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The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections¹

By Professor Ron McCallum²

1. Introduction

On 3 May 2008, the United Nations Convention on the Rights of Persons with Disabilities, which I shall call the CRPD, came into force. It is the first United Nations convention of the 21st Century. It began to operate on 3 May 2008 because in accordance with article 45 paragraph 1 of the CRPD it would commence operation 30 days after the twentieth nation's ratification document had been deposited with the United Nations. For the first time in the history of the United Nations, the CRPD guarantees both civil and political and economic and social rights to we persons with disabilities.

On 17 July 2008, Australia ratified the CRPD and this ratification came into force on 16 August 2008.³ Australia did not ratify the CRPD's Optional Protocol until 21 August 2009. On 3 September of that year, the Australian Government asked if I would be prepared to seek election to the CRPD's committee of experts as Australia's candidate. I said yes, and on 3 November 2008 at the United Nations in New York I was elected as one of twelve persons to the inaugural United Nations Committee on the Rights of Persons with Disabilities which I shall call the CRPD Committee.

On 8 June 2009, the Government of the United Kingdom ratified the CRPD, and on 7 August 2009, it also ratified the CRPD's Optional Protocol.

In this paper, I wish to accomplish three tasks. The first task is to set forth a brief sketch of the CRPD and of its Optional Protocol. The CRPD is an unusual convention because it contains both civil and political rights, as well as economic and cultural ones. The second task is to note that several Australian court decisions have cited and commented upon the CRPD, but more importantly to unpack *Nicholson v Knaggs*.⁴ This decision uses the CRPD in its re-casting of the

¹ This paper is derived from a lecture titled "The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections" which I delivered at a seminar titled, "Disability, Discrimination and Human Rights: Recent National and International Developments", which was jointly sponsored by the Centre on Human Rights for People with Disabilities Belfast, and the Human Rights Centre Queen's University Belfast, Northern Ireland, UK, Saturday 20 February 2010.

² Professor of Labour Law, Faculty of Law, University of Sydney; and 2010 Chair United Nations Committee on the Rights of Persons with Disabilities. I wish to warmly thank Ms Linda Steele for assisting me with the research for this paper. May I also thank my wife, Professor Mary Crock, and our daughter, Kathryn McCallum, for their assistance with my United Nations work.

³ See art 45 2 CRPD.

⁴ *Nicholson v Knaggs* [2009] VSC 64 (Unreported, Vickery J, 27 February 2009).

Common Law test concerning testamentary incapacity due to undue influence. As a member of the CRPD Committee, my third and final task is to explain the early operations of this Committee. In particular, I shall discuss the monitoring and reporting functions of ratifying countries and the monitoring role of the CRPD.

2. The Convention on the Rights of Persons with Disabilities

In this section of the Paper, I shall examine the origins and the making of the CRPD. It will be timely then to unpack its provisions, and especially the rights bestowed on people with disabilities.⁵ I shall also say a few words about reservations, interpretive declarations and the Optional Protocol.

2.1. Origins and Scope of the CRPD

The story of the making of the CRPD can be traced back to a statement made by the President of Mexico, President Vicente Fox in 2001 at a conference in Durban, South Africa.⁶ He asserted that a United Nations convention should be established to set forth, to safeguard and to protect the rights of persons with disabilities. The President re-iterated his proposal at the 56th meeting of the United Nations General Assembly, and the General Assembly established an ad hoc committee to draft such a convention. The ad hoc committee met on a number of occasions, however, it is important to appreciate that this committee was not confined to representatives of governments. Organisations of disabled persons, known as civil society, were also members of the ad hoc committee; and in fact, the disability organisations played a central role in the drafting of the CRPD, and their slogan of ‘Nothing about us, without us’ has become a rallying cry for we persons with disabilities. It is my understanding that at most sessions of the ad hoc committee, Ambassador Don McKay of New Zealand chaired the sessions and his skills greatly facilitated the negotiations. It has been my privilege to meet with Ambassador Don McKay who has great empathy for all persons on our globe.

