**Submission of the Australian Government**

**Draft General Comment No. 6 on**

**Equality and Non-discrimination (Article 5)**

1. The Australian Government presents its compliments to the United Nations Committee on the Rights of Persons with Disabilities (the Committee) and has the honour to refer to the Committee’s call for written submissions on draft General Comment No. 6 on Equality and Non-discrimination (Article 5) (the draft General Comment).[[1]](#footnote-1) Australia thanks the Committee for the opportunity to provide a written submission.
2. Australia is a longstanding party to the Convention on the Rights of Persons with Disabilities (the Convention) and its Optional Protocol, and is firmly committed to upholding its obligations under these instruments. Australia has implemented these obligations domestically, including by enacting legislation prohibiting disability discrimination (the *Disability Discrimination Act 1992*)[[2]](#footnote-2) and by ensuring that services and facilities are available for, and accessible to, persons with disabilities.[[3]](#footnote-3)
3. Australia appreciates the Committee’s work in preparing this comprehensive draft General Comment. Australia’s understanding of the purpose of General Comments accords with the Committee’s aims in drafting this General Comment, that is, ‘to guide State parties and other stakeholders’.[[4]](#footnote-4) Australia considers the Committee’s analysis of the right to equality and non-discrimination to be helpful in informing its implementation of the obligations under Article 5 of the Convention.
4. While the current draft of the General Comment provides valuable guidance on the content of Article 5, Australia takes the opportunity in this submission to highlight and discuss parts of the draft General Comment that differ from Australia’s interpretation of Article 5 of the Convention, with a view to contributing to the Committee’s constructive work in developing the draft General Comment.

*Interpreting Article 5 of the Convention in context*

1. At the outset, Australia recalls that ‘[t]he purpose of the … Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities…’.[[5]](#footnote-5) The Convention itself does not create any new human rights. Rather, it clarifies the application of existing rights in international human rights treaties to ensure those rights can be effectively and practically exercised by persons with disabilities, on an equal basis. This is reflected in the *travaux préparatoires* of the Convention and has since been confirmed by the United Nations High Commissioner for Human Rights[[6]](#footnote-6) and academic commentators.[[7]](#footnote-7) The Convention is firmly anchored in existing principles of international human rights law.
2. Australia therefore welcomes the Committee’s recognition that the Convention ‘was built’ on the other core human rights treaties which provide for equality and non-discrimination.[[8]](#footnote-8) Australia’s view is that the right of persons with disabilities to equality and non‑discrimination should be interpreted in accordance with international law and consistently across the core human rights treaties. This position has informed Australia’s approach to the present draft General Comment.
3. Accordingly, Australia does not consider that the definition of ‘discrimination on the basis of disability’ in Article 2 of the Convention ‘goes beyond’ definitions of discrimination in other international human rights treaties due to the inclusion of the phrases ‘on an equal basis with others’ and ‘denial of reasonable accommodation’, as suggested by the Committee.[[9]](#footnote-9) In Australia’s view, the inclusion of ‘on an equal basis with others’ and ‘denial of reasonable accommodation’ in the definition of disability‑based discrimination seeks to ensure that the rights to equality and non‑discrimination can be effectively and practically exercised by persons with disabilities consistently with the obligation of non-discrimination at international human rights law.

*Models of disability and compatibility with the Convention*

1. Australia welcomes ‘the human rights model of disability, which leaves charity, welfare, and medical approaches behind and is based on the assumption that disability is not primarily a medical issue’, and recognises that the Convention affirms a social model of disability.[[10]](#footnote-10) That said, Australia does not consider that the medical model of disability, or medical paradigms to disability, are ‘incompatible’ with the Convention.[[11]](#footnote-11) In Australia’s view, the social model of disability is best practice but not a precondition for conformity with the Convention. While Australia’s National Disability Strategy and the *Disability Discrimination Act 1992* promote a social model of disability, as do many of Australia’s programs, there are different definitions of disability in use in Australia, consistent with the Convention.
2. Some domestic legislation used the medical model definition of disability at the time that Australia ratified the Convention. At that time, Australia did not consider its law and practice to be incompatible with the Convention. Nor does it consider it to be incompatible with the Convention today. Notwithstanding, Australia commits to working towards the social model of disability.

