



## Position Paper- Legal Capacity

The Convention on the Rights of Persons with Disabilities recognizes:

- ❑ that persons with disabilities have the right to recognition everywhere as persons before the law;
- ❑ that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
- ❑ that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

### **BACKGROUND:**

For people with intellectual disabilities self-determination and full citizenship are fundamental principles that underlie the potential enjoyment of human rights. It is the presumption of legal capacity that makes it possible to exercise self-determination and full-citizenship.

**Guardianship** laws assume that some people do not have the capacity to make legally binding decisions and put in place substitute decision making provisions.

**Supported Decision-Making** means a person may accept help in making decisions without relinquishing the right to make decisions. Supported Decision-Making helps a person to understand information and make decisions based on his or her own preferences. A person with an intellectual disability might need help with reading, or may need support in focusing attention to make a decision. A person who has no verbal communication might have a trusted person or people who interprets their non-verbal communications, such as positive or negative physical reactions, or uses Alternative and Augmentative Communication.

### **Position**

Inclusion international demands the right of every person with an intellectual disability to have their right to make decisions recognized and to receive the support they require in making those decisions.

The right to legal capacity includes the capacity to have rights and the capacity to act on those rights, i.e. the capacity to make legal agreements with others. The capacity to act is not only part of the legal capacity guaranteed in Article 12, it is the most defining part: the right to make decisions. The following provides some overarching principles and key elements to help guide the work of II members in their work to support the development of supported decision making models and in their work with their governments to advance the implementation of Article 12.

- Article 12 must be implemented as a part of the whole Convention. Other articles of the Convention impact on the right to exercise legal capacity
- All persons have a will which, with adequate support, can be discerned
- The right to support is required to exercise legal capacity
- Having support does not negate a person's full legal capacity
- Other parties have a duty to accommodate (doctors/lawyers/bankers/contractors etc)
- Appropriate measures means supports can take various forms both informal and formal and these must be tailored to the persons circumstances
- Presumption is that all people can exercise their legal capacity independently
- If the capacity to act independently is challenged in the context of legal relationships and contracts then the tests that would be applied on an equal basis with others should be disability neutral. Any test would question whether support and accommodations have been put in place and the responsibilities of other parties have been met.

In situations where supported decision making measures are not yet in place and a person's right to exercise their full legal capacity is not realized, states must take measures to develop and put in place supports to build capacities of communities to enable people to make decisions in their lives.

Where substitute decision making currently exists, reforming laws, policies and practices to be consistent with Article 12 and to implement supported decision making may take time.

Immediate steps should be taken for law reform and provisions to limit substitute decision making including:

- Safeguards shall ensure measures taken respect the rights, will and preferences of the persons
- Acknowledge that all people have legal capacity
- All steps demonstrated to provide support
- Least restrictive to persons
- Only made for specific matter and that decision/moment
- Free of conflict of interest
- Apply for the shortest time possible
- Distinguish between the kinds of decision (financial/personal) and decision making processes
- Provision for the abolition of incapacity and a procedure to provide support in the exercise of legal capacity