# Response to the call of the Special Rappourter on the rights of persons with disabilities[[1]](#footnote-1)

# Access to justice - Legal capacity

Persons with psychosocial and intellectual disabilities live in particularly vulnerable situations and face significant obstacles in accessing justice, including both criminal and civil proceedings. These people are often labelled by judicial authorities as unable to stand trial or restricted on liberty for the purposes of treatment. [[2]](#footnote-2) In practice it means that legal capacity of a person is removed or limited and, consequently, they are placed under partial or plenary guardianship.[[3]](#footnote-3)

Denial of legal capacity represents one of the most widespread barriers in access to justice for persons with mental health problems.[[4]](#footnote-4) Therefore, the interplay between Article 12 - Equal recognition before the law and Article 13 – Access to justice of the UN CRPD is substantial. In its General Comments on Article 12, the UN CRPD Committee noted that ‘the recognition of the right to legal capacity is essential for access to justice in many respects.’[[5]](#footnote-5) Furthermore, according to Article 13, interpreted in conjunction with Article 12, persons with mental health problems should be guaranteed the necessary support to participate in judicial proceedings.[[6]](#footnote-6) This particularly means the support to enforce their legal rights against another, or to defend themselves in legal proceedings, including criminal proceedings.

Article 12.1 of the UN CRPD states that States Parties ‘shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’, as legal capacity is an inherent right of all people, including persons with disabilities. By interpreting provisions of Article 12.2 the UN CRPD Committee has distinguished between two aspects of legal capacity, the ability to hold rights (legal standing) and to exercise those rights (legal agency). Legal standing involves recognition as a legal person before the law. Legal agency involves the capacity to enter, modify or end legal relationships. Being denied legal capacity means being denied the right to make decisions in many aspects of life and the effects of the denial of legal capacity have been compared to a ‘civil death’ by some commentators.[[7]](#footnote-7)

Article 12.3 of the UN CRPD states 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’. The UN CRPD Committee stressed the importance of respecting the will and preferences of the person who needs support. It further notes that this key requirement is vital to ensuring a move away from the paternalism often displayed by ‘best interests’ assessments and the substituted decisions made on the basis of these assessments. Mental Health Europe (MHE) believes that people with mental health problems should be supported to make decisions based on their will and preferences in line with Article 12.

General Comments together with the provisions of the UN CRPD also provided guidance on what supported decision-making measures should look like and more specifically on the safeguards that should apply to such measures in order to ensure that they are not abused. [MHE has put together the following criteria](https://www.mhe-sme.org/position-paper-on-article-12/) relevant for successful supported decision-making for persons with psychosocial disabilities. Supported decision-making measures should:

* be available to all, including those with high support needs, and tailored to their circumstances,
* respect the person’s other rights as outlined in the UN CRPD including the right to privacy,
* maintain the person’s right to legal capacity and to make decisions which have legal affect,
* be based on choice and require the permission of the person requiring support and ensure that the person should be able to terminate or alter the support at any time,
* be accessible i.e. provided in a way that the person can understand, and, in a place, they can access,
* be able to be legally recognised,
* ensure that a person’s will and preferences are respected,
* have safeguards which prevent abuse including ensuring that there is no conflict of interest or undue influence,
* allow for a third party to verify who the support person is and to challenge the actions of the support person if he/she is acting contrary to the will and preference of the person with support needs,
* be applied for the shortest time possible,
* be subject to regular review by a competent, independent and impartial body or the judiciary.[[8]](#footnote-8)

The UN CRPD Committee also gave more information about what forms supported decision-making can take and noted that such support could be formal and informal. For example:

* the choosing of a support person by the person requiring support in the exercise of their legal capacity,
* the provision by banks of information in understandable formats which enable persons with disabilities, to open accounts, enter into contracts or conduct transactions,
* advanced planning which can be particularly helpful for persons with psychosocial disabilities who may experience crisis situations and whose doctors, family member and friends could benefit from pre-prepared guidance which outlines their will and preferences.

