**Submission of the Australian Government**

**Draft General Comment No. 5 on**

**Article 19 of the Convention on the Rights of Persons with Disabilities:**

**Living independently and being included in the community**

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 draft General Comment No. 5 (2017) (the draft General Comment).[[1]](#footnote-1) The Australian Government thanks the Committee for the opportunity to provide a written submission. The Australian Government also thanks the Committee for the opportunity to have provided a written submission in advance of the Day of General Discussion on the draft General Comment on 19 April 2016.
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[[2]](#footnote-2) and by ensuring that services and facilities are available for, and accessible to, persons with disabilities.[[3]](#footnote-3)

The context and content of Article 19 of the Convention

1. Australia welcomes the Committee’s recognition that the right to live independently and be included in the community ‘is deeply rooted within the normative framework of international human rights’.[[4]](#footnote-4) Australia agrees that Article 19 is largely derived from the right to liberty of movement and freedom of residence in Article 12 of the International Covenant on Civil and Political Rights (ICCPR) and should be interpreted consistently with this right (including as interpreted by the Human Rights Committee). Article 19 should also be interpreted consistently with the right to an adequate standard of living in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), including as interpreted by the Committee on Economic, Social and Cultural Rights. Australia agrees that Article 19 is also linked to rights in other human rights instruments, including the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women.[[5]](#footnote-5)
2. Australia agrees with the Committee that Article 19 has a hybrid legal character involving the realisation of civil and political rights, as well as economic, social and cultural rights.[[6]](#footnote-6)
3. As with all human rights obligations, Australia considers that the obligations contained in Article 19 must be interpreted consistently with the widely accepted 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 19.
4. For example, the draft General Comment states that ‘[t]he article covers two concepts which are only clearly mentioned in its heading: the right to independent living and the right to be included in the community or community living’.[[8]](#footnote-8) Australia respectfully submits that article headings may be an aid to interpretation, but cannot bear the content of an obligation.[[9]](#footnote-9)
5. The starting point should be the text of the ‘chapeau’ of Article 19. In Australia’s view, 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’.
6. Australia understands the significance of Article 19 within the context of the Convention as a whole. Whilst Australia agrees that Article 19 is an intersectional article, Australia does not agree with the characterisation of Article 19 as ‘a precondition for the implementation of the Convention across all articles’.[[10]](#footnote-10) The Australian Government’s position is that there is no hierarchy of rights; all human rights are universal, indivisible and interdependent.[[11]](#footnote-11)
7. Australia welcomes the emphasis in the General Comment on non-discrimination. Australia’s view is that the right of persons with disabilities to live independently and be included in the community should be viewed through the lens of non-discrimination. To underline the importance of this obligation, Australia suggests noting in the draft General Comment that non‑discrimination is protected in Articles 2(1), 3 and 26 of the ICCPR and Articles 2(2) and 3 of the ICESCR.
8. Australia is uncertain as to the relationship the Committee seeks to draw between Article 19 and The New Urban Agenda (Habitat III) and the Sustainable Development Goals (SDGs).[[12]](#footnote-12) While there is clearly a common goal between realisation of the elements of Article 19 and implementation of the SDGs by all States, it is not clear how the Committee considers either the SDGs or The New Urban Agenda to be instructive as a matter of treaty interpretation in describing the content and obligations contained within Article 19. The Committee should clarify its views to distinguish legal obligations from policy considerations.
9. Australia suggests that the Committee ensure that the text in paragraph 69 on requirements relating to consultation reflects the text of the legal obligation in Article 4(3), which refers to consultation with ‘persons with disabilities, including children with disabilities’.
10. Australia appreciates the Committee’s explanation in Part II of its draft General Comment on the normative content of Article 19. In Australia’s view, the draft General Comment would benefit from a clearer explanation of the distinction between residential services and institutional forms of support.
11. Australia also appreciates the guidance provided by the Committee in Part III of its draft General Comment on implementing the obligations in Article 19 of the Convention. However, Australia would appreciate clarification from the Committee in relation to two broad issues that it has identified in the draft General Comment. Firstly, Australia would like to provide some observations on the manner in which the Committee has addressed progressive realisation of economic, social and cultural rights. Secondly, Australia is concerned that the Committee has been overly prescriptive in indicating how the obligations contained in Article 19 are to be fulfilled, and has described some examples as obligations in and of themselves, which in Australia’s view go beyond the scope of States Parties’ legal obligations under Article 19.

