

**Submission of the Australian Government**

**Draft General Comment on Article 27 of the Convention on the Rights of Persons with Disabilities**

1. The Australian Government (Australia) 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 invitation for written submissions on the draft General Comment on the right of persons with disabilities to work and employment (draft General Comment).[[1]](#footnote-1)
2. Australia is a longstanding party to the *Convention on the Rights of Persons with Disabilities* (the Convention or CRPD) and its Optional Protocol, and is firmly committed to upholding its obligations under these instruments. Australia has implemented these obligations domestically, through legislation, policy and programs at federal and state and territory levels. Each of these jurisdictions has a framework of laws and institutions that implement Convention rights. This includes prohibiting disability discrimination[[2]](#footnote-2) and ensuring that services and facilities are available for, and accessible to, persons with disabilities.[[3]](#footnote-3)
3. Australia makes the following preliminary observations on the draft General Comment, noting that these preliminary observations are not exhaustive and do not include comments on all aspects of the draft General Comment. Australia would be grateful for the opportunity to provide further comments on the draft General Comment, along with other stakeholders, as it is developed.
4. Australia welcomes the Committee’s efforts to provide valuable guidance to States Parties. However, Australia considers that such guidance should be clearly differentiated from legally binding obligations. Australia considers that some parts of the draft General Comment purport to extend the responsibilities of States Parties beyond the legal obligations in the text of the Convention. Australia therefore invites the Committee to clarify the statements in the draft General Comment regarding the scope of the legal obligations of States Parties under the Convention.

*Models of disability and compatibility with the Convention*

1. Australia welcomes the human rights model of disability which recognises ‘that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights’,[[4]](#footnote-4) and recognises that the Convention affirms a social model of disability. That said, Australia does not consider that the medical model of disability, or medical paradigms of disability, are incompatible with the Convention.[[5]](#footnote-5) In Australia’s view, the social model of disability is best practice but not a precondition for conformity with the Convention. While Australia’s Disability Strategy, the National Disability Insurance Scheme 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.

*Content and scope of States Parties’ obligations under Article 27*

1. In considering the scope and content of Article 27, the Committee has made particular reference to Articles 6 and 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the views of the Committee on Economic, Social and Cultural Rights (CESCR). The Australian Government interprets its obligations under the CRPD in conformity with its positions on comparable rights in the *International Covenant on Civil and Political Rights* (ICCPR) and the ICESCR and, where applicable, other international human rights treaties. Accordingly, Australia welcomes the emphasis the Committee has appropriately placed on Articles 6 and 7 of the ICESCR.
2. The Australian Government also welcomes the Committee’s consideration of the normative content of Article 27 at the outset of the draft General Comment.[[6]](#footnote-6) Having regard to the preamble of the CRPD, the Australian Government considers that it would be preferable to situate Article 27 within the normative framework of international human rights law and the seven core international human rights treaties, rather than regional human rights instruments and treaties to which all States Parties to the CRPD are not necessarily a party.
3. As with all human rights obligations, Australia considers that the obligations contained in Article 27 must be interpreted consistently with the principles of treaty interpretation reflected in the 1969 *Vienna Convention on the Law of Treaties*.[[7]](#footnote-7) In this regard, Australia encourages the Committee to base its interpretation more closely on the text of Article 27.
4. For example, at paragraph 18 the draft General Comment provides that the progressive realisation of the right to work can only be ‘evidenced [by] employment in an open and inclusive labour market’. However, Article 27(1) of the CRPD provides for ‘…the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities’. The ordinary meaning of the terms, in particular the use of ‘includes’, suggests that alternative points of employment are not prohibited, provided that alternative points of employment are not the only form of work available. This is also the view taken by the CESCR, which the Committee has helpfully set out at paragraph 15 of the draft General Comment.
5. Additionally, Australia is uncertain as to the relationship the Committee seeks to draw between Article 27 and the Sustainable Development Goals (SDGs).[[8]](#footnote-8) While there is clearly a common goal between realisation of the elements of Article 27 and implementation of the SDGs by all States, it is not clear how the Committee considers the SDGs to be instructive as a matter of treaty interpretation in describing the content and obligations contained within Article 27. The Committee should clarify its views to distinguish legal obligations from non-binding principles.
6. The Australian Government notes that in Australia, Australian Disability Enterprises (ADEs) are workplaces that primarily exist to support the employment of people with moderate to severe disability consistent with the overarching aims of the Convention. The majority of employees in ADEs are National Disability Insurance Scheme (NDIS) participants. NDIS participants can receive funding within their plans to help them find and keep a job. This funding can be used to work in an ADE, however can also be used in a range of employment settings including: private, government or not for profit organisations; a social enterprise or similar environment; self-employment or a micro-business; or a family run business. ADEs provide employment for individuals with moderate to severe disability who may struggle to find and retain employment in other employment settings. In 2018 consultations with supported employees commissioned by the department, the majority of supported employees indicated their job in an ADE was what they wanted. Social connection, a sense of belonging and descriptions of ADEs being a 'family' for supported employees were consistently raised as the reason supported employees stay in an ADE for long periods.The Fair Work Commission is responsible for making, reviewing and varying modern awards. Modern awards set out how pay, penalty rates, hours of work, breaks and allowances work

