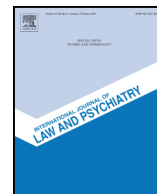




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## The concept of capacity in Australian mental health law reform: Going in the wrong direction?

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### ABSTRACT

The six Australian states and two territories each have legislation that enables the involuntary detention and treatment of individuals diagnosed with mental illness who are considered in need of treatment and where there is evidence of a risk of harm to self or others. A number of governments have undertaken or are currently undertaking reviews of mental health laws in light of the Australian Government's ratification of the Convention on the Rights of Persons with Disabilities. While United Nations bodies have made it clear that laws which enable the detention of and substituted decision-making for persons with disabilities should be abolished, debates in Australia about the reform of mental health legislation have largely focused on Article 12 of the CRPD and what is meant by the right of persons with disabilities to enjoy legal capacity on an equal basis with others. It is argued that a more holistic view of the CRPD rather than the current narrow focus on Article 12 would best serve the needs of persons with mental impairments.

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### 1. Introduction

Article 12(2) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) recognises that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. Such a recognition of universal “legal capacity”, has raised the issue of whether a perceived lack of or impairment of “mental capacity”, which the United Nations CRPD Committee refers to as “the decision-making skills of a person” (United Nations Committee on the Rights of Persons with Disabilities, 2014: para. 12), should be used as the basis for restrictions in civil law areas relating to involuntary mental health treatment and guardianship.

In Australia, a number of governments have recently undergone or are currently undertaking reviews of mental health legislation in the light of the principles set out in the CRPD. The six Australian states and two territories each have separate mental health acts that enable involuntary detention and treatment where there is evidence that a person is mentally ill, is in need of treatment and there is a risk of harm to self or others.

This article provides an overview of the current debates concerning the concept of “capacity” in mental health law reform in the light of Australia's interpretive declaration (set out below) which states that

the CRPD allows for the “compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability.”

It is argued that the current law reform focus on Article 12 and matters of capacity – as exemplified by the Australian Law Reform Commission's focus on capacity in its 2014 Inquiry into disability and commonwealth laws – has served to keep attention on involuntary detention and treatment, rather than viewing the CRPD as an opportunity to find new ways of ensuring voluntary access to the highest attainable standard of mental health services and community care.

It is further argued that Article 12 is only one article in a Convention that is designed to ensure persons with disabilities are able to exercise their human rights and fundamental freedoms on an equal basis with others. When viewed within the context of the CRPD as a whole, legal capacity is not only “indispensable” for the realisation of other rights (United Nations Committee on the Rights of Persons with Disabilities, 2014: para. 8), but other rights, such as the rights to health and to independent living, are critical for the realisation of legal capacity.

The reform of service delivery by offering individually tailored formal and informal decision-making support and a greater range of care and treatment options should be viewed as essential to implementing the support model (Flynn & Arstein-Kerslake, 2014) envisaged by Article 12 and in realising other important rights. Rather than focusing purely on debates about legal capacity as is currently the trend in Australian mental health law reform, it is argued that it is necessary to take a more holistic view to “unleash the CRPD's potential” (Lewis, 2010, p. 105).

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The next section outlines how the CRPD relates to persons with mental impairments<sup>1</sup> and how Australia has interpreted the scope of the CRPD. An overview of Australian mental health laws is then provided followed by an examination of the growing international human rights discourse surrounding legal capacity and whether or not it can be limited by assessments of mental capacity. Finally, it will be argued that the focus of scholarly attention and mental health law reform should be redirected to focus on the way in which a broader construction of the CRPD than the current concentration on the “negative” human rights to legal capacity and to liberty (Article 14) to such “positive” rights as the right to health (Article 25) and the right to independent living (Article 19) could support meaningful change and empowerment for persons with mental impairments.

## 2. The convention on the rights of persons with disabilities and Australia's interpretive declaration

Australia ratified the CRPD on 17 July 2008. It is therefore bound to comply with its provisions.<sup>2</sup> However, the Articles set out in the CRPD do not form part of Australian law unless they are specifically incorporated by parliament into domestic law.<sup>3</sup>

Neither “disability” or “persons with disabilities” is defined in the CRPD, but Article 1 states that the latter term includes “those who have long-term physical, *mental*, intellectual or sensory *impairments* which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” [emphasis added]. The Preamble recognises that disability is “an evolving concept” and results from the interaction between individuals with impairments and societal barriers.

