An International Dialogue on

Implementing Article 12, UN CRPD
Legal Capacity and Equal Recognition Before the Law

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A Background Paper

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Introduction
Inclusion International and Centre for Citizenship and Inclusion, with the support of the Disability Rights Initiative of The Open Society Foundations (OSF), is convening the first of what is anticipated to be a dialogue series about directions for law, policy and practice reform for full implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities. This background document introduces the first dialogue which will focus on alternatives to traditional guardianship systems -- an essential but not exclusive component for implementing reforms to achieve the aims of Article 12. This first dialogue may begin to touch on topics which future dialogues in the series will address more systematically, such as other ways in which legal capacity is restricted, forced treatment, access to the justice system, adult protection and related issues.

This document provides background to this dialogue series – how it was initiated, and its relevance. Key objectives for the dialogue are outlined and an agenda for the first dialogue with a set of questions is presented. These are meant to serve as an initial guide to participants in considering implications of Article 12 for law, policy and practice reform with respect to creating alternative systems to guardianship and substitute decision making systems. Additional questions will be raised and considered by participants during the discourse.

Participants in this dialogue series have been invited because of their expressed commitment to advancing the new paradigm for protecting autonomy and advancing legal capacity that Article 12 points toward. A range of participants will participate who represent disability rights organizations, and/or who bring additional expertise in the area of law, policy and practice reform, and who bring experience from different regions of the world.

The questions proposed for this dialogue are informed by two impulses: first, to advance a set of concepts on which an entirely new set of systems to protect autonomy and legal capacity might be designed; and second, to consider institutional mechanisms for bridging from current systems to a new paradigm. The dialogue is intended to keep this tension in focus so that as we conceptualize new systems, we can also build the ‘ramps’ from an old paradigm to the new paradigm of legal capacity.

At the end of the agenda for this dialogue time is set aside for considering next steps and how best to convene future dialogues.
Background

The idea for a dialogue series on Article 12 was initiated at a meeting convened by Inclusion International, and supported by OSF in May 2010, that brought together a group of interested advocates, academics and researchers (many wearing one or more of those ‘hats’) to consider the implications of Article 12 for advancing the right to legal capacity for people with intellectual disabilities. Participants at that meeting raised a number of issues related to implementation – both conceptual as well as practical – as developments in a number of countries were considered. Two main suggestions from that meeting were:

- Further dialogue was needed to convene advocates, academics and researchers to grapple with a set of complex conceptual, legal and systems issues raised by Article 12 – possibly a ‘deliberative dialogue’ on the issues raised.
- In further discussions, implications should be considered for not only for people with intellectual disabilities, but also for people with psychosocial disabilities and people with cognitive disabilities (e.g. seniors with dementia-related disabilities, people with brain injury, etc.).

Following that meeting, and in consultation with its participants, OSF engaged Michael Bach, of the Canadian Association for Community Living, member of Inclusion International’s Convention Action Team on Legal Capacity, and Board member of the Mental Disability Advocacy Centre, to develop a short concept paper on what a structured dialogue process might look like. He recommended a structured dialogue series designed to consider a framework of 1) core concepts, 2) system requirements (government machinery, justice system and community systems) and 3) law reform in four intersecting areas directly affecting legal capacity of people with intellectual, psychosocial and/or cognitive disabilities, including measures for:

- alternatives to restricting the legal capacity of individuals to make decisions related to finances, health care, and personal care and life – areas traditionally restricted by plenary and partial guardianship systems;
- measures to prevent and remedy exploitation, violence and abuse;
- mental health law and alternatives to involuntary/forced committal for psychiatric assessment and treatment; and
- access to the justice system, where testimonial capacity and credibility is often questioned on the basis of intellectual, cognitive and/or psychosocial disability.
In developing a series of questions to guide the Dialogues, Michael Bach also drew on work he recently completed with Lana Kerzner, for the Law Commission of Ontario and titled “A New Paradigm for Protecting Autonomy and the Right to Legal Capacity” (at: http://www.lco-cdo.org/disabilities/bach-kerzner.pdf). While the paper proposes a framework for legal capacity law in Canada, it outlines more general principles as the basis for maximizing autonomy, and translates them into a proposal for a comprehensive set of mechanisms and guidelines for intervention, spanning legal capacity, adult protection and involuntary treatment.

