

LAW SOCIETY SUBMISSION



SUBMISSIONS ON AMENDMENTS NECESSARY TO EXISTING STATUTORY PROVISIONS TO COMPLY WITH THE RATIFICATION OF THE UNCRPD¹

DEPARTMENT OF JUSTICE AND EQUALITY
DEPARTMENT OF HEALTH
DEPARTMENT OF SOCIAL PROTECTION

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¹ The UN Convention on the Rights of Persons with Disabilities

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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Executive Summary

The Law Society of Ireland (Law Society) makes this submission in the context of the necessary amendments required to a number of existing statutory provisions in order to comply with the ratification of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

The Society is aware that amendments are being made to a number of Acts in the context of the *Disability (Miscellaneous Provisions) Bill 2016* (2016 Bill). In this submission, the Law Society is not commenting on the sections of the 2016 Bill as initiated in the Dáil on 31 January 2017 and is also aware that provisions relating to Deprivation of Liberty are to be introduced to the Bill at Committee Stage. On sight of those further provisions, we may make further submissions.

This submission includes specific recommendations in relation to necessary amendments to three Acts impacted upon by our UNCRPD obligations.

Part A of these submissions relates to matters relevant to the Nursing Home Support Scheme Act 2009; Part B deals with the Social Welfare Consolidation Act 2005; and Part C deals with the Assisted Decision-Making (Capacity) Act 2015. The following is a summary of the Law Society's recommendations:

- The repeal of Sections 21 and 22 of the *Nursing Home Support Scheme Act 2009* on the commencement of Parts 3, 4 and 5 of the *Assisted Decision-Making (Capacity) Act 2015*.
- Replace existing Section 21 of the *Nursing Home Support Scheme Act 2009* with the following provision –
Where a person whose capacity is in question or may shortly be in question or who lacks the capacity to make an application for a care needs assessment or to make an application for ancillary State support, the provisions of the Assisted Decision-Making (Capacity) Act 2015 shall apply.
- The amendment of Section 244 of the Social Welfare Consolidation Act 2005 to provide for the insertion of the following provision:
Where a [detail specific benefit or pension] is payable to a claimant or beneficiary whose capacity is in question or may shortly be in question or who lacks the capacity to manage or who needs support in managing their own financial affairs the provisions of the Assisted Decision-Making (Capacity) Act 2015 shall apply, the provisions of the Act of 2015 will also apply in the determination of that person's capacity.
- The amendment of Section 100 of the Assisted Decision-Making (Capacity) Act 2015 by the deletion of Section 100(4).

Part A: Nursing Home Support Scheme Act 2009

1. Introduction

- 1.1 The *Nursing Home Support Scheme Act in 2009* (2009 Act) provides for a scheme of financial support for people who need long-term nursing home care. Where a person lacks the capacity to make an application for a care needs assessment and/or for State support and has not appointed an attorney under an Enduring Power of Attorney or is not a Ward of Court, the Act provides that another person can make such application/s on his or her behalf.
- 1.2 The 2009 Act was enacted prior to the enactment of the *Assisted Decision-Making (Capacity) Act 2015* (2015 Act) which sets out the necessary criteria in statutory format to enable the State to comply with its obligations under the UNCRPD.
- 1.3 The 2015 Act provides for Guiding Principles which must be followed where a person's capacity is in question or where a person lacks capacity which include safeguarding the person's autonomy in so far as possible and also the requirement to respect the dignity of the person as an individual. It also provides that a person, whose capacity is in question, is to be supported and/or assisted by a person of his or her own choosing or where a person lacks capacity to make decisions, the Act provides that the Circuit Court can appoint a suitable person to make decisions. The court in such situations is also obligated to give effect in so far as practicable, to the past and present will and preferences of the person in so far as they are reasonably ascertainable and to take into account the person's beliefs and values.

2. Care Representative

- 2.1. Section 21(4) (a) of the 2009 Act provides:

"Where a person...does not, for the time being, have the capacity to make a decision in relation to a matter to which this section applies, a person belonging to a class of persons referred to in subsection (12) may apply to the court for an order appointing that person to be a care representative in relation to a matter which is a matter to which this section applies....."

