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ABSTRACT

In recent years, the enumeration of the right to legal capacity in the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) has caused considerable controversy. The adoption of General Comment No. 1 by the UN Committee on the Rights of Persons with Disabilities (‘CRPD Committee’) in April 2014 sheds new light on major debates in the field, particularly regarding implementation measures to fulfil the obligation of States Parties to provide people with disabilities with ‘support to exercise legal capacity’ on an equal basis with others. This interpretive guidance builds upon the CRPD framework for achieving equal recognition before the law for people with disabilities. Yet commentators have criticised both the CRPD Committee’s interpretation and the enumeration of Article 12 in the CRPD itself, as wanting in key respects. This article draws on the General Comment No. 1 to list and respond to major concerns raised about the obligation of States Parties to provide people with disabilities the support they may require in exercising their legal capacity. The list of concerns and counter-arguments are set against a broad range of implementation measures from domestic law and policy from around the world.


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1 INTRODUCTION

In this article I will examine major concerns raised about the enumeration of legal capacity in the United Nations Convention on the Rights of Persons with Disabilities (CRPD). I will set out a list of questions raised by scholars and other commentators regarding the obligation of States Parties to provide people with disabilities with the ‘support they may require in exercising their legal capacity,’ pinpointing controversies and highlighting ongoing practical and conceptual issues. These questions will be considered with specific regard to the General Comment No. 1 (‘General Comment’) of the United Nations Committee on the Rights of Persons with Disabilities (‘CRPD Committee’), which was adopted on 11 April 2014 and provides specific interpretative guidance on Article 12 of the CRPD.

Article 12 aims to ensure that all persons are recognised as equal before the law, regardless of disability, and their legal capacity is promoted and respected on an equal basis with others. Article 12 establishes that all people have legal capacity regardless of disability (and regardless of mental functioning) and includes the obligation on States Parties to the CRPD to ensure equality before the law for people with disabilities and to provide them with the ‘support they may require in exercising their legal capacity’ on an equal basis with others.

According to the General Comment of the CRPD Committee, ‘support to exercise legal capacity’ includes a broad spectrum of support, some of which may engage legal mechanisms, some of which may not. Such support might include, for example, personal advocacy, plain language aids, decision-making assistance, and in

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2 Article 12(3) CRPD.
3 CRPD Committee, General Comment No 1: Equal Recognition Before the Law (article 12), 11 April 2014. The CRPD Committee is authorised under Article 34 of the CRPD to review the compliance reports of States Parties. Article 34 CRPD.
4 Article 12(3) CRPD.
exceptional circumstances – when it is necessary to make a decision where a person’s wishes are unknown or unclear – using the ‘best interpretation of a person’s will and preference’ to guide decisions.5 ‘Supported decision-making regime’ is a term used in the General Comment to refer to the broad elements required to implement this system of support. Supported decision-making is contrasted with ‘substituted decision-making,’ a term defined by the CRPD Committee as having three common characteristics: the removal of legal capacity ‘even if this is just in respect of a single decision;’ authorisation for appointing a substituted decision-maker by someone other than the person concerned ‘against his or her will’; or the making of substituted decisions ‘based on what is believed to be in the objective “best interests” of the person concerned as opposed to being based on the person’s own will and preferences.’6

It is important to note at the outset that Article 12 of the CRPD does not introduce a ‘new model’ of legal capacity per se. Instead, while the scope and content of the right to legal capacity in Article 12 is not new, its application is unique — restated as it is for the context of disability.7 The obligation of States Parties under Article 12(3) to provide ‘support to exercise legal capacity’ to people with disabilities on an equal basis with others is seemingly novel in this respect. CRPD directives for realising ‘universal’ legal capacity in accordance to Article 12 are purported to produce a number of benefits. These benefits include: the promotion of personal autonomy, authority and control for people over their own lives;8 the use of a more realistic account of autonomy and decision-making which take into account a person’s social

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5 CRPD Committee, supra n 3 at para 25.
6 Ibid para 23.
7 Kayess and French pointed out that the aim of drafters was not to introduce new rights but instead to restate existing rights as applied to people with disability; they also note the somewhat paradoxical aim to address the failure of existing human rights formulations to ensure the rights of persons with disabilities. Kayess and French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) Human Rights Law Review 1, 20. Debate is likely to continue as to whether the CRPD has restated existing rights, or whether it introduces new substantive rights. See Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30 Human Rights Quarterly 494.
context and interdependence;\textsuperscript{9} providing a clear structure for addressing decision-making by people who may require support to make decisions, or whose will and preference is unclear;\textsuperscript{10} and even realising a ‘frontier of justice’ by extending core civil rights to people with disabilities.\textsuperscript{11}

Yet despite these apparent benefits, the terms of Article 12 and the CRPD Committee’s compliance directives have been seen by diverse commentators as wanting in key respects.\textsuperscript{12} The increasing number of conceptual studies on Article 12 of the CRPD have identified numerous concerns — so many as to make it difficult to locate key issues. As such, the list presented here is by no means exhaustive.\textsuperscript{13} Instead, the concerns were chosen for having been raised repeatedly in scholarship and law reform materials, or where issues appear to present significant risks or ambiguities.

The scope of analysis will extend beyond a human rights focus to include pragmatic arguments, including matters of resourcing, conceptual coherence and the weighing of evidence with respect to the successes and shortcomings of proposed implementation measures. The purpose of articulating these issues is to assist in weighing the costs and benefits of various interpretations of Article 12 and to tease


\textsuperscript{13} A fuller range of concerns raised about the CRPD formulation of Article 12 can be found among the 73 submissions to the CRPD Committee in response to its draft General Comment on Article 12. United Nations Office for the High Commission for Human Rights, ‘Submissions to the Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law and Draft General Comment on Article 9 of the Convention – Accessibility’, CRPD Committee Website, February 2014, available at: http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx [last accessed 28 July 2012].
out some of the major practical and conceptual concerns. The intention here is to raise a range of critical issues and to present possible counterarguments so as to better examine which issues the various implementation strategies may or may not address.

Finally, in assessing the costs and benefits of a particular interpretation and implementation measures for realising the right legal capacity on an equal basis, it is perhaps as easy to give the law too much credit for solving personal and social maladies, as it is too much blame for causing them. One possibility is that any benefits of using the law for social justice in this way are overwhelmed by other powerful forces in society, such as resource allocation or wealth disparity. Nevertheless, it is generally agreed that the law authoritatively creates the power structures, institutions and incentives of disability service ‘systems’, which directly shape the lives of people with disabilities, their families and others. Further, the issues listed in this article concern the intersection of law and practice and are relevant not just to persons with disabilities, but also families and other informal supporters, legal and medical professionals, and service providers — all of whom will be impacted by, and may influence developments in current law and policy. The core significance of these issues to persons with intellectual, cognitive and psychosocial (mental health) disabilities rests on their being among the last groups to hold and exercise decision-making rights on an equal basis with others.

