

**Final Report to the Australian Government
Departments of Families, Housing, Community Services, and Indigenous
Affairs, and Attorney-General**

**Consultations with
Australian representative organisations governed by persons with disability,
disability advisory councils, and the disability legal services network
on the impact of ratification of the
Convention on the Rights of Persons with Disabilities**

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State and Territory
Disability Advisory Councils

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Executive Summary

This report presents the outcomes of consultations conducted in February 2008 with Australian representative organisations governed by persons with disability, the national and state and territory disability advisory councils, and the disability legal services network on the impact of Australia ratifying the Convention on the Rights of Persons with Disabilities (CRPD). These consultations were undertaken to provide for disability sector input into the Australian Government's National Interest Analysis in relation to its' proposed ratification of the CRPD. The key outcomes of these consultations may be summarised as follows:

- There is overwhelming support among this constituency for Australian ratification of the CRPD;
- This constituency calls on the Australian Government to ratify the CRPD as early as possible, and certainly in time for Australia to participate in the first Conference of State Parties to the CRPD, and in the nomination and election of members of the CRPD Treaty Body;
- This constituency is unanimous that Australia should also immediately sign and ratify the Optional Protocol to the CRPD, and that a failure to do so would reflect poorly on Australia's willingness to be accountable for the implementation of CRPD rights, and undermine its leadership in human rights in the international community;
- There is an extensive range of significant benefits associated with Australia ratifying the CRPD and its Optional Protocol for Australians with disability and the community generally. There are no disadvantages associated with ratification;
- There is no significant barrier to Australia ratifying the CRPD arising from any fundamental inconsistency between CRPD obligations and Australian laws, policies and programs;
- Ratification of the CRPD will have significant positive economic, environmental, social and cultural impacts in Australia. It will have no negative impacts.
- Full realisation of CRPD rights will require a number of important implementation measures, including the direct incorporation of the CRPD into Australian law, a national audit of laws, policies and programs, and the establishment of a national office of disability policy coordination in the Department of the Prime Minister and Cabinet;
- Australia's ratification of the CRPD should be accompanied by a number of statements of interpretation and a declaration to clarify how CRPD obligations will be applied in the Australian context.

1. Introduction

- 1.1 This report presents the outcomes of consultations conducted in February 2008 with Australian representative organisation governed by persons with disability, the national and state and territory disability advisory councils, and legal services involved with persons with disability on the impact of Australia ratifying the Convention on the Rights of Persons with Disabilities (CRPD).
- 1.2 These consultations were undertaken to provide for disability sector input into the Australian Government's National Interest Analysis in relation to its' proposed ratification of the CRPD.

2. Method & acknowledgements

- 2.1 The consultations were targeted at major representative organisations governed by persons with disability operating at either the national or state or territory level, the national and state and territory disability advisory councils, and the disability legal services network. This targeted approach was selected in view of the technical nature of the issues to be canvassed and the two broad-based consultations that had already been undertaken with the disability sector during the period the CRPD was being negotiated in the United Nations.
- 2.2 Three roundtables were conducted, one each in Melbourne, Brisbane and Sydney. Representatives from other states and territories, and from regional areas, were flown to these roundtables. A total of thirty-eight representatives participated in the roundtables from a total of 35 organisations. Participants in the roundtables are set out at Appendix 1.
- 2.3 Prior to the roundtables, a detailed background paper was circulated to participants, which provided contextual information and identified the key issues for consideration. A detailed session plan was also devised for the conduct of the roundtables, which ensured coverage of all the necessary issues in the limited time available.
- 2.4 A Task Force comprising representatives from the Australian Federation of Disability Organisations (AFDO), People with Disability Australia (PWD), Queensland Advocacy Incorporated, the National Association of Community Legal Centres and the secretariat of the state and territory disability advisory councils initiated and oversaw this project. This Task Force was convened in June 2007 by representatives attending a major national meeting on CRPD ratification and implementation in Australia auspiced by the Australian Human Rights and Equal Opportunity Commission (HREOC). The membership of the Task Force is set out at Appendix 2. The Task Force has provided advice in the preparation of the background paper, the roundtable session plan, and in the preparation of this report. Task Force members and

their organisations also greatly assisted in the preparation and conduct of the roundtables. The contribution of Task Force members and the support of the organisations they represent are acknowledged with appreciation.

- 2.5 A project team of staff from PWD managed the project with assistance from the Disability Studies and Research Institute. The membership of the project team is set out at Appendix 3. The contribution of the project team is also acknowledged with appreciation.
- 2.6 The Australian Government Department of Families, Housing, Community Services, and Indigenous Affairs (FaHCSIA) funded this project as part of the Australian Government's National Interest Analysis in relation to its proposed ratification of the CRPD. This funding, and FaHCSIA's continuing commitment to involve persons with disability in the development and implementation of the CRPD is acknowledged with appreciation.
- 2.7 AFDO was the fundholder and contract manager for this consultation project.

