



# Supported Decision-Making

*a human rights perspective*

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# Contents

01

Convention on the  
Rights of Persons  
with Disabilities  
(CRPD)

02

Legal Capacity  
and  
Substitute Decision-  
Making

03

Supported Decision-  
Making









1.  
Convention on the Rights of Persons with  
Disabilities  
(CRPD)



# Convention on the Rights of Persons with Disabilities (CRPD)

A world map in shades of grey and green, with several countries highlighted in dark green: the United States, the United Kingdom, and Australia. A red location pin is placed over the United States. The map is overlaid with several horizontal text boxes containing information about the CRPD. The background features abstract, wavy shapes in light green and orange.

*Adopted on 13 December 2006 (General Assembly by Resolution A/RES/61/106)*

*The most up-to-date international legal instrument concerning the rights of persons with disabilities.*

*The first comprehensive human rights treaty of the 21<sup>st</sup> century*

*The first human rights convention to be open for signature by regional organizations*

*Ratification/accession 185; signatories 164 (per 22 May 2022)*

*Indonesia has ratified CRPD in 2011 (Law no. 19/2011)*

# Article 12 of CRPD

## Equal recognition before the law

*States Parties 'shall recognize that persons with disabilities **enjoy legal capacity on an equal basis** with others in all aspects of life*

01.

### No discrimination label

discriminatory labels are not legitimate reasons for the denial of legal capacity (*both legal standing and legal agency*).

02.

### No denial of legal capacity

perceived or actual deficits in mental capacity **must not** be used as justification for denying legal capacity.

03.

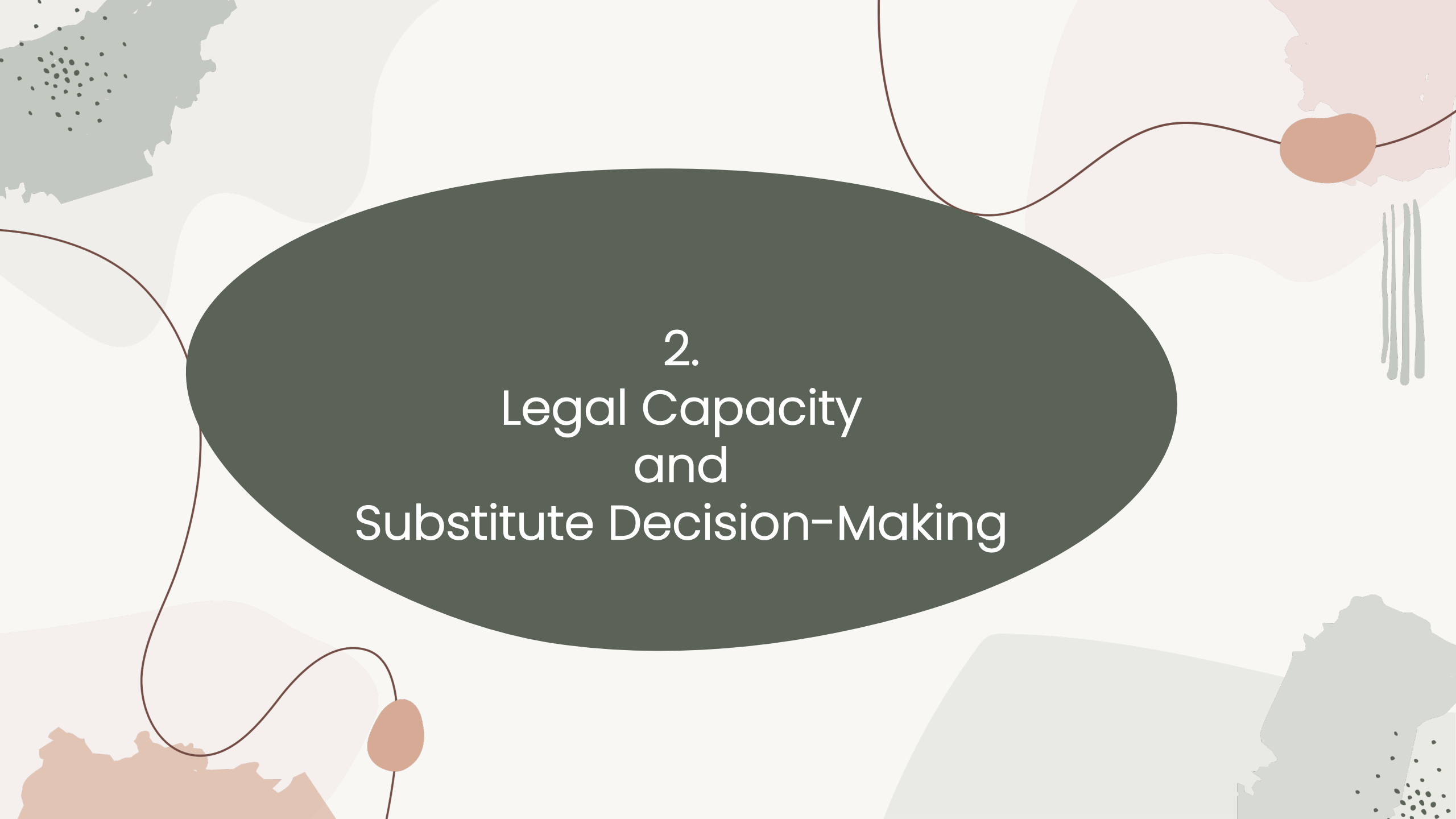
### No involuntary detention and treatment

