



## **Disability Human Rights Clinic**

### **Does Australian and German Law Fulfil Article 12(4)'s Requirement of Ensuring the Rights, Will and Preferences of Persons with Disabilities?**

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This report is the outcome of a project undertaken during the Disability Human Rights Clinic's second semester in 2016.

The clinic was co-ordinated by Yvette Maker and Dr Annegret Kaempf (under the leadership of Dr Anna Arstein-Kerslake) and is one of the subjects in Melbourne Law School's Public Interest Law Initiative, which offers experiential learning to Juris Doctor students.

Students in the clinic learn to apply a human rights framework to legal analysis on projects that target issues concerning rights violations experienced by persons with a disability.



**Melbourne Law School**

# Does Australian and German Law Fulfil Article 12(4)'s Requirement of Ensuring the Rights, Will and Preferences of Persons with Disabilities?

## I INTRODUCTION

Article 12(4) of the *Convention on the Rights of Persons with Disabilities* ('*CRPD*')<sup>1</sup> requires states parties to safeguard the right of persons with disabilities to enjoy legal capacity on an equal basis with others and to implement measures to ensure their rights, will and preferences are respected. Doing so gives effect to their equal recognition before the law. In this paper, we focus on the safeguard to respect the will and preferences of persons with disabilities as the Committee on the Rights of Persons with Disabilities ('the Committee') has stated that respecting this is the primary purpose of article 12(4)'s safeguards.<sup>2</sup>

Domestic systems of guardianship and custodianship are a common means of depriving legal capacity on the basis of disability.<sup>3</sup> This research paper critically evaluates the domestic laws of guardianship and custodianship in both Germany and Australia to determine whether each jurisdiction fulfils its obligation, as states parties to the *CRPD*,<sup>4</sup> to ensure respect for the rights, will and preferences of persons with disabilities. This paper will be used to contribute to wider research into disability and legal capacity, and to aid both advocacy and awareness of disability rights. This analysis of states parties' guardianship and custodianship laws and their compliance with the *CRPD* can aid governments to identify and address deficiencies in their respective schemes.

This paper considers the background to the *CRPD*, including the dominant theories of human rights and the concept of legal capacity, which is fundamental to being recognised before the law on an equal basis with others. It also takes into account the ideology of the *CRPD* and the interpretations of the Committee. It then addresses the implementation of safeguards identified in article 12 of the *CRPD*, in the domestic laws of both countries, and offers comparisons between the two countries and suggestions for reform.

## II THEORIES OF HUMAN RIGHTS AND THE PERSON

In the 20<sup>th</sup> Century, supranational rights emerged in response to schismatic historical events and atrocities, in an attempt to reach an international consensus on protecting the inherent dignity of persons. Through multi-lateral treaties, nations undertook to respect the human rights of their citizens and refrain from discrimination. Two of the earliest and most fundamental of these treaties are the *International Covenant on Civil and Political Rights* ('*ICCPR*') and the *International Covenant on Economic, Social, and Cultural Rights* ('*ICESCR*').<sup>5</sup> While contributing significantly to the emancipation and protection of vulnerable groups by attempting to provide political, symbolic, and legal bases for arguing freedom from discrimination by states parties, the two documents suffer from a marked absence of disability

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<sup>1</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

<sup>2</sup> Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014)*, 11<sup>th</sup> sess, UN Doc CRPD/C/GC/1 (11 April 2014) [20] ('*General Comment No 1*').

<sup>3</sup> *Ibid* [7].

<sup>4</sup> Ratified by Australia in 17<sup>th</sup> July 2008 and Germany in 24<sup>th</sup> February 2009.

<sup>5</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(1) ('*ICESCR*').

as a basis of such discrimination.<sup>6</sup> This deficiency and the ongoing violation of the human rights of persons with disabilities globally, demonstrated the need for the *CRPD*, which elaborates on the unique human rights experience of persons with disabilities.<sup>7</sup>

Expressions of the universality of rights are found in the preamble to the *Universal Declaration of Human Rights* ('*UDHR*'), which declares all persons equal in dignity and rights by virtue of their birth.<sup>8</sup> Enlightenment liberalist scholars influenced the conception of universal rights<sup>9</sup> and characterised rights primarily in terms of freedoms *from* state intervention into a person's natural rights.<sup>10</sup> This characterisation of universal rights rests on how one characterises the 'personhood' of the subject of the human right. According to the liberalist conception, to be a person is to be a rational actor with the capacity to choose your own method of self-determination. This freedom protects the essence of what it means to be a person and therefore certain aspects of life should be beyond the reach of the state.<sup>11</sup>

How we conceive of rights is important as it relates to the way we characterise personhood. The traditional liberalist approach of personhood is limiting as it conditions recognition of personhood on a person's ability to reason. Article 12 of the *CRPD* addresses this issue by reiterating that persons with disabilities have legal capacity and as a corollary have the right to recognition as persons before the law and the right to enjoy legal capacity on an equal basis with others in all aspects of life.

### III THE IDEOLOGY OF THE *CRPD*

The preamble to the *CRPD* emphasises that disability results from the interaction between persons with impairments and barriers in society that prevent their full and equal participation in society.<sup>12</sup> This reflects the social model of disability, as contrasted with the medical approach to disability, which focuses on problematising the specific diagnoses of the individual. While the term 'social model' is not expressly mentioned in the *CRPD*, the focus on the need to remove barriers to full inclusion *is* incorporated in article 1 and reiterated throughout the *CRPD*, and thus informs our interpretation of the language and requirements of the *CRPD*.<sup>13</sup>

#### *A Negative vs Positive Rights*

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<sup>6</sup> Disability has been interpreted to be an 'other status'.

<sup>7</sup> Aisha Nicole Davis 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28 *Harvard Law School Human Rights Journal* 205. See also, *General Comment No 1*, UN Doc CRPD/C/GC/1, 23; *CRPD* Preamble para [p]; Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention*, 10<sup>th</sup> sess, 107<sup>th</sup> mtg, UN Doc CRPD/C/SR.107 (7 October 2013) 3 [10] (Ms Maina) ('*Consideration of Reports*').

<sup>8</sup> *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 1.

<sup>9</sup> Burns H Weston, *Human rights* (14 March 2016) Britannica, Academic Edition <<https://www.britannica.com/topic/human-rights>>.

