>; Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Australia*, UN Doc: A/HRC/31/14 (13 January 2016) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/004/89/PDF/G1600489.pdf?OpenElement>>.

²²² Special Rapporteurs (SR) and Independent Experts are part of the Human Rights Council's Special Procedures mandate.

²²³ General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Manfred Nowack. (28 July 2008) A/63/175 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/PDF/N0844075.pdf?OpenElement>>. See also Human Rights Council *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez. A/HRC/22/53 (1 February 2013) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf>.

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- ²²⁴ Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc: A/HRC/35/21 (28 March 2017) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/076/04/PDF/G1707604.pdf?OpenElement>>.
- ²²⁵ International Law Commission, *The function and scope of the lex specialis rule and the question of 'self-contained regimes': An outline*. (30 July 2014) <https://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf>.
- ²²⁶ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 2.
- ²²⁷ Sandra Fredman, (2011) *Discrimination Law*, Oxford University Press, 2nd edition, p. 30.
- ²²⁸ Sandra Fredman, (2011) *Discrimination Law*, Oxford University Press, 2nd edition, pp 26–29.
- ²²⁹ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 18.
- ²³⁰ The CRPD Committee uses the term 'inclusive equality' when referring to transformative equality as outlined by Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35.
- ²³¹ Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, UN Doc: CRPD/C/GC/6 (26 April 2018), para 11.
- ²³² By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. Office of the High Commissioner for Human Rights, *International Human Rights Law* <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>> para 3.
- ²³³ Civil and political rights are increasingly being recognised as involving positive obligations of the character associated with economic, cultural and social rights.
- ²³⁴ Economic, cultural and social rights may also involve obligations of non-interference or of immediate realisation, which are usually associated with civil and political rights.
- ²³⁵ Phillip French and Rosemary Kayess (2008), 'Deadly Currents Beneath Calm Waters: Persons with Disability and the Right to Life in Australia', *UNSW Law Research Series* No. 2008, p.34, available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397388> p. 2.
- ²³⁶ Office of the High Commissioner for Human Rights *Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights?* <<https://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.aspx>>.
- ²³⁷ For an in-depth analysis of the right to life in the context of disability in Australia, see Phillip French and Rosemary Kayess (2008), 'Deadly Currents Beneath Calm Waters: Persons with Disability and the Right to Life in Australia', *UNSW Law Research Series* No. 2008, p.34, available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397388>.
- ²³⁸ This outline draws substantially on Professor Andrew Byrnes' use of a similar framework to describe CEDAW in 'The Convention on the Elimination of All Forms of Discrimination against Women and the Committee on the Elimination of Discrimination against Women: Reflections on their role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform', *UNSW Law Research Series* No. 2010-2017, available at SSRN: <<https://ssrn.com/abstract=1595490>>.
- ²³⁹ Janet E Lord, 'Preamble' 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), p. 1.
- ²⁴⁰ Janet E Lord, 'Preamble' 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), p. 1.

²⁴¹ This includes: United Nations (1948), Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71 (1948); United Nations (1966), International Covenant on Economic Social and Cultural Rights, United Nations Treaty Series, vol 993, 3; United Nations (1966), International Covenant on Civil and Political Rights, United Nations Treaty Series, vol 999.

²⁴² *Declaration on the Rights of the Mentally Retarded* (1971) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfMentallyRetardedPersons.aspx>>; *Declaration on the Rights of Disabled Persons* (1975) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfDisabledPersons.aspx>>; *UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (1991) <<https://digitallibrary.un.org/record/162032?ln=en>>.

²⁴³ CRPD article 1.

²⁴⁴ CRPD article 1.

²⁴⁵ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8.

²⁴⁶ During the negotiations, it was explicitly argued that 'traditional' impairment groups were blind people, deaf people, and people who used wheelchairs. The concern was that including people with cognitive impairment, psychosocial disability and those with health conditions, such as HIV/AIDS, would significantly impact on domestic implementation.

²⁴⁷ Kayess, R and French, P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities'. *Human Rights Law Review*, (2008) 8, p. 25.

²⁴⁸ CRPD articles 14 and 23.

²⁴⁹ Jerome E. Bickenbach 'Minority rights or universal participation: The politics of disablement', pp 101-115, in Melinda Jones and Lee Ann Bassar Marks (eds), *Disability, Divers-Ability and Legal Change*, Martinus Nijhoff Publishers, London, (1999).

