# Draft of a new act on supported decision-making

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# 1 INTRODUCTION AND DELIMITATION

Uloba has requested an official study to look at issues and the principal direction for a proposed new act on supported decision-making and a guardianship act that is in line with the UN Convention on the Rights of Persons with Disabilities (CRPD). The assignment is linked to an upcoming dialogue meeting in September 2022 between the Ministry of Justice and Public Security and civil society, which is part of a comprehensive review of the guardianship system and the Guardianship Act. Uloba has been promised an opportunity to present its work on developing a proposal for a

supported decision-making board. This report is intended to form part of the basis for submitting input to the Ministry.

The assignment has been further specified and delimited in ongoing communication with the client, most recently in a digital meeting on 29 June 2022. The legal and societal context of the assignment is complex and somewhat unclear since it must be seen in light of ongoing assessments of whether (and how) the CRPD should be incorporated into Norwegian law, partly due to an ongoing review of the guardianship system and the Guardianship Act, and partly due to ongoing work on developing good practical arrangements for supported decision-making. A number of existing reports, studies, input etc. from various social actors with different remits and interests are available for all of these elements. This creates some challenges. The themes are to some extent interwoven, but I consider it necessary in principle to keep them apart for the purpose of my assignment. Several of the questions that are necessary to consider for my assignment have already been investigated more thoroughly by others than it is possible for me to do within my allocated framework. Furthermore, it must be acknowledged that different actors do not necessarily define terms such as 'supported decision-making' in the same way.

My understanding of the assignment, which in my perception the client supports, therefore indicates that my efforts should primarily be related to the design of a concrete draft for a statutory regulation on the basis of already available reports and the like from different actors, rather than providing independent assessments of all the factors that play a role in the design of such regulation. As such, I use existing studies without conducting independent assessments of the same questions that have already been thoroughly investigated, unless there is reason to the contrary. I rely in particular on the Equality and Anti-Discrimination Ombudsman's (LDO) report *Retten til selvbestemmelse – Fra vergemål til beslutningsstøtte* (The right to self-determination – from guardianship to supported decision-making) from 2021, which in my view provides an excellent presentation of the issues that need to be addressed and adopts views that I can as good as unreservedly endorse. Independent assessments will mainly be given for selected issues where there is dissent among relevant actors about the legal situation and where a specific legal opinion must be used as a basis for designing a statutory regulation. This applies primarily (but not exclusively) to the question of the CRPD's significance to the Norwegian Guardianship Act. This has been a subject of discussion for some time and is, in my understanding, part of the ministry's ongoing 'comprehensive review', but it is necessary to state my own view on the matter.

In light of these initial considerations, I have structured this document as follows:

Section 2 below provides a brief status clarification where I summarise the relevant sources with which I am familiar and provide an indication of the weight I attach to these in the further work. This is divided into three parts. I firstly provide an overview of selected Norwegian sources, including relevant statements from political parties and existing reports and assessments from various actors. I then summarise the CRPD

Committee's relevant practice, as well as provide a brief presentation of relevant statements from the UN Special Rapporteur on the rights of persons with disabilities. Finally, I summarise legislation from other countries that I have been made aware of, mostly to contribute to a common understanding of what this legislation says and what transfer value it may have to Norwegian law.

Section 3 presents my views of CRPD Article 12, since this is clearly a key topic for any solution proposal. The provision has been thoroughly covered in existing sources, but it appears necessary to state my own view on the interpretations and to comment on the way in which other parties interpret it. As part of this discussion, I also explain the importance I myself believe should be attached to the Committee's view in Norwegian law.

Section 4 sets out my draft act, before the concluding Section 5 provides comments on each proposed provision. In these comments, I also elaborate on the importance of the various sources described in Section 2.

# 2 CLARIFICATION OF STATUS

## 2.1 Status in Norway

### *2.1.1 Programmes of the parliamentary parties*

In its parliamentary programme 2021–2025, the Centre Party has stated that the party will 'repeal the Guardianship Act and introduce a supported decision-making scheme in line with the CRPD'. The Socialist Left Party has a similar formulation in its work programme for 2021–2025, to 'replace the current Guardianship Act with an act that provides the right to assistance to make decisions in accordance with an individual's own preferences and own will'. The Liberal Party's programme states that the party 'will review the guardianship scheme with a view to changing it to a supported decision-making scheme in line with the CRPD'. The Green Party points out that the 'human rights model' should be adopted in all regulations affecting persons with disabilities and emphasises that the party will 'ensure the right to self-determination and the right to receive the necessary support in order to exercise their legal capacity'.

As far as I can see, the Labour Party does not have a concrete relevant section about this issue in its programme. Neither guardianship nor supported decision-making is mentioned in the party's programme for 2021–2025, and the CRPD is not mentioned beyond general remarks that the Convention shall be 'implemented in all parts of society' and that it is to be incorporated in the Human Rights Act. Something similar can be said of the Christian Democratic Party, while the Red Party points out that the interpretative declaration pertaining to Article 12 of the CRPD should be withdrawn.

The Conservative Party's programme states that 'persons with disabilities must be ensured services that to the degree possible enable them to live fully worthy lives', but does not say anything more specifically about guardianship or supported decision-making. The Progress Party's programme also states that persons with disabilities 'shall to the degree possible be given the same opportunities to function in society as everyone else', but does not say anything more specifically about guardianship or supported decision-making.

The Hurdal platform is more in accordance with the Labour Party's programme than that of the Centre Party. It does not mention guardianship, supported decision-making or legal capacity. The four parties mentioned in the first paragraph above, which are the most specific when addressing the topic, do not have a majority in the Storting.

I therefore assume that, at present, there is no pronounced majority in the Storting to replace the current guardianship system with a supported decision-making scheme. However, this investigation is designed on the premise that this is what will be proposed, and as such, I do not discuss potential alternatives such as an extended supported decision-making scheme within the framework of the current guardianship scheme.

### *2.1.2 Work in progress at departmental level*

The Ministry of Justice and Public Security is currently conducting a comprehensive review of the guardianship system. This is based on the Storting resolution of 27 April 2021: 'The Storting requests that the Government conduct a comprehensive review of the guardianship system and present proposals for legislative amendments that strengthen and improve it.' The resolution is based on parliamentary motion 77 S (2020–2021) from representatives of the Progress Party Kjos and Amundsen, and on the Standing Committee on Justice's recommendation 285 S (2020–2021). It appears from the parliamentary motion that the grounds were related to the situation for professional guardians rather than the situation of persons under guardianship. The Committee's recommendation had a broader perspective, and the majority of the Committee pointed out that 'the CRPD Committee has given clear signals that the current guardianship system is unsatisfactory, and recommended that Norway transition to a supported decision-making scheme, entailing a replacement of the scheme involving making decisions on behalf of the individual under guardianship with schemes that support the individuals will'. The majority (consisting of the members of the Labour Party, the Centre Party and the Socialist Left Party) proposed that the Storting should request that the Government 'conduct a comprehensive review of the guardianship scheme, including considering alternatives such as a supported decision-making scheme in line with the CRPD, and present proposals for legislative amendments that strengthen and improve the legislation for the persons to whom the scheme is intended to apply'. In the Storting's vote, this proposal was rejected by 44 to 41 votes, while the Committee's minority proposal (which was identical to the parliamentary motion) was unanimously adopted. The parliamentary debate is brief and contains little of concrete guidance. The

then Minister of Justice Mæland pointed out nonetheless that the Ministry is 'now working on several important amendments, including a bill to clarify the right to self-determination and enhanced implementation of the CRPD Convention'. I understand that the ongoing review has employed such a broad perspective, even though the wording of the parliamentary resolution is similar to the narrower approach of the parliamentary motion.

I further understand that Mæland's statement refers to work on the follow-up of two different consultation papers.

- *The Ministry of Justice's (Legislation Department) consultation paper of 14 November 2018 (Case no 18/5852) on amendments to the Guardianship Act etc. (persons who do not have the capacity to give consent, particularly management of funds, right of appeal and right of petition in cases concerning the guardian etc.).* The proposals here include amendments to Section 20 second paragraph and Section 29 second paragraph of the Guardianship Act. In Section 20, it is proposed that a guardianship without deprivation of legal capacity may not be established if it must be assumed that this will be contrary to the person's will, and in Section 29 it is proposed that the person under guardianship may request that a guardian be removed from their role. The consultation paper says little about the relationship to the CRPD, but this is somewhat more addressed in the underlying interpretative declaration from the Legislation Department of 20 March 2018. In general, the consultation paper entails a strengthening of the individual's right to self-determination.
- *The Ministry of Justice's (Civil Affairs Department) consultation paper of 12 June 2020 (Case no. 20/2965) on amendments to the Guardianship Act and the Guardianship Regulations on remuneration etc.* This consultation paper contained two relevant proposals: i) Firstly, it was proposed that the wording 'under guardianship' in the Guardianship Regulations be changed to 'who has been appointed a guardian', on the grounds that this would provide 'better compliance with the UN Convention on the Rights of Persons with Disabilities (CRPD) Article 12, that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life'; and ii) secondly, amendments were proposed to Section 29 second paragraph of the Guardianship Act where an appointed guardian could be removed from the role of guardian 'if this would be in line with the wishes of the person 'who has been appointed a guardian'. A new second sentence was also proposed: 'A guardian who is not a next of kin may also be deprived of the role of guardian to ensure a well-functioning system with good use of resources.' The consultation paper points out that the changes will 'strengthen the person's right of self-determination, cf. CRPD Article 12' and that together with the proposals in the 2018 consultation paper, the amendments are 'in line with the CRPD Committee's understanding of the CRPD Convention'.