On 13 December 2006, the General Assembly of the United Nations adopted the CRPD.⁷ The CRPD was open for signing on 30 March 2007, and as I have noted earlier it came into force on 8 May 2008. According to United Nations figures, approximately six hundred and fifty million people in our world are persons with disabilities with most of us living in developing countries. The CRPD is not a long document, in fact it is less than ten thousand words in length. The best way to comprehend the CRPD is to read it, however, in the following paragraphs I shall sketch its main elements.

⁵ For a detailed and thorough analysis of the CRPD, see Marianne Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities* (2009) available at <<http://www.makingitwork-crpdp.org/resource-library/crpd>>.

⁶ For further details on the origin of the CRPD, see Marianne Schulze above n 5; Rosemary Kayess and Phillip French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 (1) *Human Rights Law Review*, 1-34.

⁷ See, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN Doc, A/RES/61/106, 13 December 2006.

2.2. The Main Elements of the CRPD

The purpose of the CRPD is clearly enunciated in the first sentence of article 1. It says:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

These words are inoffensive because most people and governments agree that persons with disabilities have rights and that they should be protected. However, the history of we persons with disabilities and the actual treatment of groups of us in many countries show that our rights are not always protected.

This is why the CRPD adopts the social model of disability, and this requires a few words of explanation. I do not have first-hand experience of the scene in the United Kingdom, so my explanation of the social model will draw upon my antipodean experience. At this point in the narration, it is necessary to distinguish between impairment and disability. An impairment is a malfunction of the body, mind etc, whereas a disability is a restriction in activities of a person with an impairment resulting from society's failures to socially include persons with disabilities.

At the beginning of the twentieth century, that is in about 1900, disability was seen through a medical lens. Put another way, persons with impairments required medical treatment to cure them and this was the medical model of disability. Failing a cure, they should be made as comfortable as possible in our world. The medical model did not see the disempowerment of persons with disabilities as flowing from the state: rather, it took the view that it was their impairments which limited them. For the proponents of the medical model, the suffering from an impairment was neither the fault of the sufferer nor of the state. Instead, impairments were simply occurrences in our less than perfect world. In the 1960's and 1970's, the Australian Government overlaid on the medical model a social welfare model of disability. Under this model, social security assistance was given to persons with disabilities in the form of payments, job creation schemes, grants etc.

By the 1980's and 1990's, however, led by a number of United Kingdom activists, we persons with disabilities had developed the social model of disability. The social model asserts that the disempowerment of we persons with disabilities is not due to our impairments, instead, the barriers which face us flow from societal attitudes and restrictions on persons with disabilities. paternalistic attitudes and stereotyping behaviours towards persons with disabilities are the real restrictions which the social model seeks to sweep away.

The CRPD adopts the social model of disability in the second sentence of article 1 which must be read together with paragraph E of the CRPD's preamble. The second sentence says:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Paragraph E of the preamble states that

... [D]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

Article 3 of the CRPD sets forth eight principles, and it is easiest to reproduce this article in its entirety. It says:

Article 3 - General principles

The principles of the present Convention shall be:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

I do not have time to unpack each of these eight principles, so the following thoughts will have to suffice. For me, principle A on respect for inherent dignity, individual autonomy and independence of persons with disabilities is crucial. We are individuals and our choices must be respected by others, whether they be the colour of my tie, or my choice of where I wish to live or of which occupation I wish to pursue. Principles B and C which concern non-discrimination and full participation in society are also central ones.

Article 4 of the CRPD sets forth general obligations which are placed upon countries like the United Kingdom and Australia which have ratified the CRPD. In international law, ratifying countries are called states parties. Paragraph 1 of Article 4 obliges states parties to implement measures to ensure that all of the rights of the CRPD are bestowed on persons with disabilities. Paragraph 2 of Article 4 deals with the implementation of the CRPD in the area of social, economic and cultural rights. It requests states parties with economic capacity to cooperate with other states parties to implement these rights throughout all of the ratifying nations. The 3rd paragraph of Article 4 requires states parties to consult and to cooperate with disabled persons organisations in the implementation of the CRPD. Paragraph 4 of article 4 is what is known as a savings clause, for it makes it clear that the CRPD should not be read so as to derogate from any existing legal rights of persons with disabilities. Finally, paragraph 5 of Article 4 makes it clear that the CRPD applies throughout federal nations like Australia which would include nations with devolved powers like the United Kingdom.