<sup>10</sup> See, eg, John Locke, *The Second Treatise of Civil Government: and a Letter Concerning Toleration* (Basil Blackwell, 1946); Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Anne M Cohler et al (eds) trans, Cambridge University Press, 1989) [trans of: *De l'esprit des loix* (first published 1748)]; Immanuel Kant, 'The Doctrine of Virtue', *Groundwork of the Metaphysics of Morals* (H J Paton trans, 1964) 116 [25] [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1797)].

<sup>11</sup> John Locke, above n 6, [61]; John Stuart Mill, *On Liberty* (Oxford University Press, 1865) 6, 11; Karl Klare, 'Legal Theory and Democratic Reconstruction' (1991) 25 *University of British Columbia Law Review* 69, 97–8.

<sup>12</sup> *CRPD* Preamble para [e].

<sup>13</sup> *Ibid* arts 1, 3(d), 4, 5(3), 9, 12, 13, 24(4), 26(1), 29(b).

Historically, rights have been demarcated into categories of negative or positive,<sup>14</sup> negative rights imposing a duty on states parties to refrain from action and positive rights imposing a duty to perform an action. However, contemporary thought conceives of rights as interdependent.<sup>15</sup> Importantly, a right alone without the capacity to exercise it is without practical value.<sup>16</sup> The distinction has implications for a state party's obligations under human rights conventions. The rights in the *ICCPR* were considered negative rights requiring immediate realisation, whereas the rights in the *ICESCR* were considered positive rights which could be progressively realised,<sup>17</sup> so that practically speaking states parties could focus on negative rights and neglect positive rights citing a lack of resources. Conversely, the *CRPD* coalesces both positive and negative rights into one instrument.<sup>18</sup>

This intermingling implies that positive actions are required by states parties to immediately implement all parts of the *CRPD*.<sup>19</sup> Many of the *CRPD*'s provisions also contain specific positive state obligations, including, for example, establishing independent mechanisms to monitor the *CRPD*'s implementation, and providing for the participation of persons with disabilities in the monitoring process.<sup>20</sup>

## **B Legal Capacity**

Legal capacity is the recognition by law of an individual's agency and competency to exercise rights, such as entering into contracts and making legally protected decisions. Article 12 articulates that persons with disabilities are equal before the law and enjoy legal capacity on an equal basis with others, and that barriers should be removed and support systems should be introduced or modified to realise this equality in substance.<sup>21</sup> As mentioned above, this approach requires a rethinking of the way legal capacity has traditionally been defined.<sup>22</sup> In its first General Comment, in elaborating on the interpretation and application of article 12, the Committee emphasises that legal capacity and mental capacity are distinct concepts. Legal capacity includes a person's ability to enter into contracts and own property,<sup>23</sup> whereas mental capacity is (construed narrowly) cognitive abilities.<sup>24</sup> As legal capacity is a universal right, the Committee states that 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'.<sup>25</sup>

Separating legal capacity from mental capacity acknowledges that a person's legal capacity cannot be denied on the basis of any variations in their cognitive and intellectual abilities. Such a separation emphasises the paramountcy of a person's will and preferences when they exercise

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<sup>14</sup> Phillip Alston and Ryan Goodman (eds), *International Human Rights: the Successor to International Human Rights in Context: Law, Politics and Morals; Text and Materials* (Oxford University Press, 2013) 183–4.

<sup>15</sup> Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009) 379; Amartya Sen, 'Freedoms and Needs', (1994) 210 *The New Republic* 31, 32.

<sup>16</sup> John Austin, *Lectures on Jurisprudence* (Thoemmes, 2012) 794–5.

<sup>17</sup> *ICESCR* art 2(1).

<sup>18</sup> Rosemary Kayess and Phillip French 'Out of Darkness into Light?: Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1, 29.

<sup>19</sup> *Ibid*; see also Oliver Lewis, 'The Expressive, Educational and Proactive Role of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing, Oxford, 2010) 97, 117.

<sup>20</sup> *CRPD* art 33.

<sup>21</sup> *Ibid* art 12.

<sup>22</sup> Gerard Quinn and Anna Arstein-Kerslake, 'Restoring the 'Human' in 'Human Rights' – Personhood and Doctrinal Innovation in the UN Disability Convention' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press, 2012) 36.

<sup>23</sup> *Ibid* 42.

<sup>24</sup> *Ibid* 46.

<sup>25</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [12].

their legal capacity despite their potentially limited mental capacity.<sup>26</sup> The focus is also shifted from assessing a person's mental abilities to the various social and environmental factors that might influence their decision-making skills,<sup>27</sup> thus highlighting the need for a supportive environment in order for people to exercise their legal capacity.

This approach also recognises flexibility in mental capacity assessments, and suggests that capacity needs to be constantly reassessed in relation to the specific circumstances of the person. For instance, it is generally recognized that children have evolving legal and mental capacity as they grow into adults; however in the context of persons with disabilities recognition of varying mental capacity is neglected.<sup>28</sup> This has implications for guardianship and custodianship laws, which allow for the appointment of guardians and custodians on the basis of mental capacity tests. While legal capacity should always be recognised, a person's mental capacity may vary and so too may their need for a guardian or custodian.

#### **IV ARTICLE 12 OF THE CRPD**

Article 12 of the *CRPD* establishes that persons with disabilities are entitled to enjoy recognition before the law on an equal basis with others. Article 12(4) elaborates on states parties' obligations to take measures to ensure this right to equal recognition. While there is very little international case law to aid in interpreting article 12,<sup>29</sup> para (4) of the article enumerates a non-exhaustive list of effective and appropriate safeguards that attach to those measures.<sup>30</sup> We focus on the safeguard to respect the rights, will and preferences of persons with disabilities, as the Committee has stated that respecting this is the primary purpose of article 12(4)'s safeguards.<sup>31</sup>

##### ***A General Comment No 1***

The Committee's first General Comment on the *CRPD*, (*'General Comment No 1'*), is directed specifically at article 12. The Committee states that the *UDHR* and *ICCPR* guarantee the right to equality before the law,<sup>32</sup> and that article 12 does not add extra rights.<sup>33</sup> It emphasises that article 4(2) of the *ICCPR* makes equality before the law a non-derogable right,<sup>34</sup> and article 12 describes the content of this 'civil' right and identifies areas where persons with impairment have been denied this right,<sup>35</sup> such as in owning or inheriting property and controlling their own financial affairs.<sup>36</sup>

The Committee makes specific observations regarding article 12, particularly in regards to its interpretation. This includes the observation that only after 'significant effort' can

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<sup>26</sup> Quinn and Arstein-Kerslake, above n 22, 38.

