

Human Rights Watch (HRW)

Canada: Submission to the UN Committee on the Rights of Persons with Disabilities

32nd Session

January 2025

Human Rights Watch welcomes the opportunity to provide input to the Committee on the Rights of Persons with Disabilities (the “Committee”) in advance of its upcoming review of Canada. This submission highlights areas of concern that Human Rights Watch hopes will inform the Committee’s consideration of Canada’s compliance with the Convention on the Rights of Persons with Disabilities (CRPD). It focuses on how Canada’s immigration detention system routinely discriminates against people with disabilities, including through widespread violations of their legal capacity rights that strip them of their ability to make crucial decisions about their own lives. The submission relates to Canada’s overall obligations toward the CRPD, specifically article 12 (but also articles 5, 13, 14 and 15).

Human Rights Watch has documented abuses against persons with psychosocial disabilities in immigration detention in Canada since 2019 and continues to monitor the situation. In December 2024, Human Rights Watch published a 40-page report, “‘It Felt Like Everything in Life Stopped’: Legal Capacity Rights Violations Against People with Disabilities in Canada’s Immigration Detention System,” which documented how the use of designated representatives undermines the rights of immigration detainees with disabilities to make their own decisions, often with life-altering or even life-endangering consequences.

Background

Since 2016, Canada has placed approximately 45,000 people in immigration detention, including refugee claimants, children, persons with disabilities, pregnant persons, and permanent residents. Over 90 percent of those people were held on grounds unrelated to public safety: they were detained because authorities suspected they may not appear for an immigration or refugee status determination proceeding, because authorities were not satisfied with their identity documents, or for the purposes of an examination upon entering Canada. For some people detained on public safety grounds, previous interactions with the criminal justice system may be the sole reason they are alleged to be a danger to the public.

Immigration detention can have devastating effects on mental health. Many people in detention develop suicidal ideation as they lose hope, particularly those fleeing traumatic experiences and persecution in search of safety and protection in Canada. People in immigration detention can develop anxiety, depression, despair, psychological distress, psychosis, and catatonic withdrawal.

Individuals with disabilities, including intellectual and psychosocial disabilities, experience discrimination throughout the immigration detention process, in breach of international human rights law:

People’s disabilities may play a role in authorities’ decision to detain them, as they are deemed ‘unreliable’ or ‘uncooperative’. People’s disabilities may also lead to detention in correctional facilities to facilitate access to “specialized care,” as per Canada Border Services Agency (CBSA) policy. Article 14(1) of the CRPD states that “the existence of a disability shall in no case justify a deprivation of liberty.”

In some provincial jails, authorities have placed persons with mental health conditions or those who express suicidal ideation in solitary confinement (also referred to as segregation, isolation, or separation). This practice could amount to a violation of article 15 of the CRPD, which states that no one should be subjected to torture, cruel, inhuman, or degrading treatment or punishment.

Persons with disabilities also face significant barriers to release from immigration detention, including onerous release conditions in the community. Release from detention may depend on them enrolling in residential treatment facilities, which have limited spots. This situation raises concerns that immigration detention is simply being substituted for nonvoluntary medical confinement and forced treatment in violation of their rights, including to privacy and bodily integrity. CBSA officials have indicated that detainees must be “stable” before they can be released into community supervision programs, and CBSA also acknowledged that it tries to “work with medication to ensure stability” in detention prior to release.

As further detailed below, persons with disabilities in immigration detention may also be stripped of their legal capacity rights to make decisions about their legal matters, which may lead to continued deprivation of liberty, or even deportation.

Substitute Decision-Making Under International Law

Legal capacity is a fundamental human right enshrined in core United Nations human rights treaties. Under the CRPD, persons with disabilities have the right to recognition everywhere as persons before the law. The CRPD rejects the notion that persons with disabilities are unfit to exercise agency, and makes it clear that their will and preferences should always be respected.

Importantly, mental capacity and legal capacity should not be conflated. Although a person’s mental capacity can vary depending on environmental or social factors, this does not, at any point, negate their legal capacity. The Committee on the Rights of Persons with Disabilities, an independent expert body created under the CRPD to oversee its implementation, has instead stressed the importance of ensuring that persons can exercise legal capacity by putting the right decision-making supports in place. To this effect, Article 12(3) of the CRPD requires states party to “take appropriate measures” to provide persons with disabilities access to “support they may require in exercising their legal capacity,” including through “supported decision-making.” Importantly, the CRPD Committee makes clear that “support in the exercise of legal capacity ... should never amount to substitute decision-making.”

Canada ratified the CRPD but made a reservation and interpretative declaration to Article 12. According to several legal scholars, given the CRPD’s mandate of “affirming maximum independence, equality, and participation of persons with disabilities in society,” Canada’s reservation on the legal capacity of persons with psychosocial disabilities “severely interferes with the Convention’s object and purpose.”

CRPD arts. 5 and 13 also obligate governments to take all appropriate steps to ensure reasonable and procedural accommodation is provided. This includes situations in which persons with disabilities have been deprived of their liberty in a prison or other legally mandated detention facility.

