

LAW SOCIETY SUBMISSION



SUBMISSION ON THE DRAFT INITIAL STATE REPORT UNDER THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

DEPARTMENT OF CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH

9 APRIL 2021

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.

Introduction

The Law Society of Ireland ('the **Society**'), through its Human Rights and Equality Committee, welcomes the opportunity to respond to a public call by the Department of Children, Equality, Disability, Integration and Youth ('the **Department**') for submissions on the Draft Initial State Report pursuant to the United Nations Convention on the Rights of Persons with Disabilities ('the **Draft Report**'). This submission is made in response to this call and is intended to assist the Department in its consideration of these important issues.

In this submission, the Society confines its observations to the issue of access to justice for persons with disabilities, focusing specifically on articles 12 and 13 of the United Nations Convention on the Rights of Persons with Disabilities ('**CRPD**').

Article 12 provides as follows:

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.

Article 12 requires that persons with disabilities be accorded equal recognition before the law. The article recognises that, unless a person is accepted as having legal agency, they are effectively denied recognition as a person with rights and the ability to assert those rights. Article 12 recognition of a person as a rights holder and a legal actor cannot be denied on the basis of an assessment of mental capacity and must be accorded to all persons equally.

Separately, Article 13 sets out the duties of the State in relation to access to justice for people with disabilities as follows:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Legal Capacity

The State enacted the Assisted Decision Making (Capacity) Act 2015 ('the **2015 Act**')¹ as a means to bring Ireland in line with the CRPD. The 2015 Act is a reforming piece of legislation, in that it is intended to replace the Victorian era court-based system of wardship, which is a form of plenary guardianship. Wardship, which has its origins in the *parens patriae* doctrine, allows the court to be vested with jurisdiction over all matters relating to the ward and their estate. The primary procedural legislation dealing with wardship is the Lunacy Regulation (Ireland) Act of 1871 ('the **1871 Act**'). Since independence, jurisdiction transferred ultimately to the President of the High Court.² When admitting a person to wardship, the court declares the person to be, 'of unsound mind and incapable of managing his person or property'.³

The 2015 Act provides for the wind down of the wardship jurisdiction.⁴ However, at the time of writing, the 2015 Act has not yet been substantially commenced and adults continue to be made wards of court in increasing numbers. Of further note is that, even after commencement, it may take a further three years for all wards to be released from wardship.⁵

At the time of ratification of the CRPD in March 2018, Ireland entered the following declaration and reservation in relation to Article 12:

"Ireland recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Ireland declares its understanding that the Convention permits supported and substitute decision-making arrangements which provide for decisions to be made on behalf of a person, where such arrangements are necessary, in accordance with the law, and subject to appropriate and effective safeguards. To the extent that article 12 may be interpreted as requiring the elimination of all substitute decision making

¹ The Powers of Attorney Act 1996 makes provision for an adult to plan ahead by making an enduring power of attorney. This allows the donor of the power to appoint a trusted person, usually a family member, to act as his or her attorney in the event that the donor becomes 'mentally incapable' of taking these decisions independently. The power may be general or specific in nature and authorises the attorney to take decisions on the donor's behalf in relation to the donor's financial affairs or personal care.

² Section 9(1) Courts (Supplemental Provisions) Act, 1961

³ Order 67 Rule 1 Rules of the Superior Court

⁴ Section 7(2) Assisted Decision Making (Capacity) Act 2015

⁵ Section 54(2) Assisted Decision Making (Capacity) Act 2015

arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards."

To provide clarification regarding what is required by Article 12, the UN Committee published its General Comment No. 1 ('**GC1**') in 2014. In GC1, the Committee distinguishes inherent legal capacity from mental capacity and states that:

*"Legal capacity is the ability to hold rights (legal standing) and to exercise rights (legal agency)."*⁶

Regarding States parties' obligations under Article 12 in GC1, the UN Committee stated:

*"States parties' obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention."*⁷

In light of the State's reservation in relation to Article 12, it is not surprising that the 2015 Act allows, in limited circumstances, for substitute decision-making, namely, where a person is considered not capable of making a decision independently despite appropriate supports being provided and where other forms of supported decision making under the Act are not adequate in respect of a particular decision.