Non-Government entities

1. The Australian Government acknowledges the role that non-government entities have to play in protecting and promoting human rights. Australia also recognises that States Parties are required to take appropriate measures to eliminate discrimination by private enterprise (Article 4(1)(e)). The current wording of paragraph 19 may be read to suggest that third parties, such as the business sector, owe human rights obligations. While States Parties’ obligations in some circumstances extend to taking steps to prevent, investigate, punish and redress abuse by third parties through effective regulation, the Convention does not place obligations on non-government entities.

Progressive realisation of economic, social and cultural rights

1. Australia welcomes the linkage drawn by the draft General Comment between Article 27 and Article 4(2) of the Convention.[[9]](#footnote-9) Article 4(2) provides that each State Party ‘undertakes to take measures to the maximum of its available resources … with a view to achieving progressively the full realization of these rights’. In this regard, Australia notes that States Parties enjoy a reasonable margin of appreciation in choosing methods to implement their obligations taking into account resource considerations. Australia notes that States Parties may fully realise their obligations over time.
2. The right to work and employment in Article 27 of the CRPD is an economic, social and cultural right derived from Articles 6 and 7 of the ICESCR. Australia agrees that certain elements of economic, social and cultural rights entail obligations of immediate effect. The CESCR has stated that the two obligations of immediate effect in respect of the right to work are (i) the guarantee that economic, social and cultural rights are available to be exercised without discrimination of any kind under Article 2(2), and (ii) the obligation to take steps towards the full realization of economic, social and cultural rights pursuant to Article 2(1).[[10]](#footnote-10)
3. Although Australia agrees that States Parties have these two immediate obligations in relation to Article 27 of the Convention, Australia does not agree with the Committee’s view that States Parties have an immediate obligation to ‘take concrete, targeted steps to develop a national right to work and employment strategy and plan of action’.[[11]](#footnote-11)
4. The draft General Comment also refers to States Parties ‘minimum core’ obligations.[[12]](#footnote-12) Australia notes that the concept of a ‘minimum core’ with respect to progressively realisable rights is an unsettled concept as a matter of international law, noting the very nature of economic, social and cultural rights is that they may be realised gradually over time.

Non-discrimination

1. Australia welcomes the Committee’s consideration of States Parties’ non-discrimination obligations, including the duty to provide reasonable accommodation, with respect to the right to work and employment. However, Australia considers that parts of the draft General Comment, for example paragraph 79 which refers to ‘the provision of reasonable accommodation at work and all stages of employment’, could benefit from further clarity to avoid it being confused with the general accessibility obligations under the Convention. As set out in paragraph 22 of the draft General Comment, the duty to provide reasonable accommodation, being ‘…necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden…’,[[13]](#footnote-13) is applicable from the moment the request of accommodation is received.
2. Australia refers to paragraph 72 of the draft General Comment which sets out the ‘immediate steps States Parties are required to undertake to achieve de facto quality and ensure non-discrimination’. As set out above, Australia agrees that non-discrimination is an immediately realisable obligation. However, Australia respectfully submits that some of the steps the Committee has outlined in paragraph 72 are of an economic, social or cultural nature and therefore may be progressively realised.[[14]](#footnote-14) While the Australian Government acknowledges the Committee’s use of non-mandatory language (‘should’) in introducing these steps, the Australian Government is nonetheless concerned that the framing of these steps in the context of ‘immediate steps States Parties are required to undertake’ risks giving the impression that such steps are to be considered immediately realisable obligations under the Convention.
3. In this context, the Committee has also referred to the concept of specific measures.[[15]](#footnote-15) Australia considers 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. However, having regard to the text of Article 5(4) of the Convention, Australia does not consider that specific measures must be undertaken under the Convention. Article 5(4) is permissive as opposed to mandatory, providing that any specific measures ‘necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the … Convention’.