3. Should Australia ratify the CRPD?

- 3.1 Informants were initially asked for their view on whether Australia ought to ratify the CRPD. They were also asked to provide reasons for this view.
- 3.2 Informants were overwhelmingly in favour of Australia ratifying the CRPD. They called upon the Australian Government to do so at the earliest possible opportunity, and certainly in time for Australia to participate in the first conference of State Parties and in the nomination and election of treaty body members. In this respect, informants noted that the first Conference of State Parties must occur within 6 months of the CRPD coming into force, and that the CRPD is likely to come into force by mid 2008.

Benefits of ratification

- 3.3 Informants cited an extensive range of reasons why Australia should ratify the CRPD, and do so at the earliest possible opportunity. These reasons included:
 - The CRPD is a comprehensive statement of the human rights of persons with disability; it illustrates how human rights are to be applied in relation to persons with disability; it recognises social development needs as comprehensively as it does civil and political rights;
 - The CRPD encapsulates a paradigm shift way from a conceptualisation of persons with disability as objects of pity, subjects of welfare systems, and burdens on the community, to right bearers with equal status to others;

- The CRPD will make the human rights of persons with disability more visible to government and the community, improving the social status of persons with disability;
- The CRPD will raise awareness of human rights among persons with disability, enhancing their self-concept and self-esteem;
- The CRPD will promote the inclusion and participation of persons with disability in Australian society; it will promote social cohesion;
- The CRPD provides a new level of national and international accountability on governments and the community to respect, protect and fulfil the human rights of persons with disability;
- The CRPD will bring a new and more positive human rights based focus on persons with disability by governments and the community – one that is not restricted to arguments about funding and services, which tend to diminish the dignity and status of persons with disability;
- Ratification of the CRPD ought to stimulate a major review and reinvigoration of disability policy, and policy compliance, in Australia;
- Ratification of the CRPD will assist Australia to resume its position as an international leader in the recognition and respect of human rights, which has been compromised over the past decade. In particular, it will assist Australia to reposition itself as a leader in human rights in its immediate region;
- The CRPD should result in higher levels of disability policy and program cooperation and integration, and greater equity in lived experience, across all Australian jurisdictions;
- The CRPD provides recognition and protection for some impairment groups – such as persons with psychosocial impairments – that has not been uniformly available in the past – particularly in relation to the right to physical and mental integrity of the person;
- The CRPD would provide a greater Australian Constitutional basis for Commonwealth laws, policies and programs relating to persons with disability, including the *Disability Discrimination Act 1992* and the *Disability Services Act 1986*;
- The CRPD provides a powerful framework and reference point for persons with disability and their advocates to argue the rights of persons with disability;

- Australia has played a positive role in the development of the CRPD and Optional Protocol, and has done so in partnership with Australian representative organisations governed by persons with disability and other representative structures for persons with disability. Ratification of the CRPD would consummate this positive contribution, and fulfil the expectations of Australians with disability, which have been raised by the CRPD negotiation process;
- Australia has a very important contribution to make to international CRPD implementation efforts due to its relatively advanced disability policy frameworks, and its' extensive experience in implementation efforts. It is important that this expertise is contributed to implementation and monitoring of the CRPD at the international level.

Disadvantages of ratification

3.4 Informants were also asked to identify any disadvantages that might be associated with Australia ratifying the CRPD. None were identified.

3.5 However, a number of implementation risks were noted. These risks are:

- That Australia will ratify the CRPD, but fail to take any substantial steps to ensure that CRPD rights are fully realised in the Australian context. This is likely to cause great disappointment and alienation among persons with disability, whose expectations have been raised by the CRPD;
- That Australia will ratify the CRPD, but fail to sign and ratify the Optional Protocol to the CRPD. Again, this is likely to cause great disappointment and alienation among persons with disability, as it will suggest a lack of commitment by Australia to accountability for the implementation of CRPD rights, and deny persons with disability a key means of enforcing their human rights;
- That the CRPD will be understood as prescribing the full range of human rights to be recognised and respected in relation to persons with disability. Although the CRPD has an extensive scope it does not deal with all human rights, or the violations of these rights, experienced by persons with disability. Key areas, such as bioethics and safeguards in relation to compulsory treatment are not dealt with by the CRPD;
- There are some areas where the CRPD establishes human rights obligations at a lower threshold than that already recognised in Australian law and policy. It will be important to ensure that these more beneficial obligations, already present in Australian law, are not eroded by the CRPD;

- There are some terms and concepts used in the CRPD – such as the disproportionate and undue burden test - that may present problems of interpretation in Australian law, unless their meaning is clarified;
- The CRPD will give rise to an overly legalistic conceptualisation and implementation approach to the human rights of persons with disability, which may be alienating to persons with disability and others.

4. Should Australia sign and ratify the Optional Protocol to the CRPD?

- 4.1 Although not specifically the subject of this consultation, informants were also asked for their views on whether Australia should sign and ratify the Optional Protocol to the CRPD, and if so, when it should do so.
- 4.2 Informants called unanimously for Australia sign and ratify the Optional Protocol to the CRPD, and to do so immediately.

