

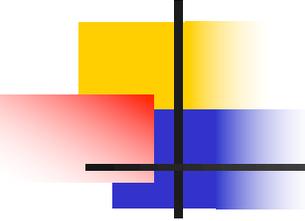
# Saving the UN Convention on the Rights of Persons with Disabilities—From Itself

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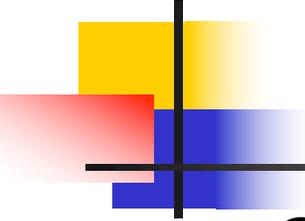
Columbia University



# Overview

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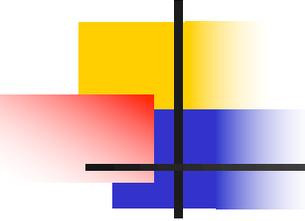
- To review several of the problematic provisions of the CRPD from the perspective of mental health law
- To identify a number of the problems they can create for people with mental disorders and other conditions that can impair brain function
- To suggest three strategies that nations can use to deal with these problems



## But First...The Virtues of the CRPD

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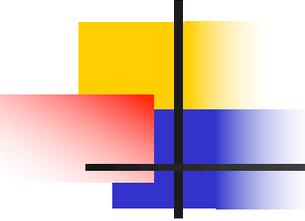
- Countries that ratify the CRPD promise to “undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.”
- Its various articles guarantee rights to accessibility, education, health, privacy, and other conditions essential to full participation in modern society.
- But there are problems...



# CRPD, Article 12

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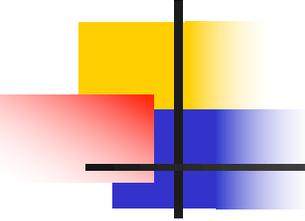
- Sec. 2: “States Parties shall recognize that **persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.**”
- Sec. 4: “...safeguards shall ensure that **measures relating to the exercise of legal capacity respect the rights, will and preferences of the person,** are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.”



## CRPD, Article 14, Sec. 1

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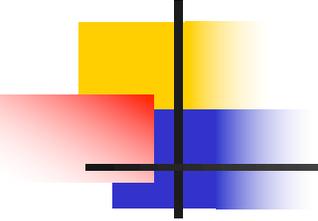
- “States Parties shall ensure that **persons with disabilities**, on an equal basis with others:
  - (a) **Enjoy the right to liberty and security of person;**
  - (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, **and that the existence of a disability shall in no case justify a deprivation of liberty.**”



# Who Decides What Those Terms Mean?

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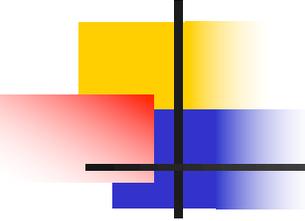
- To oversee implementation of the CRPD, the UN established a Committee on the Rights of Persons with Disabilities.
- Its 18 members are each nominated by a ratifying state and elected for 4-year terms.
- The committee reviews reports from state parties and determines whether they are in compliance or what steps need to be taken to come into compliance.
- It is empowered to make recommendations to the UN General Assembly that would facilitate implementation.



# What Does Article 14 Imply?

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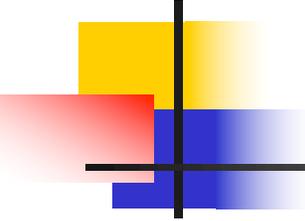
- In its General Comment #1, the Committee held that detention of persons on the basis of mental disabilities (e.g., involuntary hospitalization) without their consent “constitutes arbitrary deprivation of liberty and violates Articles 12 and 14.”
- Even if commitment requires additional findings of dangerousness to self or others or need for care and treatment, insofar as it rests in part on the presence of a mental disorder, it is precluded.