Prior to discussing the rights contained in the CRPD, it should be noted that the CRPD does not

create any new human rights for we persons with disabilities that did not previously exist in other human rights instruments. Rather, the CRPD seeks to enhance the realisation by people with disabilities of existing human rights. It does this through framing these rights in a way that is relevant to the impairments and experiences of people with disabilities and takes into account the barriers imposed by society that promote discrimination against people with disabilities and have prevented people with disabilities from participating in society and realising their human rights.

Article 5 is titled 'Equality and non-discrimination'. Its first two paragraphs say:

1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

Articles 6 and 7 exhort states parties to recognise that women and girls and children who are disabled often suffer further discrimination because they are female or are children. Article 8 of the CRPD is concerned with awareness raising. It requires states parties to develop programs to promote persons with disabilities and to combat stereotypes etc. Article 9 deals with accessibility which is a crucial matter for we persons with disabilities. It requires states parties to take measures to enable we persons with disabilities to access the physical environment, to have access to buildings and to transport, and for we blind people, to have access to information. In my view, access is one of the big problems facing we persons with disabilities, and especially my sisters and brothers in wheelchairs.

Articles 10 to 23 and article 29 of the CRPD set forth civil and political rights. These are:

- the right to life;
- the right to be protected in situations of risk;
- the right to equal recognition before the law and access to justice;
- the right to liberty of the person, including liberty of movement and nationality and freedom from torture or degrading punishments;
- the right to integrity of the person and the right to be free of exploitation, violence and abuse; the right to live independently and to be part of the community and to have personal mobility;
- the right to freedom of expression and to access to information;
- the right to privacy the right to marry and to found a family; and
- the right to participate in political and public life.

Articles 24 to 28 and article 30 of the CRPD set forth the following economic and social rights:

- the right to education;
- the right to the same health care as others, and also to habilitation and to rehabilitation;
- the right to work on an equal basis with others;
- the right to an adequate standard of living; and
- the right to recreation and to participate in cultural and sporting life.

This summary of the rights set out in the CRPD does not do them justice, and I strongly suggest

that you read these provisions in full to comprehend how they have been tailored to assist we persons with disabilities.

As I will refer to article 12 of the CRPD later in this paper when discussing *Nicholson v Knaggs*, let me unpack it now for it will show the manner in which the CRPD sets forth rights for we persons with disabilities. At the 2nd session of the CRPD Committee which was held in October 2009, we held a day of discussion on article 12 of the CRPD which is headed ‘Equal recognition before the law’. Paragraph 1 of article 12 affirms that we persons with disabilities possess ‘... the right to recognition everywhere as persons before the law’. Paragraph 2 is important, and it says:

2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

The third paragraph of article 12 recognises that some of us with disabilities require support, and states parties are obliged to render such support.

Paragraph 4 of article 12 says:

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

This paragraph has been the subject of great debate. It obliges states parties to enable we persons with disabilities who require assistance, to receive assistance in making decisions about our financial affairs, or about our health. In my view, this paragraph also recognises that on occasions, some persons with disabilities may not be able to make decisions, and that where substituted decision-making occurs, it is subject to safeguards and prompt and frequent judicial oversight. Finally, paragraph 5 ensures that we persons with disabilities have the right to own or to inherit property and to control our financial affairs.

Article 31 of the CRPD deals with the collection of statistics and data, while article 32 exhorts states parties to engage in international cooperation through aid programs to assist persons with disabilities. Articles 33, 34, 35 and 36 deal with national monitoring, the CRPD Committee and periodic reporting by states parties, and I shall unpack them in the penultimate section of this paper.

2.3. Reservations and Interpretive Declarations

When ratifying conventions, states parties may make reservations and/or interpretive declarations. Briefly put a reservation is a statement by the ratifying country that it will not

regard itself as bound by an article, a paragraph or a sentence of the convention. Article 46 permits reservations, provided they are not incompatible with the CRPD. Article 46 provides:

Article 46 - Reservations

1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted.
2. Reservations may be withdrawn at any time.