involuntary detention and treatment of people with mental health disabilities are prohibited under the Convention

04.

### Will and preferences

respect the “**will and preferences**” of the persons with disabilities



## 2. Legal Capacity and Substitute Decision-Making



## Background

All persons with disabilities, including those with physical, mental, intellectual or sensory impairments, can be affected by denial of legal capacity and substitute decision-making.

However, persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity.

(CRPD/C/GC/1, paragraph 9)







Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under **substitute decision-making regimes** such as guardianship, conservatorship and mental health laws that permit forced treatment.

These practices **must be abolished** in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

(CRPD/C/GC/1, paragraph 7)

# The denial of legal capacity to persons with disabilities --→ deprived of many fundamental rights



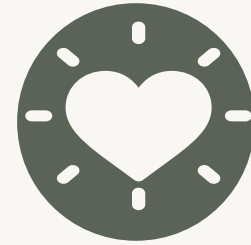
right to vote



the right to marry  
and found a family



reproductive rights



parental rights



the right to give consent for intimate  
relationships and medical treatment



the right to liberty.



- a universal attribute **inherent** in all persons by virtue of their humanity
- must be upheld for persons with disabilities **on an equal basis** with others”
- indispensable for the exercise of civil, political, economic, social and cultural right

(CRPD/C/GC/1, paragraph 8)

## Legal Capacity

- **legal standing** (the ability to hold rights and duties; to be recognized as a legal person before the law)  
→ entitles a person to full protection of his or her rights by the legal system.
- **legal agency** (the ability to exercise those rights and duties; to act and to have those actions recognized by the law)  
→ recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships.

The key to accessing  
meaningful participation  
in society

## Mental Capacity

- the **decision-making skills** of a person
- **vary** from one person to another
- **affected by many factors**, including environmental and social factors.

The concept of mental capacity  
is highly controversial in and  
of itself.

(CRPD/C/GC/1, paragraph 13, 14)



what are other  
words for  
legal capacity?



capacity, efficiency,  
active capacity,  
legal competence, competence,  
capacity for acting, ability





States parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others

(CRPD/C/GC/1, paragraph 7)

# Legal capacity: recognition of a person's right to make



## Healthcare decisions

CRPD art. 15, 25, 26



## Financial/property decisions

Purchase, sale, credit, investment, will. CRPD art. 12(5), 28



## Personal life's decisions

Where to live, participation access, employment, mobility and supports.  
CRPD art.  
13,14,15,18,19,20,23,,25,26,27,28,29,30

to own or inherit property

to control their own financial  
affairs

to have equal access to  
bank loans, mortgages and  
other forms of financial  
credit

ensure that persons with  
disabilities are not arbitrarily  
deprived of their property

