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Article 16

Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Introduction

That disabled people experience higher rates of exploitation, violence and abuse is not a contested fact.¹ Indeed, it is a significant problem globally which requires immediate redress and, on this basis, the framing of the issue as a specific human right with detailed attendant obligations is important. Frequently, such harm is not dealt with by state authorities and the individual continues to be harmed, sometimes with tragic circumstances.² The continued institutionalisation of disabled people provides fertile ground for exploitation, violence and abuse, both through deliberate abuse, alongside the neglect and harmful treatment that result from living in controlled spaces which are frequently under-resourced.³ This abuse may be in the form of physical violence, alongside

¹ See, for example, the range of studies referenced in Peter Bartlett and Marianne Schulze, 'Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities (2017) 53 Int'l J.L. & Psychiatry 2, 4

² For example, the tragic case of Steven Hoskin in England in 2006. Steven had refused social care support, and was subsequently murdered by people whom he had considered his friend. Margaret C. Flynn, *The Murder of Steven Hoskin, A Serious Case Review, Executive Summary*, (Cornwall Adult Protection Committee, 2007)

³ The Non-governmental organisation Disability Rights International made international headlines with a report in 2015 into abuse of children and adults with mental disabilities in Mexico City – Priscilla Rodriguez et

emotional and psychological abuse. Sexual violence, particularly against women, is common,⁴ and institutions in particular provide opportunities for this to occur, as both adults and children who are institutionalised may be used to being ignored or silenced, and thus make easy target for potential abusers.⁵ The contribution of institutionalisation to other forms of exploitation, violence and abuse was famously noted by Erving Goffman in the 1960s,⁶ and reiterated by two recent United Nations Special Rapporteurs on Torture.⁷

Where abuse does occur, criminal sanctions may not be sought for any number of reasons, frequently due to a perception that evidence is unreliable. Rather than criminal sanctions, civil protective measures, frequently through social care, will be put in place.⁸ Thus, evidence demonstrates that when states do intervene to protect disabled people, and in particular disabled women, the measures employed often result in the removal of control and choice.⁹ To keep the individual 'safe', restrictions are often placed around her life, rather than that of the perpetrator – supervision and observation of the disabled person are frequently the result, alongside other controls put in place around her activities – for example, where she can live and with whom she can associate. Specific provisions around protection, therefore, must be approached carefully and considered in light of the 'paradigm shift' of the Convention as a whole. In particular, article 16 calls for an awareness that the measures put in place to care for, or protect, disabled people, are a significant cause of the harm that they experience, where segregation and isolation from the community allow for abuses of power by those who are supposed to be caring for disabled people. Article 16 also raises the fact that much of the abuse that disabled people experience is the result of the relationships of care they are in and that harm frequently occurs both within the home, as well as outside it. Article 16 extends state obligations beyond the narrow purview of institutions and into a wider variety of arenas, including family relationships.

Background and Travaux Préparatoires

al., 'No Justice: Torture, Trafficking and Segregation in Mexico', (Disability Rights International, 2015) available at https://www.driadvocacy.org/wp-content/uploads/Sin-Justicia-MexRep_21_Abr_english-1.pdf (last accessed October 3rd, 2017). Other examples of such abuses can be found globally, including other reports by DRI on Georgia, Ukraine, the United States and Guatemala, just within the past decade.

⁴ As Combrinck notes, there is not a large body of literature on the sexual violence experienced by disabled women, but the existing research does indicate that it is a particular problem (Helene Combrinck, 'Promises of protection? Article 16 of the Convention on the Rights of Persons with Disabilities and gender-based violence in South Africa' (2017) 53 Int'l J.L. & Psychiatry 59, 60)

⁵ Harry Ferguson, 'Abused and looked after children as 'Moral Dirt': child abuse and institutional care in historical perspective' (2007) 36(1) Journal of Social Policy 123; Janine Benedet and Isabel Grant, 'Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities' (2014) 22(2) Feminist Legal Studies 131

⁶ Erving Goffmann, *Asylums: Essays on the social situation of mental patients and other inmates* (2007 Aldine Transaction)

⁷ Manfred Nowak, 'Interim report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/63/175, 28 July, 2008; Juan E Méndez, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' UN Doc A/HRC/22/52 1 February, 2013

⁸ Anna Lawson, 'Disabled People and Access to Justice: From disablement to enablement?' in Peter Blanck and Eilionoir Flynn (Eds.) *Routledge Handbook of Disability Law and Human Rights* (Routledge 2017) 88, 92

⁹ Amanda Keeling, 'Organising objects': Adult safeguarding practice and article 16 of the United Nations Convention on the Rights of Persons with Disabilities' (2017) 53 Int'l J.L. & Psychiatry 77

The mandate of the Ad Hoc Committee in developing what became the Convention on the Rights of Persons with Disabilities was not to create new rights, but rather reformulate existing legal standards to specifically enable disabled people to both claim and enjoy those rights. While the reality of this claim is often contested, article 16 does have precedence within international human rights law, particularly article 19 of the UN Convention on the Rights of the Child (CRC), which states that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Similarly, the 1993 UN Declaration on the Elimination of Violence Against Women¹⁰ requires state action to condemn and prevent violence against women, through legislative and other measures, training and the funding of protective mechanisms. In the context of the CRPD, the right in article 16 was not originally separate, but part of the right to be free from torture, cruel, or inhuman or degrading treatment or punishment; whether it should remain so, or be stated as an autonomous right was a matter of significant debate in the negotiations on the text, as the issue became entwined with the wider debate around involuntary treatment and legal capacity. This section sets out three key areas of discussion around the content of article 16, namely: the interaction with torture and involuntary treatment; the (other) types of harms that fell within the scope of the article and; the preventative nature of the protective duty.

a) Scope: types of harm included in ‘exploitation, violence and abuse’

A debate that was perhaps deserving of greater attention than it received was the scope of the harms which should fall within article 16. The original wording in Mexico’s draft text of the Convention, at the first session of the Ad Hoc Committee, recognised that disabled people were ‘particularly vulnerable to different forms of violence...’, but did not list those forms of violence.¹¹ In the many submissions made at the second session, there were a number of different formulations of rights that recognised various separate harms. Venezuela suggested a right around freedom from sexual abuse and institutional violence,¹² while the European Union’s submission made reference to an obligation to protect disabled people from ‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation’.¹³ The Bangkok draft

¹⁰ A/RES/48/104, 85th plenary meeting, 20 December 1993

¹¹ Draft article 9, Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, Working paper by Mexico, A/AC.265/WP.1 English

¹² Article 17, Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Draft submitted by the Government of the Bolivarian Republic of Venezuela, 18th June, 2003, A/AC.265/2003/WP.1

¹³ Part III: Autonomy, European Union ‘Elements for an International Convention’, A/AC.265/2003/CRP.13/Add.2

recommendations made a similar requirement,¹⁴ while DPI Japan called for an obligation around economic exploitation.¹⁵

However, the Draft Elements produced by the Chair of the Working Group as a basis for discussion at the Working Group, introduced an obligation to protect from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse'¹⁶, echoing the list in article 19 of the CRC. This list was changed slightly in the final draft text submitted to the third session of the Ad Hoc Committee by the Working Group, stating that the obligation was to protect from 'all forms of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual exploitation and abuse'.¹⁷ This iteration of the Convention situated the right to freedom from violence and abuse as a separate right, with a significant expansion of content. Now included was a requirement to protect disabled people from 'forced interventions or forced institutionalization aimed at correcting, improving or alleviating any actual or perceived impairment, and abduction' and prohibit such action in draft article 12(2).

As is recounted in the following section, the presence of this paragraph dominated the negotiations on article 16, leaving the discussions around other types of harm somewhat lacking. There was, however, some discussion at the third session as to what harms should be included in the list in paragraph 1. Many contributors called for a longer list that added other harms, including a distinction between mental and physical abuse,¹⁸ abandonment,¹⁹ economic exploitation,²⁰ sexual exploitation,²¹ harassment,²² victimisation,²³ and emotional abuse.²⁴ There was also a call to move abduction from the contentious paragraph 2 into the list in paragraph 1.²⁵ Following the discussions,

¹⁴ Bangkok recommendations on the elaboration of a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, Outcome of an expert group meeting and seminar held in Bangkok at the headquarters of the Economic and Social Commission for Asia and the Pacific from 2 to 4 June 2003, A/AC.265/2003/CRP/10

¹⁵ Compilation of proposals for a Comprehensive and Integral Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, Add. 1, NGO contributions to the elements of a convention, A/AC.265/CRP.13, Add.1

¹⁶ Article 13, Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (December 2003) Available at <<http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm>> (accessed 10th June, 2017)

¹⁷ Draft Article 12, United Nations Ad Hoc Committee, Working Group to draft a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Report to the Ad Hoc Committee, Annex I, A/AC.265/2004/WG/1

¹⁸ United Nations, Ad Hoc Committee, Daily summary of discussions related to article 12, Freedom from Violence and Abuse, (May 26 and 27, 2004) available at <<http://www.un.org/esa/socdev/enable/rights/ahc3sum12.htm>> (accessed 10th June, 2017), per Costa Rica and Mexico

¹⁹ Ibid., per Republic of Korea

²⁰ Ibid., per New Zealand, Mexico, Serbia and Montenegro, Australia Disability Inc.

²¹ Ibid., per New Zealand

²² Ibid., per Australia Disability Inc.

²³ United Nations, Ad Hoc Committee, Daily summary of discussions related to article 12, Freedom from Violence and Abuse, (May 26 and 27, 2004) available at <<http://www.un.org/esa/socdev/enable/rights/ahc3sum12.htm>> (accessed 10th June, 2017), per Australia Disability Inc.

²⁴ Ibid.

²⁵ United Nations, Ad Hoc Committee, Daily summary of discussions related to article 12, Freedom from Violence and Abuse, (May 26 and 27, 2004) available at <<http://www.un.org/esa/socdev/enable/rights/ahc3sum12.htm>> (accessed 10th June, 2017), per European Union

the Mexican delegation revised its proposal to include a list of harms that reflected the discussion, providing a list in the first paragraph that was significantly longer than the Working Group text. This stated as follows:

1. State Parties recognize that persons with disabilities are at greater risk, both within or outside the home, of abandonment, violence, injury or mental or physical abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual and economic exploitation and abuse.²⁶

At the fourth Ad Hoc session, there was further support for the reference to abandonment,²⁷ economic abuse,²⁸ harassment²⁹ and abduction.³⁰ China and Argentina's draft submissions removed mention of sexual violence, while South Africa argued for its continued inclusion, as it was a common form of 'dehumanizing' abuse faced by disabled people.³¹

By the fifth session, there was still disagreement as to how to approach this issue.³² South Africa suggested a form of words close to the final text in article 16, which removed a list of types of harm and instead called for protection from 'all forms of neglect, exploitation, violence and abuse'.³³ Australia, supported by New Zealand, suggested a wording which made it clear that the harms listed were not exhaustive, stating the obligation to protect from 'all forms of harm, including...', but it was clear that if harms were to be listed there was disagreement about what those should be.³⁴ There was particular disagreement around the specific reference to economic exploitation. New Zealand, Chile and Jordan argued for its inclusion, while Russia was concerned it was too vague a term.³⁵ Jordan observed that the phrase did appear elsewhere in international human rights law, save for article 32 of the Convention on the Rights of the Child,³⁶ but the European Union was opposed to citing it together with sexual exploitation.³⁷

There was significant support for the South African approach, as it left the scope of the article open and could include a wide range of harms. This was the approach adopted in the text from this point onwards, but there continued to be debate on the issue. At the seventh session of the Ad Hoc Committee, Canada called for a specific reference to gender-based violence, while Mexico continued

²⁶ United Nations, Ad Hoc Committee, Proposals to the draft text – Mexico, available at <http://www.un.org/esa/socdev/enable/rights/ahc3mexico.htm>

²⁷ United Nations Ad Hoc Committee, Daily summary of discussions related to Article 12, Freedom from Violence and Abuse, (August 26, 2004) available at <http://www.un.org/esa/socdev/enable/rights/ahc4sumart12.htm> (accessed 10th June, 2017), per Chile, Serbia and Montenegro, and Venezuela

²⁸ Ibid., per Chile, Serbia and Montenegro, Venezuela and Lebanon

²⁹ Ibid., per Norway

³⁰ Ibid., per European Union and Norway

³¹ United Nations Ad Hoc Committee, Daily summary of discussions related to Article 12, Freedom from Violence and Abuse, (August 26, 2004) <http://www.un.org/esa/socdev/enable/rights/ahc4sumart12.htm> (accessed 10th June, 2017)

³² Daily summary of discussion at the fifth session, (28 January 2005), available at <http://www.un.org/esa/socdev/enable/rights/ahc5sum28jan.htm> and (31 January 2005), available at <http://www.un.org/esa/socdev/enable/rights/ahc5sum31jan.htm> (accessed 10th June, 2017)

³³ Daily summary of discussion at the fifth session (31 January 2005), available at <http://www.un.org/esa/socdev/enable/rights/ahc5sum31jan.htm> (accessed 10th June, 2017)

³⁴ Ibid.