The Bach/Kerzner paper is used to inform the design of the dialogue on alternatives to guardianship outlined in this document. The intention is to draw on the paper as a 'jumping off' point to initiate discussion; and not in any way to constrain the options for core concepts, law reform, or systems design elements that participants may wish to consider. Nor is it intended to present this paper as an authoritative prescription for what law, policy and practice reform should look like. It is a place to start, and participants will be encouraged to draw on other studies, position statements, etc. to enliven and enrich the discussion.

**Objective for Dialogue on Alternatives to Guardianship**

The objective of this dialogue is to:

- Sharpen the understanding of the practical implications of CRPD Article 12 with respect, in particular, to alternatives to guardianship.

The process for accomplishing the objective is a critical group consideration of a guiding framework of 1) concepts, 2) directions for law reform, and 3) systems (government, justice systems, and community systems) for promoting and protecting the rights recognized in Article 12.

Other dialogues are anticipated that will focus on implications with respect to alternatives to involuntary/forced committal for psychiatric assessment and treatment, adult protection in the face of serious abuse and neglect, and fair access to the justice system.

For the purposes of this dialogue guardianship systems are understood as those set of arrangements which are used to restrict a person’s legal capacity to make financial, health, and personal life/care decisions.
Starting Points for the Dialogue
The Dialogue will:

• affirm as its foundation, principles set out in the position statements on Article 12 and related issues by Inclusion International, the World Network of Users and Survivors of Psychiatry, and the International Disability Alliance.
• start with the framework set out in Bach’s and Kerzner’s paper, “A New Paradigm for Protecting Autonomy and the Right to Legal Capacity,” as a jumping off point for the discussion;
• clarify the relevance, application, and potential need for further exploration of the concepts, machinery and interventions proposed in that paper, as well as where opinions converge and diverge;
• focus on alternatives to guardianship, recognizing that the discussion will also need to broach issues that would fall under the three inter-related areas of law reform – involuntary committal, adult protection, and access to the justice system;
• consider implications from three vantage points: people with intellectual, psycho-social and/or cognitive disabilities (which includes people who experience disability related to brain injury, dementias, and neuro-degenerative diseases often associated with aging, HIV/AIDS, etc.).

Questions to Frame the Discussion
Six areas of questions have been framed to guide the dialogue, including

• types of decision-making status to exercise legal capacity
• types of decision-making supports which should be available
• duty to accommodate and positive obligation to provide decision-making supports
• resolving disputes about decision-making status, supports and accommodations
• key elements for a system for protecting legal capacity and resolving disputes
• strategic steps to implementation

Specific questions in each of these six areas are provided in Appendix A. The questions are drawn in part from the Bach/Kerzner paper, and also from those raised at the preceding May 2010 discussion on Article 12 implementation. They provide the ‘building blocks’ for a discussion that will be designed to proceed in a stepwise fashion, as follows:

• The first two sets of questions on types of decision-making status and supports address the core concepts on which more specific law reform and system design issues can be addressed. Beyond the principle of a
right to legal capacity without discrimination and a State Party’s obligation to provide access to supports for this purpose, these questions deal with how we can account for the diversity of ways in which people exercise their legal capacity at various times of their life and some of the implications of doing so. For example, some decisions are reached by people exercising their capacity independently, whilst others only with communication and/or additional personal supports. As well, it may be necessary to determine what counts as supports related to legal capacity, for which States Parties have particular obligations under Article 12, as distinct from other kinds of supports which are referenced throughout the CRPD.

- The questions on the duty to accommodate and the extent of State Party obligations with respect to supports can be addressed once it is determined the ways in which legal capacity is exercised and the kinds of supports that need to be accessed related to financial, health care, and personal care/life decision-making processes. In other words, what are we asking other parties to accommodate for with respect to decision-making processes?

- With these concepts clarified, at least to some extent, it will be possible to consider the basis on which disputes can be addressed and resolved, about the ways in which a person is supported to exercise their legal capacity, the extent of the duty to accommodate by any particular party, and the nature and extent of supports to which a particular person should be assured.

- On this basis, it is then possible to consider the kinds of ‘systems’ or ‘machinery’ that would enable recognition, promotion and protection of the right to legal capacity in the terms defined. In other words, ‘form follows function.’ A set of questions about systems is provided to guide this discussion.