(Art 12(5) CRPD)



# 3. Supported Decision-Making



## Obligations of States parties

access to support in  
the exercise of legal  
capacity.

refrain  
from  
denying  
legal  
capacity

enable  
to make  
decisions  
that  
have  
legal  
effect

respect the rights,  
will and preferences

(CRPD/C/GC/1, paragraph 16,17)

# Supports



informal and formal  
support arrangements



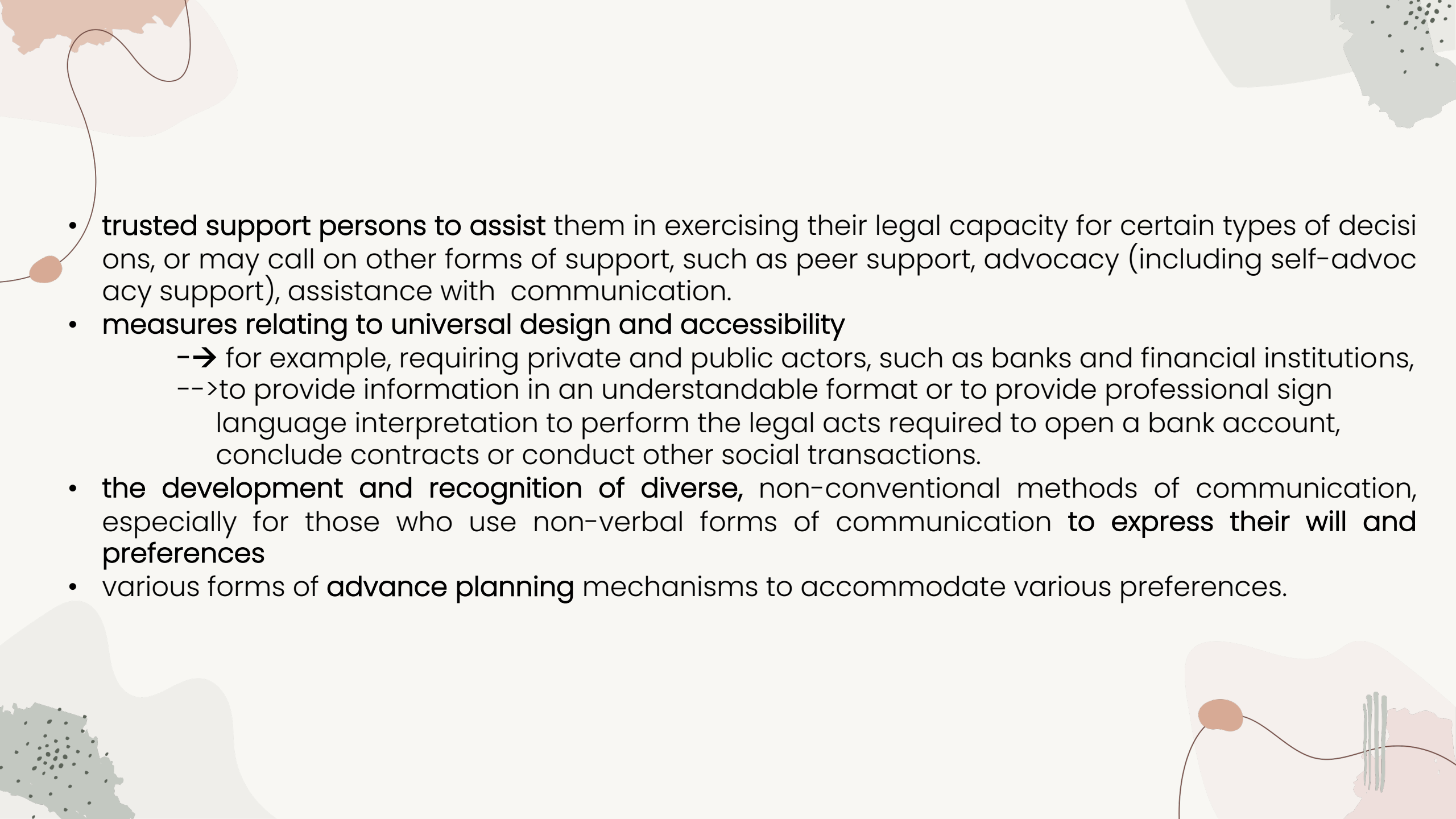
varying types and  
intensity

Respect for difference and acceptance

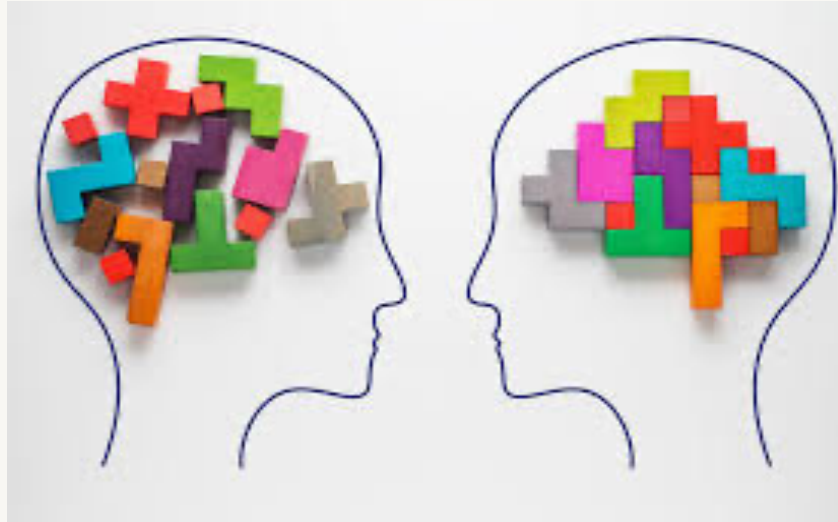


individual autonomy and capacity

(CRPD/C/GC/1, paragraph 17,18)

- 
- **trusted support persons to assist** them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), assistance with communication.
  - **measures relating to universal design and accessibility**
    - for example, requiring private and public actors, such as banks and financial institutions, -->to provide information in an understandable format or to provide professional sign language interpretation to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions.
  - **the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences**
  - various forms of **advance planning** mechanisms to accommodate various preferences.

# will and preferences



the “best interpretation of **will and preferences**” must replace the “best interests” determinations



to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.

(CRPD/C/GC/1, paragraph 21)



## Undue influence

is characterized as occurring, where the quality of **the interaction** between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation



## Protection against undue influence

- Safeguards for the exercise of legal capacity must include protection against undue influence;
- however, the protection must respect the rights, will and preferences of the person, including the right to take risks and make mistakes.

(CRPD/C/GC/1, paragraph 22)



## State Obligations, Future Supports

- to respect, protect and fulfil the right of all persons with disabilities to equal recognition before the law. refrain from any action that deprives persons with disabilities of the right to equal recognition before the law.
- take action to prevent non-State actors and private persons from interfering with the ability of persons with disabilities to realize and enjoy their human rights, including the right to legal capacity.
- One of the aims of support in the exercise of legal capacity is to **build the confidence and skills** of persons with disabilities so that they can exercise their legal capacity with less support in the future, if they so wish.
- to provide **training** for persons receiving support so that they can decide when less support is needed or when they no longer require support in the exercise of their legal capacity.

