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2014

# Submission to United Nations Committee on the Rights of Persons with Disabilities Draft General Comment on Article 12 – Equal Recognition Before the Law

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## Publication Details

Beaupert, F. & Steele, L. Roslyn. (2014). Submission to United Nations Committee on the Rights of Persons with Disabilities Draft General Comment on Article 12 – Equal Recognition Before the Law Submission (pp. 1-6) Switzerland : United Nations Human Rights. ( Website )

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# Submission to United Nations Committee on the Rights of Persons with Disabilities Draft General Comment on Article 12 – Equal Recognition Before the Law

## **Abstract**

We support the Draft General Comment on Article 12 – Equal Recognition Before the Law ('Draft General Comment'). Our submission is primarily concerned with drawing the Committee's attention to issues around mental capacity. We argue that despite the Committee's urging in the Draft General Comment for a split between legal capacity and mental capacity, mental capacity (and the related disciplines, professions, institutions and practices of psychology, psychiatry and neuropsychology through which mental capacity is defined and assessed) will continue to have cultural and material significance to the realisation of article 12 and the human rights of people with disability generally. We therefore make a number of recommendations concerning how the Committee might address mental capacity in the General Comment.

## **Keywords**

article, 12, equal, recognition, before, law, united, submission, nations, committee, rights, persons, disabilities, draft, general, comment

## **Disciplines**

Arts and Humanities | Law

## **Publication Details**

Beaupert, F. & Steele, L. Roslyn. (2014). Submission to United Nations Committee on the Rights of Persons with Disabilities Draft General Comment on Article 12 – Equal Recognition Before the Law Submission (pp. 1-6) Switzerland : United Nations Human Rights. ( Website )

# **Submission to United Nations Committee on the Rights of Persons with Disabilities**

## **Draft General Comment on Article 12 – Equal Recognition Before the Law**

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We support the Draft General Comment on Article 12 – Equal Recognition Before the Law (‘Draft General Comment’). Our submission is primarily concerned with drawing the Committee’s attention to issues around mental capacity. We argue that despite the Committee’s urging in the Draft General Comment for a split between legal capacity and mental capacity, mental capacity (and the related disciplines, professions, institutions and practices of psychology, psychiatry and neuropsychology through which mental capacity is defined and assessed) will continue to have cultural and material significance to the realisation of article 12 and the human rights of people with disability generally. We therefore make a number of recommendations concerning how the Committee might address mental capacity in the General Comment.

### **1. Concept of ‘capacity’, and the distinction between ‘legal capacity’ and ‘mental capacity’**

We support the Committee’s observations about the existing conflation of legal capacity and mental capacity and support the recommendation that these two concepts be split (see [12], p 4 of the Draft General Comment). However, we wish to raise some issues in relation to the splitting of ‘legal capacity’ and ‘mental capacity’.

Splitting the two concepts of capacity and focussing on extending legal capacity to all individuals must not leave untouched the problematic ideas about mental capacity. The Committee in its Draft General Comment recognises that related to the conflation of the two capacity concepts these ideas are central to the present failure of States to realise the rights enshrined in article 12. This point is premised on the view that far from mental capacity being an objective, scientific and natural phenomenon, mental capacity is contingent on social, historical, political and institutional contexts, and mental capacity is both a product of and itself supports power inequalities within society. Furthermore, the psychology, psychiatry and neuropsychology disciplines, professions and practices which play a dominant role in assessing mental capacity are not scientifically objective and abstracted from political and social contexts, but are also contingent on social, historical, political and institutional contexts. Moreover, processes of diagnosis and assessment through which an individual’s mental capacity is determined are embedded in unequal power relations between professionals and individuals, which can lead to individuals becoming unjustifiably entrenched in an incapacity status – but without adequate support to either enhance their mental capacity or have their mental capacity recognised.

In the current approach to article 12 in the Draft General Comment, *legal* capacity is contested and it is extended to all individuals as per article 12 by formally divorcing it from mental capacity, but *mental* capacity itself is not similarly contested and consequently remains a purportedly scientific-based, internal, apolitical individual feature of individuals. Uncritical acceptance of the concept of mental capacity fails to question the epistemologies upon which mental capacity is defined or assessed, and their political and social contexts. Moreover, the psychological, psychiatric and neuropsychological disciplines, professions, institutions and practices of diagnosis and assessment which have the authority – in partnership with legal processes – to deem individuals as mentally incapable and the medical and welfare models of disability which do not necessarily increase or support capacity are also left uncontested in the Draft General Comment, even though they are similarly socially, politically and historically contingent and can be contested and changed. Only changing the law so that everyone is recognised as having legal capacity will not in itself change underlying discriminatory ideas and practices in the collaboration between psychological, psychiatric and neuropsychological disciplines and the legal system that continues to provide the possibility and legitimacy of identifying individuals with disability as lacking mental capacity.