²⁵⁰ CRPD article 3.

²⁵¹ Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on Equality and non-discrimination*, UN Doc: CRPD/C/GC/6, para 9.

²⁵² Such as CRC, CEDAW. See also, United Nations, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990) Treaty Series, vol. 2220, p. 3; Doc. A/RES/45/158.

²⁵³ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p. 17.

²⁵⁴ Committee on the Rights of Persons with Disabilities, *General comment No. 3 (2016) on women and girls with disabilities*, 25 November 2016, UN Doc: CRPD/C/GC/3, para 16. <<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>>.

²⁵⁵ Committee on the Rights of Persons with Disabilities, *General comment No. 3 (2016) on women and girls with disabilities*, 25 November 2016, UN Doc: CRPD/C/GC/3, para 4(c).

²⁵⁶ Committee on the Rights of Persons with Disabilities, *General comment No. 3 (2016) on women and girls with disabilities*, 25 November 2016, UN Doc: CRPD/C/GC/3, para 16.

²⁵⁷ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p.17.

²⁵⁸ CRPD, article 6(1).

²⁵⁹ Theresia Degener, 'Disability in a human rights context', in *Laws* (2016), 5, 35, p 10.

²⁶⁰ These references are not intended to limit the gender analysis across the whole of the CRPD. These references are found in article 8 (Awareness-raising); article 13 (Access to justice); article 16 (freedom from exploitation, violence and abuse); article 25 (Health); Article 34 (Committee on the Rights of Persons with Disabilities).

²⁶¹ CRPD preamble (s).

²⁶² Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on Equality and non-discrimination*, UN Doc: CRPD/C/GC/6, para 36.

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- ²⁶³ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Terms of Reference*, para (g).
<<https://disability.royalcommission.gov.au/about/Pages/Terms-of-reference.aspx>>.
- ²⁶⁴ General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc: A/RES/61/295 (2 October 2007).
- ²⁶⁵ The 2006 *Yogyakarta Principles* and the 2017 *Yogyakarta Principles Plus 10* provide guidance on principles and binding international human rights standards in relation to sexual orientation, gender identity, gender expression and sex characteristics
<<https://yogyakartaprinciples.org>>.
- ²⁶⁶ EMRIP provides the Human Rights Council with expertise and advice on the rights of Indigenous Peoples as set out in UNDRIP, and assists Member States to implement the UNDRIP. <<https://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx>>.
- ²⁶⁷ The Special Rapporteur of the Rights of Indigenous Peoples
<<https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>>.
- ²⁶⁸ CRPD articles 5, 10, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 27, 28, 29, 30.
- ²⁶⁹ The overarching nature of these articles is to place an obligation on States Parties, although in specific situations, particular provisions may be justiciable and give rise to an individual right under the Optional Protocol to the CRPD.
- ²⁷⁰ These principles derive from UDHR and other UN materials, and are now accepted as the central principles underpinning international human rights law.
- ²⁷¹ Most human rights can be subject to restrictions provided these restrictions are prescribed by law to achieve a legitimate objective and are proportionate to the achievement of that objective.
- ²⁷² CRPD article 5(3).
- ²⁷³ Reasonable accommodation was included in the standard of non-discrimination in Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities (Eleventh session, 1994), UN Doc E/1995/22; and also in the Council of the European Union Directive, but only in relation to employment. See The Council Of The European Union, article 5 EU Directive 2000/78/EC *Establishing A General Framework For Equal Treatment In Employment And Occupation*, 27 November 2000 L 303/16.
- ²⁷⁴ CRPD article 2.
- ²⁷⁵ *Disability Discrimination Act 1992* (Cth), s 11; *The Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1995* (NT); [online] *Anti-Discrimination Act 1991* (QLD); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (TAS); *Equal Opportunity Act 2010* (VIC), and; *Equal Opportunity Act 1984* (WA).
- ²⁷⁶ CRPD article 5(4).
- ²⁷⁷ Other international human rights treaties, such as CEDAW and ICERD, use the term 'temporary special measures' in relation to measures taken to accelerate de facto equality.
- ²⁷⁸ Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on Equality and non-discrimination*, UN Doc: CRPD/C/GC/6, para 29.
- ²⁷⁹ In *Brown v. Board of Education of Topeka*, 347 US 483 (1954), the US Supreme Court declared that laws establishing separate education for black children were unconstitutional, finding that 'separate educational facilities are inherently unequal'. This overturned earlier rulings going back to *Plessy v. Ferguson* in 1896 which endorsed the policy of 'separate but equal'.
- ²⁸⁰ McKean, W A (1983) *Equality and Discrimination under International Law*, Oxford: Clarendon Press p. 225.
- ²⁸¹ Committee on Economic, Social and Cultural Rights, *General Comment No 13, The right to education (art 13 of the Covenant)* (1999), UN Doc E/2000/22 at 111 (2000).
- ²⁸² *Olmstead v L.C.* 527 US 581 (1999).