A number of consultation submissions were received in response to both consultation papers. I have tried to acquaint myself with them, although there is no reason to

summarise them here. In particular, the consultation submissions from the LDO, Norway's National Institution for Human Rights (NIM) and the Parliamentary Ombud are useful reading, in addition to the submissions from the client and other civil society representatives.

### *2.1.3 NOU 2016: 17 På lik linje (On equal terms)*

It is not entirely clear to me when supported decision-making was first introduced as an alternative to guardianship in Norwegian social debate, but for the purpose of this investigation, it is in any case unnecessary to go further back than to the Rights Committee's (*Rettighetsutvalget*) official report NOU 2016: 17 *På lik linje.* Here, section 13.6 provides an assessment of the Guardianship Act against the CRPD, while a right to supported decision-making is specifically proposed as part of 'measure 1' (*løft 1*) in section 19.2.3. The majority of the committee considered the current Guardianship Act to be discriminatory and contrary to the CRPD, and that 'it is neither relevant nor necessary to link the right to impose compulsory guardianship, or the withdrawal of legal capacity, to a medical diagnosis or condition'. The majority nonetheless found that the rules on the withdrawal of legal capacity could be relevant 'in marginal exceptional cases', but in such case that the rules must be based on a functional assessment. There was dissent among the committee on this point, as one member believed that the withdrawal of legal capacity on the basis of a functional assessment would sustain a form of indirect discrimination against persons with disabilities in violation of the CRPD Article 5. Supported decision-making is linked to the authorities' positive obligations (a duty to take action, a duty to protect human rights), and section 19.2.3 proposes the following:

> Guardianship for adults with legal capacity is replaced by a right to supported decision-making. The right to supported decision-making will apply to adults who are unable to look after their own interests and who need assistance in making legally binding decisions or managing their own finances. The framework for the decision adviser's activities is clarified in a new act on supported decision-making. It is assumed that the following elements will be incorporated into the new act:
>
> – Persons with disabilities are provided with adapted information about dispositions that are to be made that concern them.
>
> – Persons with disabilities receive help to clarify different courses of action and preferences.
>
> – Arrangements are made to ensure that persons with disabilities are able to express their opinions and make decisions themselves, including through increased training.
>
> – Persons with disabilities are involved in all decisions that concern them.
>
> – Persons with disabilities can choose not to receive support for decision-making, or not to receive support for decision-making in a particular situation.
>
> The decision adviser may in exceptional cases make decisions on behalf of the person with disabilities where this is specifically agreed, or where this is clearly necessary and it

> can be assumed through tacit consent. In all cases, the disabled person's will and preferences shall form the basis for the decisions made. The decision adviser cannot make decisions that are contrary to the will of the disabled person.

The wording of the proposal to apply to 'adults with legal capacity' implies that it does not concern the matter of the withdrawal of legal capacity. Instead, this is followed up in section 19.2.4 of the report, where the majority expresses that 'the conditions for depriving a person of legal capacity shall not be based on a diagnosis, but a concrete assessment of whether a person has the mental capacity in a given situation'. Among other things, the minority object that a proposal 'to be able to deprive the disabled person of legal capacity on the basis of a lack of decision-making competence, even where there is active opposition, undermines the autonomy sought to be strengthened through the right to supported decision-making'.

It is also useful that the committee provides an assessment in section 28.1 of the financial consequences of a proposal for supported decision-making.

As far as I understand, follow-up of the investigation has not yet been completed. Elements of it are addressed in Report No 25 to the Storting (2020–2021) *Likeverdsreformen* (the Equality Reform) and the Government's Action Plan 2020–2025 *Et samfunn for alle (*A society for all*)*, but a new white paper has apparently also been announced. The report is not mentioned at all in the Legislation Department's interpretative declaration statement from March 2018; it is mentioned once in the consultation paper from 2018, and not at all in the consultation paper from 2020.

#### *2.1.4 NOU 2019: 14 Tvangsbegrensningsloven (The limitation of coercion act)*

The Limitation of Coercion Act Committee discusses legal capacity in particular in Chapter 7 of the report, while supported decision-making is discussed in particular in Chapter 20. Chapter 7 expresses opposition to the CRPD Committee's interpretation of Article 12, including by referring to the interpretation as 'an extreme' and a 'radical interpretation' with limited support. The committee (under dissent) assumes the basis that the withdrawal of legal capacity is possible, and states, among other things, (on p. 182) that 'the majority of the committee cannot endorse the CRPD Committee's rejection, as a matter of principle, of intellectual disability as one of several conditions for the use of coercive measures'.

Chapter 20 discusses supported decision-making primarily with regard to 'situations where persons may need support to make decisions about what treatment and other assistance they should receive from the health and care services' (p. 413). The committee nonetheless assesses more general issues related to supported decision-making, including the content of the CRPD and existing elements of supported decision-making in the guardianship legislation. Elsewhere in the report, the committee makes statements regarding the interpretation of the CRPD that could be criticised, but on this point, I find the committee's description level-headed and sensible. The committee refers to 'different views' on how CRPD Article 12 is to be understood, it explains the

CRPD Committee's statements, and it expressly points out that supported decision-making differs from 'substituted decision-making' in that 'it is the person's will and preferences, not an objective assessment of the person's best interests, that should guide the decision' (p. 415). I also find it positive that the committee argues that the fact that the protection mechanisms in Article 12.4 of the CRPD should, in the opinion of the CRPD Committee, be linked to supported decision-making schemes, should not be understood as an opportunity for the withdrawal of legal capacity. Furthermore, I find the committee's description of the CRPD Committee's practice in section 20.3.2 to be detailed and comprehensive and I have little to add to it. It also provides a thorough description of other international bodies, other countries' legislation, etc.

The section on the committee's assessments and proposals, section 20.7 on page 431 ff., takes the following as its basis:

> If it is unclear whether the person has decision-making competence, supported decision-making will be able to help clarify this and, if necessary, facilitate the person to make the decision themselves. The committee believes that, as far as possible, supported decision-making should promote understanding of when one is faced with choices and the consequences of such choices. Supportive measures should also help ensure that a person's will and preferences are realised, regardless of their current decision-making capacity, to the extent these are identifiable (and not contradictory) and do not infringe on the rights of others. The committee considers this particularly important where it is relevant to implement measures despite not having the person's consent, and possibly also where they expressly oppose the measure.

Here, some dilemmas are addressed that must be considered when drawing up legislation on supported decision-making. The committee then points out that 'people with dementia do not always undergo a proper assessment of their capacity to give consent', which is also an experience that must be taken into account in the further work. The committee's further proposal is, of course, characterised by the fact that it is the use of coercive measures in the health and care field that is the topic of the committee's remit, not the guardianship legislation's rules on legal capacity. However, it is pointed out (on p. 432) that 'the Guardianship Act is not sufficiently adapted to the focus on the individual's right to self-determination in the implementation phase on which the health and care legislation is based', and this is a positive recognition (although it is less positive that the committee thereafter considers that the appointment of a guardian could remedy weaknesses in the current model).

Finally, the committee points out (in section 20.7.9) challenges that also affect my own work:

> The committee is of the view that a clear-cut supported decision-making scheme is still at the conceptual stage, and that developing and proposing a more comprehensive reform clearly goes beyond the framework of its remit. The committee therefore sees a need for significant development efforts. Issues related to due process protection must be identified and resolved. It must also be considered how the special needs of individual groups can be addressed, including the role of next of kin.

The committee proposes its own rules on supported decision-making, next of kins' rights etc., in Chapter 3 of the draft act, which I will not go further into here beyond pointing out the proposals that supported decision-making should be exercised 'to the greatest extent possible' (Section 3-1), that the appointment of a guardian should be considered in the event of 'obvious conflicts of interest between the person and his or her next of kin' (Section 3-5), and that the draft act as a whole allows for the use of coercive measures against persons who oppose treatment (Section 6-5 ff.).

In the Ministry of Health and Care Services' consultation paper of July 2021, it is stated (on p. 33) that the Ministry 'will take the Limitation of Coercion Act Committee's proposal relating to the conditions for lack of decision-making competence as a basis for its further work on coercion legislation'. Furthermore, it is stated that (p. 38):

> The Limitation of Coercion Act Committee pointed out that the realisation of other human rights such as the right to health (which is also enshrined in the CRPD), can in some cases only take place through restrictions to individuals' legal capacity. They therefore considered that the CRPD does not preclude providing rules that restrict individuals' legal capacity.
>
> The Ministry endorses the committee's assessments.

*2.1.5 The Equality and Anti-Discrimination Ombud*

In 2021, the Equality and Anti-Discrimination Ombud (LDO) published the report *Retten til selvbestemmelse – Fra vergemål til beslutningsstøtte* (The right to self-determination – from guardianship to supported decision-making). It is this report I use as the main basis for my draft act, as I almost unreservedly agree with the views the report puts forward. I will only provide a brief summary of the report here.

