

# An Urgent Call to Amend Section 4 of the 2019 Mental Health Act

## Executive Summary

Section 4 of the Mental Health Act 6 of 2019 removes the fundamental right to legal capacity. It removes the legal personhood of persons with psychosocial disabilities.

Within the Mental Health Act, section 4 is used to violate the right to health of persons with mental and psychosocial disabilities, including by institutionalising substituted decision-making in healthcare decisions. Beyond the Mental Health Act, the legislature has started to use section 4 to deny persons with mental and psychosocial disabilities the right to exercise their legal capacity including in participating in constitutional and political reforms.

Section 4 violates the Constitution, the 2012 Persons with Disabilities Act and international and regional human rights law.

Section 4 of the Mental Health Act should be immediately removed or amended to prevent further harm and rights violations.

Once removed, persons with disabilities should be consulted in good faith to assist in redrafting the provision to ensure full compliance with the Zambian Constitution and Persons with Disabilities Act, as interpreted by the United Nations Convention on the Rights of Persons with Disabilities.

There exists no legal or therapeutic reason for Zambia to perpetuate rights-infringing approaches to legal capacity for persons with disabilities.



## Introduction

This policy brief has been prepared by the Mental Health Users Network of Zambia (MHUNZA) and Disability Rights Watch (DRW) in consultation with lawyers from Zambia in academia and private practice, from Validity Foundation (an international non-governmental organisation that uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide) and from the Southern Africa Litigation Centre (a regional non-governmental organisation working to support human rights and the rule of law).

- The brief analyses section 4 of the Mental Health Act 6 of 2019 and explains why the provision violates constitutionally-protected human rights, particularly the right of persons with mental and psychosocial disabilities to enjoy their legal capacity.
- The Brief explains why the right to legal capacity is important. It explains why section 4 of the Mental Health Act poses a critical and urgent threat to the wellbeing and rights of persons with disabilities and requires immediate repeal.
- Finally, the Brief explains what the consequences in law would be if section 4 was severed and removed from the Mental Health Act during the interim period in which a rights-affirming alternative is considered.

## What is “legal capacity” under human rights law?

**Legal capacity is a fundamental human right.** As stated by the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee), legal capacity is “a universal attribute inherent in all persons by virtue of their humanity.”

Legal capacity is the right to make legally valid decisions and to form legally-recognised relationships. Legal capacity is the ability to hold and to exercise rights and duties under the law. It refers to the recognition of a human being as a person in law.



Legal capacity is an established legal right:

- The right to legal capacity is founded in a number of constitutionally-recognised human rights including the right to **equality before the law**,<sup>2</sup> the right to **equality and freedom from discrimination**,<sup>3</sup> and the right to **human dignity**.<sup>4</sup>
- Section 8(1) of the **Persons with Disabilities Act of 2012** recognises the right to legal capacity for all persons with disabilities, including persons with mental and psychosocial disabilities:

“(1) A person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life.”

Section 8 of the Persons with Disabilities Act further requires the judiciary to take special measures to enable persons with disabilities to exercise their right to legal capacity without discrimination.<sup>5</sup>

- In February 2010, Zambia ratified the **United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)**. Article 12 of the UNCRPD describes State duties in relation to the fundamental human right to equal recognition before the law in relation to persons with disabilities. Article 12 affirms that States have a duty to recognise the right of persons with disabilities (including persons with mental and psychosocial disabilities) to legal capacity on an equal basis with others in all aspects of life. Article 12 also recognises that States have a duty to take measures to enable persons with disabilities to exercise their right to legal capacity.<sup>6</sup>
- The **Committee on the Rights of Persons with Disabilities (CRPD Committee)**, which oversees implementation of the CRPD worldwide, has made clear that legal capacity should never be removed from people on the basis of disability, including for persons with mental or psychosocial disabilities. Rather than removing legal capacity, Zambia has an obligation to provide support for people to exercise to make decisions about their lives.<sup>7</sup>



## How is “legal capacity” different from “mental capacity?”

Legal capacity and mental capacity are not the same thing and should never be equated.