Progressive realisation of economic, social and cultural rights

1. Australia notes that the Committee has acknowledged the applicability of the principle of progressive realisation to most of the economic, social and cultural rights referred to in the draft General Comment. In doing so, the Committee has referred to Article 2(1) of the ICESCR, but not to the analogous article in the Convention: Article 4(2). 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 discretion in selecting methods to implement their obligations, taking into account resource considerations. In Australia’s view, Article 4(2) must be referred to when analysing any economic, social and cultural right that is contained in the Convention.
2. Australia disagrees with the Committee’s formulation at paragraph 40 of certain matters as ‘core elements’ that States must ensure are ‘always respected, particularly in times of financial or economic crisis’. It is not clear on what basis the Committee considers certain elements of the obligation to be ‘core’ and therefore outside the normative framework of international human rights law (which includes the principle of progressive realisation in relation to economic, social and cultural rights). While Australia acknowledges that certain aspects of Article 19 reflect civil and political rights, Australia considers that the following rights are of an economic, social or cultural nature and are therefore subject to progressive realisation:
   1. ‘To have access to basic personalised and human rights-based disability specific services’, and
   2. ‘To have access to basic mainstream community-based services and support on an equal basis with others’.[[13]](#footnote-13)
3. For completeness, Australia submits that where social and cultural rights are referred to in the draft General Comment as underpinning Article 19, so too must economic rights.[[14]](#footnote-14)

Specificity of measures to fulfil obligations: distinguishing obligations of States Parties and policy recommendations

1. Australia is of the view that the draft General Comment would benefit from being less prescriptive in recognition of the different circumstances of each State Party. 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 19. From a policy perspective States may support some of these examples. However, Australia is concerned about the framing of these examples in mandatory terms. For example:
   1. ‘States parties must closely consult and actively involve a diverse range of people with disabilities through their representative organizations on all aspects concerning independent and community living’.[[15]](#footnote-15)
   2. ‘Programs and entitlements to support living in the community must cover disability‑related costs’.[[16]](#footnote-16)
   3. ‘[I]ndividualised support services must be considered a right instead of a form of medical care or charity’.[[17]](#footnote-17)
2. The term ‘must’ should be used only to refer to legally binding provisions in the Convention to which States Parties have explicitly consented to be bound. As a result, 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 and to reframe these ‘obligations’ as recommendations only.
3. In a similar vein, Australia is also concerned about the categorical nature in which the Committee appears to oppose certain forms of support. For example, the Committee states that ‘[r]esidential services, where housing and support are delivered in one package, cannot be counted as personal assistance’. Australia does not agree with this characterisation and is of the view that the consistency of measures to fulfil the obligation with the obligation itself must be by reference to the central rights contained in Article 19, being life in the community, equality of choice, and full inclusion and participation.
4. Australia disagrees with assertions that certain acts on behalf of States would necessarily constitute violations of the Convention, for example:
   1. ‘Misallocation of resources into institutionalized support services is a clear violation of article 19. States parties must take deliberate and immediate steps to reallocate funding into independent and community living programs and phase out funding for institutional care’.[[18]](#footnote-18)
   2. ‘Placing persons with disabilities in institutions or depriving them of their liberty because of their impairment or against their free will, or also because there is no support available in the community is a violation of article 14’.[[19]](#footnote-19)
5. 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 No. 5 (2017): Article 19: Living independently and being included in the community*, endorsed during the Committee’s 17th session (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 9 of the draft General Comment. [↑](#footnote-ref-4)
5. See paragraphs 10-11 of the draft General Comment. [↑](#footnote-ref-5)
6. Paragraphs 7, 9 and 41 of the draft General Comment. [↑](#footnote-ref-6)
7. 1155 UNTS 331. [↑](#footnote-ref-7)
8. Paragraph 18 of the draft General Comment. [↑](#footnote-ref-8)
9. Richard Gardiner, *Treaty Interpretation* (2nd edition, 2008, Oxford University Press), pp. 200-201. [↑](#footnote-ref-9)
10. Paragraph 6 of the draft General Comment. [↑](#footnote-ref-10)
11. See, for example, *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, paragraph 5. [↑](#footnote-ref-11)
12. Paragraph 13 of the draft General Comment. [↑](#footnote-ref-12)
13. Paragraph 40 of the draft General Comment. [↑](#footnote-ref-13)
14. See, for example, paragraphs 7 and 41-42 of the draft General Comment. [↑](#footnote-ref-14)
15. Paragraph 55 of the draft General Comment. [↑](#footnote-ref-15)
16. Paragraph 57 of the draft General Comment. [↑](#footnote-ref-16)
17. Paragraph 27 of the draft General Comment. [↑](#footnote-ref-17)
18. Paragraph 65 of the draft General Comment. [↑](#footnote-ref-18)
19. Paragraph 79 of the draft General Comment. [↑](#footnote-ref-19)