Benefits of ratification

- 4.3 Informants cited an extensive range of reasons why Australia should sign and ratify the Optional Protocol. These reasons included:
- Human rights are meaningless unless duty bearers can be held to account by right holders;
 - Signature and ratification of the Optional Protocol would demonstrate the genuineness of Australia’s commitment to accountability for the realisation of the human rights of persons with disability; it would demonstrate that Australia is not afraid of international scrutiny of its human rights record; in this respect it would also facilitate and buttress Australia’s international leadership in the recognition and respect of human rights;
 - Potential and actual accountability to the Treaty Body for the implementation of CRPD rights would provide a critical incentive for Australian agencies to seriously commit to the implementation of CRPD rights;
 - Potential and actual accountability to the Treaty Body for the implementation of CRPD rights would also provide a critical incentive for Australian agencies to keep abreast of international developments in the human rights of persons with disability ensuring that Australia is optimally integrated into international policy developments relating to the human rights of persons with disability;

- Signature and ratification of the Optional Protocol would better position Australia to mount a successful nomination for inclusion in the Treaty Body, an objective that was strongly pressed by informants.

Disadvantages of ratification

- 4.4 Informants were also asked to identify any disadvantages that might be associated with Australia signing and ratifying the Optional Protocol to the CRPD. None were identified.
- 4.5 However, informants considered it an implementation risk that Australia would sign and ratify the Optional Protocol without putting the domestic measures in place that would ensure effective access for persons with disability to Optional Protocol remedies – such as affordable access to specialist legal advice and advocacy support.

5. Compliance of Australian laws with CRPD obligations

- 5.1 Informants were asked to indicate if they could identify:
- (a) any Australian law, policy or program that was in conflict with CRPD obligations;
 - (b) any CRPD obligation that was not currently recognised in Australian laws, policies and programs.
- 5.2 Informants did not identify any fundamental inconsistency between Australian laws, policies and programs and CRPD obligations that would present a barrier to Australia ratifying the CRPD.
- 5.3 In this respect informants noted that the CRPD is an ‘implementation’ convention that applies existing human rights to the circumstances of persons with disability. The principal source of the existing rights applied are the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, both of which Australia has ratified.
- 5.4 Informants also noted in this respect that the Australian Government consulted closely with the States and Territories and other stakeholder groups throughout the CRPD negotiation process. No State or Territory or other stakeholder group raised any significant barrier to Australia accepting the obligations of the CRPD during this period.
- 5.5 However, informants took care to distinguish between the fundamental consistency of Australian laws, policy and programs with CRPD obligations and the full realisation of CRPD rights in the Australian context. It was

argued strongly that significant and ongoing efforts will be required post ratification for Australia to fully realise the human rights of persons with disability.

6. Impact of ratification

6.1 Informants were asked to identify the potential economic, environmental, social and cultural impacts of Australia ratifying the CRPD

Economic impacts

6.2 Informants identified the following potential economic impacts of ratification of the CRPD:

- The CRPD will facilitate and promote greater workforce participation, less dependency upon social security, and greater tax contribution by persons with disability and their close associates;
- Persons with disability will participate to a greater extent in the economy due to increased disposal income from employment;
- The CRPD emphasises universal design for the built environment, transport systems, the Internet and other major domains of life. Universal design will greatly reduce expenditure on retrofitting inaccessible environments, and providing parallel specialist services; it will provide for a more sustainable environment over the life-cycle, and on an intergenerational basis;
- The CRPD will promote the development of international markets for disability aids and appliances, assistive technologies, and universally designed goods and services, which ought to be exploited by Australian companies;
- Compliance with CRPD obligations will position Australia to take advantage of a rapidly growing market for accessible tourism;
- The CRPD will promote greater personal resilience among persons with disability and their close associates; improvements self-concept and self esteem; better social attitudes and environmental supports; each of which will result in reductions in the costs of health services associated with the treatment of anxiety, depression and exhaustion among persons with disability and their close associates;
- Realisation of CRPD rights will reduce poverty and financial stress among persons with disability and their close associates; there is a direct

relationship between poverty and ill-health; improved health outcomes will reduce public outlays on health services for persons with disability and their close associates.

Environmental impacts

6.3 Informants identified the following potential environmental impacts of ratification of the CRPD:

- Full realisation of CRPD rights will result in a built environment that is fully accessible to persons with disability; this will have the positive economic benefits outlined at paragraph 6.2; it will also facilitate the social inclusion of persons with disability, and the social cohesion of the community more generally; it will also benefit many other members of the community, such as older persons and young children and their parents;
- Full realisation of CRPD rights will result in an ICT (Internet) environment that is fully accessible to persons with disability; this will increase the economic participation and reduce the social isolation of persons with disability;
- Full realisation of CRPD rights ought to result in longer-term, cross-sectoral integrated planning for the built environment, which will make this environment more functional for all persons, and more sustainable over time;
- Full realisation of CRPD rights ought to result in greater accessibility of the natural environment to persons with disability, by ensuring that tourist infrastructure supports participation by persons with disability.