In the absence of full commencement of the 2015 Act, it is not possible to evaluate the extent to which substitute decision-making will continue to be a feature of Irish law. What is very clear however, is that the system of wardship, which effectively strips the ward of their legal capacity and places it in the hands of the Court, is not "necessary" in all circumstances and accordingly, it cannot meet the requirements of Article 12, even when considered in conjunction with the State's reservation. The Society understands that the State intends to fully commence the 2015 Act in mid-2022. However, it is evident that a number of steps, including legislative steps, must be taken by the State prior to such commencement at which time the wardship jurisdiction will continue for a further three-year period.⁸

Recommendations:

- 1) That the State should ensure that all measures required, including legislative measures, to fully commence the Assisted Decision Making (Capacity) Act 2015 are completed by mid-2022 as currently intended so that there is no further delay in commencement .
- 2) That the State keeps the operation of the 2015 Act under review in relation to substituted decision-making with a view to the early withdrawal of its reservation to UNCRPD.

⁶ Committee on the Rights of Persons with Disabilities, *General Comment No.1: Article 12: Equal Recognition Before the Law*, 11th Session May 2014 para. 13

⁷ *Ibid.*, at para 28

⁸ See statement of the Decision Support Service [here](#).

- 3) That the State takes all measures necessary to ensure that persons with disabilities have access, where that is their wish, to appropriate forms of supported decision-making under the 2015 Act, in circumstances where they do not have a trusted friend or family member to provide such support.

Access to Justice

Article 1 of the CRPD sets out the Convention's purpose and explains who is protected by the rights it affords as follows:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

This ‘social model’ of disability adopted by the CRPD views persons, not as inherently disabled but rather, as experiencing disability as a result of environmental or societal factors that hinder their equality by failing to accommodate their needs. We have already considered the fundamental importance of recognising the legal capacity of persons with disabilities. Further to this, Article 13 recognises that person with disabilities can be hindered in their participation in the justice system by various other factors that the State is required to address.

Indeed, the fact that the CRPD has a stand-alone article which addressed access to justice for people with disabilities underlines the central role it plays as regards all other rights under the CRPD which, in the absence of proper access to justice, cannot be vindicated.

Barriers to access to justice have been identified and guidance on how to address same has been provided by the United Nations in its recently published Guidelines on Access to Justice for Persons with Disabilities (‘the **Guidelines**’).⁹ These principles recognise that persons with disabilities have the following rights in the justice system:

- Facilities and services must be universally accessible to ensure equal access to justice;
- The right to appropriate substantive and/or procedural accommodations;
- The right to substantive and procedural safeguards on an equal basis with others and accommodations to guarantee due process;
- Access to free or affordable legal assistance;
- Access to legal notices and information in an accessible and timely manner;
- The right to participate in the administration of justice on an equal basis with others; and
- Those involved in the justice system must be provided with awareness raising and training on the rights of persons with disabilities.

⁹ The United Nations International Principles and Guidelines on access to Justice for Persons with Disabilities, August 2020 which is available [here](#).

'Justice' ensures that the law treats people with disabilities fairly and on an equal basis with all other people. In this regard, the Guidelines require that effective and robust monitoring mechanisms must be in place and that persons with disabilities have the right to:

- i. report complaints;
- ii. initiate legal proceedings concerning human rights violations and crimes;
- iii. have their complaints investigated; and
- iv. be afforded effective remedies.

It is noted that section 2 definition of 'property and affairs' in the 2015 Act includes decisions regarding "the conduct of proceedings before any court or tribunal, whether in the name of the relevant person or on his or her behalf". As such, the conduct of legal proceedings is a matter which is amenable to the support framework provided under the 2015 Act. In this way the Act (once commenced) should have the potential to ensure practical, individualised supports which enhance a disabled person's access to justice in accordance with the right guaranteed by Article 13.

As noted in the Draft Report, each Judge is provided with a bench book entitled "The Equal Treatment of Persons in Court"¹⁰ which contains "the legal framework concerning disability and inter alia has sections on Persons with Disabilities, Children/Mental Disability, Physical Disability, Interpreters, practical arrangements to be considered in accommodating a person with disabilities etc." However, this book was published in 2011, is not available to the public and is likely to have been reviewed in light of the CRPD. Further, and in the absence of publication, it is impossible to know whether Judges are adhering to the guidance or whether additional training and facilities are needed to apply same in all circumstances of persons with a disability. The Society is unclear how such guidance can be properly applied by solicitors when they have no access to the guidance.