2 The Right to Legal Capacity

Article 12 of the CRPD sets out the right to legal capacity on an equal basis as a
subordinate to the right to equal recognition before the law.\textsuperscript{16} The right to legal capacity on an equal basis with others was first advanced in 1979 in the Convention to Eliminate all forms of Discrimination Against Women.\textsuperscript{17} The right to equal recognition before the law can be found in the earlier Universal Declaration of Human Rights\textsuperscript{18} and the International Covenant on Civil and Political Rights (ICCPR).\textsuperscript{19}

Under the CRPD, Article 12(1) establishes that persons with disabilities have the right to be recognised everywhere as persons before the law — applying the existing right to equal recognition before the law to the specific context of persons with disabilities.\textsuperscript{20} The right to legal capacity on an equal basis in Article 12(2) CRPD draws on a formulation of legal capacity which has two constitutive elements: a person’s legal standing (legal personality) but also his or her ability to act on such legal standing (legal agency).\textsuperscript{21} Article 12 (3) sets out the obligations on States Parties to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’\textsuperscript{22} and is often regarded as the \textit{locus situs} of the obligation of States to provide ‘supported decision-making’ (a term which will be elaborated upon shortly).\textsuperscript{23} Article 12(4) sets out safeguards required for all measures related to the exercise of legal capacity.\textsuperscript{24} These include the principle of proportionality, freedom from conflict of interest and undue influence and respect for the rights, will and preference of the person. These safeguards should

\textsuperscript{16} Article 12 CRPD.
\textsuperscript{18} Article 6 Universal Declaration of Human Rights 1948, GA Res 217A (III), A/810 (1948).
\textsuperscript{19} ‘Article 16 of the ICCPR simply states: ‘Everyone shall have the right to recognition everywhere as a person before the law.’ Article 16(1) International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR).
\textsuperscript{22} Article 12(3) CRPD.
\textsuperscript{24} Article 12(4) CRPD.
ensure legal capacity support measures ‘apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.’ Finally, Article 12(5) contains explicit recognition of the importance of the right to legal capacity for persons with disabilities in respect of financial and property matters. Overall, Article 12 sets out a commitment by States Parties to uphold the legal standing of people with disabilities and to ensure they may act on such legal standing on an equal basis with others.

**A. Article 12 CRPD: Key Concepts**

Theoretical questions in current debates about Article 12 of the CRPD and legal capacity have been closely considered in the literature. These concerns include: the historical evolution of the concept of legal capacity in international human rights law; the challenges of cognitive disability to moral philosophy; the regulation of personhood in constructions of legal capacity; typologies of support in line with Article 12; and supported decision-making in the context of extreme self-harm and suicide, mental health law, and elder law. As noted, the recently published General Comment of the CRPD Committee on Article 12 provides an important resource for navigating the expanding literature (though little scholarly analysis of the General Comment has emerged at the time of writing). Before proceeding to list the major practical and theoretical questions about Article 12, it is useful to glean this literature to outline key elements of the CRPD’s enumeration of legal capacity.

Flynn and Arstein-Kerslake have argued that Article 12 of the CRPD ‘identifies that an individual has a right to legal capacity irrespective of whether or not they

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25 Ibid.
26 Article 12(5) CRPD.
27 McSherry, supra n 21.
29 Quinn, supra n 23 at 16.
have a disability, and simultaneously recognises that some people require assistance to exercise their legal capacity.\textsuperscript{34} States are therefore required to support individuals who require assistance and to safeguard against neglect, abuse and exploitation.\textsuperscript{35} Key elements of the CRPD Committee’s recommendations for implementing legal capacity on an equal basis in domestic law include replacing the ‘best interests’ standard for substituted decision-making with an adherence to the will and preference of the individual.\textsuperscript{36} Where it is not possible to discern a person’s will and preference, according to the General Comment, supporters are to make decisions based on the supporter’s ‘best interpretation of the will and preference’ of the individual, where necessary.\textsuperscript{37}

A number of key concepts within this model require brief elaboration. Defining core terms helps to avoid a situation where participants in conceptual debates misunderstand one another, and offer arguments that do not meet.\textsuperscript{38} The brevity of the following definitions can be justified on the grounds that the literature has progressed a great deal in clarifying conceptual questions about what constitutes support to exercise legal capacity.\textsuperscript{39}

‘Support to exercise legal capacity’ refers to the broad obligation set out in Article 12(3) of the CRPD to which States Parties must provide to persons with disabilities on an equal basis with others. ‘Support’ is not specified in Article 12(3) but ‘encompasses both informal and formal support arrangements, of varying types and intensity.’\textsuperscript{40} Hence, support to exercise legal capacity is considerably broad, and could include personal advocacy, accessible education, plain language aids, and so on. The CRPD Committee’s General Comment states that support to exercise legal capacity

\textsuperscript{34} The term ‘support model of legal capacity’ is used by Flynn and Arstein-Kerslake to describe the conditions for achieving universal legal capacity in practice. Flynn and Arstein-Kerslake, ‘Legislating personhood: realising the right to support in exercising legal capacity’ (2014) 10(1) International Journal of Law in Context 81 at 85.
\textsuperscript{35} Article 12(4) 16 CRPD.
\textsuperscript{36} CRPD Committee, supra n 3 at para 25.
\textsuperscript{37} Ibid para 21.
\textsuperscript{40} CRPD Committee, supra n 3 at para 15.
‘must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making.’ In contrast, the term ‘substitute decision-making’ is defined by the CRPD Committee as follows:

Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is just in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will or (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.

The contradistinction to substituted decision-making advanced in disability law, ‘supported decision-making’ is one type of support to exercise legal capacity. Supported decision-making refers to a decision made by a person, on his or her own behalf, with support from others in order to exercise legal capacity. There is some disagreement in the literature as to whether ‘supported decision-making’ should refer to statutory arrangements alone, such as those found in British Columbia’s Representation Agreement Act 1986, in which formal supporters are authorised as ‘associates’ with specific legal powers. Others draw on the term to refer to informal, support arrangements for decision-making to exercise legal capacity. These conceptual ambiguities will be discussed later in the article.

A further conceptual distinction is advanced by Michelle Browning, Christine Bigby and Jacinta Douglas who differentiate supported decision-making from ‘decision-making assistance.’ ‘Decision-making assistance,’ they argue, could refer to broader measures to assist people who require assistance to make decisions outside the context of directly exercising legal capacity – for example through

41 Ibid.
42 Ibid para 23.
44 Bach and Kerzner, supra n 10 at 84.
45 Representation Agreement Act B.C. 1996 (Canada) c 405.
47 Browning, Bigby and Douglas, supra n 30.
accommodations such as plain language information, decision-making aids or self-advocacy training. Such efforts may indirectly influence the exercise of legal capacity (for example, by giving people the confidence and skills to engage in legal transactions) but its scope is less targeted.

A definition of ‘supported decision-making regime’ is provided in the General Comment to outline the core elements of what is required to apply CRPD compliant support to exercise legal capacity in law, policy and practice. This includes providing ‘protection for all rights,’ including upholding autonomy (for example, the right to legal capacity, right to equal recognition before the law and the right to choose where to live) as well as rights related to freedom from abuse and ill-treatment (right to life, right to physical integrity, and so on). Such a regime could take various forms yet should incorporate key features, including being available to all, even those with complex communication and intensive support needs, and being ‘based on the will and preference of the person, not on what is perceived as being in his or her objective best interests.’ The regime should include readily available and accessible supports, including facilitating support for ‘people who are isolated and may not have access to naturally occurring supports in the community,’ as well as the right to refuse such supports. Based on this definition, a supported decision-making regime includes supported decision-making, decision-making assistance and broader support to exercise legal capacity, across a range of law, policy and practice.

