

Requiem for Capacity (and decision-making):
The aspiration of Art 12 (3) CRPD in NDIS
land and the opportunity that awaits.

The information in this presentation is for educational purposes only and should not be substituted or relied upon as legal advice.

United Nations Convention on the Rights of Person with Disabilities

Article 12 - Equal recognition before the law



- States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

What is legal capacity?

Is substitute decision making compatible with the obligations of Art 12 CRPD?

Legal Personhood -
'civil death'



The four basic National Principles are:

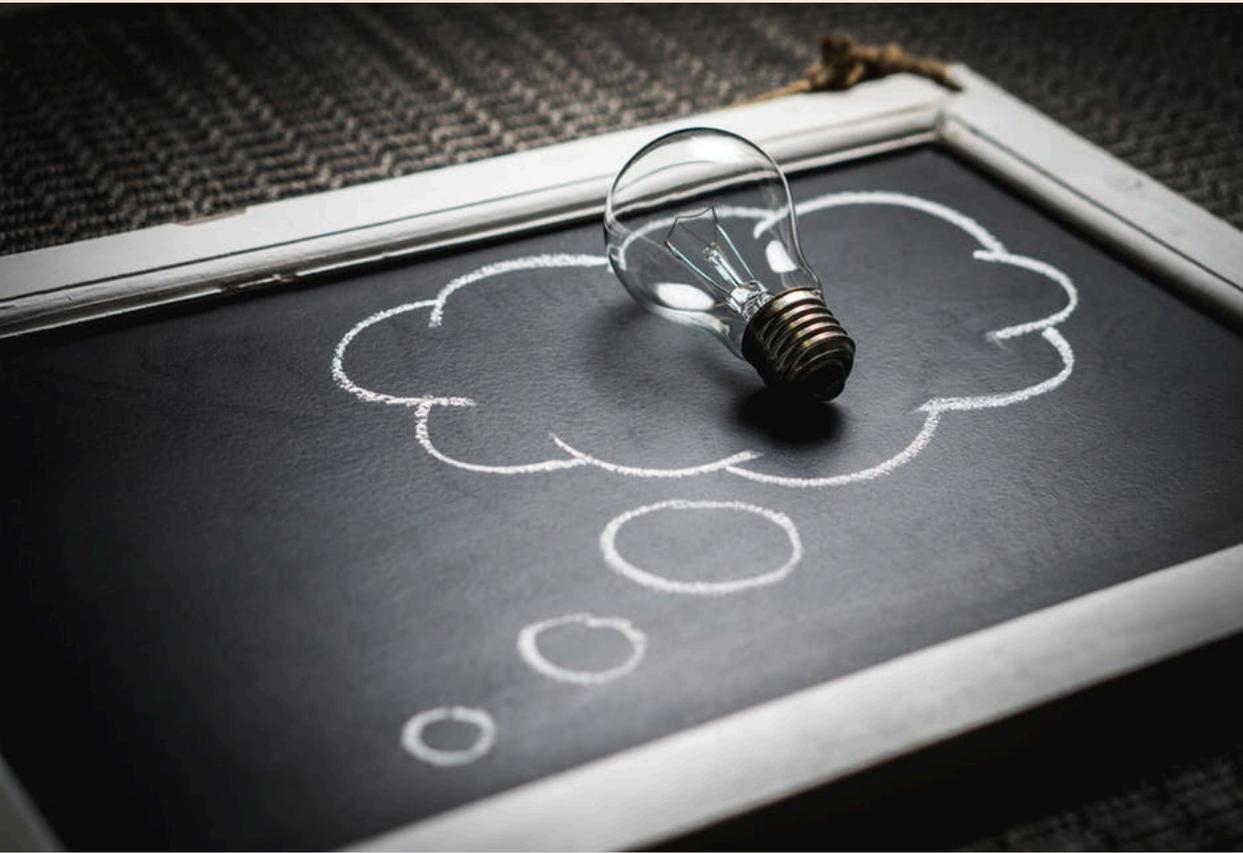
- *Principle 1: The equal right to make decisions*
- *Principle 2: Support*
- *Principle 3: Will, preferences and rights*
- *Principle 4: Safeguards*



The evolution of disability as a concept has seen a movement away from the medical model towards the social model.

Medical	Social
<p>Focused on assimilation, identifying impairments and focusing on cure, care and institutionalisation.</p>	<p>Interactions between impairment and the social environment. Identification of barriers and challenging established restrictions which limit the inclusions of persons with a disability.</p>
From	To
A presumption of capacity	A presumption to act independently
Capacity assessment	Assessing the need for supports
Finding of incapacity	Finding of a need for support
Substitute decision making	Supported decision making and the use of agency
Best interests	Interpretation of will and preference

A Swedish Perspective: Personal Ombudsmen



- A nationwide system of Personal Ombudsmen that provides support in decision-making for persons with severe mental or psychosocial disabilities.
- Starting a dialogue, building a relationship and earning trust.
- Availability and accessibility
- 'I need help.'
- Limitations

1) Expectant parents

Potential child apprehension

Interest of the child

2) Complex medical decision making

3) Mental illness and capacity

4) Informal supports –Centrelink and
Banks



NDIS – The Opportunity



Spirit of the CRPD

Real alternatives to substitute decision making

Dignity of risk balanced against abuse and exploitation

Acknowledgement that the exercise of autonomy is inter-dependent rather than independent

Tailored to individuals – linked to the fluidity of decisions

Oversight and ongoing training for supporters

Support which scaffolds and helps with the exercise of making choices