Recommendation:

That the State commences work, in consultation with all relevant stakeholders in the justice sector and persons with disabilities, to review the Equal Treatment of Persons in Court bench book, specifically addressing the substantive and procedural accommodations required by persons with disabilities in the justice system, in line with the requirements of the CRPD. In addition, the book should be made generally available to the public in accessible formats so that all those who are impacted by it, and their legal representatives, are aware of its contents.

¹⁰ Draft Initial Report under the Convention on the Rights of Persons with Disabilities, Ireland, at para 168

Equality Legislation

There are some 643,000 people with disabilities in Ireland.¹¹ While the Draft Report highlights the fact that there is equality legislation in place to protect persons with disabilities from discrimination in employment and access to goods and services, according to the Workplace Relations Commission ('WRC') only 73 complaints were made in 2019 on the ground of disability pursuant to the Equal Status Acts.¹² While the reasons for this low number have not been fully researched, we can assume that it relates, at least in part, to low awareness among persons with disabilities of their rights. In addition, confusion is caused by the requirement to make a complaint for discrimination in relation to access to goods and services to 'the Workplace Relations Commission' which, on the face of it, would suggest that the entity deals exclusively with employment related matters. In addition, the online complaint form, which is the required method for referring a complaint, is directed to complaints in relation to employment, and there is no separate form for Equal Status complaints. This can be incredibly confusing for individual complainants.

Recommendation:

That the WRC functions under the Equal Status Acts are transferred to a separate, standalone body or that a separate division of the WRC be established under a new name, with a dedicated website, contact details etc. to deal exclusively with matters under the Equal Status Acts and to promote awareness of the remedies available under the Acts.

The time-limits for bringing actions pursuant to the Equal Status Acts are not in line with other disputes which are dealt with by the WRC. A person is required, at first instance, to put a respondent on notice of a potential complaint under the Equal Status Acts within two months of the alleged discrimination and thereafter, the person has six months within which to refer a complaint. Two months is an unduly short period of time for formulating a complaint and researching the remedies available and gives no consideration to the needs and challenges of such a constraint on people with disabilities. The notification requirement does not apply to allegations of discrimination in employment, and it is hard to understand why such a strict and short time limit should apply in relation to discrimination around the provision of goods and services.

Recommendation:

That the State reviews the time limits under the Equal Status Acts and removes the strict requirement for prior notification from the legislation.

¹¹ Official Census, 2016. This figure represents 13.5% of the population and had risen since the previous census in 2011.

¹² WRC Annual Report 2019, at p.24. The number had reduced from 90 in 2018. It is noted that complaints on the disability ground under the Employment Equality Acts rose slightly in that year, suggesting a greater awareness of rights amongst persons with disabilities who are in employment.

Section 14 of the Equal Status Acts provides an exclusion (from the ambit of the remedies provided by the Act) for any action that is required by or under any enactment or order of a court which essentially means that the State can introduce legislation that discriminates against persons with disabilities, and there is no remedy for such discrimination under the Equal Status Acts. The justification for this broad exclusion is not clear and it would appear not to be in line with the general prohibition on discrimination in Article 5 of the CRPD. While the Society acknowledges that the requirements of EU law or compliance with a court order may not be amenable to challenge under the Equal Status Acts, it is not evident why the discriminatory impact of legislation cannot be scrutinised under equality legislation to understand, at a very minimum, whether the legislation is within the parameters of EU equality law.

Recommendation:

Review section 14 of the Equal Status Acts to remove the broad exemption applied to actions taken pursuant to an enactment.

Ireland's State-funded civil aid scheme is administered by the Legal Aid Board under the provisions of the Civil Legal Aid Act 1995. Legal representation and advice under this scheme are not free. Applicants must pay a financial contribution which, in some instances, can be quite significant.¹³ Applicants are also subjected to a strict means test. The applicant's disposable income must be below €18,000 and the disposable capital threshold is €100,000.¹⁴ If a person does not satisfy the means test, there is no facility for the Legal Aid Board to provide legal aid.

Waiting times for civil legal aid is a significant issue. In January 2021, law centres reported waiting times of up to 44 weeks for an initial consultation with a lawyer, this time line takes a prospective applicant well beyond the time limit for referring a complaint of discrimination to the WRC.