- Finally, there is the question of how to be strategic in advocating for measures to implement Article 12. In many countries, it will take some time to fully reform the laws, policies and practices to give effect to the spirit and intention of Article 12. Even where existing laws comply with the CRPD, practice may lag behind. The Dialogue closes with questions about how to be strategic with regard to implementation, and if there are some initial steps or building blocks that can be recommended which are essential as a foundation for a robust set of arrangements to ensure the right to legal capacity for all. An attempt will be undertaken to make recommendations to States that are modular and progressive, giving
particular weight to varying contexts and socio-legal-economic differences across jurisdictions.

As indicated above, one of the underlying touchstones for the discussion is to consider the implications of the concepts, and proposed system elements from three vantage points: people with intellectual disabilities, people with psychosocial disabilities, and people with cognitive disabilities. As well, participants bring a diversity of experience in research, advocacy and law reform from their own countries, and the intention is to draw on those reform efforts, and consider how the general concepts and system proposals considered would apply or need to be adapted in particular contexts.

Format of the Meeting

The meeting will take place over two days. Participants will be asked to read the Bach/Kerzner paper in advance, with the framing questions identified in Appendix A in mind.

The Dialogue will be facilitated, and will follow the structure of the discussion-framing questions, with a session for each of the six areas identified above. The facilitator for each session will introduce the key concepts for that session, and will be invited to propose questions and offer critical remarks that open up the discussion.

Agenda and Dialogue Structure

May 2

9:00 – Introductions and Overview

9:30 – Overview of Proposals
The first session would include a presentation by Michael Bach and Lana Kerzner in order to frame the workshop’s discussion, with a focus on elucidating the principles and assumptions that serve as the foundations for the whole structure.

10:30 – Break

11:00 – Facilitated Discussion
• Types of decision-making status to exercise legal capacity
• Types of decision-making supports which should be available

12:30 – Lunch

1:30 – Facilitated Discussion
• Cont’d… Types of decision-making status and supports
• Duty to accommodate and positive obligation to provide decision-making supports

3:30 – Break

4:00 – Facilitated Discussion
• Resolving disputes about decision-making status, supports and accommodations

5:00 – Closing

May 3

9:00 – Summary and Review of Day 1

9:30 – Presentation on proposed system elements – by Michael Bach and Lana Kerzner

10:00 – Facilitated Discussion
• Key elements for a system for protecting legal capacity and resolving disputes

10:30 – Break

11:00 – Facilitated Discussion
• Key elements – continued

12:30 – Lunch

1:15 – Facilitated Discussion
• Strategic steps to implementation – accounting for differing socio-legal-economic contexts. Timing will provide for an initial discussion and will necessitate further reflection.

3:00 – Distilling discussion, areas of consensus & difference, moving forward
During the final session, a small team from among the participants that has been designated in advance to follow and record the discussion of the previous two sessions, will endeavor to extract propositions that will be presented for group discussion, regarding concepts, directions for law reform, and systems elements:
  o which have drawn consensus
  o over which opinions diverge
  o which participants agree necessitate further exploration

The Dialogue will conclude with a roundtable discussion on participants’ recommendations for next steps in the Dialogue process.

4:00 – Closing
Appendix A – Guiding Questions

The dialogue will be guided by the following six sets of questions. These questions are presented to initiate and structure the discussion, and it is anticipated that participants will frame many other questions and approaches as the dialogue takes shape.

Types of Decision-making Status to Exercise Legal Capacity

1. Does legal recognition of the three distinct decision-making statuses listed below (and described in more detail in Section III) adequately encompass the range of ways in which people might exercise their legal capacity?
   a. legally independent status (with accommodations and supports to the point of undue hardship)
   b. supported decision-making status
   c. facilitated decision-making status (…and can this status be adequately distinguished from substitute decision making?).

2. Does the conceptualization of these three distinct statuses adequately address the following concerns of people with disabilities?
   a. protecting the right to autonomy and acting legally independently
   b. recognizing that some people have a need for accommodation and support in decision-making processes, and
   c. addressing situations where people are unable to communicate in ways that others understand; they have no prior planning documents that express their wishes; they are not able to appoint someone to represent them; there are no persons in a relationship of personal knowledge and commitment who could represent and interpret the person’s communication for others.