Social impacts

6.4 Informants identified the following potential social impacts of ratification of the CRPD:

- The CRPD will improve the self-concept and self-esteem of persons with disability, by interpreting them as right bearers and full citizens, rather than as objects of pity and charity, the subjects of welfare, and burdens on their families and communities; it also challenges the 'medical model' of disability and asserts the much more positive and empowering 'social model' of disability;
- The CRPD will result in more positive attitudes towards persons with disability in the community generally; in the eradication of prejudice and stereotypes; and in increased appreciation of the actual and potential contribution of persons with disability to community life;

- Full realisation of CRPD rights will promote and facilitate the participation and inclusion of persons with disability in community life, promote social cohesion, and reduce social isolation; the CRPD will have a 'civilising' impact on the Australian community;
- Full realisation of CRPD rights will allow persons with disability and their close associates to live with dignity.

Cultural impacts

6.5 Informants identified the following potential cultural impacts of ratification of the CRPD:

- Full realisation of CRPD rights will require formal recognition of Australian Sign Language and promote recognition and respect for Deaf culture;
- Full realisation of CRPD rights will result in recognition of the rights of persons with disability to participate in, and contribute to, the cultural life of the community;
- The CRPD establishes universal norms of human rights that are applicable and accepted in all cultural systems; this has important implications for addressing culturally based negative attitudes and practices towards persons with disability that exist within the multi-cultural Australian community.

7. National implementation and monitoring measures

7.1 Informants were asked to identify the key CRPD implementation measures that should accompany (that is, immediately follow) Australia's ratification:

Incorporation into Australian law

7.2 Informants were unanimous in the view that it is essential that the CRPD is directly and comprehensively incorporated into Australian law. It was noted that while the *Disability Discrimination Act, 1992* and the *Disability Services Act, 1986* and their state and territory counterparts might be said to incorporate some major elements of the CRPD, they certainly do not incorporate all elements, nor do existing provisions cover all elements of those rights that are incorporated in part.

7.3 It was proposed that the most appropriate and effective means of direct incorporation of the CRPD is as a schedule to a national Bill of Rights,

provided that such a Bill of Rights is supported by robust enforcement and monitoring mechanisms that extend to the CRPD, and which would provide for:

- Justiciability of both civil and political and economic, social and cultural rights;
- Accessible individual and representative complaint procedures with effective remedies for human rights violations, including injunctive relief and fair compensation;
- Capacity for HREOC to intervene in proceedings in which CRPD rights are agitated, or ought to be agitated;
- Capacity for HREOC to initiate own motion prosecutions in relation to CRPD right violations;
- Capacity for HREOC at its own motion to develop, issue and monitor guidelines and standards for compliance with CRPD rights;
- Statements of compatibility with CRPD rights to be prepared for all proposed legislation and all existing legislation undergoing review and amendment;
- Parliamentary scrutiny of all Bills to ensure their compatibility with CRPD rights;
- Interpretation of all laws, whether statutory or at common law or in equity, by Courts and Tribunal in a manner that will further CRPD rights;
- It to be unlawful for a public authority or official to act in a way that is incompatible with a CRPD right or, in making a decision, to fail to give proper consideration to a relevant human right. Such conduct ought also to be subject to administrative review;
- All public authorities and non-state actors providing goods and services to the public to develop action plans to ensure their basic compliance with, and where applicable, the progressive realisation of CRPD rights. HREOC ought to be provided with compulsory powers to direct that an action plan be developed, to reject or require the amendment of an action plan, and to monitor compliance with an action plan;
- All public procurement of goods and services must be compatible with, and further, CRPD rights;

- Broad standing provisions that would allow disability representative and advocacy bodies to bring public interest based proceedings to enforce CRPD rights.

National audit of laws, policies and programs

- 7.4 It has been noted that informants did not identify any fundamental inconsistency between CRPD obligations and Australian laws, policies and programs that would prevent Australia from moving to immediately ratify the CRPD. However, it has also been noted that informants made it clear that this was far from equivalent to concluding that CRPD rights are fully realised in Australian laws, policies and programs.
- 7.5 Informants highlighted many sub-optimal laws, policies and programs that would require review and development so as to ensure the full realisation of CRPD rights in the Australian context. Informants also highlighted many areas of non-compliance with existing Australian laws that purport to recognise and protect the human rights of persons with disability.
- 7.6 Major areas of concern included:
- Disability discrimination law – particularly with respect to the duty to provide reasonable accommodation; limits on the categories of persons protected; limits on the areas of life covered; the exclusion of particular categories of state and non-state actors; the relative inaccessibility and cost of enforcement for individuals;
 - Disability services law – particularly with respect to the lack of compliance with the principles and objectives of the legislation; the lack of remedies for violations; and the lack of entitlement to essential support services;
 - Laws and regulations relating to the built environment – particularly with respect to public infrastructure, residential dwellings, and in relation to emergency egress;
 - Guardianship and administration laws – particularly with respect to the absence or ineffectiveness of procedural safeguards; the failure to implement in some cases the principle of the least restrictive alternative; and the failure to ensure the effective promotion and support of alternatives to substitute decision-making;
 - Mental health laws – particularly with respect to the absence or ineffectiveness of procedural safeguards for compulsory treatment, the failure to implement in some cases the principle of the least restrictive alternative; and the failure to ensure the effective promotion and support of alternatives to compulsory treatment;

- Child protection laws – particularly with respect to the failure to provide adequate protection and support for children with disability, and discriminatory practices in relation to parents with disability;
- Migration law – the discriminatory restrictions on persons with disability migrating to Australia, and the denial or restriction of social security benefits and support services to migrants with disability;
- Critical levels of unmet demand for essential support services, including personal care, daily living support, accommodation, therapy, aids and appliances.