²⁸³ Gerard Quinn et al. 'Segregation and segregated facilities as a *prima facie* form of discrimination: The impermissibility of using the ESIF to invest monies in long-term care residential institutions for persons with disabilities'. Legal Memorandum, (March 2018) < <https://enil.eu/news/segregation-and-segregated-facilities-as-a-prima-facie-form-of-discrimination/>>.

²⁸⁴ Commonwealth of Australia, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, UN Doc CRPD/C/AUS/2-3, para 275 (b).

²⁸⁵ Kayess, R. 'The Convention on the Rights of Persons with Disabilities: A methodology for collaboration in capacity building and research', in *The Development Bulletin* No.74, (June 2011) pp 25–29.

²⁸⁶ Committee on the Rights of Persons with Disabilities, *General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*. UN Doc: CRPD/C/GC/7, para 3.

²⁸⁷ Committee on the Rights of Persons with Disabilities, *General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*. UN Doc: CRPD/C/GC/7, para 11.

²⁸⁸ Committee on the Rights of Persons with Disabilities, *General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*. UN Doc: CRPD/C/GC/7, para 13.

²⁸⁹ Committee on the Rights of Persons with Disabilities, *General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* UN Doc: CRPD/C/GC/7, para 1.

²⁹⁰ *Statement by Catalina Devandas-Aguilar, Special Rapporteur on the rights of persons with disabilities at the 71st session of the General Assembly* (26 October 2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20764&LangID=E>>.

²⁹¹ General Assembly, 'Torture and other cruel, inhuman or degrading treatment or punishment', sixty-third session, UN Doc A/63/175 (28 July 2008).

²⁹² General Assembly, 'Torture and other cruel, inhuman or degrading treatment or punishment', sixty-third session, UN Doc A/63/175 (28 July 2008), para 44.

²⁹³ General Assembly, 'Torture and other cruel, inhuman or degrading treatment or punishment', sixty-third session, UN Doc A/63/175 (28 July 2008), para 41.

²⁹⁴ CRPD article 3(a).

²⁹⁵ Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) Article 12: Equal recognition before the law*, Eleventh session, UN Doc CRPD/C/GC/1 (19 May 2014), para 8.

²⁹⁶ Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) Article 12: Equal recognition before the law*, Eleventh session, UN Doc CRPD/C/GC/1 (19 May 2014), para 40.

²⁹⁷ Committee on the Rights of Persons with Disabilities, *Guidelines on the right to liberty and security of persons with disabilities*. See Annex to the Bi-Annual Report 2016 A/72/55, para 9.

²⁹⁸ General Assembly, 'Torture and other cruel, inhuman or degrading treatment or punishment', sixty-third session, UN Doc A/63/175 (28 July 2008); Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez', twenty-second session, UN Doc A/HRC/22/53.

²⁹⁹ Committee on the Rights of Persons with Disabilities, *Guidelines on the right to liberty and security of persons with disabilities*. See Annex to the Bi-Annual Report 2016 A/72/55, para 42.

³⁰⁰ Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) Article 12: Equal recognition before the law*, Eleventh session, UN Doc CRPD/C/GC/1 (19

May 2014), para 35; Australian Civil Society CRPD Shadow Report Working Group, *Disability Rights Now 2019*, July 2019, p. 29.