3. Do these statuses respect the primary aims and concerns of constituencies of:
   a. People with intellectual disabilities
   b. People with psycho-social disabilities
   c. People with cognitive disabilities – related to dementias, brain injury, neurological conditions related to cognitive impairment.

4. Given the particular vulnerability of a person in a facilitated status, should those acting for persons in this status be bound by a ‘best interests’ test, such as:
Based on the facilitator(s)' best understanding of the person's prior wishes, instructions and values, what decision would best:

- improve the quality of the person's life;
- prevent the quality of the person's life from deteriorating,
- reduce the extent to which, or the rate at which, the quality of the person's life is likely to deteriorate;
- make decisions which seek to augment a person's decision-making capabilities; or
- benefit the person in ways that outweigh the risk of harm, in comparison to an alternative decision.

5. What sort of safeguards need to be put in place to allow a challenge to the facilitated decision-maker’s view of a person’s best interests?

6. The recognition of different types of decision-making status may affect how decisions that fundamentally affect personal integrity are dealt with. Such decisions include, for example, sexual relations, identity preferences and behaviours, non-therapeutic sterilization, non-therapeutic abortion, cochlear implant surgery, non-therapeutic plastic surgery, sex re-assignment surgery, assisted suicide (in jurisdictions that provide for this), etc. The list of the types of decisions is not fixed, and certainly evolves over time. It is assumed that any person acting in a legally independent manner, even with supports, has the right to make any decisions allowable under the law, including those identified above. However, where persons are acting in either a supported or facilitated status, other considerations might apply.

   a. Given the risk of exploitation, violence and abuse related to such decisions, should they be restricted or subject to external review where a person with a disability is making them through a supported decision-making status?

   b. Should facilitators for persons in a facilitated status be restricted or regulated in enabling these decisions to be made, given the risk for abuse and/or the scope for misunderstanding communication from persons in this status?

**Types of Decision-Making Supports which should be available**

7. Are the following criteria sufficient for identifying the kinds of supports anticipated by Article 12.3 that people may require to exercise and enjoy
Duty to Provide Reasonable Accommodation and Positive Obligation to Provide Decision-Making Supports

9. What is the nature and extent of the duty for private and public third parties to provide reasonable accommodation in decision-making
processes regulated in some way by law – contracts, providing informed consent, financial and other commercial transactions; and for the State to ensure people have access to supports in decision-making?

a. Does Article 5 of the CRPD that requires States Parties to take measures to ensure reasonable accommodation is provided apply to parties to decision-making processes that are regulated in some way by the law?

b. If so, does the following statement articulate an adequate general principle of the duty of the third parties and the State in this regard:

   i. People with a disability have a right to supports – to assist in development, participation in community life, to enable access and to exercise legal capacity. The CRPD makes clear the obligation of the State to provide supports for people with disabilities, and these must be available to the person to enable them to enter transactions for the purpose of exercising their legal capacity.

   ii. Third parties have a duty to accommodate people with disabilities in transactions and decision-making processes to the point of undue hardship (to be defined). This means that third parties must:

      • accommodate whatever supports a person brings into the decision-making process; and
      • must provide additional supports, to the point of undue hardship, to enable the person to exercise legal capacity in a manner that maximizes their autonomy.

   iii. Individuals wishing to make decisions, their representatives, and third parties may require assistance in determining appropriate supports and accommodations, and in making needed arrangements to access them. Assessment of needed supports and accommodations should be decision-specific, and cannot be based on disability status. The focus of the assessment is to determine what supports the individual requires to make their own decisions – either independently or with the support of others.

   iv. Where additional supports are required in order to maximize the exercise and enjoyment of legal capacity beyond what the person brings to the decision-making process, and beyond what a third party can reasonably provide as an accommodation, governments have an obligation in
accordance with the CRPD to provide such measures. These should include:

- provide information and resources to people with disabilities and third parties outlining the types of supports that may be of benefit along with practical mechanisms for putting the supports into practice;
- provide funding for supports to people whose decision-making capability is in question and who are in need of supports; and,
- maintain a registry of planning documents (e.g. representation agreements) which name supporters.