The LDO's point of departure is that 'the legal capacity of persons with disabilities must be recognised on an equal basis with others, and the state has a duty to ensure that they have access to the support they may need to exercise their legal capacity' (p. 13). The LDO further addresses (on p. 14) something I think some other studies could highlight more clearly, namely that the right to self-determination is a 'general principle concerning individual autonomy with the right to make one's own choices', which 'means that all individual rights in the Convention should be interpreted in light of the obligation to ensure self-determination'. This means, in the LDO's view (which I support), that 'the CRPD leaves no doubt that traditional guardianship must be discontinued' and that 'the CRPD obliges Norway to replace guardianship systems with systems for supported decision-making' (p. 15). The LDO states on the same page that:

> Supported decision-making means that persons receive the support they may need in order to exercise their self-determination. In a supported decision-making system, the person who receives support maintains their legal capacity and is able (is helped) to act based on their own will and preferences. Supported decision-making can therefore be understood to comprise more than simply replacing the content of previous guardianships. While the guardianship system has its roots in a paternalistic mindset that

> persons with disabilities must be controlled and cannot take care of themselves, supported decision-making is based on the idea that everyone has a will and can be the main player in their own lives if they receive proper help and adaptation. It is not only persons with (good) spoken language who are entitled to supported decision-making – everyone has an equal right to self-determination, and everyone has a will and things they like and dislike. If a person cannot express a specific preference in a matter, it can be deduced as best as possible what the person's preference would be based on their personality, general preferences and interests.

Thereafter, the need for good control mechanisms and due process protection mechanisms is pointed out. The LDO then explains (in section 2.6 on p. 16 ff.) their understanding of the CRPD Article 12, which I will return to in Section 3.2 below. It is mentioned already at this point that the LDO in several places states its view that it has not been legally clarified whether it is compatible with the CRPD to restrict legal capacity as long as this is not done on the basis of a disability or diagnosis.

It is important and useful that part 3 of the report provides recommendations for a new supported decision-making system, where in particular Chapter 6, *Viktige byggesteiner i et beslutningsstøttesystem* (Important building blocks in a supported decision-making system), and Chapter 7, *Anbefaling 1. Lov om beslutningsstøtte* (Recommendation 1. The act on supported decision-making), are useful for developing draft legislation. On p. 59, key elements of a supported decision-making system are summarised as follows:

> A supported decision-making system:
>
> — Is necessary to ensure equal right to self-determination in practice.
> — Enables the people who receive support for decision-making to carry out their wishes and will.
> — Is voluntary and is chosen by the person concerned.
> — Is designed according to what the person wants help with, and can in addition to providing help to make decisions include help to communicate decisions in areas the person so wishes.
> — Consists of self-elected support persons/advisers who the person has a great degree of confidence in.
> — Emphasises the process until a decision is made.
> — For people with extensive assistance needs/disabilities, this means that the support person(s) make decisions based on the best interpretation of the individual's will in cases where the person is unable to express this directly. The best interpretation is based on knowledge of the person – their general interests, personality and personal history.
> — Must have good due process protection mechanisms adapted to the needs of the recipient of supported decision-making. An independent supervisory authority must listen to the recipients of supported decision-making, and the support persons' decisions must be contestable.

Chapter 7 points out, among other things, that 'the main purpose of the act is to ensure equal right to exercise legal capacity through a voluntary offer of supported decision-making to people who need it' and that the act must be drafted 'within a human rights paradigm (rather than a paternalistic or medical paradigm)'. By pointing explicitly to the

CRPD's implementation of a paradigm shift, the LDO's report makes a significant contribution to studies and assessments in other areas that do not address the importance of this. The LDO describes the need for changes in terminology, and that the act 'must clearly state that supported decision-making recognises and builds on the person's own resources'. This is specified as follows:

> The decision-maker must have ownership of what they receive help for and from whom. Contrary to the current Guardianship Act, a supported decision-making act should stipulate procedural requirements that it be documented when designing any form of agreement or assignment description between the decision-maker (the person in need of supported decision-making) and the support person(s) how the person themselves has played a leading role in the process of determining what they will receive support for, how the support will be provided and by whom.

A number of specific elements are also specified:

> It should be clearly stated in the act that in cases where the person is unable to communicate their own will, it must be based on the best interpretation of the person's will. This must apply both to the establishment of a supported decision-making agreement/assignment and to the continuous assignment of support persons (and supervisory bodies) to help the person make decisions in line with their self-determination. The best interpretation of the person's will would, for example, be based on knowledge of their personality, general interests, ways of expressing themselves, values, history and what the person understands. Knowledge of what the person understands also includes knowledge of the person's diagnosis and what is currently called 'capacity to give consent'. The Act must not leave any doubt that the right to exercise one's legal capacity applies regardless of a person's diagnosis and 'capacity to give consent'. However, a person's diagnosis and understanding can be included as two of several elements in interpreting their will – as elements of understanding the person's manner of expression and needs. Since several elements are involved in making a competent interpretation in good faith of the person's will, there will be different people surrounding the person who may possess different types of competence and information. An essential element will be to know the person and their way of expressing themselves.
>
> Procedural requirements should be made for the grounds for comprehensive agreements that the person receives support to enter into. Requirements must be made for specification of which criteria justify and express that the agreement is an expression of the person's will. Laying down requirements for such grounds supports the intention that, in practice, the support is based on the person themselves exercising their legal capacity, and is also necessary to make decisions contestable.

With reference to the LDO's view that it has not been legally clarified whether the CRPD allows for restrictions on legal capacity as long as this is not based on disability/diagnosis, it is pointed out that there is in any case 'no doubt that the CRPD obliges states to establish a system for supported decision-making that reduces the need for restrictions on legal capacity'. The LDO believes that it is not necessarily the case that restrictions on legal capacity should be regulated in an act on supported decision-making, and further that legislation should distinguish more clearly between

guardianship/supported decision-making for minors and for adults.

In 2022, the LDO published another report, *Retten til et selvstendig liv og til å være en del av samfunnet – Ombudets gjennomgang av saker om helse- og omsorgstjenester til mennesker med utviklingshemming* (The right to an independent life and to be part of society – The Ombud's review of cases concerning health and care services for persons with disabilities). The report reiterates the previous report's proposals regarding a new act on supported decision-making, and provides limited independent guidance for the drafting of such an act. However, the report provides underlying data on challenges with the implementation of the right to self-determination in practice, which is useful in further work.

#### *2.1.6 Norway's National Institution for Human Rights (NIM)*

On 21 March 2022, NIM published the report *Inkorporering av CRPD i norsk rett – Særlig om CRPD artikkel 12 og 14* (Incorporation of the CRPD into Norwegian law – About the CRPD Articles 12 and 14 in particular). I agree with many elements of the report, such as the fact that many of the disputed issues related to incorporation (including how the Convention should be interpreted and what weight should be given to the CRPD Committee's opinions) are not affected by its potential incorporation. I also find it positive that NIM argues for incorporation by, among other things, stating that the concerns about the incorporation of the CRPD leading to greatly weakened legal protection seem excessive. On other points, however, I find more reason for dissent, in particular about the interpretation of the CRPD Article 12 and the meaning of the CRPD Committee's statements. I will return to this in Section 3, and the following therefore only presents a summary of NIM's views without comments.

NIM formulates the question as whether 'Article 12 of the CRPD establishes a prohibition on national legislation that could restrict or deprive a person with disabilities of their legal capacity'. Based on the wording, NIM believes that 'seen as a whole, Article 12 appears to allow for restrictions to a person's legal capacity when supported decision-making does not succeed, if the restrictions are based on a mapping of the person's wishes and preferences, take place within due process safeguards, are proportional and last for the shortest possible time'. Thereafter, it is stated that the CRPD's 'purpose and context argue for the right of self-determination to be respected, but that in certain situations, it is possible to restrict a person's legal capacity in order to provide effective human rights protection as the state is also obliged to ensure under the Convention'. Thereafter, the other provisions of the Convention, subsequent state practice, other human rights conventions and preparatory works are discussed in order to provide support for the following conclusion:

> Based on a comprehensive assessment of Article 12 in accordance with the rules for the interpretation of treaties (including the interpretation of human rights conventions), it is difficult to claim that the provision contains an absolute prohibition against rules that, under certain conditions, restrict the legal capacity of persons with disabilities. This interpretation of Article 12 is based primarily on the wording, together with purposive

> constructions and the Convention within its context. The conclusion is supported by an underlying principle of efficiency, primarily based on the consideration of other human rights. State practice also provides some support for this conclusion. The CRPD Committee's interpretations draw in the opposite direction, but this one source of law is unlikely to be weighty enough to change the conclusion.
>
> At the same time, Article 12 third paragraph requires the States Parties to take measures to ensure that persons with disabilities have access to the necessary support in decision-making. In accordance with Article 12, it is presumably not possible to interpret it to confer a right to deprive persons of their legal capacity without establishing a system for supported decision-making. A mapping of the person's wishes and preferences, and not the person's 'best interests', must in any case be the guiding principle, both as regards supported decision-making and in the exceptional cases where it is necessary to restrict legal capacity.
>
> Although Article 12 does not contain an absolute prohibition against restrictions on legal capacity, self-determination and the safeguarding of legal capacity must be the main rule as far as possible, and all restrictions on legal capacity must be accompanied by due process safeguards.

NIM discusses the importance of the CRPD Committee's statements by referring to Supreme Court case law and to literature, and points out that these statements do not weigh heavily enough to disregard other sources of law. This is even more clearly stated in the report's discussion of the CRPD Article 14: 'The Committee expresses clearly that the Convention must be understood as establishing such a prohibition. In NIM's view, this cannot be given decisive weight when considering it in conjunction with all the other sources of law, in light of the general international law method'. Despite the different wording, it is arguably the same in reality as in the discussion of Article 12.