The term ‘supported decision-making regime’ arguably causes confusion by giving the impression that the CRPD Committee interprets Article 12 to preclude some decisions being ‘made for’ a person. Instead, the CRPD Committee invites States Parties to rethink how decisions are ‘made for’ people in exceptional circumstances, such as where will and preference are unclear or unknown. As previously noted, the CRPD Committee interpret Article 12 to include the use of standards such as the ‘best interpretation of a persons wishes and preference,’ as well as other proposals for non-discriminatory ‘support’ to exercise legal capacity in exceptional circumstances. These points will be elaborated upon in the following

48 Ibid.

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48 Ibid.
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The above terms and concepts are useful for policymakers and practitioners wishing to implement support to exercise legal capacity on an equal basis. For the purposes of legal research, these distinctions help to clarify some of the conceptual ambiguities of Article 12. The analytical distinctions are not meant to be conclusive, nor will they provide an unfalsifiable judgment of being the ‘right’ or ‘true’ approach to all conceptual questions. But they can help avoid confusion, and can help to affirm when an analysis (particularly a human rights-based analysis) is good, or comparably better, for a particular purpose.54

3 Major Issues in Debates about Support to Exercise Legal Capacity

The purpose of this article is to elaborate on the limitations, conceptual tensions and ambiguities raised in the literature on the application of the right legal capacity and the CRPD, to which I will now turn. The intention is to outline the concerns as clearly as possible, including a number of possible counter arguments, in order to provide a more complete analysis of CRPD Committee directives for achieving universal legal capacity in practice.

A. ‘What About the Person in a Coma?’ Are there Exceptions in the Provision of Support to Exercise Legal Capacity?

The most common critique of the CRPD Committee directive to replace substituted decision-making with supported decision-making is captured in the following questions: ‘What about a person in a coma? How can Article 12 apply when a person is incapable of expressing any will or preference in the strict sense, or cannot

49 CRPD Committee, supra n 3 at para 29.
50 Ibid.
51 Ibid para 29(d).
52 Ibid.
53 Ibid para 21.
54 This approach to linguistic issues is adapted from a discussion by Brian Bix. Bix, supra n 38 at 29.
consistently express a sense of “yes” and “no”? Undoubtedly, there will always be situations where even a person’s closest supporters cannot evince a sense of his or her will and preference. This may also include someone who has been institutionalised for decades or who is socially isolated and has no connection to others from whom to gain support.

In part, proponents who reject the view that some form of substituted decision-making should be retained have argued against acknowledging decision-making ‘incapacity’ or ‘incompetency’, as it risks fixing such a status without any countervailing incentive to accommodate residual expressions of a person’s will and preference.\textsuperscript{55} This risk is particularly pointed to people with disabilities given a long history of their being considered to have limitations that are ‘natural’ and fateful, but which are in fact socially engineered, born from low-expectations or a lack of accommodations due to underdeveloped or unavailable assistive technology.\textsuperscript{56} In a recent iteration of this pattern, Lorina Naci and Adrian Owen have produced some evidence suggesting that it is possible to open up communication with a small but significant proportion of people in a so-called ‘persistent vegetative state.’\textsuperscript{57} Naci and Owen used functional magnetic resonance imaging data to establish a form of brain-communication with comatose persons. ‘(D)espite the apparent absence of external signs of consciousness,’ they have reported, ‘a significant small proportion of patients with disorders of consciousness can respond to commands by wilfully modulating their brain activity, even respond to yes or no questions, by performing mental imagery tasks.’\textsuperscript{58} Such studies add a pragmatic dimension to queries as to whether there is any justification for ‘locking in’ a categorical notion of incapacity.

Nevertheless, there will remain individuals for whom no relationships of trust exist and for whom not enough intention is expressed to guide decision-making. There are clear risks to stretching the meaning of the term ‘supported decision-making’ to cover situations where decisions are being made ‘for’ a person, rather

\textsuperscript{55} Dhanda, supra n 10.
\textsuperscript{57} Naci and Owen, ‘Making Every Word Count for Nonresponsive Patients’ (2013) JAMA Neurology 3686.
\textsuperscript{58} Ibid.
than ‘by’ a person. Quinn has argued:

...what’s worse: stretching a fiction (100% support) to the point that it is visibly at odds with reality – a factor that is only likely to be seized on by States acting out of abundant caution and enter declarations or reservations ring-fencing substitute decision-making – or, admitting the obvious and then using our talents to lock in the exception and transform how decisions are ‘made for’ people?69

More decisively, he concludes, ‘(w)e cannot trade-off the reality that decisions will be “made for” some people under the carpet in the hope of cementing into place the paradigm shift only for the majority.’60 Acknowledging that decisions will be “made for” some people, particularly in times of emergency, immediately raises difficult questions. Certain types of psychosis and extreme self-harm, for example, raise particularly challenging issues (as will be considered shortly).

The CRPD Committee’s General Comment offers some interpretative guidance on this point. The CRPD Committee indicate that Article 12 requires discarding the term ‘substituted decision-making,’ even as some of the practices currently seen to operate under the term may be retained. The CRPD Committee refers to the use of an interpretation by a third party based on the perceived wishes of the person as a way out of many of the difficulties described in the coma scenario and like situations. For the comatose patient, the use of the ‘best interpretation’ by friends or family, or even by public officials who seek to identify the wishes and preference of an individual based on his or her life story, values and beliefs, would conform with the concept of support advanced in Article 12 of the CRPD. In the terms of the CRPD Committee:

Where, after significant efforts have been made, it is not practicable to determine the will and preference of an individual, ‘best interpretation of will and preference’ must replace ‘best interests’ determinations. This respects the rights, will and preferences of the individual, according to Article 12 (4). The ‘best interests’ principle is not a safeguard which complies with article 12 in relation to adults. The ‘will and preference’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.61

States wishing to realise this interpretation will be confronted with the challenge of

69 Quinn, supra n 23 at 16.
60 Ibid 18.
61 CRPD Committee, supra n 3 at para 21.
situations in which the ‘best interpretation’ approach would not appear to quite fit. This could include a person who is non-verbal, requires intensive support and has no financial experience or apparent preference regarding her personal finances. On what basis should a supporter make investment choices with her money? The Victorian Law Reform Commission (VLRC) has suggested the guiding principle in these exceptional instances should be an overarching goal of ‘promoting the personal and social wellbeing’ of the supported person, with other principles applied in certain circumstances, such as the ‘prudent person principle,’ in administrating a person’s finances. It would seem difficult to apply support to exercise legal capacity in accordance with the CRPD when at first glance these approaches seem indistinguishable from the ‘best interests’ standard.

But while it might be impossible to stretch the fiction that the person is being supported to ‘make’ a decision in these exceptional scenarios, it is not inconceivable to suggest that the best interpretation of the person’s will and preference by the supporters could be the principle driver in a decision, even as other guiding principles such as those advanced by the VLRC are applied. For example, supporters wishing to make an investment decision for a person who is non-communicative aside from a small number of physical and verbal cues known only to them, could reasonably presume that the person wishes to be free from harm and vulnerability, and would therefore prefer secure and stable investments. While robust mechanisms for addressing financial exploitation would be required (as they are under ‘best interests’ frameworks), as well as arbitration procedures to resolve possible disputes about the ‘best’ interpretation of a person’s will and preference, this framework could conceivably extend to the exceptional cases, which are often advanced in debates about disability and legal capacity.

The CRPD Committee also included ‘rights’ as a third element of the ‘best interpretation of will and preference’ determination, stating that any such

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62 For example, when making financial decisions, the VLRC proposed that ‘financial decision makers should be required to apply the prudent person principle in managing a person’s finances to the extent this promotes their personal and social wellbeing.’ Victorian Law Reform Commission, Guardianship: Final Report 24 (Author 2012), xxix 398, s 17.139, available at: http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Full%20text.pdf [last accessed 7 May 2012].
determination must respect ‘the rights, will and preferences of the individual, according to Article 12 (4).’ Although the ‘rights’ element is not specifically emphasised nor elaborated upon by the CRPD Committee, it is likely to receive attention by States wishing to address ambiguities in ‘best interpretation’ determinations. In very recent law reform activity in Australia, for example, the Australian Law Reform Commission (ALRC) has recommended that ‘if it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person’s human rights and act in the way least restrictive of those rights.’ An important issue to resolve under such a scheme then becomes determining the point at which it is ‘not possible to determine what the person would likely want.’ Identifying such a point will pose challenges, including questions as to who decides, how they decide, and the extent of support that must be provided before such a decision is made. Another challenge will arise in instances where a person’s 'rights' are seen to conflict with a representative’s ‘best interpretation’ (or indeed the person’s own wish and preference, as discussed later in the article). States wishing to heed the General Comment will be required to set boundaries as to how far the best interpretation of wishes and preference might stretch, and in giving due consideration to ‘rights, will and preference’ in establishing such boundaries.

