

LAW SOCIETY SUBMISSION



**FURTHER SUBMISSION ON THE ASSISTED DECISION-MAKING
(CAPACITY) ACT 2015: Part 6 Wards of Court**

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

MAY 2017

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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1. Introduction

- 1.1 The Law Society notes that the Disability (Miscellaneous Provisions) Bill 2016 (2016 Bill) passed the Second Stage in the Dáil in February 2016 and is now proceeding to Committee Stage.
- 1.2 Minister McGrath, Minister of State for Disabilities, stated in the Dáil that the legislative provisions relating to the issue of Deprivation of Liberty will be included in the Bill at Committee Stage. The Society has already confirmed¹ that it may make a submission on this issue when it has sight of the draft provisions.
- 1.3 The purpose of this submission is to recommend that additional amendments to the *Assisted Decision-Making (Capacity) Act 2015* (2015 Act) be included in the 2016 Bill. This is to ensure that, in the review of the capacity of wards who are adults (as provided for in Section 54 of the 2015 Act), their rights are fully respected and that each ward is treated on an equal basis with a '*relevant person*' within the provisions of the 2015 Act.
- 1.4 In 2015, the Law Society made a submission on the rights of wards of court and is disappointed that the respect for these rights is not fully addressed in the 2015 Act. This gap does raise questions as to compliance with the *UN Convention on the Rights of People with Disabilities* (UNCRPD) for a ward of court who is transferring from the old 'lunacy' regime to the new arrangements under the 2015 Act.

¹ Law Society Submission on amendments necessary to existing statutory provisions to comply with the ratification of the UNCRPD to Department of Justice and Equality, Department of Health and Department of Social Protection – February 2017.

2. Applications to Court in respect of Relevant Persons and Related Matters

- 2.1 Part 5 of the 2015 Act (Sections 36 – 52) deals with applications to court in respect of *relevant persons*. In particular it provides that, in an application to court under Part 5, a relevant person can be assisted by either a legal or non-legal representative in addition to an entitlement to Legal Aid (if required) in respect of such applications.
- 2.2 Section 36 acknowledges the right of the ‘relevant person’ to have legal representation and provides that, if the relevant person has not instructed a legal practitioner, and there is no decision-making assistant, co-decision-maker, decision-making representative, or attorney for the relevant person, or if there are such but they are not willing to assist the relevant person during the course of the hearing, and there is no other person (e.g. an independent advocate) in respect of whom the court is satisfied that such person is suitable, willing and able to assist the relevant person during the course of the hearing, the court may direct the Director of the Decision Support Service to appoint a ‘court friend’ for the relevant person. A court friend for a relevant person is a person who assists the relevant person in relation to an application under Part 5 and who may make submissions to the court on behalf of the relevant person.
- 2.3 Sections 48 and 49 provide for an interim order to be made by the court (Section 48) and for a review of a declaration as to capacity and specifies that such reviews will take place periodically but in any event at least every 12 months (Section 49). As such, interim orders and reviews will be made by the court and the relevant person will be entitled to representation in relation to such applications.
- 2.4 Section 52 amends the *Civil Legal Aid Act 1995* to provide that a ‘relevant person’ is entitled to legal aid (to include legal advice) for the purposes of an application under Part 5 of the 2015 Act. Section 52 further specifies that, if a legal aid certificate has not been granted to the applicant in respect of such application, the Legal Aid Board may seek to recover some or all of the costs of providing legal aid to the relevant person.
- 2.5 The ‘court’ as defined for the purpose of Part 5 of the 2015 Act means the Circuit Court. Therefore legal aid is not available for any application where the jurisdiction of the High Court is necessary or indeed in relation to matters outside of the scope of Part 5 of the 2015 Act where the jurisdiction of the Circuit Court may be invoked.
- 2.6 It is also noted that Section 38 provides that the court when appointing a person to be a decision-making representative for a relevant person must consider the suitability of a person to be a decision-making representative and also must have regard to the following:

- The known will and preferences of the relevant person;
- The desirability of preserving existing relationships within the family of the relevant person;
- The relationship (if any) between the relevant person and the proposed representative;
- The compatibility of the proposed representative and the relevant person;
- Whether the proposed representative will be able to perform the function to be vested in him or her;
- Any conflict of interest.