**Legal capacity** is the formal right to hold and to exercise rights and duties. Everyone has a right to legal capacity.

**Mental capacity** is the decision-making skills and competencies of a person. Mental capacity varies from person to person based on culture, age, gender, societal structure, etc. Mental capacity can also fluctuate from time to time and may be different depending on the types and complexity of decisions to be made.

Amnesty International distinguishes the concepts as follows:

*“Mental capacity assesses people’s ability to make decisions based on their ability to understand and retain information and to use it in reaching a decision...Legal Capacity is the law’s recognition of the validity of a person’s choices.”<sup>8</sup>*

The CRPD Committee states that-

*“Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.”<sup>9</sup>*

**Most legal systems respect the rights of people to freely make choices about their lives, including choices which other people might disagree with. Denying this freedom to persons with mental or psychosocial disabilities is discriminatory.**

## What does it mean to “enjoy” and to “exercise” one’s legal capacity?

As a human right, legal capacity is inherent in the person by virtue of being a human being. The right to **“enjoy”** one’s legal capacity means more than simply to be recognised as a person before the law. It also includes the right to **do** things: to make choices that are respected by law; to be an actor under the law.

In order for one to enjoy equal protection of the law one must be able to **“exercise”** one’s legal capacity.



The UNCRPD and the Persons with Disabilities Act of 2012 recognise that some people may need support to be able to exercise their legal capacity. Persons with mental and psychosocial disabilities may need different levels and types of support to exercise their right legal capacity at different times in their lives and depending on the nature of the issue or decision.

## What is the difference between supported and substituted decision making?

Your mental capacity should never determine your right to enjoy legal capacity. However, it is possible that your mental capacity might impact your ability to exercise your right to legal capacity.

This is why **States have a duty to provide persons with mental and psychosocial disabilities with the supports we may require to exercise our legal capacity**.<sup>10</sup> Supported decision making **IS** a bridge between mental capacity and legal capacity. A support person guides the person with mental disability to be able to make their own decision but cannot under any circumstance make a decision on their behalf.

In line with the principles in sections 4 and 8 of the Persons with Disabilities Act, the UNCRPD requires States to ensure that measures taken to support persons with disabilities to exercise our legal capacity should provide for certain safeguards to ensure that the will and preferences of the person are upheld and that measures are tailored to the specific needs of the individual at the time needed.

The CRPD Committee states that *“the human rights-based model of disability implies a shift from the substituted decision-making paradigm to one that is based on supported decision-making.”*<sup>11</sup>

- The idea of **“supported decision-making”** as a concept under disability rights (as established in the UNCRPD and the Persons with Disabilities Act) is therefore different to ideas of “guardianship” and “substituted decision-making” or “proxy” decision-making that are used in many older laws.
- Supported decision-making implies helping the person with a disability to formulate, express and enact decisions based on that person’s actual **will and preferences**. Guardianship and “substituted-decision-making” implies making decisions on behalf of a person with a mental or psychosocial disability based on **best interests**. The CRPD and Persons with Disabilities Act call for recognition of a person’s will and preferences.
- Supported decision-making enables the exercise of legal capacity and helps the individual to realise their **autonomy and independence** to the greatest extent possible.



Guardianship and substituted decision making denies legal capacity and treats persons with disabilities like objects under the law. Support is something that can be freely chosen or refused by persons with disabilities, placing them in the driving seat to live their own lives. Substituted decision-making sidelines persons with disabilities, forcing them to live the way that others choose for them.

## Why is the right to legal capacity important?

The denial of legal capacity means that your community does not recognise you as a person before the law. If you are not a “legal person” it means you have no rights or power to exercise your rights.

This is dehumanising and the premise of the denial of other civil, political, social, economic and cultural rights.

Without legal capacity, you have no voice. You have no ability to make even basic decisions about your life – what you want to eat, what you want to do with your time, your body, and your assets, or even if you want to marry.