<sup>27</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [14].

<sup>28</sup> Quinn and Arstein-Kerslake, above n 22, 43.

<sup>29</sup> The right to be on a jury has been dismissed. See, eg, Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 11/2013*, 15<sup>th</sup> sess, UN Doc CRPD/C/15/11/2013 (25 April 2016) [7.6]; Committee on the Rights of Persons with Disabilities, *Communication No 12/2013*, 13<sup>th</sup> sess, UN Doc CRPD/C/13/D/12/2013 (29 May 2015) (Dismissed; no legal analysis of article 12). Whereas the right to vote appears at least tangentially protected, see Committee on the Rights of Persons with Disabilities, *Communication No 4/2011*, 10<sup>th</sup> sess, UN Doc CRPD/C/10/D/4/2011 (20 September 2013) [9.5].

<sup>30</sup> *CRPD* art 12(4).

<sup>31</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [20].

<sup>32</sup> *Ibid* [1]. Without mention of the *ICESCR*.

<sup>33</sup> *Ibid* [1].

<sup>34</sup> *Ibid* [5].

<sup>35</sup> *Ibid* [1].

<sup>36</sup> *Ibid* [14]; *CRPD* art 12(5).

determinations be made of the best interpretation of will and preferences (rather than best interests).<sup>37</sup> Furthermore, it observes that a person's will and preferences includes the right to take risks and make mistakes,<sup>38</sup> and that although 'support' is a broad contextual term and not defined in the *CRPD*, it must never amount to substitute decision-making.<sup>39</sup>

Specifically, the Committee states that approaches to denying legal capacity that are based on the diagnosis of an individual, a determination of the reasonableness of an individual's decisions, or the functional capacity of an individual to make decisions are flawed.<sup>40</sup> The Committee elaborates that while article 12(2) requires support to be provided for a person's decision-making, this does not deny their legal capacity.<sup>41</sup>

Finally, the Committee observes that the recognition of legal capacity is inextricably linked to the enjoyment of other human rights, and as such article 12 is to be read in conjunction with other provisions of the *CRPD* in order to ensure equal participation of all persons with disabilities.<sup>42</sup>

### **B Supported vs Substituted Decision-Making**

The Committee was concerned that there has been a general misunderstanding of the requirements of article 12, which mandates that all substitute decision-making schemes should be abolished and replaced with supported decision-making schemes.<sup>43</sup> This is relevant to Australia's and Germany's guardianship and custodianship laws as both have been impugned by the Committee for providing for substitute decision-making mechanisms.<sup>44</sup>

Examples of substituted decision-making include:

- Removal of legal capacity in respect of even a single decision;
- Appointment of substitute decision-makers against the will of the person, and by application of a person other than the person subject; and
- Use of objective 'best interests' test rather than interpretation of will and preferences.<sup>45</sup>

Conversely, supported decision-making includes:

- The right to refuse, terminate or change the guardianship relationship at any time;<sup>46</sup>
- Primacy to will and preferences and human rights norms;<sup>47</sup> and
- Appointment of decision-makers using non-discriminatory assessments rather than mental capacity assessments.<sup>48</sup>

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<sup>37</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [21].

<sup>38</sup> *Ibid* [22].

<sup>39</sup> *Ibid* [17].

<sup>40</sup> *Ibid* [13].

<sup>41</sup> *Ibid* [15]; see also at [3].

<sup>42</sup> *Ibid* [31].

<sup>43</sup> *Ibid* [3].

<sup>44</sup> Committee on the Rights of Persons with Disabilities, *Concluding observations on the Initial Report of Germany*, UN Doc CRPD/C/DEU/CO/1 (13 May 2015), [25]–[6] ('*Concluding Observations on Germany*'); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 13<sup>th</sup> sess, UN Doc CRPD/C/AUS/CO/1 (13 September 2013) 3 [25] ('*Concluding Observations on Australia*').

<sup>45</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [27].

<sup>46</sup> *Ibid* [29(g)]

<sup>47</sup> *Ibid* [29(b)], [29(f)].

<sup>48</sup> *Ibid* [29(h)].

The key distinction is that under supported decision-making, the person with a disability would make a decision, while under substitute decision-making, the subjective desires of the person are supplanted to an objective determination of what would be in the person's best interests, which does not sufficiently respect a person's legal capacity.<sup>49</sup>

The Committee has specified that it is not sufficient to have parallel support and substitute decision-making paradigms,<sup>50</sup> or a scheme that discourages but does not prohibit substitute decision-making. Importantly, the state obligation to provide for the access and provision of supported decision-making is subject to immediate realisation as necessary for the realisation of equal recognition before the law (article 16 of *ICCPR*).<sup>51</sup>

## V WHAT IS GUARDIANSHIP OR CUSTODIANSHIP?

Guardianship and custodianship laws are legislative schemes that allow for the appointment of a person (known as a guardian or custodian) to perform a task or collection of tasks for another.<sup>52</sup> These tasks include making decisions for a person concerning their financial, medical, or social matters. Both Germany and Australia have legislative schemes that provide for the appointment of guardians to persons with disabilities. Article 12 of the *CRPD* is particularly engaged by such appointments as the right to recognition of legal capacity involves respecting an individual's decisions and self-determination. A court ordered guardian or custodian with the power to make decisions for another significantly deprives that person of recognition when they exercise their legal capacity.