**B. Manipulation and Undue Influence by Supporters**

The scenarios discussed in the previous section raise another common critique in proposals for implementing Article 12 — support mechanisms such as supported decision-making open the possibility of manipulation and unchecked abuse against people with disabilities. Adrian Ward argues that Article 12 was the result of ‘inept drafting’ where the definition of capacity is confused and confusing, leading to the potential for unbridled manipulation of people by so-called supporters. He argued that a ‘lack of clarity on this issue means that any reference to supported decision-making should be viewed as a flashing amber light requiring vigilance to distinguish

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63 CRPD Committee, supra n 3 at para 21 (emphasis added).
between the adult’s own competent decision, made without undue influence, on the one hand, and on the other a decision more truly reflective of the views and values of the supporter, masquerading as the supported decision of the adult, but in fact straying into the area of de facto substituted decision-making.66 Certainly, evidence is required to measure the incidence of undue influence, coercion or abuse in supported decision-making arrangements, including identifying factors which may encourage or discourage subtle coercion and substituted decision-making.

As a starting point, it is important to note that all adults are subject to influence, pressure, manipulation and subtle coercion by those close to them. This (almost banal) point remains important so as to avoid lowering standards for State intrusion into the decision-making of people with disabilities compared to the general population. Avoiding such exceptions is important, according to Dhanda, in the light of the historical over-use by governments of protectionism and paternalism based on the alleged incapacity of persons with disabilities.67

From this view, an important question then becomes to what extent it is possible to ‘draw a bright line in law’ as a safeguard against ‘undue’ influence and manipulation in general.68 It is difficult to see how any such bright line exists for the majority of people making life decisions.69 The notion of supported decision-making (even prior to the CRPD) was designed in recognition that autonomy is a relational phenomenon.70 This view of autonomy as interdependent is contrasted with individualistic and rationalistic conceptions of the self which have dominated law and policy based on assessments of mental capacity.71 The notion of ‘relational autonomy’ casts some doubt on a claim for it to be possible to categorically distinguish between the ‘competent decision, made without undue influence, on the one hand,’ from ‘a decision more truly reflective of the views and values of the supporter.’ Resolving this line of enquiry requires a clearer definition of ‘undue influence.’

66 Ibid.
67 See generally, Dhanda, supra n 10.
68 Quinn, supra n 23 at 19.
69 Ibid.
70 Gordon, supra n 9 at 62.
71 Ibid.
Indeed, the draft General Comment of the CRPD Committee was criticised for being unclear on this point.\textsuperscript{72} In response, the final draft of the General Comment included elaboration on what is meant by ‘undue influence.’ The CRPD Committee notes that undue influence is characterised ‘where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation.’\textsuperscript{73} Clarifying these definitions at the domestic level, as well as designing measures to assess the ‘quality of the interaction’ between supporter and supported if need be, will help develop adequate safeguards, including placing duties on supporters to refrain from undue influence. Thresholds for undue influence in contract and probate law – which are broader than mental capacity determinations – may also provide guidance on this point, including tests as to whether a relationship is characterised by trust and confidence, power imbalance, and so on. Further research is required to identify how these kinds of abuses can be identified and addressed, including identifying the limits of the law in entering interpersonal spheres of decision-making.

Another concern raised by Nina Kohn, Jeremy Blumenthal and Amy Campbell, is that manipulation may arise not just in the form of deliberate coercion or unconscious influence from supporters, but also in terms of the undue influence arising from ‘deliberate deference by the principal decision-maker.’\textsuperscript{74} This may include elderly people who prefer a decision-making proxy rather than making such decisions themselves as some research indicates is the case.\textsuperscript{75} Such deference can subvert the goals of supported decision-making, though again, there is little evidence to support how or when this happens.\textsuperscript{76}

Yet although deference to others is a serious issue requiring concerted efforts to encourage maximal autonomy, this is an issue – again – that all adult people must grapple with at an interpersonal level. All people are likely to defer some decisions

\textsuperscript{72} See, for example, Series, ‘Re: Comments on Draft General Comment on Article 12 - the right to equal recognition before the law’, Submission to the UN CRPD, 21 February 2014, 3, available at: http://www.ohchr.org/Documents/HRBodies/CRPD/GC/LucySeriesArt12.doc [last accessed 6 August 2012].

\textsuperscript{73} CRPD Committee, supra n 3 at para 22.

\textsuperscript{74} Kohn, Blumenthal and Campbell, supra n 43 at 1123.

\textsuperscript{75} Ibid n 108.

\textsuperscript{76} Ibid 1123.
about themselves to those they trust. This may be magnified if expert advice is given. Indeed, there is some evidence in neuroscience showing that expert advice may, for those receiving it, shut down areas of the brain seemingly responsible for decision-making processes, particularly when individuals are trying to evaluate a situation involving risk. Nonetheless, manipulation by ‘supporters’ remains a concern, particularly given the long history of people with disabilities having their abilities de-valued and suffering abuse in the private sphere. Further, some people with disabilities – such as those whose disabilities mean they cannot communicate meaningfully with more than one or two people – would seemingly be vulnerable to abuse in substantially different ways, as will be discussed in the next section.

Finally, it is important to acknowledge the on-going difficulty of safeguarding against abuse under current substituted decision-making models. The prevention of abuse and the application of adequate safeguards that balance freedom and protection remains an issue of significant (and possibly equal) difficulty under current substituted decision-making laws.78

C. The Need for Boundaries Between Different Support Arrangements

Establishing comprehensive support to exercise legal capacity in law and policy would seemingly still require ‘dividing lines’ between different categories of support and safeguarding. This includes separating those categories in which a legislative mechanism is required where a decision must be ‘made for’ someone, rather than by that person, including where a person’s wishes and preference are unclear or unknown, or are only discernible to a small number of people.