## 2.2 Status internationally, about the CRPD Committee's practice in particular

### *2.2.1 The CRPD Committee*

The opinions of the CRPD Committee are adequately described in the sources reviewed in section 2.1 above, and within the timeframe at hand, it does not seem expedient to give a separate account. The most important documents are in any case known:

- General comment no. 1 (2014) on Article 12: Equal recognition before the law
- The Committee's Concluding observations on the initial report of Norway, 7 May 2019

During work on its report from March, NIM had reportedly reviewed all 96 final remarks made by the committee by 20 February 2022, and NIM summarises these remarks so that 'all 96 have received recommendations from the Committee to move away from a 'substituted decision-making system'. However, NIM uses this as an expression of state practice in favour of restrictions rather than as support for the

Committee's practice. I have not reviewed all the final remarks myself, but I have done some random checks. I have also looked at the five final remarks that were submitted after NIM's report (Hungary, Jamaica, Venezuela, Mexico and Switzerland, received in March 2022), and these support NIM's findings. For example, Hungary is recommended to 'abolish all provisions allowing restrictions on the legal capacity of persons with disabilities on the basis of impairment,' which is arguably the clearest recommendation for the topic of this report.

Norway received the following recommendation:

> 20. Recalling its general comment No. 1 (2014) on equal recognition before the law, and given that the Guardianship Act is under revision, the Committee recommends that the State party:
>
> (a) Consider systemic change by replacing guardianship and all other forms of substituted decision-making with supported decision-making for all persons with disabilities, regardless of their support requirements;
>
> (b) Repeal the Guardianship Act, which allows for the deprivation of legal capacity based on impairment, ensure that no person is placed under guardianship and increase training on the recognition of the full legal capacity of all persons with disabilities;
>
> (c) Establish a legal procedure aimed at restoring the full legal capacity of all persons with disabilities, and, in the adoption of a supported decision-making regime, ensure respect for the autonomy, will and preferences of the person concerned;
>
> (d) Create appropriate and effective safeguards for the exercise of legal capacity that are monitored and supervised at the county level to ensure respect for the rights, will and preferences of persons with disabilities and to protect them from undue influence;
>
> (e) Conduct capacity-building activities for public officials on the right of persons with disabilities to equal recognition before the law and on supported decision-making arrangements, and for persons receiving support to help them to decide when they need less support or when they no longer require support in the exercise of their legal capacity.

In general comment no. 1, all text is fairly relevant to the topic, but some paragraphs in particular can be emphasised. To the second paragraph of Article 12:

> 15. In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to

> have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach). The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.

To the third paragraph:

> 16. Article 12, paragraph 3, recognizes that States parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect.
>
> 17. Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making. …

In extension of this, some guidelines are provided for what supported decision-making must entail. To the fourth paragraph:

> 21. Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The "best interests" principle is not a safeguard which complies with article 12 in relation to adults. The "will and preferences" 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.

And more generally:

> 28. 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.

It is also useful to include the Committee's general recommendations on the content of a supported decision-making scheme, in paragraph 29:

> 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:

(a) Supported decision-making must be available to all. A person's level of support needs, especially where these are high, should not be a barrier to obtaining support in decision-making;

(b) All forms of support in the exercise of legal capacity, including more intensive forms of support, must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests;

(c) A person's mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people;

(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) In order to comply with the requirement, set out in article 12, paragraph 3, of the Convention, for States parties to take measures to "provide access" to the support required, States parties must 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 of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty;

(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.

Other sections could also be mentioned, but for me, these are sufficient to establish that the Committee undoubtedly is of the view that the withdrawal of legal capacity is not in accordance with Article 12 of the CRPD (even in marginal exceptional cases), and that certain elements must be present in national legislation in order to satisfy the requirements of the Convention. In my draft legislation, I attempt to build on the criteria

mentioned here.

In conclusion, it is mentioned that the general comment contains a separate section on the relationship to other provisions of the Convention. It is sometimes argued that the fulfilment of other rights in the Convention requires a restriction on a person's right to self-determination, cf., for example, NIM's statement that 'an underlying principle of efficiency, primarily based on the consideration of other human rights', indicates that 'it is difficult [to] claim' that Article 12 'contains an absolute prohibition against rules that, under certain conditions, restrict the legal capacity of persons with disabilities'. It is worth recalling that the relationship to Article 25 on the right to health, which is among the provisions that are often included in such arguments, is explicitly described in the general comment:

> 41. The right to enjoyment of the highest attainable standard of health (Art. 25) includes the right to health care on the basis of free and informed consent. State parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment. In conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.

The comment also discusses the relationship to Articles 5, 6, 7, 9, 13, 14, 15, 16, 17, 18, 19, 22 and 29, and the Committee does not provide any support for the argument that the effective implementation of rights under any of these provisions presupposes a restriction of legal capacity.

#### *2.2.2 UN Special Rapporteur*

The UN Special Rapporteur on the Rights of Persons with Disabilities, who at the time was Catalina Devandas Aguilar, prepared a thematic report on legal capacity and supported decision-making in 2018 (A/HRC/37/56). As a source of law, the basis of this report in Norwegian law is likely to be limited, but it provides a good account of, among other things, the consequences of the withdrawal of legal capacity for the non-fulfilment of other rights. The report also underlines the paradigm shift and expresses support for the CRPD Committee's General Comment No. 1. It also makes specific recommendations on law reform:

> 63. States must take immediate measures to reform their legal frameworks in order to ensure or restore the right to legal capacity of all persons with disabilities. It is important that legislation expressly recognize that persons with disabilities have the capacity to both hold and act upon rights and duties. Legislation must also recognize the right to access support for the exercise of legal capacity, if desired, and ensure that support arrangements are available, accessible, adequate and affordable. States must establish an enabling legal framework that facilitates the creation and implementation of various supported decision-

making schemes, including the provision of financial and technical assistance to civil society organizations for that purpose. All substitute decision-making regimes must be repealed.

> 64. States must ensure an appropriate framework of safeguards to ensure respect for the rights, will and preferences of individuals in the provision of support and protect them from conflicts of interest, undue influence and abuses. When discussing crisis or emergency situations, States must adhere to the principles and rights recognized in the Convention. In particular, States must refrain from establishing exceptions to the full enjoyment of the right to legal capacity of persons with disabilities at all times and from creating new apparently disability-neutral responses that will disproportionately and adversely impact on persons with disabilities.

> 65. States should initiate a comprehensive law review process and make changes in their legal systems to fully implement the right to legal capacity of persons with disabilities. The review must be comprehensive and encompass different areas of law, including family, criminal, mental health and tort and contractual law. The concerns of third parties, such as those regarding the duty of care, liability and the security of transactions, must be addressed in the light of the Convention. States must be aware that many experts working in the area of legal capacity are not familiar with the standards of the Convention and may thus require prior information and training. The law review process should include persons from different groups and sectors, including persons with disabilities themselves and those providing support in practice.

The recommendations to the states are summarised later, as described by the Limitation of Coercion Act Committee in NOU 2019: 14 section 20.3.5. I cannot see that the recommendations provide anything additional to what is stated in the CRPD Committee's recommendations.

In the same report, the Special Rapporteur explains her understanding of the interpretative declarations submitted to Article 12 by Norway and certain other countries:

> 37. Thirteen States parties to the Convention have issued reservations and declarations upon ratification or accession, with the intention of limiting the implementation of article 12 and other related articles. According to article 19 of the Vienna Convention on the Law of Treaties and article 46 of the Convention itself, reservations and declarations incompatible with the object and purpose of the Convention are not permitted. Given the centrality of article 12 to the enjoyment and exercise of all rights set out in the Convention, such restrictions clearly contradict the object and purpose of the Convention, as they hinder and/or deny the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. In that regard, the Special Rapporteur urges the States parties concerned to withdraw all their reservations and declarations.

It is clarified in a footnote that the Special Rapporteur considers the interpretative declarations to be reservations rather than declarations: 'The Special Rapporteur considers such declarations as reservations, since they aim to exclude or modify the legal

effect of the provisions of the Convention.' I offer some thoughts on the significance of this as a source of law in Section 3.3.

### 2.3 Other countries' legislation

During the work on this report, I have received relevant legislation from other countries, in particular Costa Rica and Peru, in addition to an account of ongoing legislative work in Bulgaria and a link to an older act (1996) from British Columbia in Canada. Costa Rica's law is only available in Spanish, so I used Google Translate to translate it, while I have used an English and Norwegian version of Peru's law. A law from Colombia was also described, but I have not had access to this. Section 7.2 of the LDO's report discusses legislation in other countries, including Argentina, Australia, Northern Ireland, India, Israel and US states. I have not looked into this legislation myself.

I must admit that it has been challenging to get to grips with this legislation within the framework I was allocated. The legal context is unknown to me, including the general principles of each individual legal system, other relevant national rules etc. Furthermore, I do not know the countries' legal traditions and their legislative techniques are at times quite different from those of Norway. I have tried to draw inspiration from the laws in place, but must take into account that many elements of this legislation are overlooked or misunderstood. A general observation, however, is that where a proposal for national legislation in Norway is met with arguments, for example that the right to withdraw legal capacity must be retained, it is a robust argument that other countries have established legislation without this. Both Costa Rica's and Peru's laws are good points of reference in this respect.

## 3 CRPD ARTICLE 12

### 3.1 My view of the weight of the CRPD Committee's practice in terms of sources of law

I have described this in previous texts to Uloba, and my opinion has not changed. In the August report, I wrote briefly in point 2.6:

> It is clear that general comments from the UN human rights bodies are not legally binding, neither in terms of international law nor national law, see, *inter alia*, Rt. 2009 p. 1261. The same applies to interpretations that are expressed in complaints concerning individuals that are not directed against Norway. At the same time, it is also clear that the Committee's practice is a relevant source of law in Norwegian law. In Rt. 2008 p. 1764, the Supreme Court established that 'a convention interpretation made by the UN Human Rights Committee must have considerable weight as a source of law'. The same basis is argued in HR-2016-2591-A as regards the CRPD.