## VI GERMAN CUSTODIANSHIP LAWS

The German Civil Code, known as the *Bürgerliches Gesetzbuch* ('*BGB*'), outlines the federal legal framework for custodianship ('gesetzliche Betreuung') in Germany. The law is codified in sections 1896 to 1908(i), and covers the appointment of custodians, either by application of the person or through an order of the court, for persons of full age who by reason of mental illness or physical, mental or psychological 'handicap' cannot in whole or in part take care of their affairs.<sup>53</sup>

### A Custodianship vs Guardianship

In 1992, the former guardianship system in Germany was completely abolished and replaced by the new system of custodianship. Under the new law, there was a shift from the use of the term 'guardianship' ('Vormundschaft') to the use of 'custodianship' ('rechtliche Betreuung'). This change signified the move from a system where persons were being considered automatically incapacitated, to one in which the 'custodian' is only appointed for selected areas of decision-making, and the individual is not automatically denied legal capacity.<sup>54</sup> While not altering our analysis, to reflect the terminological difference we will use 'custodianship' in discussion of the German law and 'guardianship' for the Victorian law.

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<sup>49</sup> Ibid [27]; Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 *International Journal of Law in Context* 81, 84.

<sup>50</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [28].

<sup>51</sup> Ibid [30].

<sup>52</sup> *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 1896(1) ('*BGB*'); *Guardianship and Administration Act 1986* (Cth) s 1 ('*GAA*').

<sup>53</sup> *BGB* § 1896(1).

<sup>54</sup> Michael Haußner, 'Guardian Law- Support Systems in Germany' in Makoto Arai, Ulrich Becker and Volker Lipp (eds), *Adult Guardianship Law for the 21<sup>st</sup> Century* (Proceedings of the First World Congress on Adult Guardianship Law, 2010) 77–85 .

## **B The German Framework**

The *BGB* stipulates that a natural person may be appointed as the custodian of an adult, if he or she is suited to taking care of the affairs of the subject within the group of tasks needed.<sup>55</sup> However, a custodian cannot be appointed against an adult's will.<sup>56</sup> Additionally, the law states that voluntary custodians are preferred to those who perform their duties as part of employment.<sup>57</sup>

Decisions that can be made by custodians include any group of tasks deemed necessary by the custodianship court,<sup>58</sup> sterilisation,<sup>59</sup> rehabilitation,<sup>60</sup> and representation in court.<sup>61</sup> Importantly, most of these decisions by the custodian are admissible only with the approval of the custodianship court.<sup>62</sup>

The test for incapacity will be satisfied when the custodianship court determines that a person cannot (in whole or in part) take care of his or her affairs because of mental, physical, or psychological incapacity.<sup>63</sup> Additionally, the custodianship court can order the revocation of an individual's consent in certain matters where this consent would be deemed insufficient without their custodian, because the court determines that such revocation would be 'necessary to prevent a substantial danger for the person or the property of the person'.<sup>64</sup>

Decisions of the custodian are to be made conducive to the individual's welfare,<sup>65</sup> must comply with the best interests of the individual,<sup>66</sup> and the guardian must discuss the decisions with the individual unless this would not be consistent with his or her best interests.<sup>67</sup> 'Best interests' here includes, but is not limited to, the 'possibility' for the individual to shape his or her life according to his or her own wishes.<sup>68</sup> Additionally, medical treatment decisions (and decisions giving effect to a 'living will') must be made in discussion with a doctor and the custodian must acquire statements from relatives and friends who have the confidence of the individual to interpret their wishes.<sup>69</sup>

## **C Germany's state report**

As a state party to the *CRPD*, article 35 mandates that Germany shall submit a 'comprehensive report on measures taken to give effect to its obligations under the *CRPD*. In its initial state report,<sup>70</sup> Germany claimed that German civil law was in conformity with the *CRPD*. It noted that many laws, regulations, schemes and projects at different levels of government are aimed at facilitating and promoting the right to self-determination, and participation and inclusion of

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<sup>55</sup> *BGB* § 1897(1).

<sup>56</sup> *Ibid* § 1896(1a).

<sup>57</sup> *Ibid* § 1897(4).

<sup>58</sup> *Ibid* §§ 1896(2), 1901(1).

<sup>59</sup> *Ibid* §§ 1899(2), 1905.

<sup>60</sup> *Ibid* § 1901(4).

<sup>61</sup> *Ibid* § 1902.

<sup>62</sup> *Ibid* §§ 1904(1), 1905(2), 1906(2).

<sup>63</sup> *Ibid* § 1896(1).

<sup>64</sup> *Ibid* § 1903(1).

<sup>65</sup> *Ibid* § 1901(2).

<sup>66</sup> *Ibid* § 1901(3).

<sup>67</sup> *Ibid* § 1901(4).

<sup>68</sup> *Ibid* § 1901(2).

<sup>69</sup> *Ibid* § 1901b(2).

<sup>70</sup> Committee on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties under Article 35 of the Convention: Initial Reports of States Parties (Germany)*, UN Doc CRPD/C/DEU/1 (19 September 2011) ('*Germany Initial State Report*').

persons with disabilities.<sup>71</sup> In particular, Germany highlighted that in accordance with section 1 of the *BGB*, all living people have legal capacity, and that this regulation therefore guarantees that persons with disabilities also have unrestricted legal capacity.<sup>72</sup>

### **D Compliance with the CRPD**

The Committee's concluding observations on the German law indicate that it views the legal instrument of guardianship as being incompatible with the *CRPD*.<sup>73</sup> Its observations on German law in relation to article 12(4) focus almost exclusively on the need for abolishing all substituted decision-making and developing supported decision-making mechanisms.<sup>74</sup> While the Committee does not specify which aspects of the law it views as substitute decision-making, this may include, for example, section 1906, which allows the guardian to put the person under guardianship in accommodation associated with the deprivation of their liberty without their consent, if the guardian and the guardian court believe they are a danger to themselves,<sup>75</sup> or section 1903(1), which allows the guardian court to revoke the consent of an individual in relation to a particular matter where it deems that there is a 'substantial danger', and the person therefore requires the consent of their guardian.

Additionally, the guardianship framework is concerned with 'best interests', rather than the 'will and preferences', of the individual.<sup>76</sup> For example, the *BGB* outlines that concerning medical decisions the guardian must comply with the wishes of the individual 'unless to the extent that this is not inconsistent with [the individual's] best interests'.<sup>77</sup> Likewise, it states that the guardian must discuss decisions with the individual 'unless not consistent with best interests to do so'.<sup>78</sup> These provisions are clearly in violation of article 12, and would need to be changed to allow for conformity with the will and preferences of the person at all times.