Resolving Disputes about Decision-Making Status, Supports and Accommodations

The following kinds of disputes can be anticipated:

- A third party insists on some form of legal representation for a person with whom they are contracting or have an agreement, and whom they consider unable to fully exercise their legal capacity or meet their contractual responsibilities without additional supports (for example, where a landlord wishes to terminate an agreement with a person who has not paid their rent).
- A person with a disability seeks additional accommodations and supports to act legally independently.
- A person with a disability challenges the imposition of representational supports and wishes to act independently of them.
- A person claims that representatives are not acting in the person’s best interests or according to their wishes, or others report this on behalf of the person.

10. There are likely to be disputes about what status an individual can exercise their legal capacity through, especially about whether they can act legally independently. In making status determinations, a ‘functional assessment’ of decision-making capability (see Section Background Document for a proposed definition) may be needed to deal with situations where there is reasonable question as to whether a person has the capability to understand and appreciate, even with assistance, the nature and consequences of a decision; or if a person meets the minimum threshold for supported decision making. Would the following assessment
be adequate to make such determinations between those who would be recognized to act in a legally independent, supported, and facilitated status?

a. Does the person appear to have the decision-making abilities to understand information and appreciate the nature and reasonably for-seeable consequences related to a particular decision?

b. If not, would additional supports and/or accommodations enable the person to satisfy (a) above? Have the supports been put in place to assist this person to understand and appreciate the nature and consequences of his or her intention and to engage and communicate in this decision-making process?

c. If not, can at least one other person who has personal knowledge of the individual reasonably ascribe to his or her actions: personal will and/or intention; memory; coherence of the person’s identity through time; and communicative abilities to that effect?

d. Are other parties to this decision reasonably accommodating the person?

e. Has the State provided sufficient supports to maximize the person’s decision-making capability?

Key Elements for a System for Protecting Legal Capacity and Resolving Disputes

Bach and Kerzner propose eight key elements for a system to protect and promote the right to legal capacity and resolve disputes identified above.

In reviewing these elements for a system, we will address two main questions:

11. Are the proposed elements comprehensive? Are any key elements missing for a system that would protect the right to legal capacity and access to needed decision-making supports? Should these be revised in any way, in principle?

12. Do good examples of these system elements exist in any jurisdiction, are they being developed?

Proposed elements are:
Legislated Framework for Legal Capacity and Decision-making Supports

The CRPD recognizes a right to legal capacity, and the obligation of States Parties to ensure supports are available to exercise legal capacity. Indeed many other Articles in the CRPD reference State Parties obligations to provide for needed supports to realize recognized rights. A legislative framework outlining supports and services benefits would give full effect to these obligations.

Ideally, a legislative framework would mandate provision of supports needed for people to exercise legal capacity, and would provide for the institutional framework outlined in this section. A legislative mandate for these supports would also give effect to the interdependence we outline in the previous section between third party duties to accommodate in decision-making processes, and the role of governments to make reasonable efforts in providing supports beyond the point of undue hardship to these parties. In the Canadian context, such legislation would likely fall primarily within the powers of provincial and territorial governments.

Legislated Duties of Representatives and Facilitators

Essential duties include:
- Act diligently, honestly and in good faith;
- Act in accordance with all applicable legislation;
- Act in accordance with any relevant agreements or Administrative Tribunal orders;
- Keep information about the adult, and his/her affairs, confidential;
- Keep records in relation to all aspects of their role; and,
- Involve supportive family members and friends.

Representatives and facilitators who comply with the above duties would not be liable for any injury death, loss or damage that results from actions they have taken in their role as representatives or facilitators.

Monitors

Monitors should be appointed to protect the decision-making rights of the adult where a supported decision-making representative or facilitator is involved. Monitors must ensure that the representative or facilitator complies with all legal duties expected of them. If the monitor finds wrongdoing, attempts to resolve it with the representative/facilitator and the person should be made. If these efforts fail, resort should be had to the Administrative Tribunal for adjudication.
• **Community-Based Resource Centre**
A community based resource centre must be established in legislation, with an arms-length, independent status and a board of directors, a majority of whom are people with disabilities. It would provide information and assistance to individuals with disabilities, support representatives, facilitators and third parties in developing and accessing needed supports and accommodations for decision making processes. The centre would maintain a registration system of representation agreements, monitors and facilitators.