*Specific measures*

1. Australia refers to the Committee’s statement that ‘States parties are required to adopt temporary or permanent specific measures where they are deemed necessary to accelerate or achieve *de facto* equality…’.[[12]](#footnote-12) Australia respectfully submits that Article 5(4) of the Convention does not ‘require’ States parties ‘to adopt … specific measures’.
2. As with all human rights obligations, Australia considers that the obligations contained in Article 5 must be interpreted consistently with the widely accepted principles of treaty interpretation codified in the 1969 *Vienna Convention on the Law of Treaties*.[[13]](#footnote-13) General Comments provide valuable guidance as to the provisions of the Convention, and are of the most assistance when they are based on the text of those provisions and the practice of States Parties to the Convention. As stated above, Article 5 should also be interpreted consistently with existing principles of international human rights law.
3. Having regard to the text of Article 5(4) of the Convention, Australia does not consider that a failure to take specific measures in an individual case amounts, in and of itself, to a violation of the Convention. Rather, Article 5(4) provides that any specific measures ‘necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the … Convention’. Australia agrees with the Committee that specific measures are an important mechanism to accelerate and achieve equality of persons with disabilities, and play a crucial role in the Convention’s framework.

*Distinguishing policy recommendations from States Parties’ obligations*

1. Australia appreciates the examples that the Committee has provided of ways in which States Parties could fulfil their obligations to persons with disabilities in furtherance of Article 5 of the Convention. While Australia supports the inclusion of such examples from a policy perspective, it is concerned about the framing of certain examples in mandatory terms. In this regard, Australia notes the following two statements in the draft General Comment:
	* ‘Explicit prohibition of disability-based and other discrimination against persons with disabilities in legislation *has to be accompanied* by provision of effective legal remedies and sanctions in civil, administrative *and* criminal proceedings’.[[14]](#footnote-14)
	* ‘In case of discrimination, including denial of reasonable accommodation, specific remedies *shall* be available and *not be* reduced to monetary damages only’.[[15]](#footnote-15)
2. Australia considers that such statements extend beyond what is required by Article 5 of the Convention and should more appropriately be presented as guidance to States, rather than requirements of the Convention.
3. Although not framed in mandatory terms, Australia also questions the usefulness of including the following statements in the Committee’s discussion of Article 5 of the Convention:
	* The Committee’s statement that ‘States parties should address stigmatization through modern forms of discrimination, such as a disability-selective antenatal screening policy that go against the recognition of the equal worth of every person’.[[16]](#footnote-16)
	* The Committee’s suggestion that ‘procedural rules should shift the burden of proof from the claimant to the respondent in cases where there are facts from which it may be presumed that there has been discrimination’.[[17]](#footnote-17)
4. Australia invites the Committee to reconsider whether these statements in the draft General Comment are reflective of States Parties’ interpretation of their legal obligations under the Convention and of State practice.

*The right to legal capacity*

1. Australia notes that the Committee’s consideration of deprivation of legal capacity in the context of Article 5 does not accord with Australia’s interpretation of the right to legal capacity, as provided for in Article 12 of the Convention.
2. Australia draws the Committee’s attention to the declaration that Australia made under the Convention in relation to Article 12.[[18]](#footnote-18) In this declaration, Australia explicitly recognises that ‘persons with disability enjoy legal capacity on an equal basis with others in all aspects of life’ and ‘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’.[[19]](#footnote-19)
3. Australia reiterates that declaration in this submission. Substituted decision-making may be necessary in limited circumstances and as a last resort to ensure, for example, that persons with disabilities are not denied access to proper medical treatment because of an inability to access or communicate their needs or preferences. Such decisions should only be made on behalf of others in exceptional circumstances – where this is necessary, as a last resort, and subject to safeguards.
4. Accordingly, Australia does not agree that, in every circumstance, ‘denying legal capacity on the basis of disability is discriminatory’.[[20]](#footnote-20) Nor does Australia agree with the Committee’s statement that ‘[t]he right to legal capacity is a threshold right, that is, it is required for the enjoyment of all other rights in the Convention, including the right to equality and non‑discrimination’.[[21]](#footnote-21)

*Protecting the integrity of the person*

1. Australia refers again to its declaration under the Convention.[[22]](#footnote-22) In this declaration, Australia explicitly 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’ and ‘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’.[[23]](#footnote-23)
2. Australia further refers to the Committee’s description of institutionalisation as a practice that is ‘in direct contravention of the Convention and its principles’ and its statement that ‘article 14 imposes an absolute prohibition on the institutionalisation of a person on the grounds of their “actual or perceived impairment”’.[[24]](#footnote-24) In Australia’s view, there is no absolute prohibition on institutionalisation. However, any circumstances of institutionalisation must be considered in light of the obligations in Article 14 of the Convention, which provides that ‘States Parties shall ensure that persons with disabilities … [a]re not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty’.[[25]](#footnote-25)

*The right to live independently*

1. Australia refers to the Committee’s references to the ‘right to live independently’ in the draft General Comment.[[26]](#footnote-26) As respectfully stated in Australia’s submission to the Committee on ‘Draft General Comment No. 5 (2017): Article 19: Living independently and being included in the community’, article headings may be an aid to interpretation, but cannot evince the content of an obligation.[[27]](#footnote-27) In Australia’s view, the starting point for interpreting the obligations in Article 19 of the Convention should be the text of its ‘chapeau’. The key concepts, as provided for explicitly in the text of the article, are: (1) ‘the equal right of all persons with disabilities to live in the community’; (2) ‘with choices equal to others’; and (3) ‘full inclusion and participation in the community’.