# Further UN Support for This Interpretation

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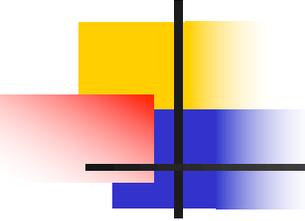
- The UN High Commissioner for Human Rights confirmed that the CRPD requires removal of all laws “authorizing the preventive detention of persons with disabilities on grounds such as the likelihood of them posing a danger to themselves or others, in all cases in which such grounds of care, treatment and public security are linked in legislation to an apparent or diagnosed mental illness”



# What Does Article 12 Imply?

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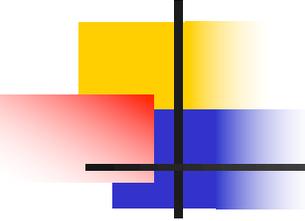
- The Committee said, “Article 12 of the Convention affirms that all persons with disabilities have full legal capacity . . . [and] makes it clear that ‘**unsoundedness [sic] of mind’ and other discriminatory labels are not legitimate reasons for the denial of legal capacity.**”
- This precludes surrogate decision making of any sort for incompetent persons: psychiatric treatment, general medical treatment, management of finances, placement in protective settings.



# To Be Specific

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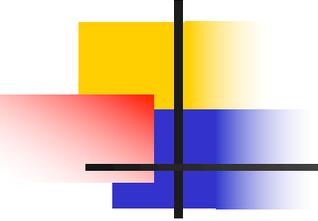
- Acceptance of the Committee's interpretation of the CRPD would require:
  - Revocation of all laws allowing involuntary hospitalization and treatment of persons with mental illness
  - Elimination of guardianship or conservator of persons who are no longer competent to manage their own affairs
  - Abrogation of procedures for determination of competence to stand trial and for the defense of not guilty by reason of insanity



# In Practical Terms

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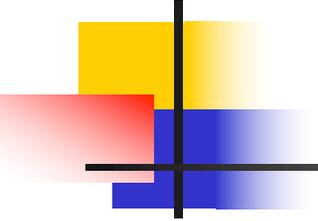
- Persons with mental illness who are suicidal or homicidal, even if they lack the ability to recognize their need for treatment, could no longer be hospitalized against their will.
- Persons with dementia who cannot pay their bills, buy food or cook meals, but see no need for assistance, could no longer have someone appointed to handle their finances and supervise their daily needs.
- Criminal defendants who committed an offense while psychotic or otherwise under the influence of a mental disorder would be punished like any other offender.



# What Can Be Done?

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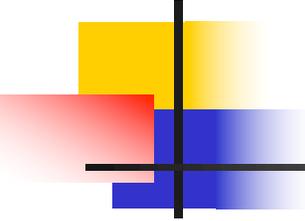
- If you think these are good outcomes, as the some of the drafters of the CRPD and members of the Committee clearly do, then you should make every effort to implement these approaches
- However, if these outcomes are of concern to you, you can encourage your government to take one of three steps



# Option 1: Ignore the Problematic Interpretations of the CRPD

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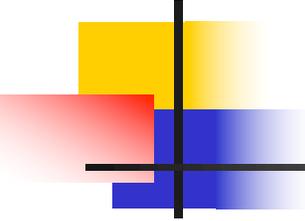
- May not seem like an available option for any of the 182 countries have ratified the CRPD.
- However, many ratifying countries did so while expressing “reservations”—essentially indicating their intent not to comply with certain provisions.
- And some countries in their biennial reports have simply asserted that they were in compliance when they clearly were not.



# Example of Reservation - Australia

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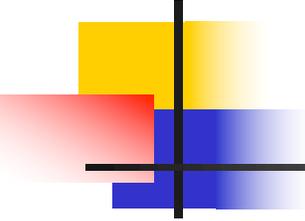
- “Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. **Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements,** which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, **as a last resort and subject to safeguards;**



# Australia's Reservation - Continued

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- "Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. **Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards...**"

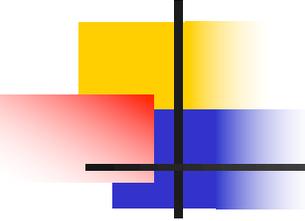


# Judicial Support for Ignoring the Problematic Interpretations

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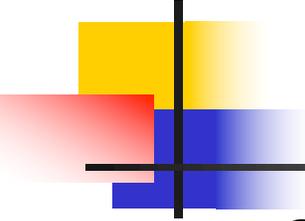
- Decision of the European Court of Human Rights: “The [appointment of a substitute decision maker for a person with intellectual disabilities] was proportional and tailored to the applicant’s circumstances, and was subject to review by competent, independent and impartial domestic courts. The measure taken was also consonant with the legitimate aim of protecting the applicant’s health, in a broader sense of his well-being”...and thus not in conflict with the CRPD.