Another concern the Committee raised is directed at article 17, and protecting the integrity of the person, and in particular the provision under section 1905 of the *BGB* allowing forced legal sterilization on the basis of substituted consent by the guardian (with the permission of the guardianship court).<sup>79</sup> This is another example of inadequate safeguards for protection of the will and preferences of the individual under article 12(4), given that the will and preferences do not need to be taken into consideration at all if it is deemed the life or health of the individual is in danger.<sup>80</sup> It is also an issue under article 6 and the protection of women and girls with disabilities, given that laws allowing forced sterilization overwhelmingly affect women and girls.<sup>81</sup> In line with the Committee's recommendations,<sup>82</sup> section 1905 would need to explicitly prohibit all sterilization without the full and informed consent of the individual concerned in order to comply with the safeguards under article 12(4).

Sections 827 (Exclusion and Reduction of Responsibility) and 104 (Incapacity to Contract) also fail to meet the safeguards of article 12(4). This is because they both allow for the limitation or denial of legal capacity and responsibility for 'major-age persons' on the basis of 'a state of

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<sup>71</sup> Ibid [5].

<sup>72</sup> Ibid [96].

<sup>73</sup> *Concluding Observations on Germany*, UN Doc CRPD/C/DEU/CO/1, [25].

<sup>74</sup> Ibid [25]–[6].

<sup>75</sup> *BGB* § 1906.

<sup>76</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [21].

<sup>77</sup> *BGB* § 1901(3).

<sup>78</sup> Ibid § 1901(3).

<sup>79</sup> *Concluding Observations on Germany*, UN Doc CRPD/C/DEU/CO/1, [37]–[8].

<sup>80</sup> *BGB* § 1905.

<sup>81</sup> Committee on the Rights of Persons with Disabilities, *General Comment No 3 (2016)*, UN Doc CRPD/C/GC/3 (2 September 2016) [44] ('*General Comment No 3*').

<sup>82</sup> *Concluding Observations on Germany*, UN Doc CRPD/C/DEU/CO/1, [38(a)].

pathological mental disturbance precluding the free exercise of will'.<sup>83</sup> As identified by associations representing the interests of persons with disabilities,<sup>84</sup> these provisions would allow for the restriction or exclusion of the legal capacity of persons on the basis of their disability, thereby failing to recognise their will and preferences under article 12(4). The claim that these sections apply equally to persons with and without disabilities does not mean, as was argued by Germany in its initial State Report,<sup>85</sup> that they comply with the law if their effect in practice is discriminatory.

Finally, while section 1986(1a) specifies that a custodian cannot be appointed against the free will of a person of full age, section 104 indicates that the free exercise of will may be questioned on the basis of an impairment or 'pathological mental disturbance'.<sup>86</sup> This loophole for the exercise of free will in the case of persons with mental impairment means that there are inadequate safeguards to meet the requirements of article 12(4).

## VII VICTORIAN GUARDIANSHIP LAWS

### A *The Australian Jurisdiction*

In Australia, guardianship laws fall under state and territory jurisdiction. While national regulatory strategies such as the National Disability Insurance Scheme (NDIS) and the National Disability Strategy (NDS) may impact the implementation of state laws, in this paper we focus on Victorian guardianship laws, in the interests of thoroughly addressing one jurisdiction and its legislative scheme and compliance with the *CRPD*, and producing findings most relevant for the Victorian community.

Particular complications arise in Victoria, as multiple acts operate in effect to appoint substitute decision makers in place of persons with disabilities.<sup>87</sup> This is a problem addressed in the Victorian Law Reform Commission's ('VLRC') report, which recommended codification of Victoria's approach to guardianship in one comprehensive piece of legislation.<sup>88</sup>

The *Guardianship & Administration Act 1986* (Vic) ('GAA') is Victoria's primary guardianship legislation that regulates the appointment of guardians over a broad range of matters, rather than in specific context such as the *Power of Attorney Act 2014* (Vic). As such, this is where our analysis is focused.

### B *The Victorian Framework*

The *GAA* was enacted to 'enable persons with a disability to have a guardian...appointed when they need'.<sup>89</sup> This indicates an approach to guardianship which is potentially flexible to account for the specific and varying needs of individuals. Further, the *GAA* states that Parliament intends for the Act to be interpreted so that the method least restrictive of rights is preferred, and the best interests of a person with a disability are given effect to, 'wherever possible'.<sup>90</sup> This inclusion of 'wherever possible' in considering a person's wishes suggests some leeway to

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<sup>83</sup> *BGB* § 827.

<sup>84</sup> *Germany Initial State Report*, UN Doc CRPD/C/DEU/1, [99].

<sup>85</sup> *Ibid.*

<sup>86</sup> *BGB* § 104(2).

<sup>87</sup> See, eg, *Disability Act 2006* (Vic); *Medical Treatment Act 1988* (Vic).

<sup>88</sup> Victorian Law Reform Commission, *Guardianship*, Report no 24 (2012) xxx, 69 [5.103]–[5.104] ('*Guardianship Report*').

<sup>89</sup> *GAA* s 1.

<sup>90</sup> *Ibid* s 4(2).

override or ignore those wishes in situations where it is deemed ‘impossible’ to take them into account.

The *GAA* defines ‘disability’ as an ‘intellectual impairment, mental disorder, brain injury, physical disability or dementia’.<sup>91</sup> This terminology demonstrates a conceptual confusion between disability and impairment, which Kayess and French argue is also a problem throughout the text of the *CRPD*.<sup>92</sup> The distinction between these concepts has been elaborated on in the social model of disability, which holds that people are not disabled by virtue of their impairments, but rather by the disabling factors they face in society.<sup>93</sup>

### **(a) Guardians' Power**

There are two guardianship orders that can be made: plenary or limited. The relationship between a plenary guardian and individual is defined as the same as a parent to a child,<sup>94</sup> including deciding where the individual is to live, with whom they can live, their employment, and consenting to healthcare.<sup>95</sup> A limited guardian can be granted one or more of the powers and duties that are granted to a plenary guardian.<sup>96</sup> The decision of a plenary or limited guardian is taken to be the decision of the represented person.<sup>97</sup> Guardians can also apply to the Victorian Civil and Administrative Tribunal (‘VCAT’) to get an enforcement order to ensure the represented person complies with a guardian's decision,<sup>98</sup> and may be free from liability for this enforcement if it is in the best interests and is reasonable in the circumstances.<sup>99</sup> Further to the above enumerated powers, a guardian may also sign and do all such things necessary to give effect to any of the powers.<sup>100</sup>

### **(b) Appointment of Guardians**

Section 19 allows that *any person* can apply to the tribunal for plenary or limited guardianship of a person with a disability. This is a broad power, and the only requirements that need to be satisfied for the application are that the person is over the age of 18 and has a disability. In its General Comment, the Committee notes that provision of supported decision making should not be based on mental capacity assessments,<sup>101</sup> because of their concern in conflating mental capacity with legal capacity, which as mentioned previously can be used as a basis to deny the will and preferences of those with mental impairments.