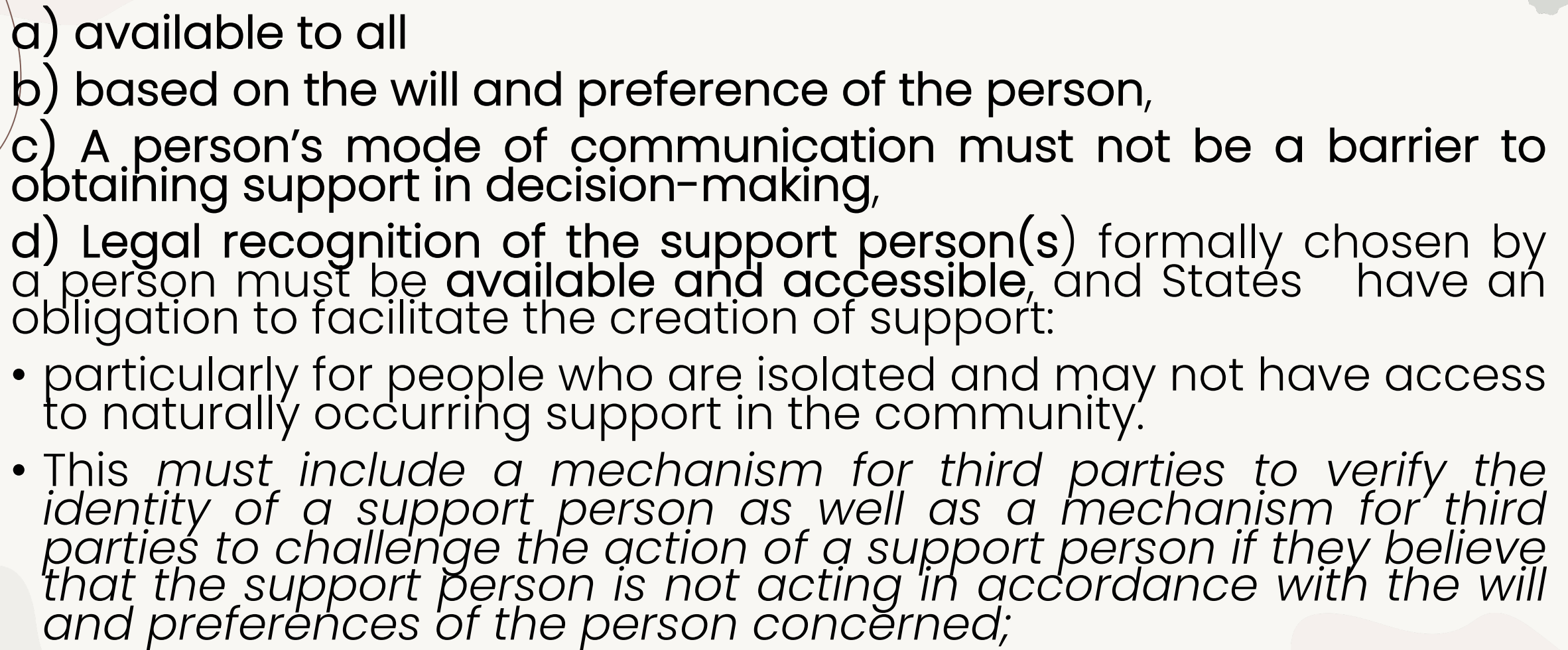
## State Obligations, Law and Policy

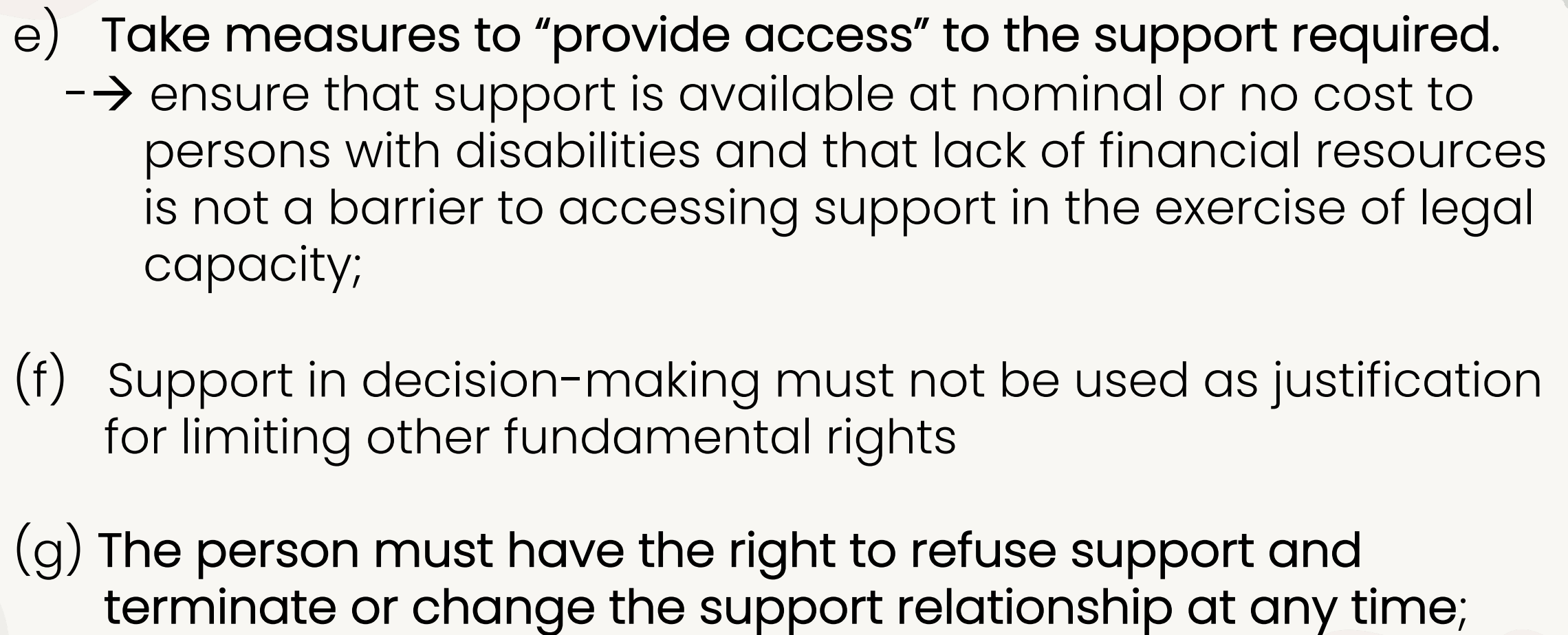
- In order to fully recognize “universal legal capacity”, whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, *States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect*
- *States parties must “review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences”.*
- States parties’ obligation *to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives.*
- The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.

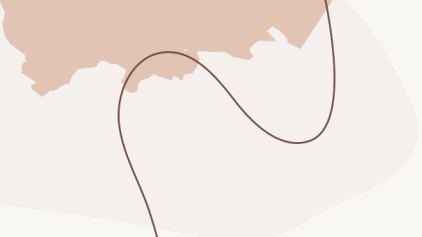
## Forms of Supported Decision-Making

- comprises various support options → will and preferences and respect human rights norms.
- provide protection for all rights:
  - autonomy (right to legal capacity, right to equal recognition before the law, right to choose where to live, etc.)
  - freedom from abuse and ill-treatment (right to life, right to physical integrity, etc.).
- systems of supported decision-making should not over-regulate the lives of persons with disabilities.
- While *supported decision-making regimes can take many forms*, they should all incorporate certain key provisions to ensure compliance with article 12 of the Convention, including the following:

(CRPD/C/GC/1, paragraph 19)