Various categories of support for exercising legal capacity in these situations

have been advanced.\(^79\) For example, Michael Bach and Lara Kerzner have suggested three categories for legal models of support in line with Article 12 of the CRPD: autonomous (or ‘legally independent’) decision-making, supported decision-making and facilitated decision-making.\(^80\) Each category in the model would be accompanied by a corresponding level of legal oversight. This would span from non-intervention with decision-making assistance, the provision of support mechanisms designed to help the person develop ‘decision-making capabilities,’ and facilitation whereby a supporter is appointed to make decisions ‘for’ another person using (in general) the ‘best interpretation of his or her will and preference.’\(^81\) Ireland’s Assisted Decision-Making (Capacity) Bill 2013 is set to introduce similar categories of support.\(^82\)

The challenge arises in setting out criteria for the application of these types of categories in ways that do not discriminate against persons with disabilities — including practices that do not discriminate in effect.\(^83\) As Genevra Richardson has observed, supported decision-making seemingly requires the creation of new boundaries which ‘determine when support is to be offered and/or imposed and to provide for cases where decision-making powers are severely impaired and, despite all support, a decision with drastic consequences is maintained.’\(^84\) Richardson notes that creating such boundaries would conceivably require some form of functional mental capacity testing and would therefore run counter to the spirit of the CRPD,\(^85\) and more recently to the explicit interpretation of the CRPD Committee.\(^86\) Indeed, Bach and Kerzner deemed it necessary to include functional assessments of ‘decision-

\(^80\) Bach and Kerzner, supra n 10.
\(^81\) Bach and Kerzner use the term ‘decision-making capability’ in a very specific way, to refer no to individual abilities or capacities but instead to ‘“capabilities to function” where function refers to the getting of things done or making things happen that are important to individuals or communities.’ Further, capabilities for decision-making are ‘a combination of... individual decision-making “abilities” and of decision-making “supports” and accommodations.’ They use these terms ‘as a way to conceptually integrate recognition of the functional diversity of individuals with an understanding of the array of supports and accommodations a person might need to enjoy and exercise his or her legal capacity.’ Ibid 20-22.
\(^82\) These supports categories are: decision-making assistance, co-decision-making, and representative decision-making. An Bille um Chinteoireacht Chuidithe (Cumas), 2013, Assisted Decision-making (Capacity) Bill (no. 83) 2013 (Ireland).
\(^83\) CRPD Committee, supra n 3 at para 25; Articles 2, 5 CRPD.
\(^84\) Richardson, supra n 31 at 103.
\(^85\) Ibid.
\(^86\) CRPD Committee, supra n 3.
making ability' with regards to the boundaries between their proposed categories of support,\(^{87}\) as did the drafters of Ireland’s Assisted Decision-Making (Capacity) Bill 2013.\(^{88}\)

The Canadian Association of Community Living (CACL) echo Bach and Kerzner and argue that functional assessments of mental capacity can help to identify those who exercise their legal capacity in ‘substantially different’ ways.\(^{89}\) In particular CACL refer to people with more profound disabilities who require supporters to interpret their unique forms of communication, assist them to develop their will and preference, and translate those wishes into ‘particular actions and decisions which enable the person to exercise legal capacity.’\(^{90}\) For CACL, functional assessments of mental capacity help determine those who require such arrangements, and can therefore be made non-discriminatory:

To recognize that people have different decisional [sic] abilities is not in itself discriminatory; just as it is not discriminatory to recognize that people have different mobility abilities. The issue is how those different abilities are recognized and supported, and how to ensure equal access and outcomes are not dependent on those differences.\(^{91}\)

CACL criticised the CRPD Committee’s rejection of assessments of decision-making ability, warning that a ‘principle of proportional support is not the answer to these challenges, except at the highest and most abstract level of principle.’\(^{92}\) Similar arguments have been advanced elsewhere,\(^{93}\) and lawmakers are struggling to find

\(^{87}\) Bach and Kerzner, supra n 10.

\(^{88}\) An Bille um Chinnteoireacht Chuidithe (Cumas), 2013, Assisted Decision-making (Capacity) Bill (no. 83) 2013 (Ireland) Section 3.


\(^{90}\) Ibid.

\(^{91}\) Ibid.

\(^{92}\) Canadian Association of Community Living, supra n 89.

alternative, non-discriminatory mechanisms of support, with accompanying safeguards.

The final draft of the General Comment did not heed CACL’s suggestion to endorse ability tests in defined circumstances. Indeed the CRPD Committee expanded on its view that mental capacity tests were prohibited by the CRPD, by stating explicitly that ‘the provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required.’ The CRPD Committee also abstained from specifying categories of support, which were conceivably viewed as being too complex and specific and hence the domain of States Parties. However, the CRPD Committee did add to the final draft the ‘best interpretation of will and preference’ standard, which CACL recommended as a tool for navigating between the more challenging categories of support to exercise legal capacity.

Those wishing to pursue the CRPD Committee’s call to discard decision-making ability tests will need to investigate alternative indicators for triggering support — or for indicating the limits of such support. Only a very small number of commentators have explored this possibility beyond the abstract. For example, a coalition of Australian non-government organisations has advanced a national framework to discard ‘ability tests’. The coalition describes such functional assessments of mental capacity as providing an ‘overarching exception to the right to equal capacity before the law, [which] embed[s] discrimination against people with disability.’ Instead, a determination as to whether the will, preference or decision of a person is recognised by the law should focus on ‘the integrity of the support process’ used to

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94 CRPD Committee, supra n 3, at para 29(i)
95 Canadian Association of Community Living, supra n 89.
97 Ibid.
98 Ibid para 5.
express that decision. This in turn requires the testing of supports based on the ‘functional ability [of those supports] to meet the requirements of a person to make and/or communicate a decision to a third party.’ In practice this would mean that:

(a)ny test of a person’s ability to exercise their legal agency is actually a test of whether the supports provided to the person are adequate and appropriate to the task in hand. If not they should be altered until will and preference can be expressed, or it becomes apparent that this is not possible.

Researchers at the Centre for Disability Policy and Law have advanced similar proposals, including proposed legislative amendments to implement this change. Such proposals are in the early stages of conceptual development and their implementation in legislation would constitute a profound shift to centuries of capacity jurisprudence. At a minimum, amendments would be required across a wide range of laws that use mental capacity assessments and States would need to provide universal support. Perhaps unsurprisingly then, no State has expressed a willingness to remove entirely functional assessments of mental capacity in the light of the CRPD. Yet conceptual alternatives have developed considerably in recent years and the search for ‘dividing lines’ between categories of support in line with Article 12, while challenging, appears to promote a more explicit consideration of the moral dilemmas at stake in fraught decision-making scenarios, and in a way the binary division of mental capacity/incapacity cannot.

D. Risk where the Person is Unaware of Harm Caused

Despite supported decision-making and broader support to exercise legal capacity under Article 12 challenging the high priority given to risk-aversion, there remains a distinct challenge where individuals are not aware of the consequences of certain decisions that carry grave danger. This point is illustrated in Elizabeth Farr’s account of her own experience of psychosis. After many years of visual and aural

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99 Ibid para 7.
100 Ibid.
101 Ibid para 11.
102 Centre for Disability Law and Policy, ‘Amending the Assisted Decision-Making (Capacity) Bill – Realising the Paradigm Shift From Mental to Legal Capacity,’ Memo to Committee of Justice, Government of Ireland, 28 October 2014.
103 Richardson, supra n 31 at 95, 103.
hallucinations, Farr felt that she had to perform a dangerous act:

I thought I was approaching some kind of horrible Enlightenment about which I felt quite ambivalent... The voices told me that in order to reach this Enlightened [sic] state I would have, at the appropriate moment, to jump from the seventh floor of a building and land on my head in a certain way. This would put me in a cosmic junction whereupon... I would be able to enlighten all mankind to all the full scope of reality that lay beyond.\(^{105}\)

Farr’s account brings into sharp relief a troubling moral dilemma to which Article 12 of the CRPD offers no easy answers. Bach and Kerzner’s legislative proposal for a framework for law and policy in line with Article 12 leaves some ambiguity on this point, where ‘facilitated decision-making’ is seemingly permitted under their proposal when a person was not able to express intention in ‘ways that would direct reasonable consequential action’—hence retaining a ‘reasonableness’ criteria from the functional assessment of mental capacity.\(^{106}\) They also use a concept of ‘serious adverse effects’ as a trigger for emergency safeguarding schemes aimed at maximizing autonomy yet simultaneously limiting legal agency in order to address issues of self-harm and the ‘unacceptably high rates of abuse and neglect of older adults and people with disabilities.’\(^{107}\)

David Webb has (tentatively) suggested that States insisting on the need for emergency powers to intervene when someone poses a grave risk of suicide may consider generic suicide prevention legislation.\(^{108}\) ‘Generic’ is used here in the sense of remaining non-discriminatory on the grounds of disability. In contrast, typical civil

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\(^{105}\) Ibid 4.