2.7 In addition to the requirement in the 2015 Act that the decision-making representative be a suitable person, Sections 39 and 40 specify the persons who are not eligible or who are disqualified from being such representative.

3. Review of Existing Wards of Court

- 3.1 Part 6 of the 2015 Act (Sections 53 – 57) provides for the review of capacity of wards who are adults and provides that any such application be made to the ‘wardship court’ and that such review is to take place within a period of three years from the date of commencement of Part 6. The ‘wardship court’ is defined as meaning the High Court or Circuit Court who exercised its jurisdiction in wardship matters and the review of each ward will be made by the court who made the order by virtue of which the ward is a ward. This in effect is the transition, where it is appropriate, for a ward of court to transfer from the current wardship regime under the provisions of the *Lunacy Regulations (Ireland) Act 1871* to the new arrangements under the 2015 Act. All wards will be discharged from wardship.
- 3.2 However, Part 6 of the 2015 Act does not make the same provision for wards of court as provided in Part 5 for a relevant person. The ward is not being given equal treatment (as required by the UNCRPD) to a relevant person. Part 6 is silent as to whether the ward is to be assisted in court in relation to an application to the court in any such review, whether any person/court friend is entitled to make submissions to the court on the ward’s behalf, and very importantly there is no provision for the ward to avail of legal aid, if he or she requires to do so, in respect of an application to the court for a review of his or her capacity. This is all the more surprising given that the review is a statutory requirement for the purposes of the 2015 Act.
- 3.3 The committee of the ward is a person who may be in a position to assist the ward in any review of capacity before the court. However, it would be important that the criteria as to suitability, eligibility and qualification (as set out at 2.6 above) be applied by the court to allowing any existing committee to assist the ward in such application. On the question of suitability alone, many practitioners with experience in wardship matters have encountered situations where there are risks between possible personal interests of the committee for a ward and the interests of the ward. Even where risks of a legal conflict of interest do not arise, there may be personal issues between the ward and his or her committee, which give rise to a compatibility issue and would prevent the ward from having confidence in his or her committee in the role envisaged. Therefore, it is important that the criteria set out in Section 38(5), Section 39 and Section 40 of the 2015 Act be applied by the court in assessing suitability of a committee who may be available to assist the ward in any application for a declaration under Section 55 of the 2015 Act and indeed to being appointed by the court (if the ward lacks capacity) to be the decision-making representative.
- 3.4 The Law Society submits that by virtue of Article 40.1 of the Constitution of Ireland - *All citizens shall, as human persons, be held equal before the law* and by virtue of Article 12.2 of the UNCRPD - *State Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life* that provision must be made for similar assistance to be available and that legal aid be provided for a ward of court in any application to the court for a review of his or her capacity in the same

manner that it will be available to a 'relevant person' who makes an application to court within the provisions of Part 5 of the 2015 Act. It simply cannot be envisaged that the rights of the most vulnerable group whose decision-making capacity is at issue would be denied assistance and access to legal aid if they were not in a financial position to meet the costs of such application personally.