It is also possible for ratifying states to make interpretive declarations. Such declarations simply state the way the country will interpret an article or a paragraph of a convention. In other words, the ratifying country agrees to be bound by the relevant provision, but signals how it will interpret that provision. As is readily apparent, as the manner in which reservations and interpretive declarations are made by states parties varies, it is often difficult to discern the exact difference between a reservation and an interpretive declaration.⁸

When the Australian Government ratified the CRPD it made three interpretive declarations on its interpretations concerning legal capacity⁹ and immigration.¹⁰ For its part, the United Kingdom Government has four reservations and one interpretive declaration. Put briefly, the reservations made by the United Kingdom concern aspects of work and employment,¹¹ education,¹² immigration¹³ and legal capacity.¹⁴ Its interpretive declaration concerns article 24 paragraph 2 which relates to mainstream and special schools and schooling. It is not appropriate for me to comment upon any nations reservations or interpretive declarations, other than to hope that in the fullness of time all ratifying states will eventually withdraw their reservations and interpretive declarations.

2.4. The Optional Protocol

The Optional Protocol of the CRPD is a very short document. Briefly put, it enables individuals to complain to the CRPD Committee if they have been treated contrary to any of the articles of the CRPD. However, complaints may be made only about matters which have occurred since the state party has ratified the Optional Protocol. Furthermore, if the state party has appropriate

⁸ For details on reservations and interpretive declarations, see Gerard Quinn, 'The "Temptation of Elegance": Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?' in G Quinn & O Arnardottir (eds), *The United Nations Convention on the Rights of Persons with Disabilities - a European and Scandinavian Perspective* (2009).

⁹ Article 12.

¹⁰ Article 18.

¹¹ Article 27.

¹² Article 24.

¹³ Article 18.

¹⁴ Article 12.

legal mechanisms and remedies, such as a disability discrimination statute, the complainant must exhaust these remedies before bringing a complaint before the CRPD Committee. When complaints come before the CRPD Committee, a lengthy process occurs where there is dialogue with the complainant's country, before any recommendations may be made.¹⁵

This is why, if individuals can resolve their CRPD complaints through the legal system of their country, this is by far the better course of action to take, provided of course that the country concerned has a viable legal system. I shall now turn to Australian case law.

3. Australian Case Law and the CRPD

There have been a number of court and tribunal decisions in both Australia¹⁶ and the United Kingdom¹⁷ where the CRPD has been cited. However, in none of them has the CRPD been conclusive. This is hardly surprising because in neither country is the CRPD enforceable in the same way as is domestic law.

Time does not permit me to speak about the facts of all of the Australian decisions where the CRPD has been cited, nor would I presume to discuss the United Kingdom cases. However, one interesting decision of the Supreme Court of the Australian State of Victoria is worthy of discussion as Vickery J uses the CRPD to assist in reshaping the Common Law. At this point in the narration, it is important to appreciate that Victoria is one of two Australian jurisdictions (the other being the Australian Capital Territory) which have bills or charters of rights. In Victoria, there is the *Charter of Human Rights and Responsibilities Act 2006* which is somewhat akin to the United Kingdom's *Human Rights Act 1998*. These mechanisms are useful vehicles whereby the CRPD can be utilised as an interpretive aid.

The decision which was handed down by Vickery J on 27 February 2009 is *Nicholson v Knaggs*.¹⁸ It concerned a partly successful application to set aside two wills. If this was a paper on wills and estates, its facts would need to be unpacked in detail for they show the complexities over disputes concerning the intentions of testators as to the disposition of their property. However, for present purposes the following brief summary will suffice.

¹⁵ Before complaints reach the CRPD Committee they are examined by officers in the Office of the High Commissioner for Human Rights to determine their genuineness etc.

¹⁶ *Devers v Kindilan Society* [2009] FCA 1392 (Unreported, Marshall J, 27 November 2009); *Halsbury v Halsbury (stay application)* [2009] FamCAFC 142 (11 August 2009) (unreported); *Kracke v Mental Health Review Board* [2009] VCAT 646 (Unreported, Bell P, 23 April 2009); *Sales v Minister for Immigration & Citizenship* (2007) 99 ALD 523; [2007] FCA 2094 (21 December 2007); *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Jansen* (2008) 166 FCR 428; [2008] FCAFC 48 (4 April 2008).