The current failure of the Draft General Comment to address mental capacity is of concern because mental capacity still matters in a human rights sense even if, as per the Draft General Comment, mental capacity is no longer explicitly conflated with legal capacity. One reason is that at the underlying level of how decisions are actually made, there is the risk that the identification of support needs an individual requires to realise their legal capacity will rely upon an assessment of mental capacity. Thus, mental capacity might still have a procedural role in the realisation of article 12, even if it is no longer explicitly substantively conflated with legal capacity. A further reason is that mental capacity has an important cultural or discursive role in promoting ideas that can inform the continued negation of legal capacity and a State's resistance to the universal recognition of legal capacity in its jurisdictions. That is, simply separating mental capacity from legal capacity will not in itself challenge the problematic ideas about mental capacity which had informed the denial of legal capacity when it was conflated with legal capacity – these ideas will still circulate in legal, social, political and psychological/psychiatric and neuropsychological contexts and have the potential to affect practices, policies and laws beyond those which are the focus of article 12. Thirdly, the continued operation of the concept of mental capacity, if not contested or rethought, may inhibit the realisation of other rights in the CRPD which are not related to an individual's exercise of legal capacity, but rather on the decisions of third parties (eg provision of services and formulation of policies). A fourth reason why mental capacity matters in a human rights sense is that in its current form and current disciplinary and institutional location in psychology, psychiatry and neuropsychology the concept feeds into diagnostic constructions of disability that are central to the enduring significance of the medical model of disability which is at the very core of the

historical denial of human rights to people with disability (and which the CRPD itself contests in para (e) of the Preamble). Thus, the concept of mental capacity has ramifications beyond its role in denying individuals' legal capacity following from its current conflation with legal capacity: simply formally splitting the two concepts of capacity (as per [13], p 4 of the Draft General Comment) will not address these issues with mental capacity itself nor address their subsequent impact on the realisation of the human rights of people with disability.

While it might be beyond the terms of the Draft General Comment to focus on mental capacity per se given that article 12 is focused on legal capacity, we recommend that the General Comment on article 12 at a minimum acknowledge these problems and also urge states to engage with them. Such acknowledgement could include a clear statement that divorcing the two forms of capacity – and restoring legal capacity to people with disabilities on an equal basis with others – does not diminish the need to think critically about the concept of mental capacity (and the related disciplines, professions, institutions and practices of psychology, psychiatry and neuropsychology), and to acknowledge the potential of the concept of mental capacity to impact adversely on the wellbeing of people with disabilities and inhibit the realisation of their rights. We will now turn to deliberate on some of the specific ways in which mental capacity might be addressed in the General Comment on article 12.

## **2. Relationship of Article 12 with other provisions of the CRPD**

We support the Committee's point that recognition of legal capacity is 'inextricably linked' to the enjoyment of many other human rights (see [27], p 7 of the Draft General Comment). The focus of the Committee's discussion on this point is on how legal capacity supports the realisation of other rights. We wish to draw the Committee's attention to a slightly different point about the relationship of article 12 to other CRPD provisions. This is that other articles in the CRPD might be used as a basis on which to deny legal capacity to individuals, whether on an individual or systemic basis, where the realisation of these other rights is premised on a model of mental capacity as a scientific-based, internal, apolitical individual feature of individuals and in turn a medical or welfare paradigm of disability which privileges and supports paternalistic and coercive interventions. This is evident in the current substituted decision-making model and related best interests principle which effectively privileges the sacrifice of legal capacity for the greater good of an individual's wellbeing. For example, if an individual is assessed as mentally incapable, then the state might view their 'right to the enjoyment of the highest attainable standard of health' as per article 25 of the CRPD as requiring interventions which deny the individual's capacity to choose whether they want such interventions.

We recommend that the Committee emphasise that as well as article 12 being central to the realisation of other articles of the CRPD, that the realisation of other articles of the CRPD cannot trump or compromise the realisation of article 12. In support of this, the Committee could refer to the general principle of non-discrimination contained in article 3 of the CRPD, as this would require attention to the underlying ideas which inform the medical and welfare paradigms of disability which privilege coercion and paternalism underpinning the substituted decision making and best interests paradigm. The Committee could also refer to article 4, paragraph 2 of the ICCPR and article 4, paragraph 4 of the CRPD concerning non-derogation of the right to equal recognition before the law. This would make clear that article 12 can never be ignored for the sake of realising other human rights (as pointed out in [5], p 2 & [28], p 7 of the Draft General Comment).