\(^{106}\) Bach and Kerzner, supra n 10 at 144.

\(^{107}\) Canadian Association of Community Living, supra n 89 at Pt 2, s VI

commitment laws require a diagnosis of mental disorder in certain circumstances, before coercive intervention can lawfully occur.\(^{109}\)

Richardson and others have pointed to another type of exceptional scenario, in which a person’s will and preference are conflicting following efforts to clarify and reconcile his or her wishes.\(^ {110}\) Anorexia provides a commonly used example of such a bind, where persons with anorexia commonly express a preference not to eat, but a will to live.\(^ {111}\) Again, a ‘best interpretation of will and preference’ could be used to guide a decision but adjudicating its application would be fraught indeed (as it is under current substituted decision-making and ‘best interests’ approaches). The issue of conflicting will and preference has been described rightly as perhaps ‘one of the most difficult situations in which to apply Article 12.’\(^ {112}\)

It is clearly outside the scope of this paper to consider the specific concern of conflicted will and preference in detail, or to discuss relative merits and drawbacks of generic suicide prevention legislation. The more important point here is the apparent need to explicitly define the emergency instances in which legal agency can be over-ridden and in which coercion can occur in ways that do not discriminate on the basis of disability (if this is indeed possible in substantive terms).\(^ {113}\) ‘Public order’ (‘ordre public’) may be invoked under the terms of the ICCPR to impose restrictions on the exercise of certain human rights,\(^ {114}\) including freedom of movement, which may help set the boundary between the individual right to legal

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\(^{110}\) Richardson, supra n 31.

\(^{111}\) See for example, Re E (Medical treatment: Anorexia) (Rev 1) [2012] EWCOP 1639 (15 June 2012) (UK).


\(^{113}\) Supra n 109.

capacity and countervailing collective interests. However, the General Comment directs that the right to legal capacity (on an equal basis) is non-derogable, even in emergencies.\textsuperscript{115} It will be useful to seek guidance in international human rights law on this point. Indeed, discovering more suitable alternatives that comply with human rights standards yet provide suitable means for emergency intervention remains an on-going endeavour for governments and others wishing to advance the provision of support to exercise legal capacity on an equal basis with others.

\textit{E. The Limits of Legislative Mechanisms in Garnering Resources}

Carney has argued that the success of supported decision-making can be measured by its ability to draw in resources,\textsuperscript{116} which would apply equally to measuring the success of broader efforts to provide support for exercising legal capacity. He emphasises the limited role of legal mechanisms for addressing issues in service provision or civil society, and argues that legislative mechanisms for supported decision-making can ‘only be judged by how well [they] mobilise... public or private resources (such as informal supports of civil society) in accordance with peoples’ individual set of values and preference (in this and other respects); but the point here is that agency is realised only to the extent that resources exist in the external environment.’\textsuperscript{117} The South Australian Office of the Public Advocate reported at the conclusion of its supported decision-making trial that Carney’s warning ‘turned out to be very much the case in our trial, particularly when people made accommodation or support decisions... that then had to be resourced.’\textsuperscript{118}

Importantly, this argument is not directly concerned with cost-effectiveness, but rather concerns the acknowledgment that implementing supported decision-making and broader support to exercise legal capacity is dependent on material conditions. Flynn and Arstein-Kerslake argue that from a human rights perspective equality before the law is a civil and political right, for which there is arguably no limit

\begin{footnotesize}
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\item CRPD Committee, supra n 3 at para 5.
\item Ibid 17.
\item South Australian Office of the Public Advocate, supra n 116.
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to the level of support that must be provided to achieve this. Further, as a brief note, it would be crucial that in any cost-effectiveness analysis – which this article will not engage directly – the comparative costs of the existing systems of substituted decision-making would need to be considered.

In fiscal terms, attracting sufficient resources for people requiring support to exercise legal capacity will continue to challenge. A number of governments around the world are transitioning to funding schemes for disability services that are self-directed by those receiving support. These schemes clearly dovetail with the emphasis on ‘choice’ in the application of Article 12 and may address certain deficits that currently limit the reasonable expectations of people with disabilities in making decisions about their lives. But the evidence varies on self-directed funding schemes and inevitably the issue of the most effective use of government spending to best realise support ‘ramps’ for exercising legal capacity will need to be carefully considered by reformers or others interested in implementation.

Interestingly, the PO Skåne model, a Swedish personal advocacy service for people with psychosocial disabilities – which was described by the European Commissioner for Human Rights as ‘decision-making support in line with Article 12’ – has a specific function for demanding resources. A report by the Swedish National Board of Health and Welfare indicates that a key role of the personal advocate is as a ‘care demander.’ The advocate (or ‘PO’), ‘make[s] demands on the public authorities that are responsible for people with serious psychiatric disabilities, to ensure that they are receiving the help and service to which they are entitled.’

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119 Flynn and Arstein-Kerslake, supra n 34 at 85.
121 See, for example, Glasby and Littlechild, Direct Payments and Personal Budgets: Putting Personalisation Into Practice, 2nd edn (2009).
Policymakers facing fiscal restraint may be deterred by such a function. Yet the same report claims the scheme produces savings up to 17 times the cost of the service itself.\textsuperscript{125} The saving is explained in the report by a reduction in the number of mental health crises, and by the POs facilitative role in co-ordinating between services and highlighting weaknesses in service provision.\textsuperscript{126}

‘Informal resources,’ or ‘natural supports,’ will be just as important in measuring the application of a supported decision-making regime in practice. It is worth reiterating that concepts such as supported decision-making were developed from relationships between people with disabilities and their (mostly) informal support networks.\textsuperscript{127} Such ideas were progressed within peer groups, families and advocacy groups, often alongside the development of theory, and applied only later to law and policy.\textsuperscript{128} This trajectory of advocacy would seem important to retain so as to guard against the appropriation of support practices solely into the specialised realm of service-provision, or law, or any other area of expertise. On the other hand, it will be important to ensure informal efforts by people with disabilities, their families and other supporters, do not replace government resourcing. (The potential risks for informal supporters in this equation has an important gendered dimension, where informal support is typically provided by mothers, and women more generally).\textsuperscript{129} An innovative effort to strike this balance in policy terms, can be found in a supported decision-making trial in Victoria, Australia, by the Office of the Public Advocate.\textsuperscript{130} The trial aims to mobilise citizen volunteers, using a paid facilitator, to develop freely-given relationships around socially isolated persons who may benefit

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\textsuperscript{125} Ibid 23-24.
\textsuperscript{126} Ibid.
\textsuperscript{127} See Gordon, supra n 9 at 64. Gordon argues that theory underpinning the concept of supported decision-making includes that of Wolf Wolfensberger. See Wolfensberger, A brief introduction to Social Role Valorization: A high-order concept for addressing the plight of societally devalued people, and for structuring human services, 3rd edn (1998).
\textsuperscript{128} Ibid.
\textsuperscript{129} Traustadottir, ‘Mothers Who Care Gender, Disability, and Family Life’ (1991) 12(2) Journal of family issues 211.
\end{flushright}
from decision-making support.131