¹⁷ *AM (Somalia) v Entry Clearance Officer* [2009] All ER (D) 09 (Jul); [2009] EWCA Civ 634 (1 July 2009); *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal* [2009] EWHC 1842 (Admin), [2009] IRLR 1007 (23 July 2009); *R (on the application of AM) v Birmingham City Council* [2009] All ER (D) 68 (Jul); [2009] EWHC 688 (Admin) (2 March 2009); *R (on application of Harrison) v Secretary of State for Health* [2009] EWHC 574 (Admin); [2009] All ER (D) 216 (Mar) (23 March 2009).

¹⁸ *Nicholson v Knaggs* [2009] VSC 64 (Unreported, Vickery J, 27 February 2009).

Ms Betty Dyke died in 2004 aged 84. She had only received schooling up to grade 8, had never married, she had no children and lived alone on a semi-rural property on Victoria's Mornington Peninsula. There were a series of wills, the earlier one having been made in 1985, but with two later wills having been executed in 1999 and 2001. While the 1999 and 2001 wills gave various extended family members and charities small gifts, the bulk of the large estate went to two or three married couples, who were her neighbours. One of the couples was Mr and Mrs Knaggs. Extended family members and a number of charities who received most of the estate under the 1985 will challenged the 1999 and 2001 wills. The argument by the challengers was either that Ms Betty Knaggs lacked testamentary capacity to make these wills, or that when executing the wills she was subjected to undue influence by one of the three sets of married neighbours.

After considering a copious amount of evidence, Vickery J held that the 2001 will should be set aside because Ms Betty Dyke lacked testamentary capacity owing to her ill health and dementure. However, the judge further held that there was insufficient evidence to hold that Ms Betty Dyke lacked testamentary capacity when she executed the 1999 will. Interestingly, his Honour further held that a portion of the 1999 will relating to a bequest to Mr Knaggs would be set aside because when executing that will Ms Betty Dyke was subject to undue influence from Mrs Knaggs.

This case is important in the present context because Vickery J did discuss the CRPD and used article 12 to broaden the Common Law test for testamentary incapacity due to undue influence. After citing the CRPD, his Honour said:

The CRPD marks a paradigm shift in approaches to persons with disabilities. It reflects a movement from treating persons with disabilities as objects of social protection towards treating them as subjects with rights, who are capable of claiming and exercising those rights and making decisions based on free and informed consent as active members of society.¹⁹

He noted that Article 12 of the CRPD which deals with legal capacity was relevant and said:

It endorses the concept that people with disabilities should have the capacity to exercise legal rights on an equal basis with others in all aspects of life. The article is capable of applying to the making of wills by persons with disabilities.²⁰

His Honour then turned to Victoria's *Charter of Human Rights and Responsibilities Act 2006* because section 5 makes it clear that the Charter is not intended to abrogate any existing rights of domestic or international law which still apply.

After dealing with some subsidiary matters, Vickery J examined all five paragraphs of article 12

¹⁹ Paragraph 13.

²⁰ Paragraph 19 (footnote omitted).

and opined that it was ‘ ... not without difficulties of construction’.²¹ However, in accordance with Australian case law and practice, he relied upon the *Vienna Convention on the Law of Treaties* 1969, the VCLT, to interpret article 12 of the CRPD. Vickery J then said:

The Concept of ‘Legal Capacity’, as it is employed in Article 12 of the CRPD has a particular meaning which is distinct from the commonly used concept which endows a person with recognition in the legal order. The common law traditionally recognises that a person with legal capacity is a person who possesses rights and obligations, and in such capacity may, for example, sue or be sued or enter into legally binding contracts. On the other hand, the idea of ‘legal capacity’, as it is used in Article 12 of the CRPD, is a wider concept which entails the capacity to exercise rights and undertake duties in the course of individual conduct. This construction becomes clear from the application of the rules for interpretation provided in the VCLT. In particular this interpretation is revealed when the Convention is construed in accordance with Article 31(1) of the VCLT and the ordinary meaning to be given to its terms, as used in their context, is applied in the light of the object and purpose of the Convention. The meaning arrived at by the application of Article 31(1) of the VCLT is confirmed by reference to the travaux préparatoires of the Convention, which may be used as a supplementary means of interpretation under Article 32 to confirm a meaning arrived at from the application of Article 31.²²