While some States have adopted legislation introducing supported decision-making, some of them draw a fine line between supported decision-making and substitute decision-making or continue to allow for the denial of legal capacity and substitute decision-making under certain circumstances. There is an great risk that without the right training to legal professionals, including the judiciary, substitute decision-making will prevail over supported decision-making whenever there is a choice between the two, due to outdated but pervasive misconceptions about persons with psychosocial disabilities and because it is an easier and cheaper tool to apply as it does not require a personalised approach. In addition, reforms in mental health law related to forms of substitute decision-making that allow for forced placement and treatment are fragmented. Ensuring autonomy in relation to health is an area of the UN CRPD that States Parties find particularly difficult to implement.

# Promising legislation and supported decision- making models

However, MHE has identified some promising legislation as well as specific forms of supported-decision-making suitable to persons with psychosocial disabilities and in compliance with most of the above-mentioned criteria. MHE would like to stress that the best services for persons with psychosocial disabilities are those that are designed, developed and delivered with participation of all stakeholders including, above all, persons with lived experience of mental health problems. Any stakeholder considering developing supported decision-making services or policies should make sure they are implementing a real co-production approach.[[9]](#footnote-9)

MHE therefore recommends that reforms in this area should be carried out with the meaningful participation of person with psychosocial disabilities, in line with Art 4.3 of the UN CRPD, and accompanied by training for mental health care users and all professionals who might need it, including social workers, health and legal professionals and law enforcement officials.

## Proposed Bulgarian Bill - “Natural Persons and Support Measures Bill”

In 2015, a new Bill was proposed by the Bulgarian Ministry of Justice to replace the existing guardianship law in order to align Bulgarian legislation with the UN CRPD[[10]](#footnote-10). If adopted, the Bill would establish various measures of support and protection which would enable adult persons with psychosocial or intellectual disabilities to exercise their basic human rights in accordance with their will and preferences.[[11]](#footnote-11) According to the Bill, any person is entitled to receive appropriate support from a supported decision-making body which must be registered and officially appointed by the Mayor of the Municipality in line with the ‘wishes and preferences’ of the person requiring support. A contract is then drafted between the support person and the person who needs support and they can also create a form of ‘advanced planning’ called a ‘preliminary declaration’.

If a ‘risk situation’ arises which is defined as a “serious and immediate risk to the life, health and property of the person”, the procedure differs and the support is established through the creation of a trusted ‘Council’ by the support person comprised of the person in need of support, relatives, close acquaintances and support bodies. The Council will be in charge of ensuring the best interpretation of the person’s ‘wishes and preferences’ in the decisions taken. Protection is safeguarded through the active role of the court as an independent body monitoring the relationship of trust and guaranteeing the rights of the person. In risk situations, if the trusted network decides, it must be submitted to the court. The strength of this Bill is that it recognises legal capacity as an inherent right while providing for supported decision-making with robust safeguards. MHE believes that this Bill is one of the most compliant reforms in terms of legal capacity that has been proposed in recent years, however it also provides for co-decision making under vague circumstances and MHE would recommend clarification that this cannot be adopted against the ‘will and preferences’ of the person who needs support. Nonetheless we believe this Bill has potential to make a great difference to the lives of persons with psychosocial disabilities and we hope that it will be adopted by the Bulgarian Parliament in due course.

## Andalusian practice of Advanced Care Planning in Mental Health

In Andalusia, the Human Rights and Mental Health Group has developed a guide on Advanced Care Planning in Mental Health (ACP-MH)[[12]](#footnote-12), designed using co-production between mental health care users and professionals in line with the UN CRPD. The guide is addressed to people interested in the process and to mental health service professionals. According to the Law 41/2002 on Patient Autonomy[[13]](#footnote-13), professionals are legally bound to respect the directives for end-of-life care and, according to some jurists, mental health care.[[14]](#footnote-14) This model of Advanced Care Planning enables people to record their will and preferences in advance[[15]](#footnote-15), this is then included in the medical record of the person and made accessible to all healthcare professionals in order to influence the health care provided in case they may face temporary inability to make decisions (i.e. crisis situations). The process and its application are in place since 2016 and the first objective was to train and sensitise professionals and users of the service with regards to the patient’s autonomy, their right to make their own decisions and the notion of will and preferences in line with Article 12 of the UN CRPD. The ultimate objective is to ensure full respect of legal capacity and the right of choice in relation to healthcare through the application of the advanced directives by the professionals as well as to establish safeguards to protect the person and prevent abuses such as undue influence.