7.7 In light of these and other challenges, informants called upon the Australian Government to undertake a national audit of laws, policies and programs in relation to persons with disability immediately following Australia's ratification of the CRPD. It was noted that there has not been a high level review of this nature since the Handicapped Programs Review of 1982-1986, which followed Australia's observance of International Year of Disabled Persons in 1981. It was strongly argued that the ratification of the CRPD necessitated such a high level review, and that it would provide the basis for the formulation of a national action plan to ensure the realisation of CRPD rights. It was also argued that such a review would result in the reinvigoration of, and recommitment to, a disability rights agenda across all sectors of the community, following an extended period of stagnation and regression.

National Office of Disability Policy Coordination

- 7.8 Informants noted that Article 33 of the CRPD requires State Parties to designate one or more focal points and coordination mechanisms within government to facilitate national CRPD implementation.
- 7.9 To fulfil this obligation, informants called upon the Australian Government to establish a National Office of Disability Policy Coordination within the Department of Prime Minister and Cabinet, which would operate under a high-level Commissioner for Disability Policy Coordination.

National human rights action plan for persons with disability

- 7.10 Informants viewed the development of a recurring national human rights action plan for persons with disability as a key outcome of the proposed national audit of laws, policies and programs in relation to persons with disability, and its implementation and monitoring as a key function of the National Office of Disability Policy Coordination, and the Commissioner for Disability Policy Coordination.

7.11 Some key initial priorities were proposed for such an action plan. They included:

- harmonisation and enhancement of the availability and standard of education for persons who are Deaf across Australia, including in particular, in relation to the availability of tuition in Auslan, and Auslan tuition for Deaf students;
- portability and mutual recognition of assistive technology, aids and appliances, and disability support services across Australian jurisdictions;
- Increased employment participation by persons with disability in the public sector;
- Access to justice initiatives, particularly to reduce the over-representation of persons with disability in the criminal and juvenile justice systems.

National program of disability rights defenders

7.12 Informants noted that human rights are only meaningful if they are fulfilled and enforced.

7.13 In this respect, informants suggested that it is essential that CRPD ratification be accompanied by major enhancements to the National Disability Advocacy Program and the National Disability Discrimination Legal Service Network. This will ensure that persons with disability have access to affordable support, where needed, to assert and enforce their human rights.

Representative advice

7.14 Informants noted that the CRPD places major emphasis on the participation of persons with disability and representative organisations for persons with disability in policy development, implementation and monitoring.

7.15 In this respect, informants viewed the establishment or enhancement of representative consultative mechanisms as a key priority for CRPD implementation. Key measures identified included:

- composition of government and independent advisory and consultative bodies in relation to disability policy by persons with disability drawn from representative organisations, who are accountable to a grass roots constituency;
- the establishment or enhancement of systematic and/or structural linkages (such as advisory committee and consultative structures) between HREOC

and the proposed National Office of Disability Policy Coordination and representative organisations for persons with disability.

- Recognition of the vital role of existing representative organisations, who are accountable to a grass-roots constituency, such as those which participated in the roundtable consultations (see Appendix 1).

8. Policy Instruments to Accompany Ratification

8.1 Informants were asked for their views on whether any policy instruments should accompany Australia's ratification of the CRPD; that is to say, whether any reservations, statement of interpretation or understanding, or declarations should accompany ratification to modify the legal effect of the CRPD with respect to Australia, or to inform the international community how a particular CRPD obligation will be interpreted and implemented in the Australian context.

No support for reservations

8.2 There was no support expressed whatsoever for any reservation to the CRPD. Informants urged the Australian government to accept the obligations of the CRPD in their entirety both for the benefit of Australians with disability, and to demonstrate leadership in the recognition and acceptance of the rights of persons with disability at the international level.

Statements of interpretation recommended

8.3 However, a number of statements of interpretation were recommended.

Recognition of indigenous persons

8.4 Informants noted with regret that the CRPD does not incorporate any general or specific obligation in relation to indigenous persons in spite of the multiple and aggravated forms of human rights violation and disadvantage to which indigenous persons are subject.

8.5 It was noted that indigenous persons are, however, referred to in the *Preamble* at paragraph (p) to the CRPD, and that the *Preamble* will potentially play an important role in the interpretation of the provisions of the CRPD as a whole.

8.6 To assist in realising this potential and in ensuring that the specific needs and concerns of indigenous persons with disability are recognised in CRPD implementation, informants urged the Australian government to refer to indigenous persons in its speech to the United Nations accompanying ratification as a specific population group requiring attention in CRPD implementation and monitoring efforts, at both the national and international

levels. In this respect, informants thought it relevant to highlight the high level of support there was for the recognition of indigenous persons during the course of CRPD negotiations.