• **Legal Capacity and Support Office**
This Office would be required to investigate allegations of serious adverse effects as well as act as a facilitator or monitor of last resort. It would arrange for needed supports to address situations where serious adverse effects are occurring or may occur.

• **Administrative Tribunal with a Focus exclusively on decision-Making**
The role of the Administrative Tribunal would be to have exclusive jurisdiction over decision-making cases. The Tribunal could give direction on any question related to a person’s decision-making status, or role of other persons in relation to that status, including where questions or issues relate to:
  - Duty to accommodate;
  - State provision of supports;
  - Decision-making status;
  - The appointment of supporters and facilitators and the approval of people applying to act as supporters;
  - The appointment of monitors – where the Administrative Tribunal determines that supporters or facilitators are not meeting their legal obligations, it would have authority to appoint monitors.

• **Access to Legal Counsel**
People who wish to take cases to the Tribunal related to decision-making supports, accommodations or status should have access to state funding for legal counsel, should an individual be unable to pay.

• **Formal Advocate**
Independent advocacy should be established to:
  - Provide advice in relation to decision-making statuses that may be of relevance to the person;
  - Provide information to people in relation to legal processes and options where there is a capacity issue;
o Explain to an individual who is the subject of a capacity proceeding the nature and implications of the proceeding, including explaining the significance of any possible orders or consequences;
o Support individuals who are in the supported or facilitated status, including assisting the person to address neglect and abuse by the representative or facilitator.

**Strategic Steps to Implementation**

We recognize that we are not likely to see law reform that implements a comprehensive set of proposals all at once. In order to make use of incremental opportunities for law reform, can we make recommendations based on the proposed framework that are modular and progressive, i.e.:

13. Based on our discussion, can we identify key building blocks which can be implemented in a strategic, if incremental, way?
14. How do we account for socio-legal-economic differences across jurisdictions in implementing Article 12, and in monitoring such implementation?
Appendix B – Key Concepts

The questions presented in the preceding section draws on the following formulation of key concepts and proposals, which have been more fully developed in the Bach/Kerzner paper “A New Paradigm for Protecting Autonomy and the Right to Legal Capacity” (at: http://www.lco-cdo.org/disabilities/bach-kerzner.pdf).

**Legal Capacity**
This concept has been extensively discussed in the process of developing Article 12. It refers to the capacity to have rights and the capacity to act on those rights. It refers to the capacity to enter agreements with others that give effect to person decisions and to initiate and conduct legal proceedings. Legal capacity is to be distinguished from the criteria usually used to recognize legal capacity, criteria related to a person’s assessed mental characteristics. Legal capacity is a basic right; it cannot be removed on the basis of disability.

**Decision-making ability and capability**
Entering agreements, making contracts, giving informed consent, and initiating and conducting legal proceedings are what exercising legal capacity is all about. By necessity, such actions involve engaging with others in decision-making processes. Other parties in these processes have a legal duty to ensure that the person they are engaging with understands and appreciates the nature and consequences of the decision being taken and can communicate this understanding and appreciation. This standard is what gives agreements between parties integrity, and what protects the rights of both parties to the agreements they enter and the decision-making processes they engage in.

It is this standard that has often been used to restrict or remove the legal capacity of people with intellectual, psychosocial and cognitive disabilities to make decisions. Recognizing the right to legal capacity without discrimination on the basis of disability, does not remove this standard. What it does do is require rethinking how this standard can be met, and the kinds of decision-making capabilities required for doing so.

To rethink this standard it is important to recognize two main factors: 1) people have different kinds of abilities (for understanding, appreciating and communicating), and 2) the supports they require to use their abilities to exercise legal capacity vary. There is nothing inherently discriminatory in recognizing that people have different kinds of abilities to carry out a task like decision making,
and that they require different kinds of supports for doing so. The process of providing reasonable accommodation involves identifying what particular supports and services a person needs, given their particular abilities, in order to accomplish a certain task.

Amartya Sen’s framework of equality is helpful in this regard. He suggests that when it comes to securing substantive equality, the measure should be an equality of ‘capability’ – to carry out certain functions recognized as socially valued. He suggests that capabilities are generated by attaching needed goods and services to a particular person’s abilities to carry out certain functions – like securing adequate food, shelter, and income.