Vickery J then examined article 12 paragraph 4 and said:

The ‘safeguards’ contemplated by Article 12(4) are required to ensure that ‘measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free from conflict of interest and undue influence, are proportional ...’ Although this text is not perfectly expressed, after considering the ordinary meaning of these terms in their context and in the light of the object and purpose of the Convention, and the travaux préparatoires, the meaning becomes clear. The article recognises that some people with disability need support to make decisions in the exercise of their legal rights. If a State Party implements a mechanism of supported decision making to assist such persons, the State is obliged to ensure that appropriate and effective safeguards are in place which respect the rights, will and preferences of the person with disabilities, so that those rights, will and preferences are, amongst other things, free of conflict of interest and undue influence, and are proportional.

International law, as reflected in international conventions to which Australia is a party, may be used by the courts as a legitimate guide in developing the common law.²³

Vickery J then commented on article 12 paragraph 2 of the CRPD in the following important passage. He said:

²¹ Paragraph 61.

²² Paragraph 64 (footnote omitted).

²³ Paragraphs 69-70 footnote omitted

The obligation assumed by States Parties expressed in Article 12(2) of the CRPD to recognise that ‘persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’ includes the capacity to exercise relevant rights on an equal basis with others. The expression ‘in all aspects of life’ emphasises the breadth of the obligation. Since natural persons in Australia, subject to the law, enjoy freedom of testamentary disposition, the CRPD has application to the exercise of will making by persons who suffer from disabilities in this country. The Convention therefore warrants a role in the development of Australian common law of will making

The effect of Article 12(2) in the present context is to provide for an obligation on Australia to recognise that persons with disabilities enjoy the exercise of the right to freedom of testamentary disposition on an equal basis with all other persons. Undue influence in the will making process may impose a significant barrier to the free expression of the testator’s preferences. Persons with disabilities, including the elderly who suffer from disabilities, are uniquely vulnerable to the exercise of undue influence on the part of others. Accordingly, the common law protection provided by the concept of undue influence, as it has developed in this country, may legitimately be engaged by the CRPD.²⁴

However, in accordance with Australian case law, he recognised that where a convention has not been legislated into law, judges should be cautious in holding that its provisions have altered the Common Law.²⁵

In his discussion of testamentary undue influence, Vickery J utilised article 12 of the CRPD in formulating a more flexible test for Australia. Under Australian and United Kingdom Common Law, actual testamentary undue influence usually has been very hard to establish. After all, the testator is dead and in most cases the evidence of undue influence is circumstantial. The evidentiary burden of proof as to undue influence is, naturally enough, on the person or persons seeking to challenge the will. The test for proving undue influence in the execution of wills was derived from the 1857 decision of the House of Lords in *Boyse v Rossborough*²⁶ and confirmed by the Privy Council in 1920 in *Craig v Lamoureux*.²⁷ The test was not that the circumstantial evidence showed a probability of undue influence, but rather that the circumstantial evidence cannot be explained by any other rational hypothesis than undue influence. In other words, the challenger bore the evidentiary burden and was required to prove that undue influence was the only rational hypothesis open on the evidence. In requiring challengers to negative all other possible rational hypotheses, the standard of proof came close to the criminal standard of beyond reasonable doubt. Obviously, such a test was hard to satisfy in most instances which came before the courts. It is not surprising that in recent times efforts have been made to broaden this

²⁴ Paragraphs 74-75.

²⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22.

²⁶ *Boyse v Rossborough* (1857) 6 HLC 1; 10 ER 1192.

²⁷ *Craig v Lamoureux* [1920] AC 349.

archaic test.