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1. Australia commends the Committee for this helpful draft. Australia reiterates its support for the work of the Committee and avails itself of this opportunity to renew to the Committee the assurances of its highest consideration.

15 November 2017

1. Committee on the Rights of Persons with Disabilities, *General Comment on Equality and Non-discrimination (Article 5)*, first draft as at 31 August 2017 (the draft General Comment). [↑](#footnote-ref-1)
2. At the Commonwealth level, the *Disability Discrimination Act 1992* makes it unlawful to discriminate against a person on the ground of their disabilities in a number of areas, such as employment, education, the provision of goods and services and facilities, accommodation, and the implementation of federal laws and programs. [↑](#footnote-ref-2)
3. Australia is implementing the National Disability Insurance Scheme (NDIS), governed under the *National Disability Insurance Scheme Act 2013*, which is reforming the way Australians with disabilities are supported to ensure that services provided to persons with disabilities are both accessible and appropriate. The NDIS was trialled in eight locations around Australia and in July 2016 the NDIS commenced rolling out nationally. It is scheduled to be rolled out nation-wide by 2019. [↑](#footnote-ref-3)
4. Paragraph 1 of the draft General Comment. [↑](#footnote-ref-4)
5. *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art1 (the Convention). [↑](#footnote-ref-5)
6. The United Nations High Commissioner for Human Rights emphasised that the Convention ‘does not recognize any new human rights of persons with disabilities, it clarifies the application of existing rights to the specific situation of persons with disabilities’ in the *Annual Report* of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities* (2009) A/HRC/10/48, page 11. [↑](#footnote-ref-6)
7. See, for example, Peter Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (2012) 75(5) *Modern Law Review*, pages 752-753. [↑](#footnote-ref-7)
8. Paragraph 6 of the draft General Comment; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 3 and 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 1 and 2; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2. [↑](#footnote-ref-8)
9. Paragraph 19 of the draft General Comment. [↑](#footnote-ref-9)
10. Paragraph 11 of the draft General Comment. [↑](#footnote-ref-10)
11. Paragraph 2 of the draft General Comment. See also paragraph 9 of the draft General Comment. [↑](#footnote-ref-11)
12. Paragraph 30 of the draft General Comment. [↑](#footnote-ref-12)
13. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). [↑](#footnote-ref-13)
14. Paragraph 23 of the draft General Comment (emphasis added). [↑](#footnote-ref-14)
15. Paragraph 35 of the draft General Comment (emphasis added). [↑](#footnote-ref-15)
16. Paragraph 44 of the draft General Comment. [↑](#footnote-ref-16)
17. Paragraph 76(h) of the draft General Comment. [↑](#footnote-ref-17)
18. Australia’s declaration under the Convention is available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en> . [↑](#footnote-ref-18)
19. See also Australia’s submission on the Committee’s draft General Comment on Article 12 of the Convention: *Views of the Australian Government on the draft General Comment by the Committee on the Rights of Persons with Disabilities regarding Article 12 of the Convention – Equal Recognition before the Law*, February 2014. [↑](#footnote-ref-19)
20. Paragraph 54 of the draft General Comment. [↑](#footnote-ref-20)
21. Paragraph 54 of the draft General Comment. [↑](#footnote-ref-21)
22. Australia’s declaration under the Convention is available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en> . [↑](#footnote-ref-22)
23. Paragraph 4 of the draft General Comment. [↑](#footnote-ref-23)
24. Paragraphs 4 and 64 of the draft General Comment. [↑](#footnote-ref-24)
25. The Convention, art 14(1)(b). [↑](#footnote-ref-25)
26. See paragraphs 26 and 65-69 of the draft General Comment. [↑](#footnote-ref-26)
27. Richard Gardiner, *Treaty Interpretation* (2nd edition, 2008, Oxford University Press), pages 200-201. See Submission of the Australian Government on *Draft General Comment No. 5 (2017): Article 19: Living independently and being included in the community*, endorsed during the Committee’s 17th session. [↑](#footnote-ref-27)