VCAT is responsible for determining whether an application should be granted.<sup>102</sup> Under section 22 of the *GAA*, VCAT may appoint a guardian if it is satisfied that the person subject to the application has a disability, is unable to make reasonable judgments in respect of any or all matters relating to their circumstances, and is in need of a guardian.<sup>103</sup> Interestingly, they must meet all three requirements in order for a guardian to be appointed. Thus, a person could be judged unable to make reasonable judgments in respect of matters relating to their circumstances but still not be in need of a guardian.

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<sup>91</sup> *Ibid* s 3(1).

<sup>92</sup> Kayess and French, above n 18.

<sup>93</sup> Mike Oliver ‘The Social Model of Disability: Thirty Years On’ (2013) 28 *Disability & Society* 1024, 1024.

<sup>94</sup> *GAA* s 24(1).

<sup>95</sup> *Ibid* s 24(2).

<sup>96</sup> *Ibid* s 25(1).

<sup>97</sup> *Ibid* ss 24(4), 25(3).

<sup>98</sup> *Ibid* s 26(1).

<sup>99</sup> *Ibid* s 26(2).

<sup>100</sup> *Ibid* s 29.

<sup>101</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [29(i)].

<sup>102</sup> *GAA* s 3(1).

<sup>103</sup> *Ibid* s 22(1).

Further, the qualifier ‘reasonable’ in respect of judgements indicates that VCAT will be involved in assessing the quality of the judgments a person with impairment can make, by reference to an objective standard. An earlier draft of the Bill stated that a guardian may be appointed if the person is unable, by *reason of a disability, to care for herself or himself* and to make reasonable judgments.<sup>104</sup> This qualifier and the proviso that the disability caused the need were subsequently left out of the *GAA*. Similarly, section 22(3) mandates that the Tribunal must be satisfied that an order would be in the ‘best interests’ of the person.

While the *CRPD* Committee recommends against objective tests, citing the need to consider social and political contexts,<sup>105</sup> the VLRC expressed an opinion that subjective tests would lead to value judgments about the merits of people’s decisions.<sup>106</sup> The VLRC considered an objective test would prevent liberal application of appointment and avoid the act being used as social control.<sup>107</sup> However, this justification is open to criticism given that having disability as a ground for appointment itself could also be used as a means of social control, through substitute decision-makers, such as a state appointed tribunal, who determines a person’s best interests according to its objective standard.

The *GAA* further identifies several considerations that qualify VCAT’s satisfaction of section 22(1)(c). These include whether the person’s needs could be met by less restrictive means, the wishes of the person, the wishes of any nearest relatives and the desirability of preserving existing family relationships.<sup>108</sup> Interestingly, the requirement that the wishes and preferences of the person proposed to be subject to the order was inserted in 2006 by amendment, in order to ensure consistency with section 4(2)(c) and the object of the *GAA*.<sup>109</sup> An additional fetter is found in section 22(4), which encourages limited guardians over plenary guardians, showing preference to limited and tailored guardianship orders over plenary and indefinite orders. Similarly, a person may be appointed as temporary guardian while an application under section 19 is being determined.<sup>110</sup> A temporary order is limited to 21 days and may be renewed only once for a further 21 days (in effect 42 day orders).<sup>111</sup>

### **(c) *Medical treatment***

While separate to the provisions of the *GAA* that deal with guardianship, the *GAA* also outlines circumstances for medical treatment of individuals without their consent. This is significant as it is also addressed in the *CRPD*, and interacts both with article 12 as well as article 14; the liberty and security of the person.<sup>112</sup> It is problematic for our purposes where the legal capacity to consent or withhold consent for medical procedures is denied on the basis of a person’s disability.

Medical treatment is demarcated into three categories: medical or dental treatment, special procedures, and medical research procedures.<sup>113</sup> A special procedure is defined as any procedure that effectively renders a person permanently infertile, terminates a pregnancy, tissue transplantation, or any other procedure prescribed.<sup>114</sup> Consent to the carrying out of medical or

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<sup>104</sup> Explanatory Memorandum, Guardianship and Administration Board Bill 1986 (Vic) [22].

<sup>105</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [14].

<sup>106</sup> *Guardianship Report*, above n 88, 253 [12.103].

<sup>107</sup> *Ibid* [7.134]–[7.135].

<sup>108</sup> *GAA* s 22(2).

<sup>109</sup> *Guardianship and Administration (Further Amendment) Act 2006* s 15.

<sup>110</sup> *GAA* s 32.

<sup>111</sup> *Ibid* s 33(2).

<sup>112</sup> Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities*, 14<sup>th</sup> sess, (4 September 2015) 9 [8].

<sup>113</sup> *GAA* s 36(1)(b).