The author Arlene Kanter explains

“Countries have enacted laws or policies that deprive a group of people of their right to equality and participation by labelling them as incompetent or lacking the ability to protect their own best interests. Slaves were routinely denied legal capacity in Ancient Roman times and, as recently as the 19<sup>th</sup> C, in the US and elsewhere. Women, too, until relatively recently, were denied the right to vote, own property, inherit or have sole custody of their own children in many countries. This denial of legal capacity was based on the view, that women were inherently unequal to men and that such inequality warranted a different and inferior legal position. In addition, women were considered to be in need of protection from harm; subjugating them to their fathers or husband’s will was considered a way to protect them from harm. ... For similar reasons related to prejudice and paternalism, many legal systems throughout history have denied legal capacity to people based on their disability.”<sup>12</sup>

Section 8 of the Persons with Disabilities Act recognises legal capacity for persons with mental and psychosocial disabilities because it is key to realising the principles and objectives of the Act that include the enjoyment of persons with disabilities of inherent dignity, individual autonomy



(including the freedom to make one's own choices), independence, recognition as persons before the law and full and effective participation and inclusion in society

The denial of legal capacity to persons with mental and psychosocial disabilities makes us **vulnerable to abusive, cruel and inhumane practices without considering our will and preferences**. This includes forced treatment, involuntary detention, isolation, seclusion, and the use of restraints, practices contrary to the protections of human rights law. The CRPD Committee has stated, for example:

*"The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention."*<sup>13</sup>

## What does Zambia's 2019 Mental Health Act say about legal capacity?

Section 4 of the Mental Health Act 6 of 2019 denies persons with mental and psychosocial disabilities our inherent human right to legal capacity on the basis of our disabilities, medical diagnoses or mental capacity.

Section 4 of the Act, read with the definitions in section 2 of the Act, uses the term "supporter" but in effect the provision institutionalises a proxy or substituted decision-making regime when persons with psychosocial or mental disabilities are denied their right to legal capacity.

Section 4 of the Mental Health Act provides:

- "(1) Subject to the provisions of this Act, a **mental patient** shall enjoy legal capacity.
- (2) Where the nature of the **mental illness, mental disorder or mental disability** results in the absence of **mental capacity** of that mental patient, the mental patient shall not enjoy legal capacity and is legally disqualified from performing a function that requires legal capacity.
- (3) Where a mental patient lack legal capacity, a court may appoint a **supporter**.



- (4) A mental patient who has legal capacity under subsection (1) may appoint a supporter through advance instruction.
- (5) Where a court declares a mental patient does not have legal capacity, that person is legally disqualified under subsection (4) and any other written law.”<sup>14</sup>

Section 2 of the Mental Health Act defines the highlighted terms as follows:

“**‘informed decision’** means a decision by a mental health service user about a diagnostic or therapeutic procedure, based on choice, which requires the decision to be voluntary and that the mental patient has the capacity for choice, which rests on the following key elements:

- (a) possession of a set of values and goals for which the mental patient need (*sic*) to make a decision;
- (b) ability to understand information and communicate decisions; and
- (c) ability to reason and deliberate;

...

**‘mental capacity’** means the capability to make independent informed decisions and to act on that decision and understand the consequences of the decision made and action taken;

**‘mental disability’** means long-term psycho-social impairment which may hinder a person’s full and effective participation in society on an equal basis with others;

**‘mental disorder’** means diagnosis of a mental condition, impairment or disability in the absence of demonstrable organic etiological factor also referred to as functional neurosis or psychosis;

...

**‘mental illness’** means a mental impairment or disability with evidence of an organic etiology’

...

**‘mental patient’** means a person diagnosed by a mental health practitioner as having a mental illness, mental disorder, mental impairment or mental disability;

...

**‘supporter’** means a person who represents a mental health service user or mental patient’s rights or interests”.





## What is the effect of section 4 of the Mental Health Act?

By defining “mental capacity” to require the ability to make “independent” decisions, the Act in effect means that any person with a disability who requires support to make and exercise their decisions, will cease to be a legal person under the law.

Read with the definition of “mental patient”, section 4(2) in essence creates a system whereby any individual who has had a diagnosis by a mental health practitioner of a “mental illness, mental disorder, mental impairment or mental disability” can be determined by any other person to “lack mental capacity” and thereby “legally disqualify” the individual from being a legal person subject to legal rights and duties.