³⁵ Ibid.

³⁶ Daily summary of discussion at the fifth session (31 January 2005), available at <http://www.un.org/esa/socdev/enable/rights/ahc5sum31jan.htm> (accessed 10th June, 2017)

³⁷ Ibid.

to call for a non-exhaustive list.³⁸ The final text of article 16(1) recognises Canada's concerns, making specific mention of the inclusion of the 'gender-based aspects' of exploitation, violence and abuse within the scope of article 16. However, Mexico's call for a non-exhaustive list of examples was not taken up, and the text remained from the seventh session as it now appears in the final text of the Convention, referring simply to 'all forms of exploitation, violence and abuse'.

b) Torture, involuntary treatment and informed consent

The most significant and contentious discussions on article 16 concerned its overlap with torture, and particularly involuntary treatment and institutionalisation in this context. The issue of involuntary treatment as an incidence of torture, cruel or inhuman and degrading treatment or punishment has long been a question for international human rights law, particularly in the context of mental health. It has generally been held in human rights law that treatment of 'competent' patients should not take place without informed consent,³⁹ but this raised the question of therapeutic treatment for mental health patients who were considered unable to consent.⁴⁰ Human rights jurisprudence has held that treatment which would otherwise be considered in violation of the threshold for inhuman or degrading treatment or punishment should not be considered so where there was a 'therapeutic' justification.⁴¹ The United Nations Special Rapporteur on Torture called this approach into question in his 2013 report,⁴² but such a strong statement did not exist at the time of the negotiations on the CRPD in 2003-2006 – and arguably, the Special Rapporteur's statements were themselves influenced both by the Convention and the forceful points made by Disabled People's Organisations (DPOs) and some member states during the negotiations. As has been recounted in the previous chapter, the issue of involuntary treatment and institutionalisation was widely debated in the negotiations on article 15, but the disagreements over how this issue should be approached also dominated the discussions on article 16, given the overlap between the two rights.

Whether or not the issue of exploitation, violence and abuse was a separate issue to the action prohibited by the right to be free from torture, cruel, or inhuman or degrading treatment or punishment was an early point of discussion. Treatment which falls short of torture is often caught by the latter prohibitions on cruel, inhuman or degrading treatment or punishment and the actions which fall within this scope arguably overlap significantly with those in article 16, with the

³⁸ Daily summary of discussions at the seventh session (19 January 2006), available at <<http://www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm>> (accessed 6th October, 2017)

³⁹ See, for example, the European Committee for the Prevention of Torture 8th General Report, CPT/Inf (98) 12 and CPD Standards, CPT/Inf/E (2002) 1-Rev. 2011

⁴⁰ Though, of course, the link between mental capacity and the legal capacity to consent has been challenged by the Committee's interpretation of article 12 – see United Nations Committee on the Rights of Persons with Disabilities, General Comment on Article 12 (2014) CRPD/C/GC/1 para 13

⁴¹ *Herczegfalvy v Austria*, European Court of Human Rights, Application no. 10533/83, 24 September 1992
Further discussion Peter Bartlett & Ralph Sandland, *Mental Health Law: Policy and Practice*, (Oxford 2014) 418-419

⁴² United Nations Special Rapporteur on Torture, Report to Un General Assembly, A/HRC/22/53, 1 February 2013

exceptions being economic exploitation and harassment.⁴³ Both of these are significant problems for disabled people, but neither easily falls within the scope of torture.⁴⁴

It was clear even from the first iteration of the right in Mexico's draft text, which was submitted to the first session of the Ad Hoc Committee, that the issue of violence as something separate from, or additional to, torture, should be considered in the scope of a right for disabled people. This was couched in the following terms:

States Parties recognize that persons with disabilities are particularly vulnerable to different forms of violence, as well as torture and other cruel, inhumane or degrading treatment or punishment, in public and private spheres. Therefore, States shall guarantee respect for the dignity and integrity of persons with disabilities.⁴⁵

At that first session, it was noted in submissions that the UN Convention Against Torture (UNCAT) had been used by disabled people to gain human rights protection from violence, but the submissions to the second session began to call for a separate article to deal specifically with the issue of exploitation, violence and abuse. At this stage, the suggested right was conceptualised in a number of different ways, overlapping with a number of difference issues, each of which recognised specific abuses that disabled people were (and remain) subjected to. However, the World Network of Users and Survivors of Psychiatry (WNUSP) suggested a right to freedom from torture, right to life, liberty, bodily and mental integrity, which encompassed issues of abuse and exploitation focused specifically around involuntary interventions and detention, an issue which subsequently became the focus of the negotiations.⁴⁶

The Draft Elements produced for discussion at the Working Group by the Chair, in December, 2003,⁴⁷ maintained the issue of violence and abuse as part of a wider right to be free from torture, inhuman or degrading treatment or punishment. Other contributions to the Working Group also recognised the issue of abuse and exploitation of disabled people, particularly in the context of institutionalisation⁴⁸ and how this was to be framed in the context of a specific right became a key point of contention in the later sessions of the Ad Hoc Committee. By the end of the Working Group, however, there was a specific and separate right to freedom from violence and abuse, in the form of

⁴³ Peter Bartlett and Marianne Schulze, 'Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD)' (2017) 53 Int'l J.L. & Psychiatry 2, 8

⁴⁴ The issue of harassment was considered by the European Court of Human rights in *Dorđević v Croatia*, Application no. 41526/10, judgment 24 October 2012. While the physical mistreatment was dealt with under article 3, the harassment was considered to fall within article 8.

⁴⁵ Draft article 9, Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, Working paper by Mexico, A/AC.265/WP.1 English, available at: <<http://www.un.org/esa/socdev/enable/rights/adhocmeetaac265w1e.htm>> (accessed 10th June, 2017)

⁴⁶ NGO Contributions to the elements of the Convention, A/AC.265/2003/CRP/13 Add. 1

⁴⁷ Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (December 2003) Available at <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm>

⁴⁸ See for example the EU Proposal for the text of an International Convention on the Full and Equal Enjoyment of all Human Rights and Fundamental Freedoms by Persons with Disabilities, available at <<http://www.un.org/esa/socdev/enable/rights/wgcontrib-EU.htm>> (accessed 10th June, 2017), and Convention on Rights of Persons with Disabilities, A Proposed draft text by China, available at <<http://www.un.org/esa/socdev/enable/rights/wgcontrib-china.htm>> (accessed 10th June, 2017)

draft article 12.⁴⁹ This draft formed the basis for discussions at the third session of the Ad Hoc Committee, which centred in particular around paragraph two, which stated that:

Such measures [in paragraph 1] should prohibit, and protect persons with disabilities from, forced interventions or forced institutionalization aimed at correcting, improving or alleviating any actual or perceived impairment, and abduction.⁵⁰

The discussion around the need to keep a right to freedom from violence and abuse as a separate provision thus began to centre on the issue of how forced intervention and institutionalisation was to be dealt with in the Convention. Ireland, representing the European Union, suggested an amendment that permitted forced intervention and institutionalisation in ‘exceptional circumstances’, as did Canada.⁵¹ In contrast, WNUSP called for the retention of such a provision in both draft article 11 on torture and draft article 12. This allowed for a strong framing of such interventions as treatment amounting to torture, cruel, inhuman or degrading treatment or punishment, but its inclusion in draft article 12 also allowed for a recognition that such actions could take place in private, by non-state actors.⁵²

The debate continued into the fourth session, where it became a significant point of contention. A number of parties to the negotiations, both states and DPOs, entered substantial amendments to draft article 12 and there were a number of disagreements around how the issue of forced intervention and institutionalisation should be dealt with, and in particular the place of informed consent in this process.⁵³ The DPOs, and in particular WNUSP, wanted a complete prohibition of involuntary treatment and institutionalisation.

States parties, in contrast, wished to retain the provisions, although there was disagreement as to how this should be achieved. The EU’s amendment altered every section of the text from the Working Group report, and redrafted article 12(2) by replacing it with four further paragraphs that provided for a partial prohibition of forced interventions. Their suggested text, however, allowed for an exception where the individual ‘lacks capacity to give or withhold informed consent’, in situations where an intervention was necessary to ‘prevent an imminent danger’ to the individual or others, and that any such interventions would be carried out in the individual’s best interests.⁵⁴

In contrast, New Zealand took a stronger line. The debate around torture had become so entangled with questions around involuntary treatment that New Zealand advocated an entirely separate article on the issue of free and informed consent.⁵⁵ In its submission it advocated the abolishment of

⁴⁹ Draft Article 12, United Nations Ad Hoc Committee, Working Group to draft a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Report to the Ad Hoc Committee, Annex I, (16 January, 2004) A/AC.265/2004/WG/1

⁵⁰ Draft article 12(2), *ibid*.

⁵¹ United Nations, Ad Hoc Committee, Daily summary of discussions related to article 12, Freedom from Violence and Abuse, (May 26 and 27, 2004) available at <<http://www.un.org/esa/socdev/enable/rights/ahc3sum12.htm>> (accessed 10th June, 2017)

⁵² *Ibid*.