> In Rt. 2015 p. 421, the Supreme Court further states that new obligations under international law 'or new practices from treaty bodies that clarify or change the understanding of existing obligations' are circumstances that may provide grounds for departing from previous case law. The statement supports the view that great emphasis should be placed on the practice of international enforcement bodies as regards the interpretation of international human rights conventions. It is important that this is taken into account when discussing the interpretation of the CRPD's provisions, both with and without incorporation. The Committee's statements must be considered in light of the other sources of law, and committee statements that cannot be enshrined in the text of the convention on the basis of the interpretative international law principles (wording in light of the context and purpose) cannot automatically be used as a basis in the application of the convention in Norwegian law.

Here, NIM's report provides additional elements (particularly in section 2.2), with reference to several judgments, literature and Report No 39 to the Storting (2015–2016), and I have no objection to NIM's general presentation of the legal situation here. On the whole, I think there is a great deal of agreement on the general line of thought. Statements from human rights bodies are not legally binding either in terms of international law or national law, but they are given 'considerable weight' in Norwegian law, as they are nevertheless seen in light of the other sources of law. I do not necessarily agree with NIM and the LDO in their joint letter from March 2021 that it is 'unclear' whether the Supreme Court's statements on the Human Rights Committee and the Children's Committee have transfer value, which I think is fairly clear, but this is a somewhat academic question. The crux of the matter now is in any regard what specific weight the CRPD Committee's general comments (in particular no. 1), as well as their concluding remarks to Norway, shall be given as regards the specific legal issue of the right to supported decision-making. Here, my view is that the CRPD Committee's statements should be used as a basis. The rationale for this is (at least) threefold.

*Firstly,* I consider it a matter of principle that follow-up of human rights bodies' statements is part of the duty of loyalty in the context of convention interpretation, cf. The Vienna Convention on the Law of Treaties Articles 26 and 31. Article 26 establishes the general duty of loyalty by stating that any treaty in force 'is binding upon the parties to it and must be performed by them in good faith', while Article 31 states that a treaty 'shall be interpreted in good faith'. For example, I can quote the 2014 Venice Commission report 'on the implementation of international human rights treaties in domestic law and the role of courts', paragraph 50 (footnotes omitted):

> The *bona fide* obligation to perform a treaty ratified by the State (*pacta sunt servanda*) is set out in Article 26 of the Vienna Convention on the Law of Treaties. The principle of good faith generates, first, a duty to take into account the international obligations existing in the treaty and second, a duty to co-operate with the Human Rights Committee … set up under the Covenant. Against the background that international (even judicial) decisions are hardly enforceable through coercive measures, it has been asserted that the fact that the HRC's views do not have the force of binding law does not play a decisive role in international practice; states comply (or do not comply) for reasons which are not only formal ones. In some cases, the HRC's views concerning the Covenant may be followed

> in the same manner as human rights courts decisions, in spite of their different characteristics.

This applies directly to the UN Human Rights Committee, but there is no legal reason why the same should not apply in general to the UN's other convention bodies. Article 26 must also be seen in light of Article 27, which states that a state 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. The scope of this is another topic that can be more appropriately discussed in academic literature, and I would not, for example, argue in general that the Supreme Court's standard is contrary to the duty of loyalty. Nevertheless, for me, the duty of loyalty is still a factor that indicates that committee statements as a clear general rule should be used as a basis, and that it is not sufficient to argue that other sources of law indicate otherwise.

*Secondly*, as an extension of this, it is appropriate to point out an academic fad on my part concerning the scope of the reservation as regards 'in light of the other sources of law.' In practice, it may appear that this reservation largely entails attaching importance to the general comments if the same follows from the wording, and disregarding them if you would interpret the wording differently yourself. As such, the general comments are not given any significant weight; they are not given any weight at all. It is probably a common opinion that general comments should be given considerable weight if the wording is unclear or incomplete, or if they give clarifications of discretionary words and expressions (e.g. when the ICCPR Article 9.3 states that anyone who is deprived of liberty shall be brought 'promptly' before a court, it is helpful that a general comment clarifies that everything within 48 hours shall be considered to be 'promptly' in the sense of the convention), while general comments cannot be used to deviate from clear wording. One of the points of the CRPD Article 12 is, however, that even those who believe that the provision allows for the withdrawal of legal capacity appear to acknowledge that it is not clear that the wording supports this; it is merely believed that the wording seen in the light of the other sources of law can be interpreted as such – and it is precisely in such a case that a general comment should be given considerable weight if there is to be any reality in such a general characterisation. The very existence of the interpretative declarations also indicates that the wording is unclear. If we acknowledge that the wording is unclear, I believe that the 'considerable weight' standard indicates that the Committee's interpretation should be used as a basis.

*Thirdly,* the 'considerable weight' standard is most important in cases where national law is to be interpreted and applied in the light of an international human rights standard, and where questions arise about the will of the legislator, the interpretation of national law etc. In cases where the national legislator is to develop (or further develop) legislation to meet our human rights obligations, I believe there should be an even higher threshold for deviating from the statements of a convention body. There will then be no existing national legislation that sets barriers, and the will of the legislator will presumably be loyal compliance with international obligations. I therefore believe that in a legislative process such as this, whether it is about the development of an act on

supported decision-making or about the amendment of guardianship legislation, committee statements should be used as a basis with a far narrower right to impose restrictions than what the 'considerable weight' standard would imply.

### 3.2 Relationship with other human rights groups

It is sometimes pointed out that other human rights bodies (including the European Court of Human Rights (ECtHR) and the UN Human Rights Committee) have not endorsed the CRPD Committee's interpretation. I will not go into the interpretation of the other bodies at this point, but would generally point out that these bodies only have the competence to interpret their own convention, not the CRPD. If the ECtHR disregards the CRPD Committee's interpretation, the ECtHR's interpretation becomes applicable law with regard to the European Convention on Human Right (ECHR), but this does not affect the interpretation of the CRPD. Other conventions are relevant for the interpretation of the CRPD under Article 31.3.c) of the Vienna Convention insofar as all parties to the CRPD are also parties to another convention. This does not apply to the ECHR, but it applies (I assume) to the UN Convention on Civil and Political Rights (ICCPR). The Human Rights Committee's interpretation of the ICCPR is nevertheless not in itself more weighty than the CRPD Committee's interpretation of the CRPD, and is in any case only relevant for context.

### 3.3 The meaning of the Norwegian interpretative declaration

As mentioned in Section 2.2.2 above, the UN Special Rapporteur has stated that the interpretative declarations made to Article 12 are in fact reservations. The Norwegian interpretative declaration reads:

> Norway recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Norway also recognizes its obligations to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Furthermore, Norway declares its understanding that the Convention allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards.

I think it is appropriate to include some sections from the report I wrote in August 2021:

> It must be acknowledged that the significance of these interpretative declarations as a source of law is not clear. In international law, this question has been answered by the UN International Law Commission, which in 2011 concluded its work on reservations to treaties. The final document defines interpretative declarations as 'a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions', unlike reservations, which are intended 'to exclude or to modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to the State'. It can probably be

discussed whether the Norwegian interpretative declarations are in reality considered reservations, but it is clear that the state intends them to be interpretative declarations. The International Law Commission also provides a number of guidelines on procedures etc., but these are of limited importance to us. One challenge lies in the fact that the final document is rather vague about the legal effects of interpretative declarations:

> 1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.
>
> 2. In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration by other contracting States or contracting organizations.

The interpretative declarations are thus a relevant factor in the interpretation of the relevant provisions of the Convention, and it is of some significance that several other states have issued similar interpretative declarations. Here, it may also be suggested that the CRPD Committee itself may have contributed to the issue becoming so inflamed by introducing its general comment no. 1 (2014) by pointing to a ‘general misunderstanding’ on the part of the state parties and the parties’ ‘general failure to understand’ what Article 12 means. From the point of view of international law, interpretative declarations have significance as an interpretative factor. It is clear that the interpretative declarations are not in accordance with the CRPD Committee’s interpretation, but regardless of incorporation, there will probably continue to be disagreement about how the relevant provisions should be interpreted.

In Norwegian law, it is clear according to HR-2016-2591-A that the interpretative declarations are important in Norwegian law in that they show a clear intention on the part of the legislator, thereby limiting the application of the presumption principle. During the work on this investigation, I was told that Norway, during the hearing related to the initial state report, supposedly stated to the CRPD Committee that ‘the declarations has [sic] no bearing on the legal status on [sic] the Convention in Norwegian law.’ This appears to be somewhat inaccurate in light of Supreme Court practice, but it has limited significance for the current purpose. The question now is rather whether the effect of the declarations will be affected by incorporation, and here no clear answer can be given. If, in connection with incorporation, Norway maintains its understanding of the relevant provisions, this understanding will probably continue to be used as a basis for the application of the Convention's provisions in Norwegian law. For the sake of legal clarity, it will be important that the interpretative declarations are withdrawn if the Convention is incorporated, but otherwise, we are in somewhat unfamiliar waters as far as sources of law are concerned.

## 3.4 My understanding of the CRPD Article 12

It follows from Section 3.1 that I, for my own part, assume the CRPD Committee’s understanding of the CRPD Article 12 as my basis, including that the provision does not

allow for the withdrawal of legal capacity on the basis of disability. I therefore also agree with the LDO’s interpretation of the Convention.