Section 4(4) further establishes that if a court declares a person to lack legal capacity, that person is then permanently denied their human right to legal capacity in terms of all law. Thus while a court may declare a person to lack legal capacity under section 4(4), the denial of legal capacity is not restricted to instances where the courts have ordered someone to be “incapacitated.”

While it appears from the definition of “informed decision” and the use of the term “mental patient” that section 4 applies only to circumstances of mental health care, section 4 has already been repeatedly cross-referenced in unrelated legislation as a basis on which to deny persons with mental and psychosocial disabilities their rights and equal participation in society.

For example, section 5(4) of the National Dialogue (Constitution, Electoral Process, Public Order and Political Parties) Act 1 of 2019 refers to section 4 as a basis to legally disqualify persons from participating in the National Dialogue Forum whose functions include to make proposals for constitutional reforms.

Section 4 read as a whole, therefore means that any individual ever diagnosed by a mental health practitioner with any condition, disability or impairment is vulnerable for life to being denied their legal personhood at the sole discretion of the relevant decision-maker, should they at any time deem one incapable of independent decision-making or lacking “a set of values or goals” they deem necessary to make the relevant decision.

This position is even more discriminatory than the previous legal position under the common law, whereby mental capacity is assumed unless proved otherwise. Under the archaic Mental Disorders Act, involuntary detention, forced treatment and exercise of control over a person’s property was only allowed following a court order. The effect of section 4 of the Mental Health Act is to even remove these minimal procedural safeguards of the Mental Disorders Act.



## Section 4 is a violation of human rights

In a sweeping manner, section 4 of the Mental Health Act permits any person who engages a mental health practitioner to be denied their inalienable human right to legal capacity.

Not only is the operation of the provision arbitrary, but it is based on the premise of using actual or perceived deficits in mental capacity as a basis to deny legal capacity: this violates the rights to equality before the law and basic human dignity.

Moreover, section 4 establishes a substituted decision-making regime to replace the will and preferences of persons with mental and psychosocial disabilities with that of a third party.<sup>15</sup>

Section 4 makes persons with mental and psychosocial disabilities as objects in law, no longer being human beings with wills and preferences that are legally respected and protected. It does not respect us as people with the right to make choices in our lives.

Within the Mental Health Act, section 4 is used to violate the right to health of persons with mental and psychosocial disabilities by allowing for substituted decision-making in healthcare decisions.<sup>16</sup> Beyond the Mental Health Act, the legislature is using section 4 to deny persons with mental and psychosocial disabilities the right to political participation and potentially a range of other rights.

We believe for these reasons, section 4 is not only unconstitutional and contrary to the Persons with Disabilities Act (which, in terms of section 3 should supersede any conflicting law) but the provision further violates Zambia's human rights obligations under international and regional human rights law, as embodied in the UNCRPD.



## What would the common law position mean?

If section 4 of the Mental Health Act was immediately removed or repealed without replacing it, the position in law would arguably revert to that which applied under the common law.

The common law position is summarised as follows:

- Under the common law, the right to give or withhold informed consent to healthcare in mental health settings is the same as in all other healthcare settings.
- Under English common law, medical interventions conducted without informed consent constitute assault as well as violating human rights protections.<sup>17</sup>
- All persons must be presumed to have capacity to consent unless the contrary is proven.<sup>18</sup> The burden of proof rests of the person asserting incapacity.<sup>19</sup>
- Capacity to consent depends on whether the specific individual at the particular time in question is capable of understanding the particular decision with which they are faced in the light of relevant and appropriate information provided.<sup>20</sup>
- Capacity to consent must be judged in relation to the particular decision or activity in question and can never be judged globally.<sup>21</sup>
- Where a patient is deemed to lack the capacity to consent (for example, if they are unconscious) healthcare workers are excused from liability if they treat the patient without their informed consent only in circumstances of “necessity”.<sup>22</sup>
- “Necessary” treatment is a restrictive concept. The burden of justifying that the treatment is strictly “necessary” rests on the service-provider.