- 2.2. The matter to which the section applies includes the making of an application for ancillary State support, consenting to the creation of a charge in relation to an interest in land and other matters including taking necessary actions in connection with the application for ancillary State support.
- 2.3. The persons referred to in subsection 21(12) are a list of classes of persons (mainly family members) who may be appointed as a care representative and subsection 21(13) sets out the priority to apply in the appointment of such persons.

Law Society comment:

- The selection of persons in this manner does not comply with the requirements of the UNCRPD to respect the autonomy of the 'relevant' person or to determine who they may wish to appoint.

- 2.4. Section 21(5) provides that the court, if it is satisfied that the person lacks capacity, may appoint a person or more than one person to be a care representative. In selecting the person to be a care representative the court is only obliged to take into account the expressed wish (if known) of the relevant person.

Law Society comment:

- There is no obligation on the court to apply the Guiding Principles contained in the 2015 Act in a manner that minimises the restriction of the relevant person's rights and freedom of action or to give effect, in so far as practicable, to the past and present will and preferences of the relevant person and in so far as that will and those preferences are reasonably ascertainable.
- Further, in contrast to corresponding provisions in the 2015 Act, there is no obligation on the court in the 2009 Act to make enquiries as to a conflict of interest between the interest of the relevant person and that of the care representative.

- 2.5. Section 21(5) further provides that where the court determines that it is in the 'best interests' of the relevant person concerned, the court may appoint a person to be a care representative. Section 21(28) also refers to the concept of best interests. It provides that, where a person is appointed as care representative, he or she shall have the duty to act in the best interests of the person in respect of whom he or she has been appointed.

Law Society comment:

- The use of the term 'best interest' is not in keeping with the spirit of the 2015 Act which puts the onus on any intervener with a relevant person to ascertain that person's will and preferences and to take account of the beliefs and values of the relevant person.
- The 2015 Act provides that the Guiding Principles set out in Section 8 applies to all 'interveners' which includes the court and any person interacting with the relevant person. A care representative is outside the ambit of these important Guiding Principles.

3. Other Relevant Issues

- 3.1 *Representation in Court:* A care representative can make the application to be so appointed directly to the Circuit Court without any legal representation. More importantly the relevant person is not represented in court either by a legal representative or any other suitable person for example a court friend, or another suitable person (advocate) as provided for in the 2015 Act.
- 3.2 *Review of Capacity:* There is no review process by the court under the 2009 Act. In compliance with international human rights obligations, the 2015 Act provides that the court must review the capacity of the relevant person periodically.
- 3.3 *Safeguarding:* There is no provision for any oversight of or reporting by a care representative. The 2015 Act provides that the Director of the Decision Support Service has an important safeguarding role in the supervision of the various decision-makers to include attorneys in relation to the performance of their functions.

Further, the Director may also investigate any complaints that are made in relation to such decision-makers.

- 3.4 *More options for respecting autonomy of the relevant person:* As already stated the application for the appointment of a care representative under the 2009 Act is an application to the Circuit Court. Under the provisions of the 2015 Act where a 'relevant' person lacks capacity to make a decision and has not appointed an attorney to make decisions, the application is to the Circuit Court to appoint a Decision-Making Representative. In making a decision-making representation order, the court has jurisdiction to give such other authority to the Decision-Making Representative as required.
- 3.5 In addition, where the relevant person's capacity is in question as distinct from lacking capacity, he/she can appoint a Decision-Making Assistant or a Co-Decision-Maker of his/her choosing and not be mandated to have a representative as statutorily provided for in the 2009 Act.
- 3.6 These are critical deficits in the 2009 Act which do not comply with the requirements of the UNCRPD and indeed are in conflict with the statutory provisions of the 2015 Act. The 2009 Act therefore requires amendment.

4. Law Society Recommendations

- 4.1 **The repeal of Sections 21 and 22 of the *Nursing Home Support Scheme Act 2009* on the commencement of Parts 3, 4 and 5 of the *Assisted Decision-Making (Capacity) Act 2015*.**

Consequential Regulations required: Regulations for the purposes of the 2015 Act in respect of decisions that may be contained in a Decision-Making Agreement or a Co-Decision-Making Agreement should provide for the functions that are currently given to a care representative under the 2009 Act. Where a Decision-Making Representation order is being made by the court under the 2015 Act, the court has wide jurisdiction to confer authority on a Decision-Making Representative, if so required, which may include the making of an application in respect of a relevant person in relation to the provisions of the 2009 Act.