³⁰¹ Spivakovsky, C. (Ed.), Seear, K. (Ed.), Carter, A. (Ed.). (2018). *Critical Perspectives on Coercive Interventions*. London: Routledge, <<https://doi.org/10.4324/9781315158693>>; Jessica Robyn Cadwallader, Claire Spivakovsky, Linda Steele & Dinesh Wadiwel (2018) 'Institutional Violence against People with Disability: Recent Legal and Political Developments', *Current Issues in Criminal Justice*, 29:3, 259-272, <DOI: [10.1080/10345329.2018.12036101](https://doi.org/10.1080/10345329.2018.12036101)>; Steele, Linda, *Lawful institutional violence against disabled people* [2017] PrecedentAULA 67, (2017) 143 Precedent 4; Frohmader, C., & Sands, T. (2015) *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings*. Australian Cross Disability Alliance (ACDA) Sydney, Australia <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Submissions>; Morgan Carpenter, 'Intersectionality, Epistemic and Structural Violence' (Speech, The Mental Health Services Conference) August 2014, <<https://morgancarpenter.com/intersectionality-epistemic-structural/>>.

³⁰² Frohmader, C., & Sands, T. (2015) *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings*. Australian Cross Disability Alliance (ACDA); Sydney, Australia, p. 19 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Submissions>.

³⁰³ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 21.

³⁰⁴ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 28, para 34.

³⁰⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 28.

³⁰⁶ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 28.

³⁰⁷ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 30.

³⁰⁸ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 30.

³⁰⁹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 30. Australia is a party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol, with the latter requiring States Parties to establish National Preventive Mechanisms (NPM) to monitor places of detention within the context of the anti-torture framework. More information about this in the Australian context, including in the context of disability is available in Meredith Lea, Fleur Beupert, Ngila Bevan, Danielle Celermajer, Piers Gooding, Rebecca Minty, Emma Phillips, Claire Spivakovsky, Linda Steele, Dinesh Joseph Wadiwel & Penelope June Weller (2018) 'A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability', *Australian Journal of Human Rights*, 24:1. <<https://doi.org/10.1080/1323238X.2018.1441611>>; Disabled People's Organisations Australia, *Position Paper: Disability Inclusive National Preventive Mechanism (NPM)*, 11 May 2018. <<https://dpoa.org.au/position-opcat-npm/>>; The Australian OPCAT Network, *The implementation of OPCAT in Australia*, Submission to the Subcommittee on

Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD), January 2020. <<https://reliefweb.int/report/australia/implementation-opcat-australia>>.

³¹⁰ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019), para 32.

³¹¹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019), para 32.

³¹² Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019), para 34.

³¹³ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019), para 34.

³¹⁴ Australia included three interpretative declarations upon ratification relating to article 12 *Equal recognition before the law*, article 17 *Protecting the integrity of the person*, and article 18 *Liberty of movement and nationality*.

³¹⁵ Interpretative Declaration on Article 12: Australia recognises 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.

³¹⁶ Interpretative Declaration on Article 17: Australia recognises 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.

³¹⁷ International Law Commission, *Guide to Practice on Reservations to Treaties* (2011), para. 1.2.

³¹⁸ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, tenth session, UN Doc CRPD/C/AUS/CO/1 (21 October 2013), para 9; Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) para 6(b).

³¹⁹ Australian Civil Society CRPD Shadow Report Working Group, *Disability Rights Now 2019*, July 2019, p. 12.

³²⁰ Commonwealth of Australia, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, UN Doc CRPD/C/AUS/2–3, para 15(a).

³²¹ Australian Civil Society CRPD Shadow Report Working Group, *Disability Rights Now 2019*, July 2019, p. 29.

³²² Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez', twenty-second session, UN Doc A/HRC/22/53, para 48.

³²³ Commonwealth of Australia, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, UN Doc CRPD/C/AUS/2–3, para 228.

³²⁴ Commonwealth of Australia, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, UN Doc CRPD/C/AUS/2–3, para 15.

³²⁵ Commonwealth of Australia, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, UN Doc CRPD/C/AUS/2–3, para 188.

³²⁶ International Law Commission, *Guide to Practice on Reservations to Treaties* (2011), 1.4 (1) (2).

³²⁷ Reservations are unilateral statements that specify the elements of a treaty that a State Party does not want to be bound to, and that alters the legal effect of certain provisions of the treaty for that State Party. To be valid, reservations must not be incompatible with the object and purpose of the CRPD and the CRPD Committee has the jurisdiction to determine this compatibility. See International Law Commission, *Guide to Practice on Reservations to Treaties* (2011) and VCLT Article 19. For further discussion of this see M Milanovic and L Sicilianos *Reservations to Treaties: An Introduction*, *The European Journal of International Law* (2013) Vol. 24 no. 4 at p. 1058.

³²⁸ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019), para 63.



Royal Commission
into Violence, Abuse, Neglect and
Exploitation of People with Disability