The common law position as traditionally applied is not compliant with the UNCRPD and is insufficient to realise the rights of persons with mental and psychosocial disabilities for a number of reasons.

This includes that the common law does not necessarily appreciate a social model of disability that understands disability as not inherent in the person but a product of society’s failure to accommodate an individual with an impairment. The common law in this way does not *per se* place a duty on a person seeking consent to ensure that the individual is supported to understand,



communicate and exercise their will and preferences. A disability-rights-compliant approach would also militate against paternalistic notions of treatment in an individual's externally-determined best interests and prefer approaches that preserve the will and preferences and autonomy of the individual as far as possible.

While the common law position is inadequate and the law should be developed for full compliance with the UNCRPD and the Persons with Disabilities Act, the position remains vastly preferable in the interim to the ongoing harm that is being done by keeping section 4 of the Mental Health Act. This is in the least because the common law retains persons with mental and psychosocial disabilities' presumption of mental capacity (in all circumstances, including mental health care settings) contrary to section 4 which imposes a sweeping and global denial of legal capacity.

A minimum obligation under human rights law is the duty of non-retrogression. Under the UNCRPD, for example, this means that States are not permitted to enact laws that are worse than those currently in place to further undermine the rights of persons with disabilities. By enacting section 4 of the Mental Health Act, Zambia has violated its duty of non-retrogression.

To urgently remove or repeal section 4 of the Mental Health Act will not align Zambia's law fully with the Constitution, UNCRPD and Persons with Disabilities Act, but in the period while amendment is considered, drafted and enacted, striking off or repealing section 4 will at least prevent the wholesale denial of legal capacity to persons with mental and psychosocial disabilities. This will not leave a lacuna in the law as the common law position will operate.

It is important to note that the World Health Organization has affirmed that a disability-rights compliant approach to informed consent is not only possible but desirable in therapeutic contexts.<sup>23</sup> There exists no legal or therapeutic reason for Zambia to perpetuate rights-infringing approaches to legal capacity for persons with disabilities.



## Recommendations

Section 4 of the Mental Health Act must urgently be removed or repealed from the Mental Health Act.

While there are a number of provisions in the Mental Health Act that are unconstitutional and violate human rights contrary to the UNCRPD, the removal of section 4 of the Act is of utmost urgency due to the fact of its use already in cross-referencing legislation as a basis to deny persons with disabilities basic human rights and equal participation in Zambia's political community.

Keeping Section 4 in place attacks the dignity of people with mental and psychosocial disabilities and renders us as second-class citizens, denied even the basic right to make choices about our own lives.

There is no need to replace section 4 of the Act in the interim while UNCRPD-compliant amendments are considered, as repealing the provision will revert the position under law to that established under the common law. To temporarily retain the common law position is at least more equitable to the sweeping and arbitrary position under section 4 of the Act, albeit inadequate in relation to the UNCRPD.

Persons with disabilities should be consulted in good faith to assist in redrafting the provision to ensure full compliance with the Constitution and Persons with Disabilities, as interpreted in reference to Article 12 of the UNCRPD.

The Zambian Government can also seek help, advice and support from the CRPD Committee under Article 37(2) of the UNCRPD to make the right to legal capacity real for all persons with mental and psychosocial disabilities in the country.



## ENDNOTES

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<sup>1</sup> Committee on the Rights of Persons with Disabilities, “General Comment No 1 (2014): Article 12: Equal Recognition before the Law” CRPD/C/GC/1, 19 May 2014.

<sup>2</sup> Article 18 of the Zambian Constitution explicitly guarantees every person the right to secure protection of the law. Under article 5 the African Charter further provides:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.”

<sup>3</sup> The rights to equality and freedom from discrimination are recognised under articles 23 and 266 of the Constitution.

<sup>4</sup> The right to human dignity is recognised in article 8 of the Zambian Constitution and section 4 of the Persons with Disabilities Act. It is similarly established under international and regional human rights law, for example, Articles 4 and 5 of the African Charter on Human and Peoples’ Rights.

<sup>5</sup> Article 8(2)-(3) provides:

“(2) The Judicature shall take necessary measures to ensure that persons with disabilities have equal and effective protection and equal benefit of the law without discrimination.

