

Questionnaire for county reports - Catalonia

1. What legislation is relevant for the protection of adults? (If applicable, differentiation between federal law or the law of individual federal states)

We must acknowledge in advance that our legislation doesn't comply with the CRDP's provisions in the matter of protection of vulnerable adults (or PWD) as, basically, our legal framework allows substitute decision-making mechanisms as a form of protection contrarily to support decision-making mechanisms encouraged and promoted throughout Art.12 CRPD.

Civil Codes (on protection of PWD; Guardianship, Curatorship and other support measures)

Spanish Civil Code: Art. 199 to 313 SCC

Catalan Civil Code: Art. 221 to 227 CCC

In Spain there are several law frameworks operative depending on the region. Due to the scope of this report we can account at least for two: the Spanish Civil Code¹ (henceforth SCC; last updated on October 2015) and the Catalan Civil Code² (henceforth CCC; first published in 2010 and last updated on October 2015), each with its own singularities. The SCC takes a more restrictive approach when we compare it to the CCC as it only contemplates *Guardianship*, *Curatorship* (partial guardianship) and the figure of the *Guardian ad litem* as judicial remedies to legal capacity, in this case applied as mechanisms to restrict it. The CCC, besides the aforementioned mechanisms it also has available a mechanism named *Assistance* and *Special Protected Assets*, which, shortly, doesn't neglect legal capacity of an individual who benefit from them but, in practice, those latter mechanisms are underused.

Aside from judicial remedies, advanced powers of attorney could be appointed by an individual under the supervision of a registered notary and it can be as gradual or flexible as the individual desire.

Former Legislation (obsolete)

- Ley 13/1982 de 7 de abril; de integración social de las personas con discapacidad (LISMI) (*social integration of people with disabilities*)

¹ <https://www.boe.es/buscar/pdf/1889/BOE-A-1889-4763-consolidado.pdf>

² <http://www.parlament.cat/document/cataleg/48033.pdf>

- Ley 51/2003 de 2 de diciembre; de igualdad de oportunidades, no discriminación i accesibilidad universal de las personas con discapacidad (LIONDAU) (*equal opportunities, non-discrimination and universal accessibility of people with disabilities*)
- Ley 49/2007 de 26 de diciembre; de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad. (*infringements and sanctions on equal opportunities, non-discrimination and universal accessibility of people with disabilities*)

Current Legislation

- Ley 26/2011 de 1 agosto de adaptación normativa de la Convención Internacional sobre los Derechos de las Personas con Discapacidad. (last updated October 2015; *normative adaptation to the Convention on the Rights of Persons with Disabilities*). Basically this law, as a general rule, recognises several principles: respect to the dignity, the right to independent living, equality of opportunities, non-discrimination and universal accessibility. It applies to: telecoms, information, public spaces, infrastructures, transportations, goods and services, relations with the public administrations, justice administration, cultural heritage and labour. It was born to ensure protection in all spheres of an individual's life.
- Real Decreto Legislativo 1/2013 de 29 de noviembre, aprueba el Texto refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social. (*Approves the revised text of the general law on the rights of persons with disabilities and their social inclusion*). Its objective is to guarantee the right to equal opportunities and treatment of individuals with disabilities as well as the real and effective exercise of rights of persons with disabilities as the Spanish Constitution and the CRPD recognises. It also establishes a regime of sanctions and penalties in case of infringement.

Criminal Law

- Ley 4/2015 de 27 de abril del estatuto de la víctima del delito. (*statute of the crime victim*) Part of procedural law, regulates the procedures taking place before, during and after a judicial procedure. As special section of this law intends to offer a further layer of protection to crime victims with special needs or in a situation of special vulnerability to avoid double victimization, unnecessary bureaucracy and to provide them with accessible language and an individualised support in the procedure. It's not

always put in place effectively due to scarcity of resources in local courts or simply because people doesn't know its availability.

2. What are the types of formal measures that exist to support people with disabilities in exercising their legal capacity? (Especially private mandates or legal representatives appointed by a court/authority)

Court Appointed

1. Guardianship
2. Modulated Curatorship
3. Curatorship
4. Assistance
5. Guardian *Ad Litem*

Non-judicial Support Measures (notarized or offered in the private sector)

1. Powers of Attorney (Simple or advanced)
2. Special Protected Assets
3. *De facto* Guardian
4. Advanced directives
5. Pre-support/Pre-Guardianship services

3. Who decides on the appointment of a supporter/legal representative and what are the requirements for the respective measures?

In the matter of restricting legal capacity and court-appointed legal representatives a Judge decides if an individual's legal capacity needs to be restricted and under which measure. In a similar manner, the court order establishes the extent, limits and scope of the measure as our system has the potential to become as flexible and adaptive as the individual's needs on a given time. However, despite of its apparent flexibility, in our experience, judges tend to establish restrictive measures such as guardianship more predominantly in detriment of measures like curatorship/s and assistances which limit but not completely override the Right to enjoy Legal Capacity.