<sup>114</sup> *Ibid* s 3(1).

dental treatment can be given by either the Tribunal or a ‘person responsible’.<sup>115</sup> For special procedures, consent can only be given by the Tribunal,<sup>116</sup> on application of a person responsible (or a person with a special interest in the affairs of the individual).<sup>117</sup>

Treatment can be carried out, in an emergency, by a registered practitioner without consent if they believe on reasonable grounds that the procedure is necessary as a matter of urgency to save the patient's life, or to prevent serious damage to the patient's health or to prevent suffering, significant pain or distress.<sup>118</sup> Further, VCAT may only consent to a special procedure if it is satisfied that the individual is incapable of giving consent, it is in the person's best interests, and the person is unlikely to be capable of giving consent within a reasonable time.<sup>119</sup> Subsequently, this power to consent may be conferred on a person responsible for further special procedures at the request or consent of that person.<sup>120</sup>

Significantly, the *GAA* appears to adopt a functional approach to determining whether or not someone can be subjected to medical treatment without their consent, by enumerating the test as the person either being incapable of understanding the general nature and effect of the treatment, or is incapable of indicating their consent.<sup>121</sup> Concerning medical treatment decisions, best interests takes into account the wishes of the person, the wishes of the nearest relative, the consequences if treatment is not made, alternative treatment options, the risks of the treatment, whether the treatment is only to promote the health and wellbeing of the patient, and any other matters prescribed by regulation.<sup>122</sup>

### ***C Australia's State Report***

In its initial report, pursuant to article 35 of the *CRPD*, Australia asserted that it devotes significant effort to ensuring that persons with disabilities are able to enjoy fully all human rights and that those rights are implemented effectively in Australia to respect and promote the inherent dignity of those persons.<sup>123</sup> Australia also stated that it was committed both to removing barriers and accommodating the diverse needs of person with disabilities.<sup>124</sup> This goes to the recognition that the *CRPD* requires both negative rights and positive duties to fulfil the *CRPD*. However the state party notes that no positive duty is created by Australia's anti-discrimination law to introduce affirmative action measures, but that Australia's overall approach is ‘aimed at achieving *de facto* equality while taking the diversity of persons with disabilities into account’.<sup>125</sup>

This declaration of a broad commitment to disability human rights is however brought into question with regard to Australia's particular approach to article 12, which the Committee's first General Comment on the *CRPD* noted, intersected largely with other articles of the Convention.<sup>126</sup> Australia asserted in its interpretative declaration and initial state report, that

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<sup>115</sup> Ibid s 42H.

<sup>116</sup> Ibid s 39(1)(a).

<sup>117</sup> Ibid s 42B(1).

<sup>118</sup> Ibid s 42A (1).

<sup>119</sup> Ibid s 42E.

<sup>120</sup> Ibid ss 42f (1), (2).

<sup>121</sup> Ibid s 36(2).

<sup>122</sup> Ibid s 38(1).

<sup>123</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities: Initial Reports Submitted by States Parties under Article 35 of the Convention*, UN Doc CRPD/C/AUS/1 (3 December 2010) [2] (‘*Australia's Initial State Report*’).

<sup>124</sup> Ibid [12].

<sup>125</sup> Ibid 12 [36].

<sup>126</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, 23; see also, *Consideration of Reports*, UN Doc CRPD/C/SR.107, 3 [10].

substituted decision-making is within the purview of article 12 and will only be used as a measure of last resort.<sup>127</sup> In considering Australia's initial report, this position was of particular concern to multiple members of the Committee,<sup>128</sup> including Mr Espinosa who queried whether Australia's declaration was 'a way to avoid stating that it did not wish to comply with the Convention'.<sup>129</sup> Ultimately in the Committee's Concluding Observations, it reiterated its position and recommended that Australia take immediate steps to replace any such measures with supported decision-making to respect a person's will and preferences in full conformity with the *CRPD*.<sup>130</sup>

### **D Compliance with the CRPD**

While the Australian Law Reform Commission and the VLRC maintain that there is a place in Australia's guardianship laws for substituted decision-making, there has been criticism of the approach taken by both academic commentators,<sup>131</sup> and Disabled Persons Organisations.<sup>132</sup> Additionally, the Committee's General Comment declares that substitute decision-making is not permitted by article 12.<sup>133</sup> Importantly, the Committee considers that the capacity to apply for guardianship by anyone other than the person subject to it amounts to substitute decision making.<sup>134</sup> As such, the *GAA* fails to comply with article 12 by allowing for the application to the Tribunal for guardianship by people other than the person subject.<sup>135</sup>

Similarly, Australia asserts that forced medical treatment is both within the bounds of its obligations in the *CRPD* and only a measure of last resort, necessary and subject to safeguards.<sup>136</sup> However, the Committee raised further issues concerning the administration of medical treatment (particularly sterilisation) without the free and informed consent of persons with disabilities,<sup>137</sup> and recommended that the state party repeal all legislation authorising medical intervention without free and informed consent generally,<sup>138</sup> highlighting specifically forced sterilisation.<sup>139</sup> This also highlights concerns of intersectionality, as women and girls with disabilities are particularly vulnerable to regimes of forced sterilization.<sup>140</sup>

Furthermore, the Committee states that substituted decision-making is an objective test that seeks to fulfil the best interests of individuals rather than interpret their will and preferences,<sup>141</sup> and that the primary purpose is respect for these will and preferences.<sup>142</sup> The Committee states that only after 'significant effort' can determinations be made of the best *interpretation* of will

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<sup>127</sup> *Australia's Initial State Report*, UN Doc CRPD/C/AUS/1, Annex A, [9]; *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth) sch 2.

<sup>128</sup> *Consideration of Reports*, UN Doc CRPD/C/SR.107, 7 [38], 4 [16], 8 [43], 4 [24].

<sup>129</sup> *Ibid* 8 [43].

<sup>130</sup> *Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/1, 3 [25].

<sup>131</sup> Annegret Kämpf, 'Involuntary Treatment Decisions: Using Negotiated Silence to Facilitate Change?' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-based Mental Health Laws* (Hart Publishing Ltd, Oxford, 2010) 129, 148–9.

<sup>132</sup> Disability Representative, Advocacy, Legal and Human Rights Organisations, 'Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities' (August 2012) [38]–[39].

<sup>133</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [17].

<sup>134</sup> *Ibid* [27].

<sup>135</sup> *GAA* s 19.

<sup>136</sup> *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth) sch 2; *Australia's Initial State Report*, UN Doc CRPD/C/AUS/1, [96], 23–4 [101]–[2], 19 [74], 18 [72].

<sup>137</sup> *Consideration of Reports*, UN Doc CRPD/C/SR.107, 3 [9].

<sup>138</sup> *Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/1, 5 [33]–[34].

<sup>139</sup> *Ibid* 6 [40].

<sup>140</sup> *General Comment No 3*, UN Doc CRPD/C/GC/3, [44].

<sup>141</sup> *Ibid* [27].