## Personal Ombudsman

The Personal Ombudsman (PO) System was developed in Sweden and grew out of the psychiatric reform which took place in 1995. Under the scheme, a PO is defined as a highly skilled person who works on the commission of a person needing mental support services for a long period and is bound by a contract. The PO helps their client with a wide range of issues, ranging from family-matters to housing, accessing services or employment. The support is flexible and fully adapted to the person’s will and preferences, as no action is taken without the agreement of the client. This model has been designed for people with psychosocial disabilities who are potentially quite isolated and as a result would be ideal for those persons mentioned in the General Comment who do not have naturally occurring support networks in their communities including those who have been institutionalised for many years, have lost contact with their family or friends or have been excluded from the community for long periods of their life[[16]](#footnote-16). The support can be stopped at any time at the request of the person needing support. This model enables persons with psychosocial disabilities to retain their legal capacity, make decisions and enjoy their life thanks to the support they receive and the trusted relationship they create with their PO. In addition, a five-year Government evaluation of the programme has shown that savings on traditional mental health care services increased each year. For one Euro invested, 17 Euros are saved after five years.

## The Circle of Friends

The Circle of Friends is a practice which gathers a group of trusted people, usually family and friends, chosen by the person requiring support who meet regularly in order to support a person to accomplish their personal goals in life.[[17]](#footnote-17) These goals are chosen by the person themselves and can include any form of exercising their inherent rights. This type of support network was first developed in Canada in order to empower persons with disabilities to evolve as well as to reinforce their independence, including their full legal capacity. It ensures that the person will be able to make decisions for themselves and will be able to seek counsel if they wish to. Although not specifically designed for persons with psychosocial disabilities, this model, in MHE’s view, is a form of informal supported decision-making which is adaptable and suitable for persons with psychosocial disabilities who have naturally occurring support systems.

## Advocacy Office in Greece

The aim of the project Action Platform for the Rights in Mental Health in Greece[[18]](#footnote-18) was to bring about a “paradigm shift” in mental health rights perception with a view not just to tolerate as a society but to fully support the self-evident rights of people with mental health problems facing stigma and exclusion.

The main pillar of the project was the creation of the first Advocacy Office in Greece, which responded to 319 cases in close collaboration with key actors in the field of advocacy (Greek Ombudsman, the Special Committee for Monitoring the Protection of the Rights of People with Mental Disorders etc). The Advocacy Office for people with mental health problems in Greece offered individualised support jointly by lawyers and clinicians. The main services helping persons with mental health problems to exercise their legal agency, included information, consultation, guidance and referral to other services and institutional bodies. It worked closely with representative users' and families' associations, trying to empower people to claim their rights and make use of their legal capacity, to recover from mental illness and "passive" position and adopt active citizenship and recover.

Advocacy Office also offered community awareness activities, networking with relevant services, targeted capacity building for professionals (lawyers, judges, mental health professionals, police) and lobbying activities, including proposals for institutional changes, based on the development of the cases, in order to address the gaps regarding rights mainstreaming in mental health and barriers in access to adequate clinical and legal services.

1. This response to the call of the Special Rapporteur on the rights of persons with disabilities on good practices to ensure effectice access to justice for persons with disabilities is submitted by Mental Health Europe (MHE), a European non-governmental network organisation committed to the promotion of positive mental health, the prevention of mental distress, the improvement of care, advocacy for social inclusion and the protection of human rights for (ex)users of mental health services, their families and carers. MHE’s membership includes associations and individuals active in the field of mental health in Europe, including people with (a history of) mental health problems, service providers, as well as volunteers and professionals in a variety of related disciplines.