**F. ‘Responsibilisation’ – Governments Placing Risks on Citizens**

One risk arising from added emphasis on informal supports noted in the previous section is that governments may abrogate their duty to provide support to citizens by conferring various risks onto individuals.132 In a more general critique, Michel Foucault argues that the government may discard its duties under the guise of increasing the rights and responsibilities of citizens.133 This ‘responsibilisation,’ as Foucault terms it, occurs where citizens view social risks, such as illness, unemployment and poverty as existing in the domain of individual responsibility and ‘self-care’ rather than being addressed by the State’s duty to provide services.134

A key function of mental capacity-based laws in this respect, such as guardianship legislation and unfitness to plead provisions in criminal law, has been the recognition at law that people cannot be held responsible for decisions for which they lack mental capacity.135 Carter and Chesterman have argued that ‘(o)ne of the most positive features of (the) guardianship system, is the acceptance of responsibility by the guardian and/or the administrator for the decisions s/he makes at a time in history when many professionals are increasingly reluctant to accept such responsibility.’136 From this view, the implementation of supported decision-making has the potential to draw credibility from the ideas and language of individual human rights, autonomy and self-determination, though it may result in the

131 Ibid.
133 Ibid. Foucault coined the term ‘governmentality’ to describe the mentality, taken on by citizens, which is most accommodating to systems of power, particularly within the logic of the prevailing economic ideology. Hence, with ‘neoliberal governmentality’ the ends of reducing the scope of government – particularly the provision of welfare – can be realised by means of techniques that lead and control individuals without the State taking responsibility for them. Foucault, ‘Security, Territory, and Population’ in P Rabinow (ed), Ethics: Subjectivity and Truth (The New Press 1997) 67.
134 Lemke, “‘The Birth of Bio-Politics” – Michel Foucault’s Lecture at the Collège de France on Neo-Liberal Governmentality’ (2001) 30(2) Economy and Society 190, 201.
135 Carter and Chesterman, supra n 132 at 19.
136 Ibid.
unreasonable transfer of risk and uncertainty by the State to persons with disabilities.

One counter-argument is that the CRPD framework for realising legal capacity on an equal basis explicitly aims to counter-balance the possibility of ‘responsibilisation’ by re-directing State duties and resources in strategic ways. An example would be the provision of support and ‘reasonable accommodation.’ Another would be efforts in law and policy to prevent abuse, exploitation and neglect by decoupling substituted decision-making from protection against abuse, exploitation and neglect.

A second counter-argument is that from a broader, structural perspective, the CRPD promotes a theory of change which rests on boosting the advocacy capacity of representative organisations of people with disabilities. The increasing power of these groups, in combination with independent monitoring processes, could conceivably serve as a countervailing power against ‘responsibilisation’ by pressuring governments to adhere to human rights directives, including the provision of goods to enjoy the human rights set out in the CRPD. Finally, bolstering disability representative organisations will be important given such organisations would be well-placed to negotiate the extent of acceptable risk of ‘responsibilisation’ taking place. The re-orientation of State responsibilities in this way may be sound in theory but will require careful evaluation and monitoring to ensure its realisation in practice.

**G. ‘Net Widening’**

Most commentators on supported decision-making see its potential for introducing a spectrum to what has heretofore been a crude binary division between those considered capable and those considered incapable of decision-making. A more nuanced spectrum of legislative intervention would help people avoid this binary system. However, Carney has raised the concern that such a spectrum may not help keep people out of adult capacity law arrangements, but will potentially ‘widen the net’ and capture more people into prescriptive decision-making structures:

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137 Articles 2, 5 CRPD.
138 Article 16 CRPD.
139 Article 33(3) CRPD.
One possible unintended consequence of any additional legal avenue is that of ‘net widening’ – where supported decision-making orders extend to an additional population rather than apply to those otherwise liable to a guardianship order; a phenomenon that may variously be both a risk (via unnecessary incursions on autonomy and privacy) or a benefit (in facilitating the provision of necessary support and the recognition of such support by third parties).140

‘Net widening’ may be especially likely to emerge from efforts to make capacity tests facially non-discriminatory.141 Lucy Series reiterated this point with reference to United Kingdom case authority, which ‘held that unless mental capacity assessors can show that a person failed the “functional test” because of a “disturbance in the functioning of the mind or brain” (as set out in the Mental Capacity Act 2005 [England and Wales]) then they should be treated as having legal capacity.’142 In other words, without a causative correlation between the decision and this ‘diagnostic criterion’ the person cannot be found to lack mental capacity. The removal of the criterion, paradoxically, would result in its application to more people generally (and more people with disabilities, who are more likely to have their mental capacity called into question).

Similarly, though in a different context, mental capacity law reform efforts in Northern Ireland have included expanded criteria for assessing mental capacity in an effort to remain non-discriminatory against persons with disability.143 The Draft Mental Capacity Bill 2014 is designed to ‘fuse’ mental health law and mental capacity law so as to avoid relying on a diagnosis of mental illness as a criterion for detention and involuntary treatment under current mental health legislation.144 The the Draft Mental Capacity Bill 2014 would see an additional criterion in assessments of mental capacity which go further than the typical functional assessment of mental capacity (the so-called ‘understand-and-appreciate’ test). The accompanying policy material states, ‘(i)It will not be sufficient for a person to have a cognitive understanding of the information relevant to the decision.’145 Instead, a ‘person whose insight is distorted by their illness or a person suffering from delusional thinking as a result of their illness, may not... meet this element of the test.’146 Such a measure explicitly widens the interpretative flexibility of mental capacity assessors and may indeed result in

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140 Carney and Beaupert, supra n 12 at 195.
The CRPD Committee did not explicitly respond to concerns raised about ‘net-widening’ in its General Comment. This is perhaps unsurprising given its mandate to monitor human rights violations against persons with disabilities specifically (and not all vulnerable individuals who may be affected by ‘net-widening’). Further, the General Comment repeatedly emphasises the need for non-discriminatory measures of support in both form and effect and rejects ‘mental capacity’ as an entirely discriminatory concept, citing it as a barrier to equal recognition before the law.

Hence, the concern raised about net-widening rests not on a criticism of the model itself but rather on its implementation. Given the inchoate nature of the application of support to exercise legal capacity in practice, the issue of ‘net-widening’ demands careful attention by reformers wishing to apply the directives of Article 12. It is not clear how pilot programmes or empirical evidence could solve this particular problem in a way that law reform, which closely considers this potential pitfall, could not.

**H. Gaps in Evidence on the ‘Success’ of Support to Exercise Legal Capacity**

This last point brings up a final issue of note. A major gap in the literature on implementing a supported decision-making regime is the lack of empirical research. Kohn, Blumenthal and Campbell describe this gap regarding supported decision-making (again, which is only one aspect of support to exercise legal capacity):

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141 Ibid.
142 Series, supra n 72 at 3. For relevant case law, see *PC and Anor v City of York Council* [2013] EWCA Civ 478.
143 *Draft Mental Capacity Bill* (Northern Ireland) s3(1)(c).
145 Ibid s 2.22.
146 Ibid.
147 It is important to note that the use of ‘insight’ as a criteria for mental capacity is likely to be implicit in other mental capacity schemes, as Emmett and colleagues found was the case under the *Mental Capacity Act 2005* (England and Wales). See, for example, Emmett et al., ‘Homeward bound or bound for a home? Assessing the capacity of dementia patients to make decisions about hospital discharge: Comparing practice with legal standards’ (2013) 36(1) *International Journal of Law and Psychiatry* 73.
Supported decision-making holds promise both as an alternative to guardianship and as an element of the guardian-ward relationship. If it empowers persons with cognitive and intellectual disabilities to make decisions for themselves, as advocates of supported decision-making claim, it has the potential to advance the interests and human rights of persons with disabilities. However, without more evidence as to how supported decision-making functions in practice, it is too early to rule out the possibility that it may have the opposite effect.\(^\text{148}\)

Indeed, there have been extensive discussions of the benefits and possible drawbacks of supported decision-making, most of which ‘provide little or no empirical support for their claims.’\(^\text{149}\) Carney and Beaupré have stated that ‘current proposals are confused and may well invite potential for use and even abuse to the detriment of the disabled person.’\(^\text{150}\) Similarly, Mason argues that ‘proposals for supported decision-making (in legislation) must be based on empirical evidence-based research and pilot programmes which are presently lacking.’\(^\text{151}\) More decisively, Mason concludes that, ‘(a)s things currently stand, the proposals seem to reflect little more than ideals that have not been carefully thought through, with the risk that they will result in experimental law-making.’\(^\text{152}\) Certainly, the gap in the empirical and social science literature on how to effectively realise a supported decision-making regime does little to assuage the concerns of policy makers, academics, families and others, about the concept.