- 8.7 It was suggested that this gesture would emphasise the importance of this issue to Australian agencies involved in implementation, and assist in focusing Treaty Body attention on the issue at the international level. It was further noted that this gesture would promote reconciliation with indigenous communities within Australia and would be consistent with and build upon the Australian Government's recent reconciliation initiatives.

Persons with vision impairment and persons with hearing impairment

- 8.8 The CRPD refers only to persons who are blind and Deaf, and not to those with vision or hearing impairment, including in the description of persons with disabilities in article 1. Potentially, this renders these groups invisible in implementation efforts, perpetuating the problems that the CRPD was formulated to overcome.
- 8.9 Informants noted that persons with vision impairment and persons with hearing impairment may be subject to different forms of human rights violation, and require different human rights implementation measures, to those who are blind or Deaf.
- 8.10 Informants therefore recommended that Australia lodge a statement of interpretation to the effect that references to persons who are 'Deaf' will be interpreted as including, where applicable, persons who are hearing impaired, and references to persons who are blind will be interpreted as including, where applicable, persons who are vision impaired. Informants expressed the view that such a statement of interpretation would assist in ensuring that these groups were visible in national implementation and monitoring efforts, and also in international implementation and monitoring efforts by influencing the approach of multilateral agencies and the CRPD Treaty Body to the issue.

Article 1 - Understanding of impairment and disability

- 8.11 Informants noted that the description or understanding of persons with disabilities set out in Article 1 of the CRPD is functionally potentially narrower than that provided in the Australian *Disability Discrimination Act*, 1992 in two key respects:
- it requires that impairment be 'long-term' in nature, which has the potential to exclude persons with episodic and temporary conditions;

- it establishes the ‘trigger’ for human rights recognition and protection at the level of disability, rather than impairment, (as understood according to a social model conceptualisation of disability (see Appendix 4)). Accordingly, strictly interpreted, the CRPD does not protect persons with impairments who do not experience disability (because, for example, an aid, appliance, or medication ameliorates or overcomes the impairment, or the relevant environment in which the person functions is barrier free).

8.12 Informants urged the Australian Government to avoid the implementation problems that potentially flow from these formulations by lodging a statement of interpretation in relation to Article 1 to the effect that Australia will interpret:

- the term ‘persons with disabilities’ as a broad and inclusive term not limited to, but including, persons with long-term impairment consistent with the definition of disability set out in section 4 of the *Disability Discrimination Act, 1992*.
- the entitlement to human rights recognition and protection under the CRPD as being triggered by impairment, whether or not the person is subject to disability.

8.13 Informants noted that Article 4(4) of the CRPD provides that CRPD provisions do not affect more beneficial national provisions, and the DDA definition potentially falls in the category of more beneficial national provisions.

8.14 Nevertheless, informants expressed the view that the definition or understanding of disability promoted by the CRPD is a crucial issue at both the national and international levels. An Australian Court or Tribunal might, for example, ultimately use the CRPD formulation to resolve a legislative ambiguity in a manner that is contrary to the interests of Australians with disability.

8.15 The CRPD formulation also has the potential to significantly compromise international implementation and monitoring efforts. Informants expressed the view that, in an effort to avoid this problem, Australia should lodge an intelligent statement of interpretation in relation to these issues with a view to positively influencing future treaty body jurisprudence in the area.

Article 5 - Disproportionate and undue burden defence

8.16 The prohibition on discrimination on the ground of disability set out in Article 5 of the CRPD is limited by the definition of ‘reasonable accommodation’ set out in Article 2, which provides that the accommodation must not impose a ‘disproportionate or undue burden’ on the respondent.

- 8.17 Informants noted that the ‘disproportionate and undue burden’ defence is potentially less beneficial to persons with disability than the ‘unjustifiable hardship defence’ that exists in Australian disability discrimination law. The concepts ‘disproportionate’ and ‘undue’ appear to invite a simple calculation of benefits and ‘burdens’ rather than the more stringent justification of discriminatory conduct entailed in the unjustifiable hardship defence.
- 8.18 Informants urged the Australian Government to lodge a statement of interpretation to the effect that it will interpret the ‘disproportionate and undue burden test’ as equivalent to the ‘unjustifiable hardship test’ that already exists in Australian law.
- 8.19 Informants noted that Article 4(4) of the CRPD provides that CRPD provisions do not affect more beneficial national provisions, and the unjustifiable hardship defence potentially falls in the category of more beneficial national provisions.
- 8.20 Nevertheless, informants sought to avoid downward pressure on the threshold of obligation inherent in the unjustifiable hardship test that may occur should a lesser standard be promoted under relevant international law. Informants expressed the view that, in an effort to avoid this problem, Australia should lodge an intelligent statement of interpretation in relation to this issue with a view to positively influencing future Treaty Body jurisprudence in the area.