⁵³ See Contributions submitted by Governments in electronic format at the Fourth Session; Proposed Modifications to Draft Article 12, available at <http://www.un.org/esa/socdev/enable/rights/ahc4da12.htm>, and NGO Comments on the draft text, available at <<http://www.un.org/esa/socdev/enable/rights/ahc4ngocomments.htm>> (accessed 10th June, 2017)

⁵⁴ Proposals to the draft text - European Union, available at <<http://www.un.org/esa/socdev/enable/rights/ahc4eu.htm>> (accessed 10th June, 2017)

⁵⁵ Contributions submitted by Governments in electronic format at the Fourth Session, Proposed Modifications to Draft Article 11, available at <<http://www.un.org/esa/socdev/enable/rights/ahc4da11.htm>> (accessed 10th June, 2017)

involuntary treatment along with forced institutionalisation on the basis of disability. Where involuntary treatment had not been abolished, its submission stated that it should only be used in 'exceptional circumstances prescribed by law and minimised through the active promotion of alternatives'. As a result, its submitted amendment regarding draft article 12 removed paragraph 2 entirely and added in article 12(1) a clause moved from article 11 stating that states had an obligation to:

- a. prevent persons with disabilities from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

In its written submission, New Zealand stated that there should never be any permitted exceptions to violence and abuse. It considered that these abuses were so serious that they should be framed in a discrete article and a prohibition should not be diluted or confused with issues around informed consent. It considered that if its suggestion for a specific article on informed consent was to replace the specific article on torture, then the duty to prevent torture should also be included in draft article 12.⁵⁶

As has been documented in this volume and elsewhere,⁵⁷ this disagreement around the importance of informed consent and the issue of capacity was a significant point of tension in the Convention negotiations. The issue of legal capacity, which became article 12 in the final text, was a key point for many DPOs involved in the negotiations, while the idea of universal legal capacity – and the potential prohibition of involuntary treatment and substitute decision-making – was a particular objection of states. The main focus of debate around the correct interpretation of the Convention since the finalisation of the text and its coming into effect has been around the right to equality before the law as enshrined in article 12.⁵⁸ Moreover, the debate around informed consent with

⁵⁶ Contributions submitted by Governments in electronic format at the Fourth Session, Proposals to the Draft Text – New Zealand, available at <<http://www.un.org/esa/socdev/enable/rights/ahc4nz.htm>> (accessed 4th October, 2017)

⁵⁷ Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2006-2007) 34 *Syracuse Journal of International Law and Commerce* 429

⁵⁸ See, for example, Anna Arstein-Kerslake, 'An empowering dependency: exploring support for the exercise of legal capacity' (2016) 18 *Scandinavian Journal of Disability Research* 77; Michael Bach and Lana Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity', (Ontario, 2010); Peter Bartlett, 'The UN Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 *MLR* 752; Terry Carney, 'Clarifying, Operationalising, and Evaluating Supported Decision Making Models' (2014) 1 *Research and Practice in Intellectual and Developmental Disabilities* 46; Nandini Devi, Jerome Bickenbach and Gerold Stucki, 'Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities' (2011) 5 *European Journal of Disability Research* 249; Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating personhood: realising the right to support in exercising legal capacity' (2014) 10 *Int JLC* 81; Eilionoir Flynn and Anna Arstein-Kerslake, 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' (2014) 32 *Berkeley J Int'l Law* 124; Piers Gooding, 'Navigating the 'Flashing Amber Lights' of the Right to Legal Capacity in the United Nations Convention on the Rights of Person with Disabilities: Responding to Major Concerns' (2015) 15 *Human Rights Law Review* 45; Gerard Quinn, 'Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD' (Harvard Project on Disability 2010); Lucy Series, 'Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms' (2015) 40 *Int'l J.L.& Psychiatry* 80; Jill Stavert, 'The Exercise of Legal Capacity, Supported Decision-Making and Scotland's Mental Health and Incapacity Legislation: Working with CRPD Challenges' (2015) 4 *Laws* 296; Katherine D Villar, 'Should Supported Decision-Making Replace Substituted Decision-Making? The Convention on the Rights of Persons with Disabilities and Coercive Treatment under Queensland's Mental Health Act 2000' (2015) 4 *Laws* 173; Penelope Weller, 'Supported Decision-Making and the Achievement of Non-Discrimination: The Promise and Paradox of the Disabilities Convention' in B. McSherry (ed) *International Trends in Mental Health Law* (International Trends in Mental Health Law, Federation Press 2008)

regard to violence and abuse shows how key the issue of legal capacity is to the general understanding of many of the other rights in the Convention.

The issue remained unresolved until the fifth session. The facilitator's text⁵⁹ and the proposed modifications by the EU⁶⁰ still retained provisions for involuntary interventions in the individual's best interests within draft article 12. In contrast, New Zealand highlighted that 'institutionalisation and involuntary care for disabled people has violated many individual human rights [...] and perhaps constitute one of the most appalling ongoing and systematic abuses of human rights experienced by disabled people across the globe'.⁶¹ It considered that a more effective approach was needed in the Convention to deal with this and that, similar to the draft article on legal capacity, 'this issue requires a 'paradigm' or 'conceptual' shift in our thinking to ensure a forward looking convention, and one that does not erode existing human rights'.⁶² It reiterated its view that the issues of torture or cruel, inhuman or degrading treatment or punishment, and violence and abuse were so serious that they should not be diluted or obscured by issues around informed consent and the latter should be dealt through a separate article.⁶³ The European Union agreed with this approach at the fifth session, calling for a separate provision around medical treatment, which would accommodate disabled people who were unable to express consent. This was supported by a number of other future member states.⁶⁴ However, others remained concerned that some forms of institutionalisation could, and should, fall within the concept of torture,⁶⁵ as could social interventions such as removing a child from the home,⁶⁶ sterilisation⁶⁷ and organ donations.⁶⁸

It was recognised during these discussions that there was significant overlap with the issue of informed consent and the discussions around draft article 9 and the issue of legal capacity, but the issue was not revisited again in relation to draft article 12. The final text of article 16 does not contain reference to involuntary treatment or institutionalisation, but the issue was specifically referenced by the CRPD Committee in General Comment No 1 on article 12.⁶⁹ This focus during the negotiations was, and remains, perhaps unfortunate, as the other types of harm which could fall within the scope of article 16 were discussed in much less detail than they seem to have warranted,

⁵⁹ United Nations Ad Hoc Committee on the Rights of Persons with Disabilities, Facilitators Proposed Modifications on Draft Articles (31 January, 2005), available at <<http://www.un.org/esa/socdev/enable/rights/ahc5facilitator.htm>> (accessed 10th June, 2017)

⁶⁰ Contributions by Governments; European Union, available at <<http://www.un.org/esa/socdev/enable/rights/ahc5eu.htm>> (accessed 10th June, 2017)

⁶¹ Contribution by Governments, New Zealand, Proposed modifications to draft Articles 11, Freedom from Torture or cruel, inhuman or degrading treatment or punishment and 12, Freedom from violence and abuse, available at <<http://www.un.org/esa/socdev/enable/rights/ahc5newzealand.htm>> (accessed 10th June, 2017)

⁶² Ibid.

⁶³ Although, as is noted later in this chapter, the issues around institutionalisation and involuntary treatment continued to be of foremost importance to the CRPD Committee in relation to article 16 in their General Comment on Article 12 UN Doc CRPD/C/GC/1

⁶⁴ Daily summary of discussion at the fifth session, (28 January 2005), available at <<http://www.un.org/esa/socdev/enable/rights/ahc5sum28jan.htm>> (accessed 10th June, 2017), per Serbia and Montenegro, Australia, Liechtenstein, Norway and Canada.

⁶⁵ Daily summary of discussion at the fifth session, (31 January 2005), available at <<http://www.un.org/esa/socdev/enable/rights/ahc5sum31jan.htm>> (accessed 10th June, 2017), per Japan and Thailand

⁶⁶ Ibid., per Israel

⁶⁷ Ibid., per Yemen

⁶⁸ Ibid., per Uganda

⁶⁹ United Nations Committee on the Rights of Persons with Disabilities, General Comment on Article 12 (2014) CRPD/C/GC/1, para. 42

given the wide level of such abuse and exploitation that occurs outside of the context of psychiatric treatment. In particular, the issue of abuse in private residences, and the structure of State obligations to monitor and prevent such abuse, was little explored, although the scope of the article does take this into account.

c) Vulnerability of Disabled People and Prevention of Harm

The next significant issue which was raised at an early stage in the negotiations was the issue of the 'vulnerability' of disabled people with regards to violence. The wording of draft article 9 presented by Mexico at the first session of the Ad Hoc Committee called for states to 'recognize that persons with disabilities are particularly vulnerable to different forms of violence', while a draft article 4(2) suggested that 'special measures' of protection were required for disabled people because of their 'special situations of vulnerability'.⁷⁰ There were several voices of disquiet with regard to this wording at the Seminar of Quito.⁷¹ It was generally felt that this suggested that disabled people were 'inherently' vulnerable to harm and therefore in need of protection – though this objection was mainly made about draft article 4, which concerned people with profound disabilities, rather than draft article 9. Even so, it was suggested at this point that issues of 'overprotection' should be added to the text of draft article 9, recognising the problems this can cause.⁷²

This position suggests that people with severe or profound disabilities were seen as being 'at special risk' of experiencing a violation of their rights and freedoms and that specific measures were needed to be taken to protect them from violence and abuse. However, it was also suggested during the Seminar at Quito that vulnerability should be understood as a 'universal' issue and that the cause was the 'uneven distribution of risks' and in particular the risk of poverty. It was argued that the approach to vulnerability should be to work to mitigate this risk, alongside the development of community and social institutions, and education – with a specific focus on inclusivity.⁷³

This issue received relatively little discussion at the Working Group, with just a few references to the special or 'heightened' vulnerability of disabled people, or specific impairment groups. However, the text presented for discussion at the Third Ad Hoc session suggested that disabled people should be seen as being at greater risk of harm, stating in draft article 12(1) that:

States Parties recognize that persons with disabilities are at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual exploitation and abuse. [...]⁷⁴

⁷⁰ Draft article 9, Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, Working paper by Mexico, A/AC.265/WP.1 English

⁷¹ Compilation of proposals for a Comprehensive and Integral Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, A/AC.265/CRP.13, Add.1 & Add. 2. The Seminar of Quito, or in full the Américas regional seminar and workshop on norms and standards related to the rights of persons with disabilities and development, was one of a number of expert meetings and seminars held to discuss the idea of, and then the potential content of, a United Nations human rights convention on disability rights. A full list of the meetings can be found at <<http://www.un.org/esa/socdev/enable/disglobe.htm>> (accessed October 4th, 2017)

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Draft Article 12, United Nations Ad Hoc Committee, Working Group to draft a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Report to the Ad Hoc Committee, Annex I, (16 January, 2004) A/AC.265/2004/WG/1

The main discussion around this issue of risk was for a continued recognition that disabled people were at a greater risk of harm than non-disabled people, but also that some groups of disabled people were 'more' at risk than others was expressed, particularly women and children.⁷⁵ The issue of whether disabled people were any more, or less, vulnerable to abuse than non-disabled people continued to be a point of discussion at the fourth session of the Ad Hoc Committee and Japan specifically noted that care must be taken in the drafting of the article to ensure that disabled people were not cast as 'vulnerable and necessarily targets of abuse'.⁷⁶ This reflects the disquiet voiced at the Seminar at Quito that the wording of the draft provisions suggested that disabled people were inherently vulnerable.

At the Fifth Session of the Ad Hoc Committee, which was the last time the provisions around exploitation, violence and abuse were discussed in any significant detail, this issue was revisited a final time. The facilitator's text did include a reference to the 'particular vulnerability' of disabled people in the context of armed conflict,⁷⁷ and the International Disability Caucus' suggested text included a broader claim, stating in draft article 12(1) that 'States Parties recognize that persons with disabilities may be at greater risk, both within and outside the home, of all forms of violence and abuse'.⁷⁸ Additionally, the issue of the 'particular vulnerability' of women and girls was raised by Canada. Ultimately, this position is what has been enshrined in the final text of 16(1), with the final part of the paragraph making particular reference to the 'gender-based aspects' of exploitation, violence and abuse. The particular experience of harm by women and girls has also been the focus of the Committee's early work on interpretation of the Convention, in its General Comment no. 3 on article 6.⁷⁹

The issue of the general vulnerability of disabled people was removed from the final text and there is no reference to any specific vulnerability of disabled people as a broad group. That disabled people *do* experience greater levels of exploitation, violence and abuse is a fact and effectively constitutes the ultimate motivation for article 16. The response of states to this increased level of harm has frequently been to remove disabled people from society to an institution. However, segregating disabled people from society in institutions, where they cannot be seen, leads to abuse and violence, a point made by both New Zealand and Uganda at the Third Ad Hoc Session – thus de-institutionalisation is an important part in removing a social cause of exploitation, violence and abuse. Even where large institutions are not used, disabled people may still be removed from the place of abuse to a group home or into an adult foster/guardianship placement. While this may

⁷⁵ United Nations, Ad Hoc Committee, Daily summary of discussions related to article 12, Freedom from Violence and Abuse, (May 26 and 27, 2004), available at <<http://www.un.org/esa/socdev/enable/rights/ahc3sum12.htm>> (accessed 10th June, 2017), per Australia Disability Inc.