However, the paucity of empirical literature is not unique to supported decision-making.\(^\text{153}\) As Kohn, Blumenthal and Campbell acknowledge, ‘there is also surprisingly little evaluative empirical literature on guardianship.’\(^\text{154}\) Donnelly has raised similar concerns about the ‘best interests’ approach, observing of the literature that, ‘the conceptual basis for the [“best interests”] standard has remained,

\(^{148}\) Kohn, Blumenthal and Campbell, supra n 43 at 1157.
\(^{151}\) Ibid.
\(^{152}\) Ibid.
\(^{153}\) Kohn, Blumenthal and Campbell, supra n 43.
\(^{154}\) Ibid 1111.
for the most part, unexplored,’ despite its widespread use.\textsuperscript{155} The lack of evidence to support the efficacy of involuntary outpatient treatment under mental health law, such as ‘community treatment orders’ and ‘assisted outpatient treatment,’\textsuperscript{156} provides another example of substituted decision-making mechanisms in law that lack a strong evidence base to indicate its success.

It is noteworthy that governments are willing to implement such under-researched coercive measures, the success of which is unproven. The reason for retaining ‘experimental law-making’ in these cases can only be speculated at, though it is not unreasonable to hypothesise that risk-aversion drives government priorities with regards to substituted decision-making measures. Substituted decision-making approaches may be also strongly supported by some service providers and professionals. Light and colleagues produced evidence indicating that many service providers are convinced about the effectiveness of community treatment orders,\textsuperscript{157} despite large-scale, randomised control trials failing to support such a view. Such conviction may in turn drive service delivery culture and entrench policy which adapts to using and relying upon forms of coercive intervention.\textsuperscript{158}

It also worth throwing caution to the wind as to claims about ‘evidence-based law’ more generally. Undoubtedly, empirical research is useful to debunk false myths which are advanced in legal debates. However, ‘evidence-based law’ is a relatively new field of enquiry compared to empirical testing in other disciplines, such as medicine or business, to which it is seeming better suited.\textsuperscript{159} Rachlinski has argued that empirical testing for medicine, with its uniform mission to treat patients, is more straightforward than law — by contrast, ‘law is often politics by other means.’\textsuperscript{160}

\textsuperscript{157} Light et al., ‘Out of sight, out of mind: making involuntary community treatment visible in the mental health system’ (2012b) 196(9) Medical Journal of Australia 591.
\textsuperscript{158} Ibid.
\textsuperscript{159} Rachlinski, ‘Evidence-Based Law’ (2011) 96(4) Cornell Law Review 901.
\textsuperscript{160} Ibid.
abandonment of the death penalty in most jurisdictions to have done so cannot be explained by the accumulation of empirical evidence highlighting its ineffectiveness in preventing crime; instead, change was driven by evolving ideas as to what is moral and unjust. Rachlinski argues that law often ‘sorts winners and losers, rather than right and wrong,’ and the imposition of empirical legal testing can cloud normative claims.

The call for ‘evidence’ regarding support to exercise legal capacity must be weighed against the qualitative criteria for justifying reform of substituted decision-making law and policy. Arstein-Kerslake argues that ‘as a moral imperative... equality of people with cognitive disabilities is “right,” and is the proper aim of law reform processes.’ She further argues that ‘the prima facie inequality enshrined in legislation is sufficient evidence to demonstrate a need for reform to reach equality and compliance with human rights law.’ From this view it can be reasonably asked why advocates for supported decision-making regimes are being asked to ‘prove’ whether such a model works.

Yet even if human rights are set aside in favour of pragmatic concerns, there are well-documented problems converting empirical legal studies into evidence-based law. Again, the death penalty issue is illustrative. John Donohue and Justin Wolfers have undertaken a meta-analysis of research examining whether or not the death penalty deters crime in the United States of America. They conclude that despite decades of concerted social scientific inquiry there has been a consistent failure to demonstrate that the death penalty is any more effective than long prison sentences at deterring crime — yet neither have studies proven that the death penalty is not more effective than long-term prison sentences at deterring crime. The methodological complexity of drawing a direct causative link between the death penalty and preventing crime seems comparable to the challenge of measuring the

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161 Ibid 905.
162 Ibid 901.
164 Ibid 12.
165 Rachlinski, supra n 159 at 912.
‘success’ of replacing substituted decision-making with supported decision-making in law and policy. What measurements could be used for such a comparison? The ‘wellbeing’ of subjects is one option; another might be the rate of reported abuse before and after legal change. Yet in both these cases it would be extremely difficult to indicate direct causality between the conceptual basis for legal change and subsequent events. Again, even if human rights concerns are set aside, it is questionable to hinge the basis for implementing the universal legal capacity model as enunciated by the CRPD Committee on empirical evidence.

4 Conclusion

The issues listed in this article revealed a number of areas requiring further attention. These include accommodating the substantially different ways people exercise legal capacity, arbitrating what it means to do so on an equal basis with others, and operationalising support and safeguards in such a way that does not create discriminatory toe-holds for historic patterns of abuse, neglect and exploitation. Addressing these concerns would require, among other things, tighter definitions of exceptional circumstances to justify overriding legal agency in emergency crises. If the right to legal capacity were to be applied as it is advanced in the CRPD, these exceptions would need to be non-discriminatory and defined within a human rights framework rather than being balanced against human rights considerations. Such reform efforts would need to be developed in ways that facilitate disabled people’s organisations and independent human rights bodies to collaborate in deliberative processes to conceive and implement alternatives. Other concerns not raised in this article are also worthy of attention. Distinct challenges are likely to arise, for example, if previously informal relationships are formalised under supported decision-making schemes. Determining the legal responsibility of supporters and representatives, including consequences where duties are breached, will also require attention. Clearly, research is required on a number of fronts.

Yet despite these gaps, the issues raised in this article provide no plausible reasons as to why domestic law, policy and practice could not be reshaped according to the CRPD Committee’s elucidation of the right to legal capacity in international human rights law. The concerns and counterarguments listed here help to resolve certain ambiguities raised in current debates about Article 12 of the CRPD. The issues were listed to provide a more complete analysis of an idea being increasingly applied in law, policy, and in informal and formal support practices for persons with disabilities and others. While certain tenets of a supported decision-making regime can be set, some of its boundaries will remain fluid — and necessarily so. This flexibility is required given complex tensions inherent to the right to legal capacity itself, and to the CRPD generally, which concerns intersections between individual needs and broader social and legal change; between informal and formal support; between State and civil society; and in competing accounts of equality and other core rights. The findings I have presented raise important questions about how governments and civil society organisations can navigate these tensions to set the boundaries of support to exercise legal capacity on an equal basis for all citizens.

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168 Carney and Beaupert, supra n 12 at 180-181.