- 4.2 **Replace existing Section 21 of the *Nursing Home Support Scheme Act 2009* with the following provision –**

*Where a person whose capacity is in question or may shortly be in question or who lacks the capacity to make an application for a care needs assessment or to make an application for ancillary State support, the provisions of the *Assisted Decision-Making (Capacity) Act 2015* shall apply.*

Law Society comment:

- Leaving this matter unresolved will only lead to unnecessary confusion, duplication, lack of clarity and very importantly leaves a class of 'intervener' (care representative) outside of necessary oversight arrangements of the 2015 Act.
- Also the provisions of the 2009 Act are not in compliance with respecting the autonomy of a relevant person as required for the purposes of the UNCRPD.

Part B: Social Welfare Consolidation Act 2005

1. Introduction

- 1.1. The *Social Welfare Consolidation Act 2005* (2005 Act) provides that payments of benefits and pension be paid to persons other than a claimant or beneficiary which includes empowering the Minister to make regulations appointing a person to act on behalf of the claimant or beneficiary in certain circumstances. This includes a circumstance where a person is unable to manage their own financial affairs and relates to a person whose decision-making capacity is in question or a person who lacks decision-making capacity and is so certified by a medical practitioner. In practice this is done through the appointment of 'an agent'.
- 1.2. While there is an obligation on an appointed agent to use the benefit or pension for the benefit of the claimant or beneficiary there is in fact little or no oversight of such agents. There is clear evidence (both published and unpublished) of a high level of financial abuse in relation to State benefits and payments in relation to this category of vulnerable persons.
- 1.3. The 2005 Act predates both the UNCRPD and the *Assisted Decision-Making (Capacity) Act 2015* (2015 Act) Act which, as stated above, sets out the necessary criteria in statutory format to enable the State to comply with its obligations under the UNCRPD. In addition to the provisions set out in the 2015 Act as to how capacity is to be construed and the necessity for any intervener to comply with the Guiding Principles, there are further requirements in the UNCRPD which point to the need to update and reform the 2005 Act. This relates to Article 12 which has two relevant elements as follows:

Article 12(4) provides:

State 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.

Article 12(5) provides:

Subject to the provisions of the article, State parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own and 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.

- 1.4. In addition it is also necessary to take account of the provisions of the **Council of Europe Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons** in particular under heading Part III on Autonomy and participation.

Paragraph 9 provides:

Older persons have the right to respect for their inherent dignity. They are entitled to lead their lives independently, in a self-determined and autonomous manner. This encompasses, inter alia, the taking of independent decisions with regard to all issues which concern them, including those regarding their property, income, finances, place of residence, health, medical treatment or care, as well as funeral arrangements. Any limitation should be proportionate to the specific situation, and provided with appropriate and effective safeguards to prevent abuse and discrimination.

Paragraph 13 provides:

Older persons have the right to receive appropriate support in taking their decisions and exercising their legal capacity when they feel the need for it, including appointing a trusted third party of their own choice to help with their decisions. The appointed party should support the older person on his or her request and in conformity with his or her will and preference.

Law Society comment:

- It is clear that the 2005 Act does not comply with requirements under international human rights law particularly in relation to the exercise of the autonomy of the person and to the requirement to have appropriate safeguarding provisions. It therefore requires amendment.

2. Payments to persons other than claimant or beneficiary

2.1. Section 244 of the *Social Welfare Consolidation Act 2005* (as amended by the *Social Welfare and Pensions Act 2008*) provides that Regulations may provide '*where it appears to the Minister that the circumstances so warrant, for enabling, subject to such conditions and in such circumstances as are prescribed, a person to be appointed to receive and deal with on behalf of a claimant or beneficiary*' certain benefits and pensions.

2.2. The relevant Regulations include the Social Welfare (Consolidation Claims, Payment and Control) Regulations 2007 (S.I. No 142 of 207) and Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No6) (Nominated Persons) Regulations 2009. In particular the 2009 Regulations sets out 'Obligations of appointed person' which include the appointee to act in the best interests of the claimant or beneficiary, ensuring the balance of any benefit is lodged to an interest bearing account, keeping a record of all sums received and to produce records when required.