In light of existing sources, it is nevertheless appropriate to clarify that I also think this is the most sound interpretation in light of other sources of law. In my view, the wording of the Convention supports this interpretation. Article 12 second paragraph, states that persons with disabilities ‘enjoy legal capacity on an equal basis with others in all aspects of life’, and no exceptions are included in this formulation. The third paragraph states that persons with disabilities must be provided with the support they may require in ‘exercising their legal capacity’, and not that their legal capacity can be withdrawn. The fourth paragraph applies correspondingly to ‘measures that relate to the exercise of legal capacity’. In my opinion, the wording clearly indicates that the withdrawal of legal capacity is not permitted. NIM draws arguments from the various wordings regarding the state’s obligations (‘shall recognize’ and ‘shall ensure’), but I cannot see that these wordings are relevant to this particular issue. NIM further states that ‘the fourth paragraph seems to presuppose that, on certain conditions, a person’s exercise of legal capacity can be restricted’, and I simply do not see this. NIM then goes into the context and purpose of the Convention, but the paradigm shift, self-determination as a general principle etc., are not mentioned to any great extent. It can just as easily (if not more easily) be argued that the context and purpose of the Convention indicate that Article 12 should be interpreted as the Committee does. The CRPD Committee has discussed its relationship with the other provisions itself, and shown that there is no need for a restrictive interpretation of Article 12 to ensure effective protection of other Convention rights. NIM also emphasises subsequent state practice and touches upon a larger discussion about what weight subsequent state practice should be given in the interpretation of a human rights convention. State practice would generally suggest a narrow interpretation of states’ obligations under international human rights conventions, and the Vienna Convention’s interpretation principle was formulated with a view to international law agreements on states’ mutual rights and obligations toward each other. One accepted recognition of human rights practice is that the Vienna Convention’s interpretation rules must be applied to human rights conventions, with due regard to the special nature of the human rights conventions compared to general international law agreements, and this can be discussed with regard to state practice. Of course I see the point of state practice, but to me, state practice is not a weighty argument for a narrow (or restrictive) interpretation of a human rights convention.

Without engaging in further polemics with NIM, the Limitation of Coercion Act Committee, the ministries or other interpreters of Article 12, I am content to summarise my view as follows: The wording of Article 12 indicates that withdrawal of legal capacity on the basis of disability is not permitted. The context and purpose of the Convention, in particular self-determination as a general principle and the general paradigm shift, support this interpretation. State practice is not a weighty argument in the opposite direction. The CRPD Committee takes this interpretation as its basis. In such a case, where the wording does not at the very least clearly support the opposite view, and where the other sources of law do not speak unequivocally (or at all) in favour

of the opposite view, the ‘considerable weight’ standard becomes fully applicable. In my view, therefore, the CRPD Committee’s interpretation of Article 12 shall be used as a basis.

# 4 DRAFT ACT ON SUPPORTED DECISION-MAKING

## 4.1 General premises

Based on the factors mentioned above, it is useful to summarise some overarching premises for the following draft act.

As outlined above, I use the CRPD Committee’s interpretation of Article 12 of the CRPD as my point of departure and assume that a draft act will be drawn up on the basis that it is not permissible to deprive anyone of their legal capacity on the basis of disability. I do not think it is necessary for that purpose to decide whether persons with disabilities can be deprived of legal capacity on other grounds (substance abuse, gambling addiction), but I believe that the CRPD does not prevent this as long as the same conditions apply to persons with disabilities as to everyone else, and as long as the rules are not applied in a discriminating manner – but I feel that this question is beyond the present scope.

I further apply the arguments for a supported decision-making scheme highlighted by the CRPD Committee and the LDO. I have looked at other countries’ statutory regulations, but I believe it to be more appropriate to formulate a new draft act based on Norwegian legal traditions than to try to mimic other countries’ regulation.

For the purpose of this report, and in light of the assumptions and frameworks within which the report has been prepared, it has not appeared necessary nor realistic to provide a separate assessment of the need for a supported decision-making scheme.
The LDO itself emphasises that the Ministry of Justice’s proposed amendments to the Guardianship Act are a step in the right direction, and others will believe that the purposes a supported decision-making act should attempt to achieve will be achieved within already existing schemes. I have taken note of the LDA’s description of the situation in its reports, and I note that in the period after 2019, there has been an increase in the number of cases involving the withdrawal of legal capacity, cf. figures submitted by the Norwegian Civil Affairs Authority:

| | 2021 | 2020 | 2019 | 2018 | 2017 |
|---|---|---|---|---|---|
| Total number of guardianships (excl. unaccompanied minor asylum seekers) | 64,732 | 64,292 | 63,299 | 64,457 | 67,105 |
| Case type ‘Adult’ | 42,561 | 42,281 | 41,452 | 41,849 | 40,465 |
| New guardianships established for adults | 6,325 | 7,667 | 6,349 | 7,579 | 7,623 |
| % of petitions for guardianship that become a guardianship | 72 | 76 | 76 | 80 | 85 |
| Deprivation of legal capacity | 296 | 280 | 236 | 224 | - |

Furthermore, it is emphasised that a fundamental premise in the following is that the act should be formulated within a human rights paradigm for disabilities with the right to self-determination as a guiding principle. In this context, the human rights perspective of such legislation mainly concerns the state's positive obligations (the obligation to take active measures to ensure that everyone receives the necessary support), not about the state's negative obligations (the obligation to not restrict anyone's legal capacity). An act on supported decision-making will require a change in thinking, shifting away from a focus on avoiding discrimination (although this remains important) and towards a focus on active measures.

Finally, a general reservation must be made that the following is only intended as a draft act that attempts to take the discussion a step further, recognising that many of the proposals are underdeveloped and oversimplified. Other actors (the LDO, the Limitation of Coercion Act Committee etc.) have pointed out that the formulation of an act on supported decision-making raises many difficult questions that need to be thoroughly assessed, and it is unrealistic within the scope of my assignment to provide a 'complete' report. My ambition is limited to proposing some opportunities and some challenges.

## 4.2 Draft act

Section 1. *Purpose and scope of application*

Persons with disabilities are entitled to the necessary support for decision-making to exercise their legal capacity on an equal basis with others. This Act is intended to ensure that persons in need of supported decision-making can exercise their right to self-determination in all aspects of life.

Section 2. *Relationship to international obligations*

The Act shall be applied in accordance with Norway's obligations under international law to protect the rights of persons with disabilities

Section 3. *Fundamental principles*

No one may be deprived of their legal capacity on the basis of, or as a result of, disability.

Any person with disabilities who needs individual adaptation or support in order to exercise their legal capacity may so request and have support persons appointed by free choice.

Supported decision-making shall always be voluntary. This means, *inter alia*, that supported decision-making shall only be offered when this is the decision-maker's wish, that supported decision-making shall be terminated when the decision-maker so wishes, and that the content of the supported decision-making arrangements shall be adapted to the decision-maker's wishes and will.

Supported decision-making shall be offered free of charge to the decision-maker.

No one shall be refused supported decision-making on the grounds that the need for support is considered to be substantial. Nor shall any person be denied supported decision-making on the grounds of the person's mode of communication or challenges in interpreting the person's communication.

Section 4. *Use of terms*

For the purposes of this Act, 'disabilities' means physical, psychosocial, cognitive or sensory impairments that in interaction with various barriers may hinder a person's full and effective participation in society on an equal basis with others.

By 'decision-maker' is meant the person who is offered or who receives support for decision-making.

By 'support person' is meant the person or persons who offer or provide support for decision-making to a decision-maker.

The following persons who have reached the age of 18 are considered 'next of kin': a) spouse or cohabitant; b) children; c) grandchildren; d) parents.

Section 5. *Initiation of supported decision-making*

A person shall be offered supported decision-making if the person so requests. If a person does not explicitly express a desire for supported decision-making, supported decision-making shall nevertheless be offered if it must be assumed that this is the decision-maker's wish, cf. Section 6.

A person shall also be offered supported decision-making if a next of kin so requests, unless it must be assumed that this is contrary to the decision-maker's own wishes. When a next of kin requests supported decision-making, the next of kin with higher priority in the order that follows from Section 4 fourth paragraph shall be given the opportunity to comment on what they assume to be the decision-maker's wish.

If a person other than the decision-maker or the decision-maker's next of kin requests supported decision-making, supported decision-making shall be offered if it must be assumed that this is the decision-maker's wish. Decisive importance shall be attached to the view expressed by the decision-maker themselves. If the decision-maker does not express an opinion, the decision-maker's next of kin shall be given the opportunity to express their views, but the decisive factor shall be what must be assumed to be the decision-maker's wishes.

Section 6. *Expression of will*

An expression of will can be explicit or tacit. It is explicit if made orally, in writing, through any direct means, manually, mechanically, digitally, electronically, through sign language or alternative means of communication, including the use of reasonable adaptation or such support as the person in question requires. It is tacit if, to the best of one's ability, a will can be deduced from an attitude or repeated conduct in the person's life history that shows that such a will exists.

Section 7. *Support persons*

The person or persons whom the decision-maker wishes to be appointed, cf. Section 6, and who agree(s) to be appointed, shall be appointed as support person(s). If no person can be identified whom the decision-maker wishes to be appointed as a support person, a support person shall be appointed based on a proposal from a non-profit organisation designated by the King. In such cases, decisive weight shall be given to with whom the decision-maker is assumed to be familiar and consider trustworthy.

The person appointed support person shall be issued with a confirmation identifying the person as a support person vis-à-vis a third person.

Support persons shall not be entitled to remuneration.

If there is reason to believe that one or more support persons are acting without taking account of the wishes and will of the decision-maker, the supervisory authority should be notified. The supervisory authority shall, without undue delay, decide on such notifications.