# Option 2: Support Reinterpretation of the CRPD



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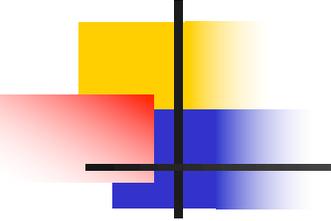
- Alternative interpretations could take several forms and have considerable cogency, including arguments that:
  - Protecting vulnerable people does not constitute discrimination – indeed, ignoring their vulnerability may be discriminatory
  - When rights protected by the CRPD are in conflict, e.g., preservation of life vs. exercise of legal capacity, the more important right should take precedence;
  - Even the language of Article 12 itself appears to recognize that limitations on a person's decision-making power may be necessary.



# What About Article 12?

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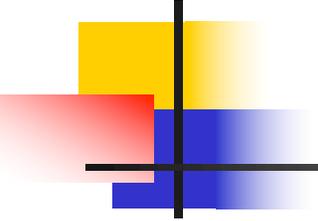
- Sec. 4: "...safeguards shall ensure that **measures relating to the exercise of legal capacity respect the rights, will and preferences of the person**, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body."
- Maybe the CRPD Committee just got it wrong in saying that the Convention intended to eliminate limitations on exercise of capacity—the drafters just intended to limit it



# How Effective Will Reinterpretation Be?

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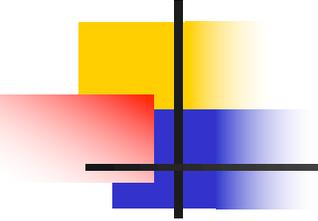
- Given the low probability that the Committee will be led by these critiques to change its interpretation, the arguments' efficacy will likely depend either on:
  - Persuading states to ignore the counterproductive aspects of the CRPD or
  - Persuading them to pursue a more radical remedy, namely amendment of the CRPD



## Option 3: Amend the CRPD

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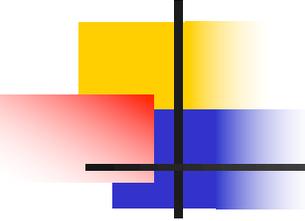
- Amending the CRPD may be the most effective long-term solution to the problems that so many governments and commentators have identified.
- The CRPD itself (Article 47) envisions a process by which amendments can be made, allowing any state that is a party to propose an amendment, which can be considered with the support of one-third of states and adopted by a vote of two-thirds.



# Can Amendment Be Accomplished?

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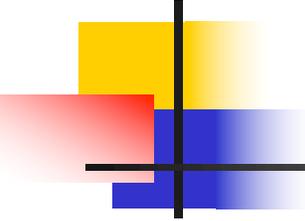
- Resistance can be anticipated from the Committee and the more radical parts of the disability rights movement that succeeded initially in capturing the drafting process;
- Hence, success will depend on mobilization of governmental agencies, professional organizations, academics, family organizations, and disabled persons themselves to lobby their governments regarding the need for change.



# How Did We Get Here in the First Place?

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- Blame is due to a drafting and UN committee process that was captured by some of the most radical elements of the patients' rights movement, which are willing to sacrifice the well-being of persons with disabilities to achieve what they see as their long-term political goals.
- It falls as well on the many governments around the world that thoughtlessly ratified the CRPD without considering its implications (or despite them).



# Can We Learn from the Process Failures with the CRPD?

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- For the future, the lesson to be learned is the critical importance of involvement of state representatives, professional organizations, and individual experts representing mainstream positions in the process of drafting crucial international documents.
- Otherwise the process, as here, will be seized by the most radical parties, leading to infinite problems in the future.