⁷⁶ United Nations Ad Hoc Committee, Daily summary of discussions related to Article 12, Freedom from Violence and Abuse, (August 26, 2004) available at <<http://www.un.org/esa/socdev/enable/rights/ahc4sumart12.htm>> (accessed, 10th June 2017)

⁷⁷ Facilitators Proposed Modifications on Draft Articles, draft article 12(1)(3) <<http://www.un.org/esa/socdev/enable/rights/ahc5facilitator.htm>> (accessed 6th October, 2017). The issue of disabled people's vulnerability in situations of armed conflict was actually visited a number of times in the negotiations, particularly by Palestine, and did appear to be in part politically motivated in the context of the Israel-Palestine conflict. Ultimately, the issue was dealt with in a separate provision, in article 11.

⁷⁸ Contributions made at the Fifth Session, NGO Comments on the Draft Text <<http://www.un.org/esa/socdev/enable/rights/ahc5contngos.htm>> (accessed October 6th, 2017)

⁷⁹ United Nations Committee on the Rights of Persons with Disabilities, General Comment on Article 6 (2016) CRPD/C/GC/3

work to protect the disabled person from the immediate harm, it does little to prevent such harm reoccurring in the future and additionally works to undermine the individual's other Convention rights.⁸⁰

The central ethos of the CRPD is the 'paradigm shift' to a socio-contextual approach to disability, which focuses on the removal of social barriers to exclusion of disabled people from society, along with the social causes of harms.⁸¹ In this context, the response to harm cannot be to consider that disabled people are 'inherently vulnerable', but to focus on what social issues may be causing the harm.⁸² In the context of a policy of greater inclusion of disabled people within society, the protection offered to disabled people cannot take the form of segregation. Moreover, within the wider aim of the Convention which is to afford disabled people equal enjoyment of rights with non-disabled people the answer cannot be to remove rights, by removing someone from a place they choose to live, or from people with whom they choose to associate.

The final text of article 16 does not retain any reference to the particular vulnerability of disabled people, nor a reference to a 'greater risk' of harm. It is also noticeable that the language of article 16 is not only framed in terms of 'protection', but also active 'prevention' centred around the disabled person, suggesting that article 16 should not be interpreted as a door to out-dated, paternalistic models of protection. While article 16(1) is framed in the language of 'protection', the other provisions focus around the prevention of harm and deal with the physical and psychological after-effects.

The incorporation of preventative obligations into article 16 was not entirely without contest, with some parties considering it unnecessary repetition, while others felt that it was important to emphasise this aspect of state obligation. The language of prevention appears for the first time in the European Union's draft Convention at the Third Ad Hoc session with regards to cruel, inhuman or degrading treatment of persons with disabilities; in contrast, the following provision around exploitation, violence and abuse only features a duty to protect.⁸³ The Chair's draft text at the Third Ad Hoc Session is worded in a similar way, with a phrase that has eventually survived intact through to the final Convention:

States Parties shall take all appropriate legislative, administrative, social and educational measure to protect persons with disabilities [...]⁸⁴

⁸⁰ Amanda Keeling, 'Organising objects': Adult safeguarding practice and article 16 of the United Nations Convention on the Rights of Persons with Disabilities' (2017) 53 *Int'l J.L. & Psychiatry* 77

⁸¹ Rosemary Kayess and Philip French, 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1; Gerard Quinn, *Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD* (Harvard Project on Disability 2010); Rannveig Traustadóttir, 'Disability Studies, the Social Model and Legal Developments' in G Quinn and OM Arnardóttir (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinius Nijhoff Publishers 2009)

⁸² Andrea Hollomotz, 'Beyond 'Vulnerability': An Ecological Model Approach to Conceptualizing Risk of Sexual Violence against People with Learning Difficulties' (2009) 39 *British Journal of Social Work* 99

⁸³ Proposals for draft articles of the draft International Convention submitted by Ireland on behalf of the European Union, available at <<http://www.un.org/esa/socdev/enable/rights/ahc3eu.htm>> (accessed 10th June, 2017)

⁸⁴ Article 13, Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (December 2003) available at <<http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm>> (accessed 10th June, 2017)

However, the text presented at the Working Group follows a structure similar to that of the final Convention provision. Paragraph 1 concerns the protection of disabled people, but paragraph 3 places an obligation to prevent harm through support and paragraph 4 through effective monitoring.⁸⁵ This document formed the basis of discussion at the third session of the Ad Hoc Committee and during the discussion Mexico argued that the focus of article 16 should be on *prevention* of exploitation, violence and abuse, rather than just protection. Moreover, it argued that this should be made clear at the outset in paragraph 1, suggesting the following for what was then draft article 12(1):

[...] States Parties shall therefore take all appropriate measures to protect persons with disabilities, both within and outside the home, from all forms of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual exploitation and abuse, **and to prevent these forms of violence and abuse.** [Mexico's added text in bold].⁸⁶

In contrast, the European Union had suggested that the text of draft article 12(3) on prevention overlapped with the text in 12(1) to the extent that 12(3) could be omitted entirely.⁸⁷ By the fifth session of the Ad Hoc Committee, the draft Convention retained a separate provision around prevention, featuring in the Facilitator's Text draft article 12(2), which at the time stated that:

States Parties shall also take all appropriate measures to prevent violence and abuse by ensuring, inter alia, appropriate forms of assistance and support for persons with disabilities and their caregivers, including through the provision of information and education on how to avoid, recognize and report instances of (violence and abuse) above.⁸⁸

The wording 'shall also take' remains through to the final version of the Convention, and suggests that the obligations to protect and to prevent are seen as linked but separate obligations on states.

At the fourth session of the Ad Hoc Committee, Mexico had called for the addition of education and training to the requirements of the preventative measures, but it is not clear to whom these refer – whether to disabled people themselves, or to their carers and families, or all three groups.⁸⁹ At the Fifth Ad Hoc Session the Coordinator raised this question, asking if there should be a 'notion' of educating disabled people and their families around exploitation, violence and abuse.⁹⁰ It was agreed that an obligation to provide support and particularly access to 'support groups' for disabled people was desirable, but there were questions around whether there should be a right to these groups for families and caregivers, linked to the more general question of their rights under the

⁸⁵ Draft Article 12, United Nations Ad Hoc Committee, Working Group to draft a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Report to the Ad Hoc Committee, Annex I, A/AC.265/2004/WG/1 (16 January, 2004)

⁸⁶ Proposals to the Draft Text – Mexico (May 27 2004), available at <<http://www.un.org/esa/socdev/enable/rights/ahc3mexico.htm>> (accessed 10th June 2017)

⁸⁷ United Nations, Ad Hoc Committee, Daily summary of discussions related to article 12, Freedom from Violence and Abuse, (May 26 and 27, 2004), available at <<http://www.un.org/esa/socdev/enable/rights/ahc3sum12.htm>> (accessed 10th June 2017)

⁸⁸ Facilitators Proposed Modifications on Draft Articles (31 January, 2005), available at <<http://www.un.org/esa/socdev/enable/rights/ahc5facilitator.htm>> (accessed 10th June, 2017)

⁸⁹ United Nations Ad Hoc Committee, Daily summary of discussions related to Article 12, Freedom from Violence and Abuse, (August 26, 2004) available at <<http://www.un.org/esa/socdev/enable/rights/ahc4sumart12.htm>> (accessed, 10th June 2017)

⁹⁰ Daily summary of discussion at the fifth session, (28 January 2005), available at <<http://www.un.org/esa/socdev/enable/rights/ahc5sum28jan.htm>> and (31 January 2005), available at <<http://www.un.org/esa/socdev/enable/rights/ahc5sum31jan.htm>> (accessed 10th June, 2017)

Convention. In addition to this, there was a call for information around abuse in accessible formats and the International Disability Caucus called for a provision requiring ‘information, support and education for persons with disabilities, their families, and persons working with persons with disabilities about how to avoid, recognise, report and seek protection from violence and abuse’.⁹¹ At the Seventh Ad Hoc Session, the IDC representative also noted the importance of supportive environments in assisting disabled people to feel safe enough to disclose instances of abuse and called for training of professionals and families, as well as disabled people, to learn to recognise signs of abuse and how to report safely.⁹² The final text of article 16, therefore, reflects this discussion, with separate obligations in article 16(1) to protect and in 16(2) to prevent harm. The latter obligation is phrased to emphasise that the prevention should be about enabling the disabled person to recognise and report harm and to be supported in doing so, rather than be removed from society in order to prevent harm occurring to him or her. However, it is difficult to separate these two obligations, as will be seen in the discussion below of the specific state obligations under article 16.

Paragraph 1

‘All appropriate legislative, administrative, social, education and other measures to protect’

The first requirement in article 16(1) is that states parties must take ‘all appropriate legislative, administrative, social, education and other measures’ to protect persons with disabilities. The phrase ‘all appropriate measures’ is a common phrase in international human rights instruments and appears elsewhere in the Convention, as well as in other paragraphs of article 16. The phrasing in article 16 echoes that found in article 19 CRC and it is clear that article 16 intends the scope of the protective measures it requires to be very broad, ranging across a number of spheres of state responsibility. This is not something to be confined to the criminal justice process, but must be expanded into social, education and ‘other’ measures. The word ‘appropriate’ should not be taken to mean that some forms of exploitation, violence or abuse are permissible.

The scope in paragraph 1 is notably more expansive than the similar wording in article 2 of the Convention Against Torture, which refers to the need for ‘effective legislative, administrative, judicial or other measures’ to prevent torture.⁹³ Neither that list, nor the one in article 16 CRPD, are intended to be exhaustive, allowing for ‘other measures’ to be included. Even so, interpretations concerning the right to be free from torture, cruel, inhuman or degrading treatment or punishment have generally focused on issues such as the judicial oversight of arrest and detention⁹⁴ and monitoring of places of detention⁹⁵, rather than ‘other measures’. That said, the United Nations has

⁹¹ Contributions made at the Fifth Session, NGO Comments on the Draft Text, International Disability Caucus, draft article 12(e), <<http://www.un.org/esa/socdev/enable/rights/ahc5contngos.htm>> (accessed October 6th, 2017)

⁹² United Nations Ad Hoc Committee on the Rights of Persons with Disabilities, Summary of Daily Discussions at the Seventh Session, (19 January, 2006), available at <<http://www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm>> (accessed 10th June, 2017)

⁹³ Article 2(1), United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46

⁹⁴ For example, see General Comment no. 2 (Committee on the Prevention of Torture, General Comment no. 2, UN Doc CAT/C/GC/2, 24 January, 2008)

⁹⁵ This has included a focus on healthcare settings, however – see for example Juan E Méndez, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ UN Doc A/HRC/22/52 1 February, 2013

recommended both professional training and the promotion of public awareness as key issues in the prevention of torture,⁹⁶ thus the scope of the preventative obligations under article 16 CRPD retain a significant overlap with obligations to prevent torture in article 15 CRPD.