- 3.5 It is understood that most of the orders made by the court by virtue of which the ward is a ward were made by the High Court. It is therefore essential that any extension to the *Civil Legal Aid Act 1995* applies in respect of an application for the review of the capacity of a ward be it to the Circuit Court or High Court (i.e. an application to the wardship court and not simply the court as defined in the 2015 Act).
- 3.6 The Law Society further submits that Principle 1 (Respect for Human Rights) of the Governing Principles of the Council of Europe's Recommendation No R (99) 4 on *Principles Concerning the Legal Protection of Incapable Adults* does not envisage legislation which provides for the exercise of functions in relation to a 'class of wards' as provided for in Section 57(b) of the 2015 Act as complying with international human rights obligations.
- 3.7 That Principle provides that '*... the fundamental principle underlying all other principles, is the respect for the dignity of each person as a human being. The laws, procedures and practices, relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms...*'
- 3.8 In addition, Section 8 of the 2015 Act sets out the Guiding Principles which must be applied for the purposes of any intervention and states that the intervener (which includes the Circuit Court, the High Court and the Director of the Decision Support Service) must give effect to those principles. The principles include giving effect to the will and preferences of the person, so far as reasonably ascertainable, taking account of the beliefs and values of the person and taking account of any other factors which the person would be likely to consider if he or she were able to do so. Section 57 therefore needs to be recast to allow the wardship court and the Director of the Decision Support Service to give effect to the statutory criteria (Guiding Principles) as set out in Section 8. The wishes and values of each ward must be considered separately having regard to his or her individual circumstances and the dignity of each ward as an individual human being must be fully respected as is required by the State's international human rights obligations.
- 3.9 It is implicit in the current wording of Section 57 of the 2015 Act that the court will simply direct the Director to exercise his or her functions in relation to the ward and that no order is necessary to appoint a decision-making representative, as it is inferred that the committee will continue to act for a ward who lacks capacity. For the reasons set out in paragraph 2.3 above, it is important that, on the review of the capacity of the ward by the wardship court, the court also ensures that the person to make future decisions on behalf of the ward is a suitable person. Section 57 of the 2015 must therefore clarify that the court must positively assess the suitability of the person to make decisions on behalf of

the ward who is now discharged from wardship and who transitions into the new system as provided for in the 2015 Act.

3.10 The rights of wards of court are further compromised by virtue of their exclusion from the provision of Section 139 of the 2015 Act, which provides that applications to the court under Part 5 (relevant person), Part 7 (donor of an enduring power of attorney) and Part 8 (maker of an advance healthcare directive) shall be heard in the presence of the relevant person or persons concerned unless certain circumstances as set out in that section arise which includes the provision that the fact that the relevant person is not or would not be present in court would not cause an injustice to that person. Equal treatment for a ward requires that the court must also consider whether, if a ward *'is not or would not be present in court'* for a review of his or her capacity, it *would not cause an injustice* to the ward (as provided for a relevant person under Section 139 of the 2015 Act). Reasonable accommodation must be afforded to a ward similar to the accommodation being afforded to others.

3.11 The Law Society recognises the possibility that the issues raised in this section, namely that:

- equal treatment in respect of an application to the court for a review of the capacity of the ward;
- the provision of legal aid;
- the need to respect the personal rights of each ward so that consideration is given to his or her individual requirements by the court and by the Director of the Decision Support Services to include the ascertainment of the ward's will and preferences;
- the appointment of a suitable person to make decisions on behalf of a person discharged from wardship, but who lacks capacity;
- the right of the ward to be present in court;

could be accommodated by an application for 'Legal and other assistance' under Section 40 of the *Irish Human Rights and Equality Commission Act 2014* (2014 Act). However, the appropriate legislation where these issues should be properly addressed is the 2015 Act. It would be a more cumbersome and costly method to endeavour to address the rights of each ward by an initial individual application to the Human Rights and Equality Commission under the 2014 Act to be followed by a subsequent application to the wardship court for the review of capacity being made under the 2015 Act.