Section 8. *The scope and content of supported decision-making*

Supported decision-making shall consist of such forms of assistance as freely chosen by the decision-maker to facilitate the exercise of their rights, including support in communication, in the understanding of legal acts and their consequences, and the expression and interpretation of their will. The support has no powers of representation other than in cases where this is expressly established by decision of the decision-maker.

The aim of supported decision-making shall always be to support the decision-maker in making decisions and dispositions in accordance with their own wishes and will. If the decision-maker cannot express their will unambiguously, decisions shall be made based on the best interpretation of the decision-maker's will in light of all the circumstances surrounding a decision, including the decision-maker's previous decisions and expressions of will, the decision-maker's life situation and needs, and the support persons' knowledge of the decision-maker's preferences, personality, general interests, way of expressing themselves, values, history and what the person understands.

Supported decision-making can be used in all areas of life, limited only by the wishes and will of the decision-maker.

Supported decision-making shall not prevent the decision-maker's exercise of other freedoms and rights in any area of life, including, *inter alia*, the exercise of voting rights, the entering into or dissolution of marriage, partnership or cohabitation, the establishment of a family or the exercise of sexual and reproductive rights, the exercise of parental responsibility, and receiving or opposing medical treatment.

Section 9. *Decision-making*

If the decision-maker expresses their will unambiguously, a support person may freely support the implementation of the decision-maker's will.

If the decision-maker's will must be interpreted, a support person should consult other support persons about what must be assumed to be the decision-maker's will. In

such cases, decisions of great importance to the decision-maker may only be made by a majority of the appointed support persons. Section 7 fourth paragraph shall apply correspondingly. Written justification shall be given for such a decision.

Support persons may never implement a decision or make a disposition that the decision-maker opposes through expression or action.

Section 10. *Termination of supported decision-making*

The supported decision-making arrangement shall be terminated immediately if the decision-maker so requests. If the decision-maker does not explicitly express a desire for such termination, the supported decision-making arrangement shall nevertheless be terminated if it must be assumed that this is the decision-maker's wish.

The supported decision-making arrangement shall furthermore be terminated if a next of kin so requests, unless it must be assumed that this is contrary to the decision-maker's own wishes. When a next of kin requests termination of the supported decision-making arrangement, the next of kin with higher priority in the order that follows from Section 4 fourth paragraph shall be given the opportunity to comment on what they assume to be the decision-maker's wish.

If a person other than the decision-maker or the decision-maker's next of kin requests termination of the supported decision-making arrangement, the arrangement shall be terminated if it must be assumed that this is the decision-maker's wish. Decisive importance shall be attached to the view expressed by the decision-maker themselves. If the decision-maker does not express an opinion, the decision-maker's next of kin shall be given the opportunity to express their views, but the decisive factor shall be what must be assumed to be the decision-maker's wishes.

Section 11. *Validity*

The decision-maker is responsible for their own dispositions and decisions, and claims may be made against the person. The provisions of the Contracts Act apply correspondingly to the decision-maker's dispositions and responsibilities.

Section 12. *Decision-making authority*

Administrative decisions on the initiation and termination of supported decision-making arrangements are made by the municipality, which also appoints support persons. Administrative decisions pursuant to the first sentence are individual decisions.

Section 13. *Supervisory authority*

A supported decision-making board shall be established to oversee compliance with the provisions of this Act.

Section 14. *Relationship to the Guardianship Act*

If a person has established a valid lasting power of attorney under Chapter 10 of the Guardianship Act, the power of attorney shall take precedence over the provisions of

this Act. This Act nonetheless applies to matters not covered by a lasting power of attorney.

Supported decision-making may replace a lasting power of attorney if the conditions in Section 89 of the Guardianship Act relating to revocation of a lasting power of attorney, as well as the conditions set out in Section 5 of this Act, are met.

Guardianship may not be established pursuant to Chapter 4 of the Guardianship Act for persons covered by this Act.

Section 15. *Legal authority to issue regulations*

The King may issue regulations setting out more detailed provisions specifying and supplementing the provisions of this Act.

# 5 COMMENTS ON THE INDIVIDUAL PROVISIONS

*To Section 1*

A provision relating to the purpose of the act can be formulated in many ways; this is merely an attempt to reflect the views of the CRPD Committee and the LDO that supported decision-making should enable individuals to exercise their legal capacity, and that the right to self-determination should be the guiding principle.

One point for discussion is whether an act on supported decision-making should cover persons with disabilities, possibly with specified disabilities, or whether it should apply to 'everyone'. I have proposed the former, simply because this is what is relevant to the CRPD and because I then avoid taking a position on whether the current guardianship system should be replaced by supported decision-making systems for other groups as well.

*To Section 2*

This is a proposal for sector monism (*sektormonisme*). I am familiar with the discussion in Norwegian Official Report (NOU) 2016: 24 *Ny straffeprosesslov (*A new Criminal Procedure Act) that, after the 2014 constitutional reform, there is no longer a need for sector monism provisions, but professionally, I disagree. If the CRPD is incorporated with precedence over other laws, a sector monism provision will be irrelevant, but if it is incorporated with the rank of ordinary law or not incorporated at all, I believe a sector monism provision will still be useful and necessary.

I have not mentioned the CRPD specifically, because other human rights conventions also include rights for persons with disabilities. Since the most important of these are incorporated into the Human Rights Act with precedence over other laws, they are less important here, but, as the Norwegian saying goes, 'No one mentioned, no one forgotten'.

*To Section 3*

In terms of legal technique, I do not think this provision is entirely elegant, but it is useful to specify some fundamental principles on which a legal regulation must be based, at least during the discussion phase. The selection of principles is based on the CRPD Committee's statements and the LDO report.

The first paragraph specifies the prohibition against the withdrawal of legal capacity on the basis of disability. The addition of 'or as a result of' is intended to show that the withdrawal of legal capacity may not be carried out if it is the disability that leads to any general condition for withdrawal of legal capacity being met. In the first draft of the draft law, I proposed the sentence that 'the same applies if the disability means that a person is not able to safeguard their own interests', but it is unfortunate to use phrases such as 'not able to'. I believe that the wording in the paragraph could nonetheless be improved, but the purpose is to cut off discussions about causal relationships such as those concerning the use of coercive measures. As stipulated in Section 8 of the draft act, the intention is also to ensure that there is no 'residual opportunity' (any marginal exceptional cases) for the withdrawal of legal capacity. Even if the decision-maker's support needs are 100%, supported decision-making is intended to be a tool to safeguard the decision-maker's interests.

The second paragraph is taken from Article 45 of Peru's act. I feel that it involves repetition from, among other places, Section 1, but it provides an alternative wording.

The third paragraph is intended to highlight the fundamental principle of voluntariness, both when establishing and exercising supported decision-making.

The fourth paragraph states that supported-decision making shall be free of charge, cf. point (e) of the CRPD Committee's general comment. I assume that the financial consequences of establishing supported decision-making systems must be discussed further, but a fundamental principle nonetheless must surely be that the decision-maker should not fund it themselves. This is also linked to Section 7 third paragraph, which states that the support person shall not be entitled to remuneration, and it is discussed in more detail there.

The fifth paragraph has also been taken from the CRPD Committee and the LDO. No one should be denied supported decision-making on the basis of a perception that their support needs are too great, nor because of an unconventional mode of communication. The proposal is based on points (a) and (c) of the CRPD Committee's general comment. The wording has been chosen on the basis of a principle that no one lacks communication skills; the challenges lie in the ability of the people around them to interpret their form of communication.

*To Section 4*

This section defines a number of terms used in the act. Disability is defined in Article 1

of the CRPD, but with some terminological changes – the convention's term 'mental' has been changed to 'psychosocial', while 'intellectual' has been changed to 'cognitive'. A change with actual consequences in practice has also been made in that the Convention's condition concerning 'long-term' impairments has been removed. The reason is that short-term impairments can also trigger a need for supported decision-making, and such an act should not obstruct this. However, through this adjustment, the scope of the act in terms of who it applies to differs from the CRPD, and it is not given that this is fortunate, cf. also the comment on Section 1 that the draft act is linked to the CRPD's scope of application.

'Decision-maker' is chosen as the term to describe the person receiving supported decision-making, in accordance with the LDO report. I have chosen 'support person' as a term to describe the person providing the support, but it is a somewhat cumbersome term – the LDO proposes 'decision adviser' as an alternative. For next of kin, I have used the list in Section 94 of the Norwegian Guardianship Act, but Section 1-3 (b) of the Act on Patient and User Rights provides an alternative – the difference is likely not that great in practice. Rather than defining next of kin, a more important question when introducing a statutory regulation is what function next of kin should have. In the draft act, I have suggested that next of kin may request the establishment or termination of supported decision-making, but they have not otherwise been assigned any function.

Incidentally, the draft act differs from Section 94 of the Guardianship Act (which excludes next of kin who themselves have a guardian), in that there is no obstacle to the next of kin utilising supported decision-making themselves. The principle is that people who receive supported decision-making have the same rights as others, and a prohibition here would contradict this principle.