There is little guidance from the CRPD Committee as to the extent to which the obligations in paragraph 1 of article 16 extend beyond legislative and administrative elements, as the concluding observations available to date have primarily focused on these first two. A common observation has been the lack of evidence of any legislative or policy framework dealing with the exploitation of, or abuse or violence aimed at, disabled people.⁹⁷ Equally, the committee has criticised the lack of sufficient funding for any such strategies.⁹⁸ Given the significant overlap with article 15 CRPD - and the clear derived nature of article 16 from classic prohibitions on torture - the right to freedom from exploitation, violence and abuse should be seen as a civil and political right and therefore not subject to progressive realisation.⁹⁹ It is clear from the concluding observations currently available that the Committee is setting a high standard of expected state action, praising some states for the measures they have taken thus far, but still requiring further action. For example, Austria was praised for the work of its Ombudsman investigating institutional mistreatment, but the Committee remained concerned at the number of continued reports of exploitation, violence and abuse of disabled people, recommending 'further measures' be taken to protect disabled people from exploitation, violence and abuse.¹⁰⁰

'Within and outside the home'

Paragraph 1 goes on to state that the obligation to protect disabled people from exploitation, violence and abuse applies both 'within and outside the home'. This obligation is to be welcomed, as while disabled people certainly experience violence and abuse within institutional settings, there is also a significant amount of abuse outside of these environments. However, the ethos of the Convention is to move away from the 'old' paradigms of how disabled people were conceptualised in law and treated by the state. On this basis, the requirement that disabled people be protected in their homes as well as institutions should be carefully read. The provision, as is the case with the entirety of article 16, is clearly responding to the high level of recorded and/or reported violence

⁹⁶ Barbara Bernath, 'Preventing Torture: An Operational Guide for National Human Rights Institutions', HR/PUB/10/1 (OHCHR, APT and AFP, 2010)

⁹⁷ CRPD Concl Obs: CPRD Committee, 'Concluding observations on the initial report of the Czech Republic' UN Doc CRPD/C/CZE/CO/1 (), para 35; 'Concluding observations on the initial report of El Salvador', UN Doc CRPD/C/SLV/CO/1 (8 October 2013) para 35; 'Concluding observations on the initial report of Gabon', UN Doc CRPD/C/GAB/CO/1 (2 October 2015) para 38; 'Concluding observations on the initial report of Germany', UN Doc CRPD/C/DEU/CO/1 (13 May 2015) para 35; 'Concluding observations on the initial report of Kenya', UN Doc CRPD/C/KEN/CO/1 (30 September 2015) para 31; 'Concluding observations on the initial report of Paraguay', UN Doc CRPD/C/PRY/CO/1 (15 May 2013) para 40; 'Concluding observations on the initial report of Qatar', UN Doc CRPD/C/QAT/CO/1 (2 October 2015) paras 31-32

⁹⁸ CRPD Concl Obs: CPRD Committee, 'Concluding Observations on the initial report of Kenya', UN Doc CRPD/C/KEN/CO/1 (30 September 2015) para 31

⁹⁹ This is also true of article 19 CRC; see United Nations Committee on the Rights of the Child, General Comment no. 13 UN Doc CRC/C/GC/13 para 73

¹⁰⁰ CRPD Concl Obs: CPRD Committee, 'Concluding Observations on the initial report of Austria' UN Doc CRPD/C/AUT/CO/1 (30 September 2013) para 35

against disabled people,¹⁰¹ a significant amount of it domestic, but this should not be seen as an opening to allow or continue paternalistic protective practises.

Notably absent from the text of article 16 is the phrase 'on an equal basis with others', which appears in almost every other substantive right in the Convention,¹⁰² and is reflective of the mandate of the Ad Hoc Committee to clearly restate existing human rights in the context of, and with specific application to, disabled people. The absence of the phrase from article 16 could be understood to suggest that disabled people must be treated 'differently' from non-disabled people with regards to protection and in particular as an argument for intrusion into their private lives. However, such an interpretation needs to pay heed to both the wider construction of article 16 and the Convention as a whole. An important aim of the Convention is to work towards a greater inclusion of disabled people in society, as full citizens; the response to a higher risk of harm, therefore, cannot be to isolate or exclude disabled people from society, but work to integrate them – obligations placed on states in the context of exploitation, violence and abuse by article 16(4). The absence of the phrase 'on an equal basis with others' reflects the greater experience by disabled people of exploitation, violence and abuse and the need for specific protective mechanisms that recognise the close relationships of care; but it does not call for other rights to be removed or diminished in the process.

As was discussed earlier in this chapter, there was discussion during the negotiations of how the idea of harm and vulnerability should be conceptualised in the Convention and early versions of what became article 16 had specific phrases suggesting that disabled people were at an increased risk of harm. In many ways, there is surprisingly little opposition recorded on this position from the DPOs present, but it is notable that no such phrase exists in the final text. As Bartlett and Schulze have recently observed,¹⁰³ article 16 cannot be read in isolation and it makes little sense to see the provision as opening a door into out-dated and disempowering protective mechanisms – as New Zealand called for during the negotiations, article 16 requires just as much a 'paradigm shift' as any other provision.

The Committee's response to this issue, particularly around the issue of domestic violence, has been to require states parties to integrate disability issues into their wider strategies and to set up detection mechanisms,¹⁰⁴ both for within family and institutional environments. As has been observed recently,¹⁰⁵ establishing these mechanisms will require a careful balance on the part of member states to ensure that rights are fully protected. The absence of the phrase 'equal basis with

¹⁰¹ See, for example, the collection of studies from around the globe, reported in the special issue of the *Journal of Interpersonal Violence*, *Violence Against People with Disability*, (2014) 29(17), and the literature cited in footnotes 2-5 above.

¹⁰² In the Preamble, para. (e) and (r), Articles 1, 3, 9(1), 10, 12(2), 13(1), 14(1) and (2), 15(2), 17, 18(1), 19(a), 21, 22(2), 23(1), 24(1) and (2), 27, 29, 30

¹⁰³ Peter Bartlett and Marianne Schulze, 'Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD)' (2017) 53 *Int'l J.L. & Psychiatry* 2

¹⁰⁴ CRPD Concl Obs: CPRD Committee, 'Concluding Observations on the initial report of Ecuador' UN Doc CRPD/E/ECU/CO/1 (27 October 2014) para 31

¹⁰⁵ Peter Bartlett and Marianne Schulze, 'Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD)' (2017) 53 *Int'l J.L. & Psychiatry* 2; Eilionoir Flynn and Anna Arstein-Kerslake, 'State intervention in the lives of people with disabilities: the case for a disability-neutral framework' (2017) 13 *Int JLC* 39; Judy Laing, 'Preventing violence, exploitation and abuse of persons with mental disabilities: Exploring the monitoring implications of Article 16 of the United Nations Convention on the Rights of Persons with Disabilities' (2017) 53 *Int'l J.L. & Psychiatry* 27

others' does allow for different protective measures for disabled people, but these must be responsive to the specific harms that disabled people experience, and not contribute to further harm or the restriction of other rights in the Convention.

'All forms of exploitation, violence and abuse, including their gender-based aspects'

As was discussed earlier in this chapter, the definition of the scope of article 16 in the text of the article was debated – but was dominated by the disagreement around the issue of involuntary detention and treatment. As has recently been noted by Bartlett and Schulze, this focus overshadowed the need to discuss more precisely the scope and types of harms encompassed under article 16, and in particular how it should be differentiated (if at all) from the right in article 15 CRPD to be free from torture, cruel, or inhuman or degrading treatment or punishment.¹⁰⁶ While much of the treatment which falls within the scope of article 16 is not torture, much of it could be caught by 'cruel, inhuman or degrading treatment or punishment' given the interpretation of that provision in other spheres of international human rights law. The Committee have not maintained a clear line between the two provisions. In considering the interaction of article 6 with the rest of the Convention in General Comment no. 3,¹⁰⁷ the Committee did not consider the relationship with article 15, but focus rather on article 16, to capture abuse and violence against disabled women. In General Comment no. 1, however, it is clear that article 15 and 16 (along with article 17) are seen to overlap significantly when it comes to the issue of 'forced treatment by psychiatric and other health and medical professionals', viewing such conduct as being a violation of all three articles.

Article 16 does, however, have the potential to be broader than article 15, covering financial abuse, along with conduct such as trafficking and economic exploitation, which have struggled to find accommodation within traditional prohibitions on torture. The wording that was retained in article 16(1) is open-ended, referring to 'all forms of exploitation, violence and abuse', although Bartlett and Schulze argue that the list of harms proposed by Mexico at the third session of the Ad Hoc Committee should, 'at a minimum', provide a starting point for determining the scope of the harms encompassed within article 16. These were 'abandonment, violence, injury or mental or physical abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual and economic exploitation and abuse'.¹⁰⁸ Determining which of these types of harms fall within the separate categories of 'exploitation', 'violence' and 'abuse', and providing separate definitions for each, is not a simple task. The Committee has not attempted to separate the categories methodically in concluding observations, and there is no evidence in the *travaux* of the intentions of the drafters.

However, in its Concluding Observations, the Committee has considered a number of harms to fall within its remit, many of them falling within the scope of this list. Domestic violence, as will be discussed, has been a key focus, but there has also been particular reference to the abandonment of children and their subsequent economic exploitation as beggars by criminal gangs,¹⁰⁹ alongside

¹⁰⁶ Peter Bartlett and Marianne Schulze, 'Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD)' (2017) 53 Int'l J.L. & Psychiatry 2, 5

¹⁰⁷ United Nations Committee on the Rights of Persons with Disabilities, General Comment on Article 6 (2016) CRPD/C/GC/3

¹⁰⁸ Ibid.

¹⁰⁹ CRPD Concl Obs: CPRD Committee, 'Concluding Observations on the initial report of El Salvador' para 35(e) and 36(e), UN Doc CRPD/C/SLV/CO/1; 'Concluding Observations on the initial report of Kenya, UN Doc CRPD/C/KEN/CO/1 (30 September 2015) para 31(b), 32(c); 'Concluding observations on the initial report of Paraguay' UN Doc CRPD/C/PRY/CO/1 (15 May 2013) para 43

physical and sexual abuse in the context of institutions.¹¹⁰ The Committee has also given an indication of the breadth of article 16 in General Comment no. 3 on article 6 CRPD and the rights of disabled women and girls. In considering how that right interacted with article 16, the Committee provided a long, non-exhaustive list of the types of harm that women and girls may experience, which would fall within article 16.¹¹¹ These included physical and sexual violence, but also other – perhaps more subtle, or controlling – behaviour, specifically linked to disability, such as restricting access to communication aids, or other assistive devices, such as ramps or wheelchairs, as well as the removal of, or refusal to provide care and other supports that enable and assist independent living. This demonstrates the specific harms related to disability and the relationships of care that require a specific response in developing policies which protect disabled people – rather than necessarily treating them on an ‘equal basis with others’ and assuming that mainstream policies will be sufficient.

The reference to the ‘gender-based’ aspects of harm in the final part of paragraph 1 has been a significant focus of the Committee’s concluding observations, where it has noted three problems. Firstly, that there is a lack of clear legislation or policy on violence against women in general,¹¹² or where there are measures, these do not include or make provision for disabled women.¹¹³ Secondly, that there is frequently insufficient funding allocated to the development of a coherent strategy, including protective measures such as shelters and legal advice.¹¹⁴ Finally, where these protective measures *do* exist, they are often not sufficiently accessible for disabled women.¹¹⁵ The Committee has therefore called for legislation and policy where it is absent, such that recognises the needs of disabled women, and applied in such a manner that protective measures are put in place and that they are made accessible.¹¹⁶ The strategies which the Committee has called for demonstrate the holistic nature of article 16, in that effective protection requires consideration of early detection and prevention, alongside support for recovery and legal remedies that include compensation and reparations, as well as accessible services should harm occur, such as shelters and counselling. This spans across the demands of every provision of article 16.