While its statutory remit is quite broad, the vast majority of advice and representation provided by the Legal Aid Board relates to family law. In 2019, 74% of cases handled by the Legal Aid Board related to family law, 14% to International Protection, 4% to childcare and only 8% to "other civil matters".¹⁵ Furthermore, the Legal Aid Board is precluded by law from providing representation before many quasi-judicial tribunals, including the WRC. Conversely, while employers and businesses can often afford to pay for private legal representation in equality cases before the WRC; persons with disabilities often cannot.¹⁶ Where a person alleging discrimination does not have sufficient financial means and is

¹³ See Legal Aid Board Information - [Paying for your civil legal aid and advice](#)

¹⁴ See Legal Aid Board Information - [Financial Eligibility & Contributions](#)

¹⁵ Legal Aid Board - [Annual Report 2019](#)

¹⁶ The National Disability Authority reports that people with disabilities are only half as likely to be in employment as others of working age.

faced with a legally represented respondent, this can give rise to a significant inequality of arms which is, of course, a matter of grave concern.

Recommendation:

Adequate financial and human resources must be given to the Legal Aid Board to enable people with disabilities to vindicate their rights in court. In particular, the State must ensure the availability of legal aid for complaints of discrimination before the WRC by designating the WRC and Labour Court as “prescribed” tribunals for the purposes of Section 27(2)(b) of the Civil Legal Aid Act 1995.

There is currently no compulsory disability awareness training for those involved in the administration of justice. The guidelines referred to above provide that “*States must remove barriers to justice for persons with disabilities by providing training on the rights of persons with disabilities to all justice officials, including the police, judicial officers, lawyers, health professionals, forensic experts, victim service professionals, social workers, and probation, prison and youth detention staff.*”¹⁷

While this might arguably be encompassed within the public sector duty under section 42 of the Irish Human Rights and Equality Act 2014, it is not evident how it has impacted on public bodies within the justice sector and whether the public sector duty encompasses all actors within the justice sector e.g. the judiciary.

Recommendation:

That all State employees involved in the administration of justice, including the judiciary and court service staff, receive appropriate and regular disability awareness training which is tailored to the particular role or function they fulfil.

Many courts are inaccessible to people with disabilities which involve mobility difficulties. This is largely because the Court estate is old and presents particular challenges in terms of adaptation. However, such a circumstance cannot be an excuse not to take steps to ensure that all persons have equal access to the Court infrastructure including through use of technology and other innovations. Similar considerations apply to Garda Stations and quasi-judicial tribunals.

In its General Comment No. 1 the UN Committee on the Rights of Persons with Disabilities has stated:

“There can be no effective access to justice if the buildings in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities (art. 13).”

¹⁷ Ibid., at para 10.1

The Courts Service's current policy on accessibility is quite limited and fails to take into account the full scope of this requirement. While the Draft Report refers to progress made in making court facilities accessible, the objective should be that all court houses, quasi-judicial tribunals and Garda Stations are fully accessible.

Recommendations:

- 1) A review of the physical accessibility of courthouses in the estate of the Courts Service and the physical accessibility of various other bodies with quasi-judicial functions should be carried out and an implementation plan put in place to progressively ensure that all such buildings are fully accessible to those with disabilities.
- 2) Information and communications provided by the Courts Service and other quasi-judicial bodies should also be reviewed to ensure that such information and communications are as accessible as possible to those with different forms of disabilities.

Optional Protocol

The Optional Protocol is a mechanism for people with disabilities to bring individual complaints (against State parties) to the UN CRPD Committee after domestic remedies have been exhausted. It is an avenue for people with disabilities to get some form of redress against State parties by way of recommendations issued by the Committee. While Ireland had indicated its intention to ratify the 'Optional Protocol' at the same time as ratifying the CRPD, such ratification has been deferred pending the completion of a review and an update of existing legislation and policy in a diverse range of areas.

Recommendation:

That the State should ratify the Optional Protocol to the CRPD without delay in order to give people with disabilities the right to make complaints to the CRPD Committee.

Conclusion

The Society appreciates the opportunity to provide the Department with the above commentary and recommendations and will be glad to engage further on any of the matters raised.

For further information please contact:

Fiona Cullen
Public and Government Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7

Tel: 353 1 672 4800
Email: f.cullen@lawsociety.ie