   MHE’s work is funded through financial support received from the European Union Programme for Rights, Equality and Citizenship. The views expressed herein should not be taken to reflect the official opinion of the European Commission. For more information, please see our website at: <http://www.mhesme.org/> [↑](#footnote-ref-1)
2. For more information on the judicial incapacitation of persons with mental health problems please see Fallon-Kund, Marie and Bickenbach, Jerome. Strengthening the Voice of Persons with Mental Health Problems in Legal Capacity Proceedings, MDPI – laws, 2016, available at: <https://www.mdpi.com/2075-471X/5/3/29/htm> [↑](#footnote-ref-2)
3. For more information about guardianship laws, please see the Fundamental Rights Agency of the EU, Report: Legal capacity of persons with intellectual disabilities and mental health problems, 2013, available at: <http://fra.europa.eu/en/publication/2013/legal-capacity-persons-intellectual-disabilities-and-persons-mental-health-problems> [↑](#footnote-ref-3)
4. Fow more information on different categories of barries in access to justice for persons with disabilities, please see Report of the Bingham Centre for the Rule of Law on Access to justice for persons with disabilities: From international principles to practice, 2017, available at:

   <https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf?showdocument=1> [↑](#footnote-ref-4)
5. Committee on the Rights of Persons with Disabilities, Committee on the Rights of Persons with Disabilities, General Comment No 1: Equal recognition before the law, 11 April 2014, at para 38. [↑](#footnote-ref-5)
6. For more information on interplay between Article 12 and Article 13 of the UN CRPD please see Weller, Penelope. Legal Capacity and Access to Justice: The Right to Participation in the CRPD, MDPI – laws, 2016, available at: <https://www.mdpi.com/2075-471X/5/1/13/htm> [↑](#footnote-ref-6)
7. E.g. Issue Paper published by the Council of Europe Commissioner for Human Rights - Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities, April 2012, available at: <https://rm.coe.int/who-gets-to-decide-right-to-legal-capacity-for-persons-with-intellectu/16807bb0f9> [↑](#footnote-ref-7)
8. It should be noted that the Article also states that the safeguards should be proportional to the amount that they affect the person’s interests and rights. MHE notes that, for example, this might mean that depending on the decision, supported decision-making measures might not need to be regularly reviewed. [↑](#footnote-ref-8)
9. The definition of co-production used by MHE can be found in our glossary, available at: <http://www.mhe-sme.org/policy/glossary/> . [↑](#footnote-ref-9)
10. However, this Bill proposal has not yet been adopted by the Bulgarian Parliament. [↑](#footnote-ref-10)
11. More information on the Bulgarian Centre for not-for-profit law, available at: <http://www.bcnl.org/en/news/1353-bulgaria-is-about-to-make-step-forward-in-the-efforts-to-recognize-the-human-rights-of-people-with-disabilities.html>. [↑](#footnote-ref-11)
12. More information on the 1decada4 website, available at: <http://www.1decada4.es/course/view.php?id=42> [↑](#footnote-ref-12)
13. Ley 41/2002 Básica Reguladora de la Autonomía del Paciente [↑](#footnote-ref-13)
14. The interpretation of the law and the scope of application are issues still discussed amongst professionals. Some jurists say it applies to all directives, including in relation to mental health care. [↑](#footnote-ref-14)
15. The advanced directive can include symptoms that the person usually notices that they experience when entering in a crisis situation, what makes the person feel good and bad when experiencing distress, who their contact person is, who he/she would allow to visit, therapies that they find helpful, information about their general health, diet etc, and they can also a specify a person who should take decisions for them, in line with their will and preferences, if their legal capacity is questioned. [↑](#footnote-ref-15)
16. MHE video on Personal Ombudsman, available at: <http://www.right-to-decide.eu/2014/08/swedish-personal-ombudsman-service-po-for-people-with-mental-health-problems/> . [↑](#footnote-ref-16)
17. MDAC’s report: Supported Decision-making, An Alternative to Guardianship, 2006, available at: <http://mdac.info/sites/mdac.info/files/English_Supported_Decision-making_An_Alternative_to_Guardianship.pdf>. [↑](#footnote-ref-17)
18. This project was realized during May 2015 - April 2016 and funded by the EEA Grants in the context of the Greek NGO Programme “We are all Citizens”. More information about project available at: <https://eeagrants.org/project-portal/project/GR04-0047> and more information on organisation responsible for the project available at: <http://ekpse.gr/en/> [↑](#footnote-ref-18)