¹¹⁰ For example, see ‘Concluding observations on the initial report of Germany’, UN Doc CRPD/C/DEU/CO/1 para 35; ‘Concluding observations on the initial report of Moldova’, UN Doc CRPD/C/CMDA/CO/1 (18 May 2017) para 32

¹¹¹ United Nations Committee on the Rights of Persons with Disabilities, General Comment on Article 6 (2016) UN Doc CRPD/C/GC/3, para 31

¹¹² CRPD Concl Obs: CPRD Committee, ‘Concluding observations on the initial report of the Cook Islands’, UN Doc CRPD/C/COK/CO/1 (15 May 2015) para 30; ‘Concluding observations on the initial report of Costa Rica’ UN Doc CRPD/C/CRI/CO/1 (12 May 2014) para 35; ‘Concluding observations on the initial report of El Salvador’, CRPD/C/SLV/CO/1 (8 October 2013) para 35

¹¹³ CRPD Concl Obs: CPRD Committee, ‘Concluding observations on the initial report of the Czech Republic’ CRPD/C/CZE/CO/1 (15 May 2015) para 34-35; ‘Concluding observations on the initial report of the Gabon’ CRPD/C/GAB/CO/1 (2 October 2015) para 38; ‘Concluding observations on the initial report of Tunisia’ UN Doc CRPD/C/TUN/CO/1 (13 May 2011) para 26

¹¹⁴ CRPD Concl Obs: CPRD Committee, ‘Concluding observations on the initial report of Germany’ UN Doc CRPD/C/DEU/CO/1 (13 May 2015) para 36

¹¹⁵ CRPD Concl Obs: CPRD Committee, ‘Concluding observations on the initial report of Kenya UN Doc CRPD/C/KEN/CO/1 (30 September 2015) para 31(c); ‘Concluding observations on the initial report of Hungary UN Doc CRPD/C/CHUN/CO/1 (22 October 2012) para 32; ‘Concluding observations on the initial report of Mongolia’ UN Doc CRPD/C/MNG/CO/1 (13 May 2015) para 27

¹¹⁶ See, for example, CRPD Concl Obs: CPRD Committee, ‘Concluding observations on the initial report of the United Arab Emirates’ UN Doc CRPD/C/ARE/CO/1 (3 October 2016) para 32

Paragraph 2

Paragraph 2 begins to expand the obligations on states parties and, in particular, makes it clear that the obligations to protect disabled people from exploitation, violence and abuse should work to prevent such treatment. This obligation is framed as additional to the obligation to protect in paragraph 1, but separating the two is difficult, particularly given the expansive focus of the measures required in paragraph 1.

The similar wording of a protective obligation in article 19 CRC is also followed by a second paragraph that expands the obligation to provide adequate care and support, ‘as well as for other forms of prevention’. In General Comment no. 13 on article 19 CRC, the CRC Committee notes that effective child protection should begin with ‘proactive prevention’;¹¹⁷ article 16 CRPD should be seen in the same way and paragraphs 1 and 2 should be seen as related. The importance of paragraph 2 is the way in which the prevention is outlined; rather than harm being prevented by disabled people being segregated from society, the obligation on states is to provide support and assistance to enable disabled people to remain safely within communities.

Preventative measures, ensuring ‘appropriate gender- and age-sensitive assistance and support’

As with article 16(1), 16(2) requires states to take ‘all appropriate measures’, this time in relation to preventing, rather than protecting, from all forms of exploitation, violence and abuse. While these two provisions are situated in separate paragraphs, it is notable in the concluding observations that it is difficult to ascribe the Committee’s recommendations to one paragraph or the other.¹¹⁸ Thus, while they are conceived as two separate obligations in the text of the Convention, the ‘preventative’ aspect of article 16(2) is often key to the Committee’s understanding of effective protection mechanisms.¹¹⁹

As discussed above with regards to paragraph one, the precise legislative, administrative, social, educational and other measures required by article 16(1) are left open – and particularly in respect of the social and educational aspects their content is undefined, with little guidance from the *travaux préparatoires*. In contrast, paragraph 2 is more detailed, and forms of ‘appropriate measures’ are suggested. The ones specifically named are those that were discussed in the negotiations on the Convention – specifically forms of assistance and support for both disabled people *and* their families and caregivers, which may take the form of ‘the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse’.

This formulation of prevention is important, as it suggests a more modern approach to protecting disabled people from harm that works to empower them to safeguard themselves rather than

¹¹⁷ United Nations Committee on the Rights of the Child, General Comment no. 13 CRC/C/GC/13, para 46

¹¹⁸ For example, the concluding observation for Kenya makes it clear that a scheme of protection ‘must include prevention’ (CRPD Concl Obs: CRPD Committee, ‘Concluding Observations on the initial report of Kenya’ UN Doc CRPD/C/KEN/CO/1 (30 September 2015) para 32). The concluding observation for Hungary does not mention the word ‘prevention’, requiring only that ‘effective measures to ensure protection’ are undertaken. However, it is clear that preventative measures are required, as the committee recommends the establishment of early detection protocols (CRPD Concl Obs: CRPD Committee, ‘Concluding Observations on the initial periodic report of Hungary’ UN Doc CRPD/C/HUN/CO/1 (22 October 2012) para 32).

¹¹⁹ Ibid.

remove them from a society that may present dangers to them. Indeed, the Committee has been critical of states where institutionalisation has been the main remedy for abuse¹²⁰ and has noted that institutionalisation often brings with it a greater incidence of harm.¹²¹ The focus on support and assistance is also in line with the wider relational framework seen elsewhere in the Convention, for example in article 12, which recognises that disabled people may need support in exercising their rights, but that these needs do not diminish their ability to hold or claim rights as legal subjects.

‘Including through the provision of information and education on how to avoid, recognize and report instances’

The Committee has made very little reference to the obligation for education for disabled people in article 16 in its concluding observations, and it was also a notable omission from General Comment no. 4, which focused more on the use of punishment, and its disproportionate affect on disabled people – and particularly corporal punishment.¹²² The concluding observations of the Committee which do refer to education measures, as discussed below, recognise that educational measures around exploitation, violence and abuse need to be made accessible to and tailored for disabled people, and there is a clear link to the requirements on accessible education in article 24, so it is unfortunate that the Committee did not make this link in the General Comment on article 24.

The main recommendations the Committee has made around the requirement for information and education have focused around the provision of accessible services, either in creating services specifically for disabled people, particularly disabled women, or making existing services accessible. In particular, they have called for accessible shelters and helplines.¹²³ A notable exception is in relation to Ecuador, where it was noted that the high rate of teenage pregnancy and childbirth amongst disabled women was indicative of high levels of sexual abuse, particularly amongst women with intellectual disabilities. In its recommendations, the Committee urged that Ecuador ‘launch a training programme on the sexual and reproductive rights of persons with disabilities, targeted specifically at women with intellectual disabilities, their families and the professionals who provide services in various state institutions’.¹²⁴ The phrasing here emphasises the need to make this assistance ‘gender- and age-sensitive’ – in this particular instance making the education specifically tailored for and targeted at women with intellectual disabilities.

This recommendation is also an example of the difficulty in separating the obligations in paragraphs 1 and 2. Such education and training programmes would hopefully prevent abuse occurring in the

¹²⁰ CRPD Concl Obs: CPRD Committee, ‘Concluding Observations on the initial report of El Salvador CRPD/C/SLV/CO/1 (8 October 2013) para 35(c)

¹²¹ CRPD Concl Obs: CPRD Committee, ‘Concluding Observations on the initial report of Ecuador’ UN Doc CRPD/E/ECU/CO/1 (27 October 2014) para 30(c). This is also something observed in the academic literature – see footnotes 2-5 above.

¹²² United Nations Committee on the Rights of Persons with Disabilities, General Comment on article 24, (2017) CRPD/C/GC/4

¹²³ CRPD Concl Obs: CPRD Committee, ‘Concluding observations on the initial report of the Plurinational State of Bolivia’ UN Doc CRPD/C/BOL/CO/1 (6 November 2016) para 41; ‘Concluding observations on the initial report of Cyprus’, UN Doc CRPD/C/CYP/CO/1 (8 May 2017) para 40; ‘Concluding observations on the initial report of Ethiopia UN Doc CRPD/C/ETH/CO/1 (4 November 2016) 36(b); ‘Concluding observations on the initial report of Gabon’, UN Doc CRPD/C/GAB/CO/1 (2 October 2015) para 39; ‘Concluding observation on the initial report of Italy’ UN Doc CRPD/C/ITA/CO/1 (6 October 2016) para 44; ‘Concluding observations on the initial report of Mauritius’ UN Doc CRPD/C/MUS/CO/1 (30 September 2015) para 28(a)

¹²⁴ CRPD Concl Obs: CPRD Committee, ‘Concluding observations on the initial report of Ecuador’ UN Doc CRPD/E/ECU/CO/1 (27 October 2014) para 31

future – but this is also a form of protection. In addition to the education for disabled people and families, there is a recommendation of training for professionals in order that they identify and detect instances of exploitation, violence and abuse and the same recommendation has been made to other states.¹²⁵ This form of prevention is not explicitly referenced in article 16(2), which refers only to ‘persons with disabilities and their families and caregivers’, but equally, it is not explicitly excluded, as the ‘assistance and support’ referred to in article 16(2) is only indicative of the types of appropriate measures that should be made available. Such obligations would fit just as easily within the more general requirements for educational measures in article 16(1), but the pertinent discussions during the Ad Hoc sessions demonstrate that education and training for all three groups were being considered and discussed together.

This clearly highlights the overlap between an obligation to protect and to prevent – but also suggests the way in which ‘protection’ is more broadly to be understood in article 16. Rather than removing disabled people from the dangers present in society, through the use of institutionalisation, the focus should be on developing a supportive environment in which they can take control themselves. As discussed in the *travaux* section, there was discussion around whether the rights in article 16 should apply to care givers and there was support for the need to recognise that ‘supportive environments’, particularly those provided by care workers, could provide a safe place for disabled people to disclose abuse.¹²⁶ Training for families, carers and other professionals to provide this space and to recognise the signs of exploitation, violence and abuse, was considered vitally important to a meaningful right in article 16. There was discussion as to whether ‘protection’ and ‘prevention’ should be maintained as separate provisions, or whether it was repetitive. Ultimately, separate provisions were left, in order to emphasise that the obligations in article 16 went beyond the ‘old paradigm’ of protection.