While some persons with mental impairments may not want to be labelled as disabled (Nabbali, 2009) and there is an argument that the episodic nature of some mental disorders means they should not be viewed as “long-term”, it is important to note that Article 1 is an inclusive rather than an exclusive definition. While it refers to “long-term” impairments, the provision is not exhaustive and other impairments may be included (Minkowitz, 2007, p. 407).

When Australia ratified the CRPD, it included a Declaration which is a form of “interpretative” statement (United Nations Enable, 2014). This differs from a reservation which may serve to limit the legal effect of certain provisions in a Treaty (Kaczorowska, 2010, p. 106). Australia's declaration attempts to clarify its understanding of certain provisions. It states:

Declaration:

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding **that the Convention allows for fully supported**

**or substituted decision-making arrangements**, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards; Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that **the Convention allows for compulsory assistance or treatment of persons**, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards; Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria [emphasis added].

This declaration signals that laws enabling “fully supported or substituted decision-making arrangements” for persons with mental impairments will remain in place in Australia, at least in the short term. However, Annegret Kämpf (2010, pp. 148–149) has argued that this declaration “contravenes the spirit of the CRPD” and that, unlike a reservation, “it cannot exclude or alter the legal effect of the CRPD”. Similarly, the Australian Law Reform Commission (2014a, p. 57) has observed that interpretive declarations “may be understood as essentially historical notes, marking a government's understanding at a particular time”.

The CRPD does not refer to the status of interpretative declarations, but Article 46(1) states that reservations “incompatible with the object and purpose of the present Convention shall not be permitted”.<sup>4</sup> This implies that if interpretative declarations by States Parties are incompatible with interpretations set out in General Comments and the like, such declarations should not inform law reform endeavours.

The Australian Law Reform Commission (2014b, p. 9), as part of its Inquiry into disabilities and commonwealth laws, released a Discussion Paper in which it has recommended the Australian Government review its Interpretative Declaration “with a view to withdrawing it”. Similarly, the United Nations CRPD (2013, para. 9) Committee has recommended that Australia review this Declaration “in order to withdraw” its interpretations of the relevant Articles. It is interesting to note, however, that the Australian Law Reform Commission (2014a, p. 58) in its Final Report reframed the issue in terms of “how to advance, to the ... [maximum] ... extent possible, supported decision-making in a federal system” and did not repeat its earlier recommendation that the Interpretive Declaration be reviewed. The Australian Law Reform Commission (2014a, p. 57) recommended that there be domestic law reform “regardless of whether the Declaration itself remains”. On that basis, Australia's declaration should not be viewed as a barrier to law reform endeavours that go beyond the status quo of involuntary detention and treatment.

<sup>1</sup> This article uses the words of Article 1 of the CRPD in referring to persons with ‘mental impairments’ rather than mental illness which is commonly used in legislation.

<sup>2</sup> Article 26 of the Vienna Convention on the Law of Treaties sets out that a convention is ‘binding upon the parties to it and must be performed by them in good faith’; Article 29 provides that ‘unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’ and Article 27 provides that ‘a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...’: Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S.331. This means that when a federation enters into a treaty it binds all of the individual states within that federation and the federation cannot use the internal laws that create its federal structure to argue that the treaty is not binding on one part of its territory. This is supported by Section 61 (external affairs power) of the Constitution of the Commonwealth of Australia which gives the Commonwealth Executive the power to enter treaties on behalf of Australia and to bind the states, although in practice the Executive consults with the Commonwealth Parliament and the Treaties Council, part of the Council of Australian Governments (COAG), prior to entering into a treaty: <http://www.dfat.gov.au/treaties/making/>; [https://www.coag.gov.au/treaties\\_council](https://www.coag.gov.au/treaties_council). In addition, Article 4(5) of the CRPD provides that ‘[t]he provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions.’

<sup>3</sup> *Kioa v West* (1985) 159 CLR 550, 570; [1985] HCA 81.

<sup>4</sup> Interestingly, Canada in ratifying the CRPD included both a declaration and a reservation. In a similar fashion to Australia, Canada declared ‘its understanding that Article 12 permits supported and substitute decision-making arrangements’, but went one step further in stating ‘[t]o the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards’. The status of this reservation is unclear given that it was permitted at the time of ratification, but given the recent pronouncements by the United Nations Committee, the reliance on substituted decision-making regimes now appears to be incompatible with the object and purpose of the CRPD.

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