Article 12 – substitute decision making

- 8.21 Article 12(3) of the CRPD requires State Parties to take appropriate measures to provide access by persons with disability to support to exercise their legal capacity. Article 12(4) requires that such support, inter alia ‘respect the rights, will and preferences of the person ...’ It may be unclear if Article 12 permits the continued operation of substitute decision-making arrangements, such as those provided for in Australian guardianship and administration legislation. If there is doubt about this, then it also follows that there is doubt as to whether the human rights safeguards imposed on supported decision-making article 12(4) apply to substitute decision-making arrangements.
- 8.22 There was not consensus across all roundtables as to whether article 12 should be understood as permitting the continued operation of substitute decision-making arrangements. Nor was there consensus across all roundtables as to whether this was a desirable or undesirable state of affairs.
- 8.23 Informants in the Brisbane and Sydney roundtables supported the view that Article 12 ought to be interpreted:

- As permitting (or requiring where they do not exist) substitute decision-making arrangements that will enable persons with disability to exercise legal capacity where they do not have the instrumental ability to do so personally; and
 - As requiring such substitute decision-making arrangements to comply with the human rights safeguards set out in Article 12(4).
- 8.24 The National Council on Intellectual Disability and the National Mental Health Consumers and Carers Forum sought to be specifically associated with this view.
- 8.25 Informants in the Brisbane and Sydney roundtables urged the Australian Government to lodge a statement of interpretation to clarify that Australia will interpret this article as permitting and requiring substitute decision-making arrangements subject to the human rights safeguards set out in article 12(4).
- 8.26 In relation to those safeguards, informants also urged the Australian Government to refer explicitly in its statement to the active facilitation and support of supported decision-making and the promotion of positive alternatives to substitute decision-making so as to ensure that substitute decision-making is genuinely a last resort.
- 8.27 This is a sensitive issue requiring further discussion and consideration of all the possible elements of the recommended statement of understanding. It was therefore recommended that the Attorney General's Department consult closely with the relevant representative organisations of persons with disability in the drafting of the proposed statement.
- 8.28 The National Council on Intellectual Disability and the National Mental Health Consumer and Carer Council sought to be specifically associated with this request.

Article 17 - compulsory assistance

- 8.29 Article 17 of the CRPD asserts that 'every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.' It is not necessarily clear what the scope and content of this right is, although it is clearly directed at non-interference with, and the protection of, body and mind.
- 8.30 Some stakeholders view the article as prohibiting compulsory assistance (or 'forced treatment'), (including for example, the involuntary detention of, or the imposition of a compulsory community treatment order on, a person with an acute mental health condition) and restrictive practices (including for example, locking the doors of a residence to prevent a person from leaving, or

restraining a person's arm to prevent self-injurious behaviour), although the article clearly does not specifically state this. If it did, it would have major implications for Australian guardianship and mental health laws. As it is, a great deal is left to the Treaty Body in terms of the interpretation of the scope and content of the right.

- 8.31 There was not consensus across all roundtables as to whether article 17 should be understood as prohibiting compulsory assistance. Nor was there consensus across all roundtables as to whether this was a desirable or undesirable state of affairs. Some informants in the Melbourne roundtable appeared to view compulsory assistance as always incompatible with human rights, whereas informants in the Brisbane and Sydney roundtables tended to view it as essential to the realisation of human rights, albeit in very specific circumstances.
- 8.32 Informants in the Brisbane and Sydney roundtables urged the Australian Government to lodge a statement of interpretation to clarify that Australia will interpret this Article as permitting and requiring the continuation of compulsory assistance subject to stringent human rights safeguards, which would include the principle of the least restrictive alternative, and the active research, promotion and support of alternatives to compulsory assistance and restrictive practices, to ensure their use as a last resort.
- 8.33 This is a sensitive issue requiring further discussion and consideration of all the possible elements of the recommended statement of understanding. It was therefore recommended that the Attorney General's Department consult closely with the relevant representative organisations of persons with disability in the drafting of the proposed statement.
- 8.34 The National Council on Intellectual Disability and the National Mental Health Consumer and Carer Council sought to be specifically associated with this request.

Declarations recommended

Article 4(f),(g) & (i) - 8(2)(b) & (c) - 9(2)(b) - 21(c) - Responsibility of non-state actors

- 8.35 The CRPD establishes, or potentially establishes, a different standard of compliance with CRPD obligations for state and non-state actors. For example, article 4(f), (g) and (i) require State Parties to merely promote research and development and the training of professionals respectively; articles 8(2)(c) and (d) require State Parties to merely 'foster' respect for the rights of persons with disability at all levels of the education system, and 'encourage' the media to positively portray persons with disability respectively; article 9(2)(b) requires State Parties merely to ensure that private

entities take accessibility 'into account;' and article 21(c) requires State Parties merely to 'urge' private entities to provide information and services in accessible and usable formats.