If we adapt this framework to the area of legal capacity and decision making, we could say that while people’s abilities may vary, people require an equality of decision-making capability in order to exercise their right to legal capacity on an equal basis with others. Securing an equality of decision-making capability means ensuring that each person gets the supports they need to maximize their particular abilities in expressing their will and intent, and in understanding and appreciating the nature and consequences of a particular decision. For some people the goods and services will be plain language, for others it might be a support person who agrees to represent the person in decision making.

**Different Ways to Exercise Legal Capacity**

While restriction of legal capacity on the basis of disability is a violation of Article 12, it is still important to acknowledge that different people, whether or not they have identified disabilities, will exercise their legal capacity in different ways. For the purposes of discussion, three different groups might be identified:

a) People who can reason, communicate and enter agreements largely by themselves and do not need or wish anyone else to be involved in decision making other than the party they are entering the agreement with. That is they can, largely on their own, understand and appreciate the nature and consequences of a decision and communicate that to others sufficient to enter agreements. People in this situation may need plain language supports or communication aids and devices and interpreter assistance, but with such accommodations they are able to make decisions by themselves for the purposes of entering contracts, giving informed consent, etc.

b) People who cannot manage on their own, even with supports, the tasks associated with entering an agreement with others –
understanding and appreciating the nature and consequences of a decision. While they cannot communicate in ways that most others understand, they can express their will and/or intentions in ways that at least one other person. This other person is in a relationship of trust and commitment to the individual, and agrees to represent them and communicate their wishes to others in decision-making processes. Some people may establish a prior planning document when they are in situation (a) above. Such a document identifies a legal representative (e.g. power of attorney), who agrees to act for them when they are in this situation (b) of not being able to communicate in ways that most others understand or being in a coma or other state when they are unable to direct decision making.

c) People in situations where no one else, at least currently, can understand how they communicate and what their wishes and intentions are, and they have no prior planning documents that indicate their wishes.

People in each of these types of situations have an equal right to legal capacity, although they will exercise it in different ways. The challenge for law and policy reform is to figure out how to make sure people in each of these situations get the supports and services they require to ensure an equality of decision-making capability.

**Decision-making status**

Given the discussion above, some proposed starting points for designing law and policy reform to advance an equal right to legal capacity are:

- people exercise their legal capacity in different ways, and there are people with disabilities in each of the three types of situations identified above;
- the same person exercises her legal capacity in different ways throughout their life, depending on the type of decision to be made, the quality of supports, and any condition which might hinder their individual capabilities in relation to their previous functioning, or to the norms that others usually operate by;
- it matters to at least some people how they exercise their legal capacity – i.e. whether they will exercise it independently or only through a support representative;
- people are owed an equality of decision-making capability in order to exercise legal capacity on an equal basis with others – which means they are owed the supports they require to in order to have the decision-making capability needed to exercise their right to legal capacity.
• third parties to decision-making processes must be confident that they are entering a contract or obtaining informed consent or being directed in legal proceedings with a person with a disability in a manner that ensures the integrity of the agreement between them.

If we accept these starting points we can anticipate that there will be situations where parties to a decision-making process disagree about how a person can best make decisions, or whether a person at a particular time can make a decision themselves at all. For this reason, it may be helpful to attach a legal ‘decision-making status’ to people in the three groups above – not only persons with disabilities, but any person. The three different statuses all assume a person has will and/or intentions to guide decision making. The difference between them is how a person is able to express their will and intention, and the extent to which, on their own or independently, they can understand and appreciate the nature and consequences of a decision or agreement:

a) Legally independent decision-making status – A person can understand and appreciate the nature and consequences of a decision and express their choice to others. No other person is required to represent an individual in decision making, though the person is free to seek, obtain, follow or reject any advice or expertise they may wish. They may require plain language or other accommodations in order to be able to understand, appreciate, decide or communicate. This is how the vast majority of decisions are taken, all over the world, on an every day basis, by people without disabilities, and people with disabilities.

b) Supported decision-making status – A person cannot understand and appreciate the nature and consequences of a decision and communicate that to other parties, sufficient for other parties to enter an agreement with the individual. Therefore, the individual requires another person who has personal knowledge about how the individual communicates, who can understand their will and/or intentions, and who agrees to help represent that person in decision-making processes.

c) Facilitated decision-making status – A person cannot communicate in a way that any other person understands their will and/or intention, and the person has no prior planning documents. Thus, people in this status are not able, currently, to provide informed consent. Facilitators have a duty and must be supported to gain insight into the person’s prior express will (the facilitated decision-maker could be a person named in an enduring power of attorney)
or (where there are no planning documents) implied will and/or intentions and as soon as they have any communication in this regard begin directing decision making accordingly. Their decisions will seek to augment a person’s capability rather than view the adult’s status as a permanent inability.