The basic requirements to initiate a measure of protection and in order to succeed in getting it approved by a court are three and they need to be concurrent (art.200 SCC):

1. Existence of a physical or mental disorder or deficiency.

2. Persistence overtime (of the aforementioned disorder or deficiency).
3. A lack of self-government caused by the above.

4. Who is involved in the procedure of determining the need of support in legal affairs and in what capacity?

The process of determining the need of support in legal affairs (Art.222-14) could be started by family members, social services, the public prosecutor and legal entities, institutions or physical persons who acknowledge a situation or a circumstance where an individual might need a court-appointed measure.

During the procedure, the public prosecutor ought to veil and defend the interests of the individual and exercises a neutral role during the procedure (the public prosecutor could initiate the procedure as a plaintiff but it also could act as a defendant of the individual in court).

A forensic doctor and the judge have the obligation to conduct a medical and clinical reconnaissance and a personal interview with the respondent, respectively.

During the court process, a series of evidence is taken into consideration. For example, reports of general practitioners, psychiatrists or social could become key evidence to rule in favour of a completely restrictive measure or a less restrictive one.

Ultimately, a judge rules via court order the protection measure and is subsequently involved in reviewing conjointly with the public prosecutor the control measures applied to the legal representative, if apply.

5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of/limited) legal capacity?

Unfortunately when a court rules in favour of establishing a measure of support there's always a deprivation of legal capacity (although varies depending on the mechanism) as they're strictly bonded together in our legal framework in mechanisms such as Guardianship and Curatorship.

6. What are the responsibilities of a supporter/representative and what are the obligations and principles he/she must comply with?

The responsibilities of a supporter are clearly defined by law and furtherly explained in the court order but Art 221-1 CCC explicitly defines its responsibilities as exercising a

protection role towards the individual; role that needs to be exercised according to its personality in order to *“take care of an individual; manage, protect or defend its assets and the person’s rights”*. Art 222-35, duty to take care and to procure alimony; Art 222-37 duty to procure education and formation; Art 222-38 duty to respect the disabled (incapacitated) person.

Aside from protecting people, legal representatives have an effective obligation to elaborate an inventory of goods, deposit or keep in a safe place valuable objects (jewellery, art, bonds or stocks, etc..) of its represented (and notify it to the court) and elaborate an annual accountability report.

7. What role do family members play and what are the requirements imposed on them?

Family members are always taken into consideration, they are entitled to initiate the procedure to request a support and protection measure and they are also taken into consideration during the process to choose who will become the legal representative in court-appointed measures. Catalan Civil Code provides us with the following guidance/list (bear in mind the following list can be overridden by the court authority):

1. The formal partner of the person or the cohabitant (as a stable partner) if they are living together.
2. Descendants of the individual who are adults of legal age.
3. Ascendants of the individual.
4. In case of death or disability of the parent of the individual, the spouse or cohabitant in a stable partnership of the parent if that individual lives together with the person to be put under a protection measure.
5. Siblings of the individual.
6. If there aren't people in the family or community who want to assume the role of legal representative/supporter, the Court shall appoint non-profit legal entities, public or private, who can assume and exercise the role satisfactorily.

The requirements imposed to them are the same requirements which need to comply professional supporters ([see question nº 9](#))

8. What role do volunteers play and what are the requirements imposed on them?

There are no volunteers who exercise the role of direct supporters and/or legal representatives of an individual, at least not in a formal manner or as a formal measure. However, volunteers do play a role collaborating with service providers, lending an extra hand in the provision of a specific service (ex. as a supporter of an individual in leisure activities or doing simple tasks conjointly with paid professionals).

9. Are there professional supporters/legal representatives and what requirements/qualifications do they have to satisfy?

Yes, the figure of professional supporters/legal representatives exist in our country and the law specifically determines that only a non-profit legal entity adhered to the public registry of associations and foundations can exercise the role of legal representative.

Art. 222-15 CCC explicitly defines the aptitudes and qualifications to effectively exercise (or being unable to exercise) the role of legal representative. The following is a list of exclusions to exercise the aforementioned role.

1. Being deprived or suspended from parental rights or custody by judicial or administrative resolution or being deprived or suspended for five years.
2. Being removed from a role of legal representative for a cause imputed personally.
3. Be serving an imprisonment or custodial sentence.
4. Being in a declared bankruptcy situation and the situation has not been restored, unless the protection measure includes managing assets and the administration of goods.
5. Being convicted by any crime which might suggest based on solid reasons a bad exercise of the designated role.
6. Exhibiting conducts that might hinder or damage the education of the minor or the well-being/care of the disabled.
7. Being in a situation unable to exercise the designated role.
8. Having or displaying hostility towards the disabled, having or have had a litigation process with the individual or presenting conflict of interest*.
9. Not having known means of survival.