Vickery J began his assault on the *Boyse/Lamoureux* rule by saying that there is no justification for requiring challengers to apply the criminal onus of proof in civil cases concerning circumstantial evidence;²⁸ and further that such a rule was contrary to Australian general law where in civil cases involving circumstantial evidence, the plaintiff was only required to prove that it was more probable than not that the act had occurred.²⁹ Although these Australian authorities did not concern testamentary incapacity due to undue influence, nevertheless they did deal with the application of circumstantial evidence and Vickery J decided to follow them in preference to *Boyse* and *Lamoureux*. After all, he opined that Australian courts are no longer bound by decisions of the House of Lords and the Privy Council.³⁰

For Vickery J, this new approach would ensure that

greater practical effect is likely to be afforded to the principle of testamentary undue influence in the common law of Australia. As such, the approach would be consistent with the recognition of the right to exercise testamentary freedom of persons with disabilities on an equal basis with others in conformity with the spirit and intention of Article 12(2) of the CRPD. Concordance would be achieved by providing a greater measure of protection to those testators who are most vulnerable to undue influence, namely those who suffer from disabilities, and the increasing numbers of elderly persons who fall into this class.³¹

His Honour then laid out his new test in the following words. He said:

The test to be applied may be simply stated: in cases where testamentary undue influence is alleged and where the Court is called upon to draw an inference from circumstantial evidence in favour of what is alleged, in order to be satisfied that the allegation has been made out, the Court must be satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.³²

What this holding shows is that the CRPD is able to influence the growth of our Common Law by ensuring that the rules governing testamentary incapacity due to undue influence are sufficiently flexible to protect persons with disabilities and other vulnerable persons from having their testamentary wishes overridden.

²⁸ Paragraph 120.

²⁹ Paragraph 121, citing *Luxton v Vines* (1952) 85 CLR 352; *Chamberlain v R (No 2)* (1984) 153 CLR 521; *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125.

³⁰ Paragraph 125.

³¹ Paragraph 126.

³² Paragraph 127.

It is important to appreciate that in *Nicholson v Knaggs*,³³ Vickery J utilised article 12 of the CRPD in his decision to alter the Common Law rules governing testamentary incapacity due to undue influence. While article 12 was by no means decisive, its status as a provision of a Convention which had been ratified by the Government of Australia was of significance. *Nicholson v Knaggs* has been cited in several subsequent cases,³⁴ however, none of these citations concerned testamentary incapacity due to undue influence. We shall have to await further decisions to see if Vickery J's more flexible rule becomes accepted by Australia's courts.

4. The Early Operations of the CRPD Committee

In this penultimate section of the paper, I shall comment on the early work of the CRPD Committee, and shall discuss the monitoring and the reporting requirements of ratifying countries.

4.1. The Early Work of the CRPD Committee

Article 34 of the CRPD establishes the CRPD Committee which is broadly similar to the monitoring committees in other United Nations conventions. On 3 November 2008 at the United Nations headquarters in New York, 41 ratifying countries elected from 23 candidates, 12 members of the inaugural CRPD Committee. As of 18 February 2010, 80 countries have ratified the CRPD. Article 34 further provides that once 80 nations have ratified the CRPD, the CRPD Committee membership will expand to a total of 18 members. This will occur at the third meeting of States Parties to the CRPD which will take place at the United Nations in New York from 1 to 3 September 2010, with the new members taking their places from 1 January 2011. Eight of the 12 inaugural members of the CRPD Committee, including myself, are persons with disabilities, with 5 of the 8 being blind or visually impaired.

In 2009, the CRPD Committee met for two sessions in February and in October respectively, and in February 2010 the CRPD Committee held its third session. The CRPD Committee has written its reporting guidelines for states parties reporting to it, and these are on the website of the Office of the High Commissioner for Human Rights. The CRPD Committee has also completed its rules of procedure and its working methods which, after further checking, will soon be placed on the internet. The work is steady yet slow as we all work with the aid of superb interpreters.

4.2 Monitoring

Article 33 of the CRPD requires ratifying nations to establish independent mechanisms to monitor the implementation of the CRPD. It is important to appreciate that this article is a new

³³ [2009] VSC 64.