It is understood that people may move through these statuses, or ways of exercising their legal capacity, at different points in their lives depending on their particular circumstances. A status would not be formally applied to a person, unless there was some dispute about the status through which they could best exercise their legal capacity. In other words, the legal presumption would not be that a person has legal capacity – as all persons have legal capacity. Rather, the presumption in law might be that all persons can exercise their legal capacity ‘legally independently’ until, after reasonable accommodations and provision of decision-making supports, it was demonstrated that a person was unable to act without the assistance of a support person to help represent and communicate their will, intentions and decisions to others.

**Decision-making supports**

Article 12 establishes an obligation for States Parties to ensure people get the supports they require to exercise their legal capacity. The CRPD does not specify the types of supports that might be covered by Article 12. So, how do we identify them? It could be argued that the range of decision-making supports that should be covered are those that enable people to plan for decision making, participate in decision-making processes, and act on decisions. Thus, the range of decision-making supports could include those that assist a person to:

- formulate aims and purposes in any domain of their life (employment, health care, housing, etc.), to plan for the future, to explore the range of decisions that need to be made, and the options available;
- engage in the decision-making process itself, including communication and representation of the person to other parties, and to enter agreements and transactions with other parties; and
- act on the decisions that one has made, to administer agreements, and to any obligations under agreements made.

It is important to note that a broader set of supports potentially affect the exercise of a person’s legal capacity. For example, financial resources, housing and disability-related supports, community-based crisis intervention and support options, etc. all affect the exercise of legal capacity. The extent to which one has such resources expands or diminishes the range of one’s choices. State obligations to ensure these broader financial and community supports are
available and accessed by people with disabilities are covered under other Articles of the CRPD including: Article 9 ‘Accessibility;’ Article 19 ‘Living independently and being included in the community;’ Article 20 ‘Personal mobility;’ Article 24 ‘Education;’ Article 28 ‘Adequate standard of living and social protection;’ and others.

Given that obligations with respect to these broader supports are covered elsewhere, at least six types of specifically ‘decision-making supports’ to exercise legal capacity meet the criteria identified above:

- Life planning supports – to assist a person identify life goals and the kinds of decisions they wish to make about where to live, education, career, etc.
- Independent advocacy – to assist a person in negotiating with other parties to decision-making processes.
- Communicational and Interpretive supports – technologies, intervenors, plain language, etc. to assist a person communicate, understand and appreciate in the decision-making process.
- Representational supports – other persons who have personal knowledge of an individual, can understand their ways of communicating, and agree to help represent that person in decision-making processes.
- Relationship-building – to assist persons in developing relationships with others who will assist a person in planning for their lives, and who may agree to act as representational supports where this is needed.
- Administrative – assistance in conducting the business of decision-making transactions, for example, administering agreements, making financial transactions, etc.

**Legislative frameworks and systems**

The challenges and questions identified above, and the concepts proposed to begin addressing them suggest the need for a number of changes in legislation and creation of new systems and administrative mechanisms that would, for example:

- Recognize that people exercise their legal capacity in different ways;
- Establish in law duties to provide decision-making supports and accommodations;
- Create a fixed point of responsibility for people to get advice, input and assistance in maximizing their legal capacity;
• Provide community-based options for assisting people in arranging needed decision-making supports;
• Mediate and rule in disputes about what status a person should exercise their legal capacity through; whether or not adequate accommodations and decision-making supports are being provided by third parties or the state; whether support representatives and facilitators are fulfilling their duties; whether a decision-making processes can be considered credible and binding on the parties involved;
• Provide for inquiring into and intervening in situations of alleged abuse, neglect or serious adverse effects;
• Provide for diverting people from the criminal justice system, when the main issues is lack of supports to exercise their legal capacity;
• Authorize orders for the state and third parties to provide supports or engage in decision making processes with an individual.