Ensure that protection services are age-, gender- and disability-sensitive

Paragraph 1 requires that states take measures to protect disabled people from exploitation, violence and abuse, and in particular the ‘gender-based aspects’. In paragraph 2 there is an obligation to ensure that the protective services that are provided to ensure the prevention of harm are ‘age-, gender- and disability-sensitive’. This is a wider reference, referring not to any particular type of harm, but rather to the accessibility of the services themselves. As has been noted previously, article 16 does not contain the phrase ‘equal basis with others’, but this does not necessarily negate the concept of reasonable accommodation and the adjustment of existing services to accommodate the specific needs of disabled people. A particular focus for the Committee on this issue has been the accessibility of information about protection from abuse, including shelters, alongside the physical accessibility of the shelters themselves and the capacity of those

¹²⁵ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Gabon’, UN Doc CRPD/C/GAB/CO/1 (2 October 2015) para 39; ‘Concluding observations on the initial report of Sweden UN Doc CRPD/C/SWE/CO/1 (12 May 2014) para 42; ‘Concluding observations on the initial report of Mauritius’ UN Doc CRPD/C/MUS/CO/1 (30 September 2015) para 28(b)

¹²⁶ United Nations Ad Hoc Committee on the Rights of Persons with Disabilities, Summary of Daily Discussions at the Seventh Session, (19 January, 2006), available at <<http://www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm>> (accessed 10th June, 2017)

shelters to accommodate disabled people, particularly women and children.¹²⁷ Concerns have also been expressed about the accessibility to mechanisms for legal redress in Mongolia.¹²⁸

As with other aspects of article 16, it is not easy to separate the ‘protective services’ in the final sentence of paragraph 2, which must be ‘age-, gender- and disability-sensitive’, from the ‘appropriate forms of...assistance and support’ which must only be gender- and age- sensitive. Shelters and legal advice can be seen as ‘protective mechanisms’, but can also be places of assistance and support that enable reporting of exploitation, violence and abuse, as well as places of education on how to avoid and recognise incidences. Some additional guidance on this matter can be found in the Committee’s interpretation of article 16 in its General Comment no. 2 on article 9.¹²⁹ In considering the interaction between article 9 and article 16, the Committee stated that ‘safe houses, support services and procedures must all be accessible in order to provide effective and meaningful protection from violence, abuse and exploitation to persons with disabilities, especially women and children’.¹³⁰

Paragraph 3

Paragraph 3 concerns the monitoring of facilities and programmes and during the negotiation of the Convention such an obligation was considered extremely important. However, the interpretation of this obligation requires examination, given the scope of the obligation in article 16(1) to encompass protection both ‘within and outside the home’.

‘All facilities and programmes’

Paragraph 3 also concerns the issue of prevention, and specifically focuses on the role of monitoring in this process. The scope of the duty in this paragraph is challenging, however, as the text of the Convention refers to ‘all facilities and programmes designed to serve persons with disabilities’. There is an obligation to monitor institutions within the remit of the Optional Protocol of the Convention Against Torture (OPCAT), but it is clear that the obligation in article 16 CRPD must stretch further than this, as the scope of the protective obligations set out in article 16(1) clearly extend beyond the institution in the wider public domain and into private residences. This raises several difficult questions for the implementation of article 16.

Paragraph 3 requires that ‘all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities’. However, the meaning of this phrase is difficult to define when set alongside the inclusion paradigm pursued by the Convention.¹³¹ A move to greater independent community living means that disabled people will no longer use ‘facilities and programmes’ designed for them alone, but it seems unlikely that the intention of the

¹²⁷ CRPD Committee Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Gabon’ UN Doc CRPD/C/GAB/CO/1 (2 October 2015) para 38

¹²⁸ CRPD Committee Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Mongolia’ UN Doc CRPD/C/MNG/CO/1 (13 May 2015) para 27(a)

¹²⁹ United Nations Committee on the Rights of Persons with Disabilities, General comment on Article 9 (2014) CRPD/C/GC/2

¹³⁰ *ibid.* para. 37

¹³¹ Peter Bartlett and Marianne Schulze, ‘Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities’ (2017) 53 *Int’l J.L. & Psychiatry* 2

Convention is to restrict protection and prevention of harm to disability-specific facilities and programmes. Secondly, in a more integrated community where disabled people are living in private residences, should those private residences be considered ‘facilities’ or ‘programmes’ susceptible to monitoring? How should carers be regulated?

This issue was briefly discussed at the fifth session of the Ad Hoc Committee.¹³² The initial proposal had included a phrase limiting monitoring where disabled people ‘are placed together separate from others, live and access services’.¹³³ This sentence was the focus of the discussion and the extent to which monitoring should extend beyond institutions. New Zealand observed in the discussions that the Working Group, in proposing the provision initially, had focused on situations where disabled people were most likely to experience violence and abuse, i.e. in institutions, while Canada called for a broader approach to monitoring.¹³⁴ New Zealand was concerned that this broadened the scope of article 12(4) (as it then was) too significantly, suggesting that disabled people should be monitored accessing general services such as banks or other financial services, and that this cannot be the intention of the article.¹³⁵

Thus far, the Committee has not given clear guidance on how this should be interpreted. Where the issue of monitoring has been addressed in concluding observations, the focus has been primarily on the fact that many states do not even have basic monitoring bodies, independent from government, at all, even with regards to institutions.¹³⁶ The comments in concluding observations with regard to paragraph 3 have, therefore, primarily urged states parties to set up independent monitoring bodies without further elaboration. For example, with regard to Mongolia the Committee recommended that it ‘appoint an independent authority to monitor and protect persons with disabilities from exploitation, violence and abuse in accordance with article 16(3) of the Convention’.¹³⁷

In three specific instances, the Committee has provided a greater indication of more specific action. With regard to Germany, the suggestion that an independent body(ies) be set up was accompanied with a requirement to ensure that complaints about incidences in institutions were handled by an independent body,¹³⁸ while in respect of Mexico a requirement that children’s shelters, as well as other residences for children, were monitored by an independent body.¹³⁹ These two recommendations make it clear that the monitoring required goes beyond traditional institutions, and that this extends to private residences, as was emphasised in the Committee’s recommendations to Italy. There, the Committee recommended ‘that the state party enact legislation, including monitoring mechanisms, to detect, prevent and combat violence within and

¹³² United Nations Ad Hoc Committee on the Rights of Persons with Disabilities, Daily summary of discussion at the fifth session (31 January 2005), available at

<http://www.un.org/esa/socdev/enable/rights/ahc5sum31jan.htm> (accessed 10th June, 2017)

¹³³ United Nations Ad Hoc Committee on the Rights of Persons with Disabilities, Facilitators Proposed Modifications on Draft Articles (31 January, 2005), available at

<http://www.un.org/esa/socdev/enable/rights/ahc5facilitator.htm> (accessed 10th June, 2017)

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ See, for example, CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Germany’, UN Doc CRPD/C/DEU/CO/1 (13 May 2015) para 36; ‘Concluding observations on the initial report of Mongolia’ UN Doc CRPD/C/MNG/CO/1 (13 May 2015) para 27

¹³⁷ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Mongolia’ UN Doc CRPD/C/MNG/CO/1 (13 May 2015) para 27

¹³⁸ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Germany’, UN Doc CRPD/C/DEU/CO/1 (13 May 2015) para 36

¹³⁹ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Mexico’, UN Doc CRPD/C/MEX/CO/1 (27 Oct 2014) para 36(c)

outside the home of persons with disabilities',¹⁴⁰ but little guidance was given as to how this obligation should be balanced against other requirements in the CRPD, particularly those in article 12.

While article 16 CRPD does not contain a provision whereby the rights within be afforded 'on an equal basis with others', it seems clear that the disproportionate monitoring of disabled people would be in danger of drifting back into an overly controlling protective framework which was restrictive of disabled people's rights overall. As Laing has noted,¹⁴¹ there appears to be an inherent tension in the understanding of article 16's protective requirements, and in particular around monitoring – but the answer cannot be to over-protect disabled people. Other interpretations of state intervention with regard to article 16 have focused on its interaction with legal capacity,¹⁴² but the Committee itself did not consider this aspect when it examined the interaction between articles 12 and 16 in its General Comment no. 1.

The interpretation of the provisions on legal capacity in article 12 have proven to be a contentious issue, but the interpretation of the Committee - as has been set out in detail elsewhere in this volume - is that an individual should be supported in their exercise of their legal capacity, and that substitute decision-making should be prohibited. In their General Comment no. 1 on article 12, the Committee considered the interaction with article 16 alongside articles 15 (freedom from torture) and 17 (the right to personal integrity). Reflecting the dominating debate during the negotiation, the Committee's concern was around the issue of involuntary medical treatment:

As has been stated by the Committee in several concluding observations, forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention.¹⁴³

However, this narrow focus omits consideration of a wider area of conflict between the two rights. Article 12, and particularly the Committee's interpretation of it, places significant emphasis on the 'will and preference' of the individual. However, with regards to the relationship between article 12 and 16, there remains a question as to what a State's action to be where an individual appears to *choose* to remain in an exploitative, violence or abusive relationship, or to choose an exploitative or abusive person to support their legal capacity? The obligations around monitoring in 16(3) raise questions around to what extent the supportive relationships around the exercise of legal capacity should be regulated by the State.

Arstein-Kerslake, in considering this question, states that central to a right to legal capacity is the State's obligation to uphold choice, and this requires support to ensure that the individual is actually

¹⁴⁰ CRPD Concl Obs: CRPD Committee, 'Concluding observation on the initial report of Italy' UN Doc CRPD/C/ITA/CO/1 (6 October 2016) para. 44

¹⁴¹ Judy Laing, 'Preventing violence, exploitation and abuse of persons with mental disabilities: Exploring the monitoring implications of Article 16 of the United Nations Convention on the Rights of Persons with Disabilities' (2017) 53 Int'l J.L. & Psychiatry 27, 32

¹⁴² Eilionoir Flynn and Anna Arstein-Kerslake, 'State intervention in the lives of people with disabilities: the case for a disability-neutral framework' (2017) 13 Int JLC 39; Amanda Keeling, 'Organising objects': Adult safeguarding practice and article 16 of the United Nations Convention on the Rights of Persons with Disabilities' (2017) 53 Int'l J.L. & Psychiatry 77

¹⁴³ United Nations Committee on the Rights of Persons with Disabilities, General Comment on Article 12, UN Doc CRPD/C/GC/1, para. 42

making a choice.¹⁴⁴ She notes that where there is concern around an exploitative relationship, the disabled person must be made aware of other options, including leaving the exploitative relationship and the existence of alternative living arrangements. However, should the person ultimately decide to remain, the State must withdraw from further interference and exist 'without undue intrusion'.¹⁴⁵ Writing with Flynn, she makes a similar point during an examination of adult protection processes.¹⁴⁶ Together, they argue that the shortcoming of many such schemes is that they work to restrict the person experiencing the harm, and that, while State intervention into people's lives can be countenanced, it must be done on a disability-neutral basis if help or support is refused. Keeling has made a slightly different point, arguing from the basis of empirical data that effective protection mechanisms under article 16 must look to article 12 and the role of legal capacity.¹⁴⁷ She argues that safeguarding mechanisms which disempower the individual do not work to prevent future harm; in order to be effective, protective mechanisms must work towards enhancing and supporting and individual's legal capacity. General Comment no. 1 has not dealt with this point in detail, and nor have adult protection frameworks been addressed from this perspective in the Concluding Observations available thus far. More detail in future concluding observations would be welcome, as would the development of a General Comment.

'Effectively monitored by independent authorities'

It is insufficient that monitoring mechanisms exist only on paper, but do not effectively prevent harm from occurring. Article 16(3) requires that monitoring must be effective at protecting disabled people and the Committee has been critical of states which, while possessing monitoring mechanisms in place, continue to have high rates of exploitation, violence and abuse in institutions.¹⁴⁸ Additionally, monitoring must be undertaken by a body that retains independence from the state, as well as the institution at hand. This latter point has been particularly criticised by the Committee in terms of complaint mechanisms situated in institutions, where there has been no independent mechanism.¹⁴⁹

Paragraph 4

Paragraph 4 provides an important aspect to article 16 that shifts state obligations far beyond concepts of protection involving the segregation of disabled people from society. On the contrary, article 16(4) sets out detailed requirements for the response of states to the experience of exploitation, violence and abuse. The focus of this obligation is around the recovery of victims, but also their reintegration into society.