Violations of Legal Capacity Rights

Under Canada’s Immigration and Refugee Protection Act (IRPA), in cases where a person in detention is “unable, in the opinion of the [tribunal], to appreciate the nature of the proceedings, the [tribunal] shall designate a person to represent the person.” In practice, Immigration and Refugee Board (IRB) adjudicators appoint “designated representatives” for people in detention who have a diagnosed or suspected mental health condition. In such cases, the tribunal selects, appoints, and pays a designated representative, typically from a roster of contracted individuals, to “protect and advance the interests” of the person in detention. Designated representatives must be at least 18 years old, they must “understand the nature of the proceedings,” and “be willing and able to act in the best interests” of the person in detention and not have a conflict of interest with them.

Designated representatives are legally empowered to make decisions on behalf of individuals in detention. Designated representatives can make these decisions without proper communication, consent, or understanding of the unique accommodation requirements of people with psychosocial disabilities in detention. This substitute decision-making practice undermines the rights and dignity of detainees with psychosocial disabilities and other disabilities.

Immigration lawyers interviewed by HRW confirmed that designated representatives routinely make substitute decisions on behalf of people in detention. One lawyer noted, “designated representatives are the voice of the [person in detention], replacing them.” When a person in detention refuses to attend their hearing out of protest, the hearings proceed and “run roughshod over the [person in detention],” and the presence of the designated representatives “superficially makes things move forward.”

Lawyers interviewed said the impact of a designated representative on their cases depended entirely on the specific individual selected. This is largely because the scope of legal authority and role of designated representatives is broad and inadequately defined. The inconsistency in the roles and effectiveness of designated representatives, coupled with the lack of support and clear limitations on designated representatives’ authority, continues to exacerbate the plight of persons with psychosocial disabilities in immigration detention across Canada.

Systemic flaws within this framework—including lack of proper assessment in appointing designated representatives; the sweeping, unclear, and contested scope of designated representatives’ role; incompetence and inadequate training; and designated representatives’ power to make substitute decisions—underscore the urgent need for comprehensive reform. Through such reform, designated representatives would be able to continue providing invaluable support for persons in detention. As one immigration lawyer indicated, “anyone stuck in detention is limited in collecting evidence,” and designated representatives can act as “essentially an extension of the client on the outside who has more liberty to build a case for release.” According to another lawyer, detention review hearings “can be so adversarial and traumatic for people in detention,” and designated representatives can act as a “buffer” to make the experience “less harsh.”

In May 2024, the federal government attempted to introduce legislative amendments to expand the scope of designated representatives beyond the realm of tribunal hearings, whereby CBSA would be able to appoint designated representatives in contexts where people may be isolated in immigration detention without access to legal advice, interpretation services, or other vital supports. This could have empowered designated representatives to waive people’s rights to make refugee claims or other legal applications preventing refoulement, with potentially life-endangering consequences. While this legislative amendment was subsequently withdrawn, the government has indicated its intention to re-introduce it in the future.

Human Rights Watch recommends that the Committee ask the government of Canada:

How does the government plan to address concerns regarding its reservation to Article 12 of the CRPD, and is it considering withdrawing its reservation?

What steps, if any, is the government taking to ensure the right to legal capacity and due process of all persons with disabilities in immigration detention?

What steps, if any, is the government taking to assess, address, and remedy the widespread rights violations in immigration detention, particularly against persons with disabilities, including detention on the basis of disability, and probable cruel, inhuman and degrading treatment?

What steps, if any, is the Canadian government taking to modify procedures in its immigration detention system to ensure that persons with disabilities can participate meaningfully on an equal basis with others?

What steps, if any, has the government taken to expand community-based alternatives to detention that provide support rather than surveillance?

What steps, if any, has the government taken to ensure meaningful consultation with people with disabilities with respect to Canada’s immigration detention system?

Human Rights Watch recommends that the Committee call on the government of Canada to:

Withdraw Canada's declaration and reservation to Article 12 of the CRPD.

Gradually abolish immigration detention, starting with the immediate end to the use of correctional facilities for immigration detention.

Immediately prohibit all forms of solitary confinement for people with intellectual, psychosocial or developmental disabilities.

Expand localized programs of community-based alternatives to detention that provide support rather than surveillance and are operated by local nonprofit organizations independently from CBSA. Support services should take a holistic view of a person's requirements, including housing, healthcare, mental health services, education, employment, children's needs, and legal representation.

Maintain effective, supportive, voluntary, and culturally-appropriate mental health services in the community that are available and accessible to Canadian and non-Canadian citizens alike. Consider reallocating funding from CBSA's budget to support community-based health services and alternatives to detention.

In line with the guidance of the UN Working Group on Arbitrary Detention, stop detaining persons with physical or psychosocial disabilities in immigration detention. Persons' disabilities should also be taken into account when determining the legality, necessity, and proportionality of any non-custodial immigration enforcement measure.

Ensure the right to legal capacity and due process of all persons with disabilities in immigration detention.