Law Society comment:

- The selection of persons as provided for in the 2005 Act and Regulations do not comply with the requirements of the UNCRPD to respect the autonomy of the 'relevant' person or to determine who they may wish to appoint or indeed to take account of the person's will and preferences.
- There is no obligation on the Minister to ensure that, in the appointment of such agents, they are suitable persons to so act or to ensure that there is no conflict with the interests of the claimant or beneficiary.

- There is minimal, if any, safeguarding provisions or oversight of persons/agents appointed under the provisions of the 2005 Act, the absence of which leads to fairly widespread financial abuse of vulnerable persons. There are in fact no procedures in place to ensure that the provisions of the Regulations are complied with.
- The use of the term 'best interest' is not in keeping with the spirit of the 2015 Act which puts the onus on any intervener with a relevant person to ascertain that person's will and preferences and to take account of the beliefs and values of the relevant person.

3. Law Society Recommendation

- 3.1 The amendment of Section 244 of the Social Welfare Consolidation Act 2005 to provide for the insertion of the following provision:

Where a [detail specific benefit or pension] is payable to a claimant or beneficiary whose capacity is in question or may shortly be in question or who lacks the capacity to manage or who needs support in managing their own financial affairs the provisions of the Assisted Decision-Making (Capacity) Act 2015 shall apply, the provisions of the Act of 2015 will also apply in the determination of that person's capacity.

- 3.2 Consequential amendments are also required to a number of Regulations made for the purposes of the 2005 Act to include Social Welfare (Consolidation Claims, Payment and Control) Regulations 2007 (S.I. No 142 of 2007) and Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No6) (Nominated Persons) Regulations 2009.

Part C: The Assisted Decision-Making (Capacity) Act 2015

1. Introduction

- 1.1. The *Assisted Decision-Making (Capacity) Act 2015* (2015 Act) provides at Section 36(8) that, where a relevant person is the subject of an application to court and they have not instructed a legal practitioner, he or she can be assisted in court by another person (the list is set out in the Act) or failing that, a court friend.
- 1.2. One in the listed category is ‘*another person, in respect of whom the court is satisfied that such a person is suitable, willing and able to assist the relevant person during the course of the hearing*’. For ease of reference this person is referred to as an ‘independent advocate.’
- 1.3. Section 100 sets out the role of the court friend and the independent advocate which includes a right to make submissions to the court on behalf of the relevant person. For the purposes of assisting a relevant person, the independent advocate and court friend may –
 - (a) *at any reasonable time, examine and take copies of any health, personal welfare or financial record held in respect of the relevant person by any person, body or organisation.*
- 1.4. However, the section goes on to provide that this does not entitle an independent advocate or court friend **who is not a registered medical practitioner** to examine or take copies of any health record of a relevant person.
- 1.5. This is an unworkable provision and is not in keeping with the spirit of the 2015 Act or indeed with human rights obligations. How can a person who is tasked with acting as a representative in court for a relevant person and make submissions to the court in relation to health matters of the relevant person meet that obligation if they are debarred from obtaining the relevant information to properly do so? This appears to have been a drafting error.

Law Society comment:

- The whole purpose of the 2015 Act is that a person is fully supported in all matters. The Act is specifically providing for a mechanism, where a relevant person can choose a person who can assist them in maximising their capacity to participate, in this instance before a court, yet an inappropriate and perhaps erroneous provision will prevent one of the purposes of the Act from being fulfilled.
- The Guiding Principles in the 2015 Act apply to all interveners which include an independent advocate and court friend. Principle 10 of the Guiding Principles clearly sets out the obligation not to obtain information unless it is required, not to use information for a purpose other than it is intended for and also sets out obligations with regard to the security of the information in relation to a relevant person. The Act itself therefore provides for the use and handling of sensitive personal data. Furthermore, there is further protection for the relevant person in relation to an independent advocate and court friend in that the information being obtained under Section 100(3) is being obtained with regard to a court application. The court is therefore in a position to make appropriate orders and ensure that Principle 10 of the Guiding Principles are fully adhered to.

2. Law Society recommendation

- 2.1 The amendment of Section 100 of the Assisted Decision-Making (Capacity) Act 2015 by the deletion of Section 100(4).

Conclusion

The Law Society hopes that by outlining the deficiencies that currently exist in the three Acts arising from our UNCRPD obligations, will be of assistance to the Department officials. The Society, through its Mental Health Task Force, is available to outline in greater detail the issues raised above, and to provide a view on further amendments required.

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