(3) Where a person with disability is a party in any legal proceedings, the adjudicating body shall take into account the condition of the person with disability and provide procedural and other appropriate facilities to enable the person with disability to access justice and participate effectively in the proceedings.”

<sup>6</sup> Article 12 provides:

“(1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

(2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

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

(4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

(5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”



<sup>7</sup> CRPD Committee General Comment No. 1 (Art 12: Equal recognition before the law) UN Doc CRPD/C/GC/1 (19 May 2014) paras 25, 28-9.

<sup>8</sup> Amnesty International (2016) “A Citizens’ Jury on Legal Capacity Law”, available at: <https://www.amnesty.ie/wp-content/uploads/2016/04/Citizens-Jury-Report-Legal-Capacity-Law.pdf>.

<sup>9</sup> CRPD Committee General Comment No. 1 (Art 12: Equal recognition before the law) UN Doc CRPD/C/GC/1 (19 May 2014) para 15.

<sup>10</sup> Article 12(3)-(5) of the UNCRPD states:

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

(4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

(5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”

<sup>11</sup> CRPD Committee *General Comment No. 1* UN Doc CRPD/C/GC/1 (19 May 2014) para 3.

<sup>12</sup> Kanter AS (2014) “The Development of Disability Rights Under International Law: From Charity to Human Rights”, Routledge, p 238-239.

<sup>13</sup> CRPD Committee General Comment No. 1 UN Doc CRPD/C/GC/1 (19 May 2014) para 40.

<sup>14</sup> Emphasis added.

<sup>15</sup> The CRPD Committee explains that substituted decision-making regimes are systems where:

“(i) legal capacity is removed from a person, even if this is in respect of a single decision;

(ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and

(iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective ‘best interests’ of the person concerned, as opposed to being based on the person’s own will and preferences.”

UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 1 (2014), Article 12: Equal recognition before the law, 19 May 2014, CRPD/C/GC/1 at para 1 and 11.

<sup>16</sup> In the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health UN Doc A/HRC/35/21 (28 March 2017) para 65 it is stated that:



"States must not permit substitute decision-makers to provide consent on behalf of persons with disabilities on decisions that concern their physical or mental integrity; instead, support should be provided at all times for them to make decisions, including in emergency and crisis situations."  
(Emphasis added.)

<sup>17</sup> *Chatterton v Gerson* (1981) 1 All ER 257; *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, at [40] per Lady Hale.

<sup>18</sup> In *Montgomery v Lankashire Health Board*, the UK Supreme Court confirmed that as far as possible, the law should treat patients "as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices." The Court confirmed the right to informed consent as established in common law and progressed under human rights law, as patients are "persons holding rights, rather than the passive recipients of care of the medical profession."

<sup>19</sup> The English Common law position is described in the following terms by Kennedy LJ in the Court of Appeal in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511:

"It is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved, and that the burden of proof rests on those asserting incapacity."

<sup>20</sup> *Dunhill v Burgin* [2014] UKSC 18 (available at: [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0136\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0136_Judgment.pdf)); *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511.

<sup>21</sup> *Dunhill v Burgin* [2014] UKSC 18 (available at: [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0136\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0136_Judgment.pdf)), Lady Hale stated:

"The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in *Masterman-Lister* that capacity for this purpose meant capacity to conduct the proceedings (which might be different from capacity to administer a large award resulting from the proceedings)."

<sup>22</sup> *Montgomery v Lankashire Health Board* [2015] UKSC 11. The UK Supreme Court unanimously held that a doctor is "excused from conferring with the patient in circumstances of necessity, as for example, where the patient requires treatment urgently but is unconscious or otherwise unable to make a decision." (Emphasis added.) The common law therefore requires an absence of capacity to consent but further limits the treatment that may be administered to that which is "necessary."

<sup>23</sup> WHO Equal rights initiative, available at: <http://apps.who.int/iris/bitstream/handle/10665/254805/WHO-MSD-MHP-17.5-eng.pdf;jsessionid=33A016D8E234E88867C64ECDAD20179C?sequence=1>.