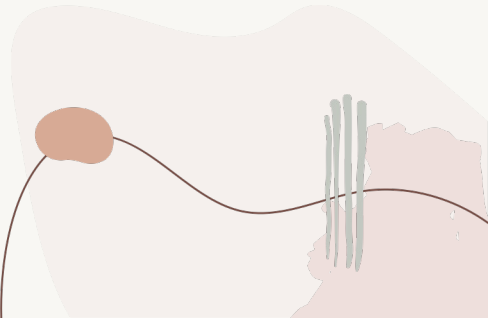
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- a) available to all
  - b) based on the will and preference of the person,
  - c) A person's mode of communication must not be a barrier to obtaining support in decision-making,
  - d) Legal recognition of the support person(s) formally chosen by a person must be **available and accessible**, and States have an obligation to facilitate the creation of support:
    - particularly for people who are isolated and may not have access to naturally occurring support in the community.
    - *This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting in accordance with the will and preferences of the person concerned;*

- 
- e) Take measures to “provide access” to the support required.
    - → ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;
  - (f) Support in decision-making must not be used as justification for limiting other fundamental rights
  - (g) The person must have the right to refuse support and terminate or change the support relationship at any time;



(h) Safeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person's will and preferences are respected.

(i) The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.







# Thanks!

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