*To Section 5*

A statutory regulation must decide how supported decision-making should be implemented, which is probably not entirely easy to regulate. The guiding principle must be that the decision-maker asks for it (requests? demands?), but it is unclear whether formal requirements can or should be imposed, and it is unclear how to regulate cases where the decision-maker does not themselves express a desire for supported decision-making. Article 659-D of Peru's act states that '[t]he person of legal age who requires support for the exercise of their legal capacity can appoint their support before a notary or a competent judge'; while Article 659-E states that the competence to designate support measures rests with the judge for 'persons with disabilities who cannot express their will'. I do not think this is suitable for Norwegian legislation. It can of course be discussed whether the competence to establish supported decision-making schemes should rest with the courts, but assigning such competence to the municipal authorities or county governor seems to align the best with Norwegian legislation in general (see Section 12). Secondly, it seems unfortunate to say that the decision-maker 'cannot express their will', because the premise of the act is that the decision-maker can always express their will, either explicitly or tacitly. I have therefore chosen a separate

regulation, but it is not given that my proposal is the best. Here, as otherwise, the purpose is rather to provide a basis for further discussion.

The first paragraph is based on the decision-maker themselves requesting it, or that it must be assumed that it is the decision-maker's wish. A reference to Section 6 regarding explicitly and tacitly expressed wishes has been included here.

The second paragraph allows for next of kin requesting supported decision-making, unless it must be assumed that this is contrary to the decision-maker's own wishes. It is possible that a variant with 'must be assumed to be consistent with the decision-maker's own wishes' would be better. A more important question is nevertheless whether or not next of kin should have such a function. I believe it is appropriate to capture the cases where the decision-maker cannot request it themselves. The second sentence is inspired by the Guardianship Act and specifies an order of priority among the next of kin.

The third paragraph is about people other than the decision-maker themselves or their next of kin. This could be friends, nurses or the like. I have tried to make it clear that it is the decision-maker's will that is crucial in all alternatives, but different wordings reveal that I am unsure of the best way to formulate this.

*To Section 6*

This provision is probably not in the correct place in the draft act, but I have not prioritised this at present. The purpose of the provision is to specify how it may be deemed that a decision-maker has expressed their will. The text is inspired by Article 141 of Peru's act. It specifies the point that unfamiliar forms of communication should not be an obstacle to supported decision-making. Peru's act mentions an expression of will being 'undoubtedly' inferred, but this seems unrealistic given that a tacit expression of will must be interpreted and can hardly be said to be 'undoubtedly' inferred in the legal sense. Therefore, 'to the best of one's ability' has been chosen instead, which also corresponds better with Section 8 second paragraph. These two provisions should be better coordinated than is perhaps the case at present.

*To Section 7*

The provision specifies who can be appointed as a support person. Again, the main point is for the decision-maker to decide for themselves, but some rules must be set out about who should be appointed if the decision-maker does not express a wish in that regard. I originally wrote that a next of kin should be appointed, but as it is not a given that this is a good solution, this has now been taken out. The alternative then is that support persons are appointed on the basis of a proposal from a non-profit organisation, by which I mean organisations that work to promote the interests of disabled persons (the Norwegian Association for Persons with Developmental Disabilities (NFU) or similar). The assessment must place decisive weight on with whom the decision-maker is assumed to be familiar and consider trustworthy. This will often (usually?) be one or more next of kin, but the text of the law is worded so that next of kin shall not have an automatic right

to be preferred. Another purpose of the provision is to clarify that the scheme of professional guardians should not merely be continued under another name ('professional support persons'), which could quickly become a reality if the municipality itself were to appoint support persons.

The first paragraph also states that supported decision-making must be based on voluntary participation, including by the person appointed as a support person.

The second paragraph is based on section (d) of the CRPD committee's general comment. This states that a support person must be able to substantiate vis-à-vis a third party that they support the decision-maker, but exactly how to regulate this is not entirely clear. The third paragraph states that support persons shall not be entitled to any remuneration, but there are considerations that speak for and against this. One purpose is to avoid the emergence of 'professional support persons', since supported decision-making should, as far as possible, be based on trust, knowledge of the decision-maker, and the decision-maker's wishes and interests rather than on financial motivation. At the same time, no absolute obstacle should be introduced to receiving remuneration, since this would make it difficult to use ombudspersons or to appoint support persons on the basis of a proposal from a non-profit organisation. Nor should support persons be prevented from having their actual costs covered. It must also be avoided that decision-makers refrain from asking for supported decision-making due to financial costs. Furthermore, a main principle of not receiving remuneration will mean that public costs are limited, which could strengthen the municipalities' willingness and ability to implement supported decision-making in an efficient manner.

The fourth paragraph touches on a question I find difficult, namely how to address situations in which one or more support persons do not act in the interest of the decision-maker. I propose that everyone should be able to notify a supervisory authority (cf. Section 13). I have not indicated any legal effect here, but this concerns, among other things, depriving someone of their role as support person. A more difficult question is what should apply to dispositions made that were not in the interests of the decision-maker. Invalidity? The support person's liability? This must be discussed.

*To Section 8*

This is a core provision that must be discussed in detail. My starting point is partly derived from the CRPD Committee's general comment section (f), and partly based on the general point that it is the decision-maker's needs that determine the scope of the supported decision-making scheme; the decision-maker should be supported to live their life like everyone else. The third paragraph second sentence involves repetition from Section 6, but the legal technique is not the most important aspect here. The wording is taken from the LDO report.

The fourth and fifth paragraphs are likely to be met with objections. The principle is that it should be possible to use supported decision-making in all areas of life to ensure that decision-makers have the same rights as others. The list in the fifth paragraph is taken

directly from the CRPD Committee, but it is easy to see that this is in clear conflict with Section 80 third paragraph of the Guardianship Act regarding restrictions on lasting powers of attorney. Nor is the list is complete – the drawing up of wills is not included, nor the use of digital services such as BankID. Greater efforts must be made here to identify all the practical challenges that may arise and what legislative amendments must be made. It goes far beyond the scope of this report to do so. However, a fundamental principle must be that any limitation in the supported decision-making's scope of application will entail a restriction of the decision-maker's rights compared to others, contrary to the CRPD.

The provision is also inspired by Article 659-B of Peru's act.

*To Section 9*

This is a proposal for the actual implementation of decisions. If the decision-maker clearly expresses their will, the provision proposes that a support person should merely help to implement this. Perhaps more difficult is the question of how decisions and dispositions should be made if the decision-maker's will must be interpreted. I propose that the majority of the support persons should decide. Unanimity would give each support person the right to veto. I also include a reference to the provision in Section 7 on the right to report the misuse of the supported decision-making scheme. Nothing in the text of the act is otherwise intended to prevent the appointment of only one support person, and in such cases, the other provisions of the act, especially Section 9, must be applied as far as they are appropriate.

*To Section 10*

This is really just a reversal of Section 5 to have a rule on termination of the supported decision-making arrangement. The provision could probably be simplified.

*To Section 11*

This touches on very difficult issues that probably need a broader assessment than I have been able to carry out. The first sentence is inspired by Article 1976-A of Peru's act and implements the principle that, since it is the decision-maker themselves who is considered to make a decision or disposition, it is also the decision-maker who is liable. The second sentence contains a reference to the Contracts Act, and it is particularly the invalidity rules in Sections 33 and 36 that are important. I am not sure whether anything concrete should be said about Chapter 2 of the Contracts Act (in the direction of 'the rules apply as far as they are appropriate') regarding powers of attorney. This concerns in particular Sections 10 and 11. Section 10 of the Contracts Act reads as follows: 'If a person holding an authorization performs a legal transaction in the name of the person who has imparted the authorization, and within the limits stipulated by the authorization, the said legal transaction creates rights and obligations directly for the person who has imparted the authorization.' Section 11 first paragraph: 'If the person holding an authorization has acted at variance with instructions given him by the person who has

imparted the authorization, and the third party has or should have understood this, the transaction shall not be binding on the person who has imparted the authorization, even if the said transaction is within the limits stipulated by the authorization.' A general reference to the Contracts Act will not cover these provisions, since the exercise of supported decision-making is not legally speaking an authorisation, see, *inter alia,* Section 8 second paragraph. At the same time, the provisions express a rule that may also be appropriate for support persons.

*To Section 12*

The provision simply states that it is the municipal authorities that decide to initiate and terminate supported decision-making arrangements and that appoint support persons. This responsibility should probably rest with a public body, and since the decision-making authority will not make any administrative decisions about the content of the supported decision-making scheme, many of the dilemmas that arise in other municipal decisions are avoided. An alternative is to delegate the authority to the county governor, but in my understanding, experience from other services indicates that this is not necessarily a better solution.

*To Section 13*

This provision proposes the establishment of a separate supervisory authority, tentatively called a supported decision-making board. This has been proposed by the LDO, among others. The more detailed competence, composition, work methods etc. of such a board must be further assessed, including whether there should be a central board or a board for each municipality.

*To Section 14*

An act of this nature must contain a provision concerning the relationship to the Guardianship Act, but I recognise that this is quite demanding. Since the act itself states that no one can be deprived of their legal capacity on the basis of disability, part of the Guardianship Act lapses, but this would not prevent the appointment of a guardian without the deprivation of legal capacity. Therefore, the third paragraph provides a rule that guardianship may not be established at all, including ordinary guardianships without the deprivation of legal capacity.

The first paragraph is more difficult, because it concerns the relationship to lasting powers of attorney. I suggest that a valid lasting power of attorney should take precedence over the supported decision-making act, but it could be discussed whether this is the best solution. The second paragraph nevertheless provides a special rule that a lasting power of attorney must be considered to be revoked if the conditions in Section 89 of the Guardianship Act are met *and* the conditions in Section 5 of the supported decision-making act concerning the initiation of supported decision-making, and this would thus ensure that the decision-maker's will is taken into account.

*To Section 15*

This is a normal provision concerning legal authority to issue regulations. It is possible that such authority should be linked to the individual provisions, but this is of less importance at present.