³⁴ *Brown v Sandhurst Trustees Ltd* [2009] VSC 212 (4 June 2009); *Re Curtis, Ex Parte Clark* [2009] WASC 254 (19 August 2009); *Edwards v Edwards* [2009] VSC 190 (21 May 2009); *Matejka v Hodge* [2009] VSC 580 (11 December 2009).

and largely untried mechanism to ensure that countries which have ratified the CRPD engage fully in monitoring and implementing this Convention.³⁵ Indeed, it is essential for states parties to adhere to the scheme set out in its three paragraphs to ensure that appropriate monitoring does take place.

Article 33 of the CRPD requires governments and organisations of persons with disabilities to work together to monitor and to implement the CRPD. It does appear to me that ratifying states who are preparing to write their first reports to the CRPD Committee are now coming to grips with this article.³⁶

Article 33 paragraph 1 obliges ratifying countries to ‘... designate one or more focal points within government’ to assist in the implementation of the CRPD. The second paragraph of article 33 obliges states to establish a framework including ‘... one or more independent mechanisms’ to promote, protect and monitor the implementation of the CRPD. When establishing this mechanism, states parties are obliged to take account of the principles, known as the Paris Principles,³⁷ relating to the status and functioning of national human rights agencies. Finally, paragraph 3 requires these nations to ensure that Persons with disabilities, and persons with disabilities organisations fully participate in this monitoring process.

It has always seemed to me that while the CRPD Committee has an important role to play, the success of the CRPD will depend much more on the manner in which ratifying countries both monitor and implement the CRPD. If article 33 is able to encourage these activities in states parties, then it will have played a crucial role in grounding the CRPD into the policies, laws and customs of ratifying nations.

4.3 Reporting

Article 35 of the CRPD obliges ratifying countries to periodically report to the CRPD Committee. Its first two paragraphs say:

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.

³⁵ For a useful discussion on the innovative nature of article 33 of the CRPD, see, OPCAT Research Team, *The Optional Protocol to the UN Torture Convention and the UN Convention on the Rights of People with Disabilities: Some common issues* (2009) University of Bristol at <<http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html>>.

³⁶ For a useful introduction to article 33 of the CRPD, see Human Rights Council, *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Monitoring and Implementation of the Convention on the Rights of Persons with Disabilities*, UN Doc A/HRC/13/29 (2009) available at <<http://www2.ohchr.org/english/issues/disability/index.htm>>.

³⁷ For a discussion of the Paris Principles, see Anna-Elina Pohjolainen, “The Evolution of the National Human Rights Institutions – The Role of the United Nations”, (The Danish Institute for Human Rights, 2006).

2. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

Therefore, pursuant to paragraph 1 of article 35, the United Kingdom will be required to deliver its first report by July 2011.

Article 36 paragraph 1 of the CRPD, gives power to the CRPD Committee to examine the reports from states parties and empowers it to

... [M]ake such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned.

The first reports from ratifying nations are due on 3 May 2010, so as yet the CRPD Committee has not had occasion to deal with any reports. Put briefly, from my knowledge of the manner in which other treaty bodies operate, it is my expectation that the process will be as follows. The country concerned will appear before the CRPD Committee to enter into dialogue about its report. It may be the case that organisations of persons with disabilities in that country will also submit their own report to the CRPD Committee, known as a 'shadow report', giving their views of the successes and shortcomings of their country's implementation of the CRPD. The nation's national human rights agencies may also appear and be part of the dialogue. It will be then up to the CRPD to make suggestions and general recommendations on the report.

5. Conclusion

The purposes of this paper have been threefold. First, the paper has unpacked the major provisions of the CRPD. Second, an examination has been made of the Victorian Supreme Court decision of *Nicholson v Knaggs* to illustrate how the CRPD may lead to an alteration of the Common Law to assist persons with disabilities. Finally, as an inaugural member of the CRPD Committee, I have endeavoured to give a brief view of its early work and to unpack the monitoring obligations of states parties, and the reporting requirements of ratifying countries and of the CRPD. If these few words have given you a useful introduction to the CRPD and its Committee, my work will have been well done.