¹⁴⁴ Anna Arstein-Kerslake, 'An empowering dependency: exploring support for the exercise of legal capacity' (2016) 18 *Scandinavian Journal of Disability Research* 77, 87

¹⁴⁵ *Ibid.*, 89

¹⁴⁶ Eilíonnir Flynn and Anna Arstein-Kerslake, 'State intervention in the lives of people with disabilities: the case for a disability-neutral framework' (2017) 13 *Int JLC* 39

¹⁴⁷ Amanda Keeling, 'Organising objects': Adult safeguarding practice and article 16 of the United Nations Convention on the Rights of Persons with Disabilities' (2017) 53 *Int'l J.L. & Psychiatry* 77

¹⁴⁸ See, for example, CRPD Concl Obs: CRPD Committee, 'Concluding observations on the initial report of Bosnia and Herzegovina' UN Doc CRPD/C/BIH/CO/1 (2 May 2017) para 31

¹⁴⁹ CRPD Concl Obs: CRPD Committee, 'Concluding Observations on the initial report of Germany', UN Doc CRPD/C/DEU/CO/1 (13 May 2015) para 36

Measures to promote the physical, cognitive and psychological recovery, rehabilitation and social integration

Where article 16 takes a significant departure from the right to be free from torture, cruel, or inhuman or degrading treatment or punishment in article 15 is the obligation in paragraph 4 to promote the recovery, rehabilitation and social reintegration of disabled people who have experienced exploitation, violence and abuse. The obligation for rehabilitation is something found in other Conventions, including article 14 of the Convention Against Torture,¹⁵⁰ article 39 of the Convention on the Rights of the Child,¹⁵¹ and article 6 of the Convention Against Transnational Organised Crime (CATOC), on the rehabilitation of victims of trafficking.¹⁵² The Committee Against Torture explored what rehabilitation from torture required in General Comment 3, noting that the aim should be to 'restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society',¹⁵³ and that it should be a 'holistic and include medical and psychological care as well as legal and social services'.¹⁵⁴ The idea of rehabilitation is also elaborated on in the provisions for victims of trafficking in the CATOC, where article 6(3) outlines measure for the 'physical, psychological and social recovery of victims' as including:

- (a) Appropriate housing;
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, educational and training opportunities.

The provision in article 16 was introduced at the Third Session of the Ad Hoc Committee, as part of the Working Group's draft text of the Convention¹⁵⁵ and was strongly endorsed by New Zealand, Serbia and Montenegro, the Philippines (who suggested the addition of 'rehabilitation'), Trinidad and Tobago.¹⁵⁶ It is important that the positive obligations under article 16 extend to these aspects, as they can, themselves, perpetuate a cycle of harm. Domestic violence, for example, can generate feelings of low self-worth, which may result in the individual entering into further abusive and exploitative relationships. This approach to protection in article 16 further emphasises that the obligation on states is within the 'paradigm shift'; disabled people should be included within wider society rather than become marginalised.

¹⁵⁰ United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46

¹⁵¹ United Nations Convention on the Rights of the Child, UN Doc A/Res/44/25

¹⁵² Article 6(3), United Nations Convention Against Transnational Organized Crime, UN Doc. A/RES/55/25

¹⁵³ United Nations Committee Against Torture, General Comment on Article 14 CAT/C/GC/3 (13 December, 2012) para 11

¹⁵⁴ *ibid.*

¹⁵⁵ Draft Article 12, United Nations Ad Hoc Committee, Working Group to draft a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Report to the Ad Hoc Committee, Annex I, A/AC.265/2004/WG/1 (16 January, 2004)

¹⁵⁶ United Nations, Ad Hoc Committee, Daily summary of discussions related to article 12, Freedom from Violence and Abuse, (May 26 and 27, 2004) <<http://www.un.org/esa/socdev/enable/rights/ahc3sum12.htm>> (accessed 10th June, 2017)

In considering the measures which fall within this obligation, the Committee has thus far had a specific focus on two groups of people: children who have been exploited by criminal gangs to beg,¹⁵⁷ and disabled women and children that have been trafficked as sex workers.¹⁵⁸ In responding to these specific harms, the Committee has not been prescriptive of what shape rehabilitative measures should take, but has emphasised that the focus should be on social inclusiveness.¹⁵⁹ Thus, the support provided should focus on both healing the psychological and physical trauma that may have been experienced, but also working to reintegrate people into society, away from exploitation. In the context of trafficking, with regard to Paraguay, the Committee recommended the development of reception centres and alternative housing, which provide safe accommodation so that women cannot be re-trafficked, alongside providing a place where legal assistance and other support can be easily obtained.¹⁶⁰ There has been less prescription with regard to children that have been raised into a begging culture, but providing secure accommodation and access to food, alongside safety from their exploiters, and education as a means to exiting poverty would seem to be an obvious parallel.

Paragraph 5

Paragraph 5 sets out an obligation to ensure the identification, investigation and prosecution of instances of exploitation, violence and abuse. This paragraph reflects the fact that many instances of abuse and exploitation are not resolved for disabled people, with the action often being that the disabled person finds greater intervention in, and restrictions placed on, her life instead of the perpetrator being prosecuted.¹⁶¹ The demands in article 16 to ensure that disabled people get the adequate support needed to understand when they have experienced exploitation, violence and that their reports are taken seriously should be read alongside obligations in article 13 to provide adjustments in the justice system for disabled people.

Effective legislation and policies...to ensure instances are identified, investigated and, where appropriate, prosecuted

Paragraph 5 requires that both legislation and policies are put in place to ensure the identification and investigation of instances of exploitation, violence and abuse. As with monitoring, these measures must also be *effective* – they cannot pay mere lip service. There are clear overlaps

¹⁵⁷ CRPD Concl Obs: CRPD Committee, 'Concluding observations on the initial report of the Dominican Republic, CRPD/C/DOM/CO/1 (8 May 2015) paras 32, 33(a); 'Concluding observations on the initial report of El Salvador CRPD/C/SLV/CO/1 (8 October 2013) para 35(e); 'Concluding observations on the initial report of Honduras UN Doc CRPD/C/HND/CO/1 (4 May 2017) para 41; 'Concluding Observations on the initial report of Kenya', UN Doc CRPD/C/KEN/CO/1 (30 September 2015) para 31(b), 32(c), 'Concluding observations on the initial report of Paraguay' UN Doc CRPD/C/PRY/CO/1 (15 May 2013) para 43

¹⁵⁸ CRPD Concl Obs: CRPD Committee, 'Concluding observations on the initial report of Paraguay' UN Doc CRPD/C/PRY/CO/1 (15 May 2013) para 41

¹⁵⁹ CRPD Concl Obs: CRPD Committee, 'Concluding observations on the initial report of the Dominican Republic, CRPD/C/DOM/CO/1 (8 May 2015) para 33(a)

¹⁶⁰ CRPD Concl Obs: CRPD Committee, 'Concluding observations on the initial report of Paraguay' UN Doc CRPD/C/PRY/CO/1 (15 May 2013) para 42

¹⁶¹ Anna Lawson, 'Disabled People and Access to Justice: From Disablement to Enablement?' in Peter Blanck and Eilionoir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge, 2017) 88

between this obligation and the obligation in article 16(3) to provide effective monitoring, but the obligation in paragraph 5 goes further. This obligation is not restricted to formal monitoring mechanisms, but extends to staff and carers who work with disabled people on a day to day basis; in order to ensure effectiveness, there must be adequate training for professionals to ensure that they are able to identify harm, as well as investigate suspicions or reports. The lack of training for professionals has been mentioned in a number of concluding observations. For example in relation to Gabon, recommendations were made to ensure that training was provided for ‘police officers, justice workers, health professional and other interlocutors so as to ensure protection from and prevention of exploitation and abuse of, and violence against persons with disabilities, including on effective reporting channels[...].¹⁶² There has also been significant criticism of the lack of data or record of cases kept by states, as without knowing the scale of the problem, an adequate policy response cannot be designed.¹⁶³

The issue of prosecution has a discretionary element – ‘where appropriate’ – but it is clear that the issue of punishing exploitation, violence and abuse of disabled people is not taken sufficiently seriously. Such incidences of violence would generally be prosecuted if perpetrated against non-disabled people, and therefore in the interest of equal access to justice, the same standard should apply for disabled people. Gabon has been criticised for failing to take women’s complaints seriously and for showing a marked reluctance to prosecute such offenses,¹⁶⁴ and Ethiopia has also recently been criticised for its failure to make the criminal justice system accessible, and for failing to treat the evidence of disabled people as credible.¹⁶⁵ Paraguay has been criticised for failing to properly investigate and prosecute criminal gangs who economically exploit disabled children,¹⁶⁶ and the Republic of Korea¹⁶⁷ Moldova,¹⁶⁸ and Honduras¹⁶⁹ for a general failure to punish perpetrators and to provide reparations. The phrase ‘reparations’ is not explicitly included in the text of article 16, and was not discussed in the negotiations. In the context of victims of torture, inhuman cruel, or degrading treatment or punishment, article 14 CAT requires the compensation of the victim, which can include rehabilitation measures alongside monetary compensation. Equally, the CATOC requires measures for compensation in place in a number of articles.¹⁷⁰ If article 16 is understood to be

¹⁶² CRPD Concl Obs: CRPD Committee, ‘Concluding Observations on the initial report of Gabon’, UN Doc CRPD/C/GAB/CO/1 (2 October 2015) para.39. See also CRPD Concl Obs: CRPD Committee, ‘Concluding Observations on the initial report of Ecuador’ UN Doc CRPD/E/ECU/CO/1 (27 October 2014); ‘Concluding observation on the initial report of Italy’ UN Doc CRPD/C/ITA/CO/1 (6 October 2016) para 44

¹⁶³ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of El Salvador’ UN Doc CRPD/C/SLV/CO/1 (8 October 2013) para 35(a); ‘Concluding observations on the initial report of Mexico’, UN Doc CRPD/C/MEX/CO/1 (27 Oct 2014) para 34; ‘Concluding observations on the initial report of Paraguay’ UN Doc CRPD/C/PRY/CO/1 (15 May 2013) para 39; ‘Concluding observations on the initial report of Qatar’ UN Doc CRPD/C/QAT/CO/1 (2 October 2015) para 31(c); ‘Concluding observations on the initial report of Turkmenistan’ UN Doc CRPD/C/TKM/CO/1 (13 May 2015) para 30(b)

¹⁶⁴ CRPD Concl Obs: CRPD Committee, ‘Concluding Observations on the initial report of Gabon’, UN Doc CRPD/C/GAB/CO/1 (2 October 2015) para 38

¹⁶⁵ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Ethiopia’ UN Doc CRPD/C/ETH/CO/1 (4 November 2016) para 35

¹⁶⁶ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Paraguay’ UN Doc CRPD/C/PRY/CO/1 (15 May 2013) paras 43-44

¹⁶⁷ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of the Republic of Korea’ UN Doc CRPD/C/KOR/CO/1 (29 October 2014) para 31

¹⁶⁸ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Moldova’ UN Doc CRPD/C/CMDA/CO/1 (18 May 2017) para 33(b)

¹⁶⁹ CRPD Concl Obs: CRPD Committee, ‘Concluding observations on the initial report of Honduras’ UN Doc CRPD/C/HND/CO/1 (4 May 2017) para 41

¹⁷⁰ Articles 6(6), 14(2), and 25(2)

linked closely to general rights prohibiting torture, then equally rights to compensation or reparation could also be seen as a natural addition to the interpretation of the right. Alternatively, perhaps it could be said that it simply follows what seems to be a general requirement for compensation or reparations in international human rights law – and indeed in many legal systems provisions around civil wrongs.

Including women- and child-focused legislation and policies

The obligation in paragraph 5 requires that there are specific legislative and policy measures put in place for children and women. This reflects again the focus on these two groups as experiencing higher levels of harm, particularly of a sexual and economic nature. This obligation, therefore, requires the adoption of legislation and policies that specifically respond to the issues that these groups face – particularly domestic violence and economic exploitation, as is the case with child begging. Developing these policies requires knowledge of the extent and types of harms that these two groups face, and therefore the need to collect data is important here is also developing effective preventative frameworks.