<sup>142</sup> *Ibid* [20].

and preferences.<sup>143</sup> According to Flynn and Arstein-Kerslake, even in the most difficult cases, for example where someone is non-verbal, the driver should still be the will and preferences of the individual, and not any ‘best interests’ test.<sup>144</sup> As outlined above, there are many areas in the *GAA* that allow for an objective test. For instance, section 23(1)(a) mandates that appointed guardians must act in the best interests of the individual and the will and preferences of the individual is only one factor of many to determine best interests.<sup>145</sup> As such, it does not comply with the requirements of article 12(4).

## VIII COMPARISON BETWEEN STATE LAWS

### A *Similarities*

We can see many similarities between the two guardianship schemes. Firstly, both German law and Victorian law allow for forced sterilisation.<sup>146</sup> Secondly, both countries utilise best interests tests.<sup>147</sup> As outlined above, both countries have been reprimanded by the Committee for these aspects. Furthermore, the laws in both states continue to support, whether explicitly or not, substitute decision-making regimes. Australia’s interpretive declaration indicates the intention to continue substitute decision-making regimes in their jurisdiction,<sup>148</sup> however the Committee has made it clear that substitute decision-making regimes are not supported by the *CRPD* and should be abolished altogether.<sup>149</sup> This is the also the case in relation to the German laws which, though not explicitly, still allow for substituted decision-making in certain areas, including placing the person in institutional accommodation associated with the deprivation of liberty without their consent.<sup>150</sup> Both the *GAA* and the *BGB* would need to be amended to ensure all instances where persons with disabilities can have their will and preferences overridden by the decision of a guardian or custodian are removed, in order to meet the safeguards of article 12(4).

### B *Differences*

There are also several points of difference between the two jurisdictions. We have identified two points of comparison where the German law goes further than the Victorian law in giving effect to will and preferences. Firstly, contrary to the Victorian act, section 1896(1) of the *BGB* states that if a person has a physical disability and is unable to attend to his or her affairs due to the physical disability, a custodian can only be appointed on application *of that person* unless the person cannot express his or her will. While this does still fail to respect the will and preferences of persons with *intellectual* disabilities, it is more progressive than the Victorian counterpart, which allows any person to make an application on behalf of anyone with a disability.<sup>151</sup> Additionally, the German law states that an order cannot be made against the wishes of a person,<sup>152</sup> whereas section 22 of the *GAA* determines that the person’s wishes are only one factor in VCAT’s decision on appointing a guardian. The Victorian law could be amended in this regard to ensure that a person’s wishes are the central component to an order, as in the German law, to comply with the safeguards under the *CRPD*.

Secondly, while German law reform sought to move away from parent-child comparison, which is reflected in the terminological difference, the Victorian act provides this exact comparison at

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<sup>143</sup> Ibid [21].

<sup>144</sup> Flynn and Arstein-Kerslake, above n 49, 98.

<sup>145</sup> *GAA* s 22(2)(ab).

<sup>146</sup> *BGB* §§ 1899(2), 1905; Ibid s 42A.

<sup>147</sup> *BGB* § 1904(3); *GAA* s 38(1).

<sup>148</sup> *Australia’s Initial State Report*, UN Doc CRPD/C/AUS/1, Annex A.

<sup>149</sup> *General Comment No 1*, UN Doc CRPD/C/GC/1, [3].

<sup>150</sup> *BGB* § 1906. See above discussion at pt VI(D).

<sup>151</sup> *GAA* s 19.

<sup>152</sup> *BGB* § 1986(1a).

section 24(1). This is problematic in that such comparisons are infantilising, and could cause persons with disabilities to be treated as child-like, dependent or incapable. Moreover, the powers exercisable by the guardian in the two schemes differ. While the German law mandates that the custodian may exercise all activities that are ‘necessary’,<sup>153</sup> the *GAA* empowers a plenary guardian all the powers a parent would have in regard to their child,<sup>154</sup> giving the guardian a much wider scope for decision-making than the person may need. Removing this comparison from the *GAA*, and focusing instead on necessary activities only, as in the German law, would bring the Victorian law closer to complying with the safeguards under article 12(4).

Conversely, the Victorian law is more progressive in its approach towards medical treatment. While both jurisdictions allow for forced medical treatment in certain cases against the will of the person subject to the order, the *GAA* provides a more functional approach to determining whether someone is incapable of consenting to medical treatment through an enumerated test.<sup>155</sup> The *BGB* gives broad discretion to a custodian to allow for forced medical treatment where the order is ‘not inconsistent’ with the intention of the person,<sup>156</sup> leaving more room for potential orders against the will and preferences of the individual. A reform of the *BGB* to provide a functional approach to the assessment may help to bring greater safeguards to ensure the will and preferences of individuals are better complied with in the area of medical treatment.

## IX CONCLUSION

The guardianship and custodianship laws in Germany and Victoria do not meet the requirements of safeguards under article 12(4) of the *CRPD*. In particular, both states fail to comply with the requirement that *all* substituted decision-making schemes are to be replaced with supported decision-making schemes. Moreover, both states have failed to replace all instances of best interests tests with laws giving primacy to the will and preferences of persons with disabilities, and they continue to allow forced medical treatment and sterilization against the will of individuals. These issues not only violate the provisions of article 12; they also violate article 6 (women and girls with disabilities), article 14 (liberty and security of the person), and article 17 (protecting the integrity of the person). In order to immediately realise the rights of persons with disabilities under the *CRPD*, both jurisdictions need to abolish all forms of substitute decision-making, whether express or not, and replace them with supported decision-making, as well as ensuring that their laws don’t in practice allow for forced medical treatment or sterilization for persons with disabilities.

Despite these shortcomings, the approach of both states to the implementation of the *CRPD* more generally does seem primarily positive. In line with the rights-based approach advocated by the *CRPD*, both states recognise in their initial reports that they have positive obligations to remove barriers and allow for the full participation of persons with disabilities. Thus while particular issues still need to be addressed in the domestic laws, it is worth noting that the recognition of these positive obligations will be significant for the direction and development of future domestic laws in these and other states parties. This is potentially a greater hurdle in the Australian context, given the interpretive declaration of the *CRPD* allowing the continued recognition and purported legitimacy of substitute decision-making regimes.

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