*ART 222-17: Our legal framework establishes that individuals (either physical persons or legal entities) who are in a situation of conflict of interest with the person under a protection measure cannot be appointed as legal representatives nor materially execute legal

representative functions. It particularly defines contractual relationships such as providing residential or assisted-living services as situations in which conflict of interest may concur.

10. Who bears the costs for procedures and the supporter/legal representative?

Art 221-3 CCC establishes the gratuity and enables individuals to enjoy the protection service free of charge. However it also establishes that it is, as a matter of fact, possible to establish remuneration for providing the service and clearly states that individuals who provide the service are lawfully entitled to claim the reimbursement of expenses and to claim a compensation for damages originated while developing the protection service at the expense of the protégé's assets if the patrimony allow it (the actual amount could be modified by a court authority) (Art. 222-13).

The cost for legal procedures is covered by the State and the cost for the supporter/legal representative is covered by the Government as the figure of supporter/legal representative is ingrained in the Social Services portfolio so part of the general budget, concretely the part designated as Social budget, is derived by the Generalitat de Catalunya to finance those services amongst others.

In case of requiring extra-judicial measures the cost is financed by the budget of an individual soliciting those services (ex. notarized powers of attorney).

11. How supporters/legal representatives supervised and what are is done to ensure that the rights, the will, and the preferences of the adult concerned are respected? (cf. Art.12 section 4 UNCRPD)

Legal representatives (either legal entities/legal persons or family members) are closely supervised by public authorities and by law itself.

By law, legal representatives, both natural persons and legal entities, are required to present an annual (at minimum) accountability report to court authorities to be reviewed by the judge and the public prosecutor. This report focuses on economic aspects of an individual's life and contains a detailed sheet of income and expenditures, an inventory of active and passive assets and a yearly balance detailing and comparing changes within the last year situation. Needless to say, invoices, bills and tickets ought to be attached to validate the report. Aside from focusing on economic aspects the annual report contains a detailed overview of changes occurred during last year in key aspects such as its health condition, place of residence and its current personal and family situation (art.222-31; 222-32).

Aside from an annual report, the Judge or the Public Prosecutor has the authority to initiate measures to control the guardian at any given time by requesting an audit or the intervention of an external z further protection to the individual (221-5).

Other measures to control could include:

1. The possibility to remove the guardian not only due to sanctions but to being unable to comply with its obligations.
2. Requiring authorizations to execute specific acts in the personal or patrimonial sphere.

12. Who decides on deprivation of liberty and involuntary medical measures and what requirements does this decision underlie? Is there a distinction between self-endangerment and endangerment of others?

In our country there are two routes to place an individual under a measure of deprivation of liberty: involuntary placement appointed by a court order and involuntary placement by urgent needs. (art. 212-5 to art. 212-7 CCC)

Involuntary placement by a court order involves the decision of a judge who might rule deprivation of liberty and involuntary placement & treatment issuing a resolution.

On the other hand, involuntary placement by urgent needs doesn't need – as a prerequisite – a court order but only requires a facultative (usually a psychiatrist, but not specified by law) ascertaining that a specific situation (cause) requires involuntary placement. In this case, the director of the institution where the individual is placed must inform the judge within 24 hours and the judge must ratify or nullify involuntary placement within 72 hours since the communication was received.

There's a distinction between self-endangerment and endangerment to others ingrained in our civil code (art.212-5.1) which literally translates as “No authorization by a judge is required if a medical emergency arises whom might require involuntary placement without delay. This emergency (cause) must be confirmed by a physician and should be based on a serious and immediate risk to the physical or mental health of the patient or third parties.”

We could argue that there are no clear criteria to define risk in our Civil Code so ultimately it's a matter of perception or subjective interpretation within normal or normative standards (of behaviour and social interaction).

13. Additional comments (elements of your country's system that may be of interest and are not covered above)

We would like to clarify, through a few remarks and technicalities, the legal, political and social situation in our country regarding the implementation of the CRPD.

1. We are currently waiting for an integral reform of our Civil Code to adapt the Catalanian legal framework to the CRPD. In essence, we have a more progressive legal framework than the Spanish counterpart but the situations it's still stagnant in relation to protection measures which respect Legal Capacity due to its overuse and potential abuse.
2. Since the signature in 2006 of the CRPD and its ulterior ratification and entering into force in 2008 a political compromise has been declared to reform the law but, so far, the only serious effort made is creating a commission on the Justice Ministry composed by high-ranked members of the judicial corpus to study how to tackle the issue but as of today they have not presented a solid proposal nor made substantial changes with legal effects.
3. Our country, Catalonia, has no legal competences in the matter of regulating, modifying or changing the judicial procedure which in essence tightly links Legal Capacity with protection measures but throughout our Civil Code we've somehow bypassed these restrictions creating new instruments and protection figures such as assistance (226-1) and special protected assets (227-1).