*Multiple forms of discrimination*

1. Australia welcomes the guidance in the draft General Comment about intersectional and multiple forms of discrimination.[[16]](#footnote-16) In this section, the Committee comments that ‘additional grounds [of discrimination] include age, race, indigenous, national or social origin, refugee, migrant or asylum seeker status, political or other opinion, religion, sex, sexual orientation and gender identity’.[[17]](#footnote-17)Australia suggests that this part of the draft General Comment refer instead to the text of the Convention, which refers to ‘the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status’.[[18]](#footnote-18)

*Interaction with other articles of the Convention*

1. Article 27 is closely linked and important to many other rights contained in the Convention. However, in a General Comment dedicated to Article 27 Australia considers the bulk of the discussion should focus on this Article. Where other articles are mentioned, the discussion of the interaction with Article 27 should be clear and succinct.
2. Australia also considers that parts of the discussion on the relationship of Article 27 to other Articles seek to elaborate the meaning of provisions of the Convention other than Article 27. Australia does not consider this to be appropriate in a General Comment on Article 27.

*Other comments and observations*

1. The *National Disability Strategy 2010-2020* (the Strategy) is an overarching policy framework that guides Australian, state, territory and local governments’ activity across mainstream and disability-specific areas of public policy. In line with Australia’s obligations under the Convention, the Strategy plays an important role in protecting, promoting and realising the human rights of people with disability.
2. The Strategy has resulted in major achievements, established strong partnerships and collaboration and set the groundwork for further effort under the next Strategy - *Australia’s Disability Strategy 2021-2031* (new Strategy). The new Strategy includes a number of key features to improve implementation and accountability including stronger public engagement, an Outcomes Framework, regular public reporting against outcomes, a data improvement plan, an enhanced Governance Model and an Advisory Council. All levels of governments – Australian, state, territory and local – are committed to delivering on its principles.
3. Employment is a focus of the new Strategy and is covered in the Employment and Financial Security outcome area. Under the new Strategy an Employment Targeted Action Plan will direct a more intensive focus on achieving specific deliverables on employment. Community attitude is considered to be a significant barrier to employment for people with disability. The Community Attitudes Targeted Action Plan is expected to include actions that will target attitudes that are barriers to social and economic participation of people with disability.
4. With regard to targeted steps, the Australian Government acknowledges that employment is an important aspect of every individual’s welfare and economic security, and has developed a Disability Employment Strategy to improve employment outcomes for people with disability. The Disability Employment Strategy will be a guiding framework for governments, employers and the broader community towards an inclusive workforce, where people with disability can thrive in their careers.
5. For completeness, Australia notes that it appears footnote 50 of the draft General Comment should refer to CESCR General Comment No.3, rather than CRPD General Comment No.3.
6. 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.
1. Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 27 on the Right of Persons with Disabilities to Work and Employment* <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CallCommentsDraftGeneralComments.aspx> (‘Draft General Comment’). [↑](#footnote-ref-1)
2. All Australian jurisdictions have legislation which makes it unlawful to discriminate against a person on the basis of disability. 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. In 2013 Australia introduced the National Disability Insurance Scheme (NDIS), governed under the *National Disability Insurance Scheme Act 2013*, to reform the way Australians with disabilities are supported to ensure that services provided to persons with disabilities are both accessible and appropriate. The NDIS is now established in all Australian States and Territories. [↑](#footnote-ref-3)
4. Draft General Comment (n 1) [9]. [↑](#footnote-ref-4)
5. Ibid [7]. [↑](#footnote-ref-5)
6. Ibid [10] – [12]. [↑](#footnote-ref-6)
7. 1155 UNTS 331. [↑](#footnote-ref-7)
8. Draft General Comment (n 1) [1]. [↑](#footnote-ref-8)
9. Ibid [59]. [↑](#footnote-ref-9)
10. Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The Right to Work*, 35th sess, UN Doc E/C.12/GC/186 (24 November 2005) [19]. [↑](#footnote-ref-10)
11. Draft General Comment (n 1) [71]. [↑](#footnote-ref-11)
12. Ibid [70]. [↑](#footnote-ref-12)
13. *Convention on the Rights of Persons with Disabilities*, art 2. [↑](#footnote-ref-13)
14. For examples, steps to promote the right to supported employment and to ensure access to training, retraining and education. [↑](#footnote-ref-14)
15. Draft General Comment (n 1) [72]. [↑](#footnote-ref-15)
16. Ibid [24]. [↑](#footnote-ref-16)
17. Ibid [24]. [↑](#footnote-ref-17)
18. Preambular paragraph 16 of the Convention. [↑](#footnote-ref-18)