4. Law Society Recommendations

In light of the above comments, the Law Society recommends that the Disability (Miscellaneous Provisions) Bill amends the Assisted Decision-Making (Capacity) Act 2015 in the following terms:

4.1 Recommendation 1

Part 5, Section 52. The Act of 1995 be amended to read –

- (a) In section 1 by inserting the following definition: “ ‘relevant person’ has the meaning it has in the *Assisted Decision-Making (Capacity) Act 2015* ; and ‘ward’ means a relevant person in the wardship of a wardship court;”,

Section 52(b) (iii) be amended to read –

- (b) (iii) by inserting, after paragraph (b), the following: “(c) a party to an application under Parts 5 and 6 of the Assisted Decision-Making (Capacity) Act shall qualify for legal advice”

Section 52(c) be amended to read –

- (b) In section 28 by inserting after subsection (3) the following: (3A) Where the proceedings the subject matter under Parts 5 and 6 of the Assisted Decision-Making (Capacity) Act 2015 relating to the matter referred to in section 37(1) and section 55(1) of that Act – (a) paragraphs (c) and (e) of subsection (2) shall not apply and (b) where the applicant is a relevant person, paragraph (a) shall not apply.”

4.2 Recommendation 2

Part 6, Section 54 to be amended by the addition of the following after subsection (3) –

- (4) The wardship court, on the hearing of an application under this Part, may allow the ward, if he or she has not instructed a legal practitioner, to be assisted in court by a court friend for the ward unless –

- (a) there is a committee for the ward, in respect of whom the court is satisfied that such committee is suitable (in accordance with the criteria set out in Section 38(5), that is willing to assist the ward during the course of the hearing, or
- (b) subject to sections 100(12) and 103(15), there is another person, in respect of whom the court is satisfied that such person is suitable, willing and able to assist the ward during the course of the hearing.

(5) Where, on the hearing of an application under this Part –

- (a) the ward the subject of the application has not instructed a legal practitioner,
- (b) (i) there is no committee of the ward who is suitable or willing to assist the ward in the course of the hearing, and
(ii) there is no person who falls within paragraph (b) of subsection (4) in respect of the ward
- (c) There is no court friend for the ward,

the wardship may direct the Director to appoint a court friend for the ward.

4.3 Recommendation 3

Section 57 to be amended to read as follows –

- (1) The wardship court may, after consultation with the Director, in respect of a ward –
 - a. Who was a ward immediately before the commencement of this section, and
 - b. Who has attained the age of 18 years

direct the Director to exercise his or her functions in relation to that ward, as if the ward were the subject of a declaration under section 37(1)(b) that the ward lacked capacity, and the wardship court may, in order to give effect to its direction, give such other directions, as it thinks appropriate having regard to the circumstances of the ward.

- (1) The wardship court shall if necessary, make an order, similar to that specified in Section 38(2) (b), appointing a suitable person who has attained the age of 18 years to be a decision-making representative for the purposes of making one or more than one decision specified in the order on behalf of the ward in relation to the personal welfare or property and affairs, or both.

Section 139(1) to be amended to read as follows –

- (1) An application to the court or the High Court under Part 5 (including an application under Section 48), 6, 7 or 8 shall be heard in the presence of the relevant person or the ward, the subject of the application unless, in the opinion of the court or the High Court, as the case may be –
 - (a) the fact that the relevant person or the ward is not or would not be present in court would not cause an injustice to the relevant person or the ward,

- (b) such attendance may have an adverse effect on the health of the relevant person or the ward,
- (c) the relevant person or the ward is unable, whether by reason of old age, infirmity or any other good and substantial reason, to attend the hearing or
- (d) the relevant person or the ward is unwilling to attend.

4.4 Recommendation 4

Section 36(10)(b) provides that hearings of applications under Part 5 shall *be heard and determined otherwise than in public*.

In the interest of transparency (the need for public access to important information on the operation of the 2015 Act), to improve an understanding of the court process and to monitor the implementation of the 2015 Act (to ensure individual rights are respected), it is important that determinations of the courts are made available in an anonymised form while at the same time respecting the right to privacy of the individual. The Law Society therefore recommends that similar provisions to those relating to the reporting of family law cases contained in Part 2 (Sections 3 -12) of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 be included in the Assisted Decision-Making (Capacity) Act 2015.

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