- 8.36 Informants viewed this lesser standard of obligation for non-state actors as seriously undesirable and inappropriate, particularly given the extensive role that the private sector now plays in the provision of public goods and services, the development and provision of disability specific services, aids and appliances, and in the shaping of social attitudes.
- 8.37 Informants noted that Australian disability discrimination law already applies an equivalent standard of obligation to many, although not all, non-state actors as it does to the public sector (apart from under s 29 of the *Disability Discrimination Act* 1992, which imposes a higher standard on Commonwealth agencies by preventing their resort to the defence of unjustifiable hardship). Informants noted that Article 4(4) of the CRPD provides that CRPD provisions do not affect these more beneficial national provisions.
- 8.38 Nevertheless, informants were of the view that the CRPD cannot be effectively implemented either at the national or international levels without the same standards of obligation applying to non-State actors as apply to State actors.
- 8.39 In order to ensure that non-State actors involved in the provision of public goods and services continue to be bound by the same standard of obligation as the public sector, informants called on the Australian Government to lodge a declaration to the effect that Australia does not consider itself limited to 'fostering' or 'encouraging' or 'promoting' or 'encouraging' non-State actors to observe CRPD rights, but may in fact require them to do so on an equivalent basis to State actors.
- 8.40 Informants believed that such a declaration might also positively influence future treaty body jurisprudence in this area.

Appendix 1: Participating organisations

Organisation	Scope	Delegate
Aboriginal Disability Network of NSW	New South Wales	Lester Bostock Damian Griffis
Action for Community Living	Victoria	Steven Eicke
Advocacy Tasmania	Tasmania	Valerie Williams
Australian Mental Health Consumer Network	National	Jenny Speed
Blind Citizens Australia	National	Leah Hobson
Deaf Australia	National	Karen Lloyd
Deaf Blind Association	New South Wales	Irene McMinn
Deafness Forum	National	Jill Duncan
Disability Advisory Council of Victoria	Victoria	David Brant
Disability Advocacy Service	Northern Territory	Janine Stewart
Disability Advocacy and Complaints Service	South Australia	Monika Baker
Disability Australia	National	Rae Hurrell

Disability Council of New South Wales	New South Wales	Dougie Herd
Disability Council of Queensland	Queensland	Paul Larcombe
Disability Discrimination Legal Centre & National Association of Community Legal Centres	New South Wales National	Rosemary Kayess
Disability Discrimination Service Welfare Rights Centre	Queensland	Larry Laikind
Disability Discrimination Legal Service	Victoria	Julie Phillips
Central Community Legal Service - Disability Discrimination Service	South Australia	John Steele
Disability Information and Resource Centre	South Australia	Sandy Puddy
Disability Resource Centre	Victoria	Martin Leckey
Disability Rights Victoria	Victoria	Frank Hall- Bentick
Integrated Disability Action	Northern Territory	Robyne Burrridge
Ministerial Advisory Council on Disability Western Australia	Western Australia	Jane Eacott
Minister's Disability Advisory Council	South Australia	Lorna Hallaran

National Mental Health Consumer and Carer Forum	National	Isabell Collins Jean Platts
National Association of People Living with HIV/AIDS	National	Rob Lake
National Council for Intellectual Disability	National	Mark Pattison
National Ethnic Disability Alliance	National	Diana Qian
People with Disability Australia	National	Samantha French Matthew Bowden
People with Disability Western Australia	Western Australia	Kerrie Duff
Physical Disability Council Australia	National	Sue Egan
Public Interest Advocacy Centre	New South Wales	Robin Banks
Queensland Advocacy Incorporated	Queensland	Kevin Cocks Rebekah Bradshaw
Queenslanders with Disability Network	Queensland	Lisa Leaman
Women with Disabilities Australia	National	Rayna Lamb

Appendix 2: Task Force Membership

Kevin Cocks	Queensland Advocacy Incorporated
Heidi Forrest	National Association of Community Legal Centres
Frank Hall-Bentick	Australian Federation of Disability Organisations
Dougie Herd	Secretariat of the State and Territory Disability Advisory Councils
Jeremy Muir	Australian Federation of Disability Organisations

Note:

People with Disability Australia is also a member of the Task Force, but stood down from it for the course of this project in view of the fact that it secured the contract to conduct these consultations on behalf of the Task Force.

Appendix 3: Project Team Membership

Project Manager

Therese Sands A/ Co-Chief Executive Officer, People with Disability Australia

Project Team

Sonya Price-Kelly Senior Advocate, People with Disability Australia

Orna Marks Information and Liaison Officer, People with Disability Australia

Luck O'Connell Publications Officer, People with Disability Australia

Phillip French Chief Executive Officer, Disability Studies and Research Institute

Appendix 4: The ‘Social Model of Disability’

The social model of disability posits that disability is the result of the interaction between persons with impairments and a barrier-filled physical and social environment. It therefore carries the action implication that the physical and social environment must change so as to enable persons with impairment to participate on an equal basis with others.

The social model of disability is in contrast to what are sometimes referred to as the ‘medical’ and ‘welfare’ models of disability, in which disability is viewed as the product of impairment. The medical model carries the action implication of changing the person, often in isolation from the mainstream, in order that they might better ‘cope’ with the physical and social environment as they presently exist.

See further United Nations ENABLE; “Frequently asked Questions;” “Are the terms “disability” and “persons with disabilities” defined in the Convention? Available at www.uneable.org/disabilities