### **3. Identifying support needs for the exercise of legal capacity**

We support the Committee's statement that persons with disabilities may themselves choose one or more trusted support persons (see [15], p 4 of the Draft General Comment). We support the discussion in the Draft General Comment concerning the importance of identifying an individual's support needs as a means of ensuring the realisation of the right to legal capacity in article 12. However, we query who will identify an individual's needs for '[s]upport in the exercise of legal capacity' (see [15], p 4 of the Draft General Comment), i.e. the individual him or herself, a third party such as a family member or a psychologist, psychiatric or neuropsychologist, particularly if the individual him or herself is of the view he or she does not require support. We question how support needs will be identified and specifically whether these will be identified by reference to assessments of mental capacity. It is unclear from the Draft General Comment the extent to which the Committee views a mental capacity assessment conducted by an 'expert' in mental capacity (e.g. a psychologist, psychiatrist or neuropsychologist) as part of the process of identifying support needs. In our view, consideration should be given to whether such a process is necessary and, if so, what it will involve. Building on our discussions about the political and social contingency of the concept of mental capacity and the existing disciplines, professions, institutions and practices of mental capacity assessment, we argue that any assessment of a person's support needs should move towards a more person-centred approach, focused on the will and preferences of the person and their social and cultural networks. Our concern is that if the identification of support needs is linked to mental capacity assessment, the identification of support needs will fall back on the problematic ideas about mental capacity which we raised earlier. We are concerned that the identification of support needs will impact on the realisation of legal capacity because: (a) the existing disciplinary and institutional frameworks for assessment of mental capacity will de-legitimise or marginalise an individual's own views on supports; or (b) the supports identified as necessary by professionals

will be paternalistic and intensive such that they operate in practice to deny an individual's ability to make their own decisions. That is, there is the risk that individuals will be inappropriately assessed as having low mental capacity and that this will result in more 'supports' than the individual requires or needs, including in a manner contrary to the views expressed by the individual. Even though pursuant to the Draft General Comment mental capacity is to be split from legal capacity, mental capacity will still have an implicit role in the supports provided to realise legal capacity. The concerns expressed here are certainly acknowledged by the Committee in the Draft General Comment where it states that 'All forms of support in legal capacity ... must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests' ([25(b)], p 6 of Draft General Comment). However, if the Committee leaves uncontested the disciplines, professions, institutions and practices related to the meaning and assessment of mental capacity, support measures might still be based on 'what is perceived as being in his or her objective best interests'.

This is not to say that there is no place for psychologists, psychiatrists or neuropsychologists in assisting a person with a disability to exercise their legal capacity and improve their mental capacity. However, a shift to supported decision making and equal recognition before the law for people with disabilities as per article 12 and the Draft General Comment calls for a consideration of the role that these professionals will have and a related critique of the power dynamics at the macro-level of their disciplines and institutions and at the micro-level of the patient-professional interaction. We therefore recommend that the Committee clearly articulate in the General Comment how support needs will be identified, that this will not be linked to mental capacity and that the views of the individual on their support needs will be acknowledged and not be overridden by the views of third parties including psychologists, psychiatrists and neuropsychologists.

#### **4. Assistance in exercising capacity**

The Committee states that one 'of the aims of support in the exercise of legal capacity is to build the confidence and skills of persons with disabilities so that they can exercise their legal capacity with less support in the future if they so wish' (see [20], p 5 of the Draft General Comment). In relation to the kind of assistance which states should provide to assist someone to exercise their legal capacity, it is our view that support measures should indeed build an individuals' confidence and skills, and should in addition bolster the social and economic resources available to them and involve broader systemic reforms needed to ensure that individuals with disability are not hindered in exercising their legal capacity.

While the Committee in the Draft General Comment wishes to draw a clear distinction between legal capacity and mental capacity, we are concerned that assistance in exercising legal capacity

will be contingent upon problematic perceptions of mental capacity. In terms of whether or how a person would be assisted to improve mental capacity, there is a risk that this process will be narrowly structured around medical therapeutic interventions rather than a broad range of social, economic and political support measures. Moreover, there is a risk that insufficient attention will be paid to economic, social, cultural and systemic issues which may inhibit a person from exercising legal capacity, or which may contribute to non-recognition of their mental capacity.

## **5. Specific issues in the criminal law system**

We submit that equal recognition before the law for people with disabilities requires the dismantling of forensic mental health systems, which regulate individuals – often using coercive methods involving substituted decision-making – even though they have not been convicted on the basis of mental incapacity, e.g. after they have been found not guilty of an offence due to mental illness, or unfit to stand trial due to mental incapacity. Such a measure is part of the obligation of State parties to ‘abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect’ (see [21], pp 5-6 of the Draft General Comment). Unfortunately there is an ongoing failure of states to acknowledge the discriminatory nature of the forensic mental health system, with the focus being on improving conditions and procedural safeguards within the system rather than abolishing the system. This might be because the subjects of the forensic mental health system (i.e. individuals with disability who are *not convicted* on the basis of mental incapacity) are being inappropriately compared to *convicted individuals without a disability*. The appropriate comparator, to ensure non-discrimination and equality before the law, is rather *non-convicted individuals without disability* – i.e. the individuals who are not convicted because there is insufficient evidence to persuade a jury beyond reasonable doubt or who avails themselves of a complete defence such as self-defence or necessity and who, importantly, are incapable of punishment or regulation by the criminal law. The continued comparison of non-convicted individuals in the forensic mental health system with convicted individuals might be due to associations between disability and risk, dangerousness and need for management which renders these individuals inherently deviant on the basis of their disability regardless of the absence of a legal finding of guilt for a specific offence.

21 February 2014

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