

LAW SOCIETY SUBMISSION



**GENERAL SCHEME OF THE ASSISTED DECISION MAKING (CAPACITY)
(AMENDMENT) BILL 2021**

**JOINT COMMITTEE ON CHILDREN, EQUALITY, DISABILITY, INTEGRATION
AND YOUTH**

JANUARY 2022

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**') is pleased to reply to the open call by the Joint Committee on Children, Equality, Disability, Integration and Youth ('the **Committee**') for submissions on the Assisted Decision-Making (Capacity) (Amendment) Bill 2021 ('the **Bill**').

Noting that the call for submissions was made on 20 December 2021, immediately prior to the Christmas break, we regret that sufficient time has not been allowed to ensure that all relevant experts at the Society had the opportunity to provide input. As such, this submission presents the Society's initial response to the issue and we may revert with further comments on the Bill once published.

In particular, crucial submissions in relation to Enduring Powers of Attorney (EPAs) at paragraphs 5 and 6 of this paper, require further consideration by our Probate, Administration & Trusts and Taxation Committees. As such, they should not be considered to represent the entirety of the Society's position on the matter.

The Society made detailed submissions during 2013 and 2014 on the Assisted Decision-Making (Capacity) Act 2015 ('the **Act**') and now provide the below initial commentary and recommendations for the consideration of the Committee.

1. **Amendment of Section 2 of the Act**

The Society notes the amendment to Section 2 to include committees as interveners.

While the Society welcomes the section 8 principles which apply to interveners, we note that committees' duties are to be regulated by rules of court, subject at all times to supervision by the President of the High Court. In this regard, please see the 17 January 2022 judgment of Hyland J. In The Matter of Mr. M, A Ward of Court.

The Society is concerned that the proposed amendment would result in previously appointed committees being made subject to statutory provisions which were not known at the time of appointment and that additional obligations may cause difficulties, particularly for family member committees.

Recommendation

The Society recommends that where committees are acting in the role of making an application to court for a capacity declaration under section 54(1), or as a person who can assist the relevant person in court under the proposed new section 54(3B), or where they

are included as committees under section 103 (Codes of practice), committees are defined as interveners to that extent alone.

The Society agrees with the inclusion of committee at Section 8(7)(d).

2. Amendments to section 15, section 30, section 47 and section 76 – Complaints

We note that amendments are sought in relation to the complaints mechanism under the Act which remove the necessity for the Director to apply to court for a determination.

It appears that, while it is anticipated that the Director would adjudicate on all complaints received, there is a lack of clarity around whether an alternative dispute mechanism (such as mediation) will be offered as part of the complaints mechanism.

In this regard we note that Article 31 of the Convention on the International Protection of Adults provides that:

“A Contracting State may encourage, either directly or through other bodies, the use of mediation, conciliation or similar means to achieve agreed solutions for the protection of the person or property of the adult in situations to which the Convention applies”.

Recommendation

The Society recommends that an option to avail of an alternative dispute resolution process should be provided in the Bill.

3. Amendment to Section 36 (10) (b) of the Act

The Society welcomes the amendment to section 36 by way of deletion of subsection (10)(b) and removal of the requirement for applications to be heard and determined otherwise than in public.

The Wardship Courts currently make orders for restrictions on publication. However, this is on the basis that the relevant person has a medical condition as such orders are made pursuant

to Section 27 (1) of the Civil Law (Miscellaneous Provisions) Act 2008 which provides as follows:

“27.— (1) Where in any civil proceedings (including such proceedings on appeal) a relevant person has a medical condition, an application may be made to the court in which the proceedings have been brought by any party to the proceedings for an order under this section prohibiting the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the relevant person as a person having that condition.”

Section 27 (1) may not be available to a relevant person who wishes the court to make orders protecting their identity, but does not have a medical condition.

Recommendation

The Society recommends that consideration is given to an amendment which would permit a relevant person to apply for restrictions on reporting, similar to those provided by Section 27 (1) of the Civil Law (Miscellaneous Provisions) Act 2008, but not limited to those with a medical condition.

4. Amendment to Section 43

We note that it is intended to amend Section 43 by deleting subsections 3, 4 and 5 of same which would remove the provision allowing the court to confer on the Director, the custody, control and management of some/all of the property of a relevant person.

While we note the reasons why the amendment is being proposed, we would caution that fundamental protections already exist to protect a Ward's assets - for example, by way of management of a Ward's funds by the Accountant of the Courts of Justice. This, along with the supervisory role of the High Court in relation to committees, would cease on enactment of the Bill and the discharge of Wards of Court.

It is likely that, in the main and in line with the will and preferences of the relevant person, it will be considered appropriate that a family member will be appointed a decision-making representative. Recent Irish case law has held that it is desirable and preferable for family members to be the committee for a person who is a Ward of Court. It may be the case that the preferred decision-making representative may not be the most suitable person to manage the person's assets.

Recommendation

The Society recommends that consideration is given to alternative protective provisions in relation to the independent management of the assets of a relevant person where a declaration is made that they lack capacity within the meaning of section 37 of the Act.

5. Part 7 Enduring Powers of Attorney

5.1 Section 61 Notice Provisions

The Society notes the deletion of the notice provisions in Section 61.

We believe that the current notice provisions under the Powers of Attorney Act 1996 have provided important safeguards for donors in the making of an EPA and where notifications are made to persons chosen by the donor.

Recommendation

The Society recommends that notice provisions, in line with those which are required to be fulfilled under the 1996 Act, should be updated to include civil partners and included in the Bill.

5.2 Amendment to Section 68

The Society notes the following proposed amendment to section 68 of the Act:

“(a) by the substitution of the following for subsection (1)

“(1) The donor shall, within 5 weeks following execution of an instrument and receipt of all completed supporting documentation, make an application to the Director, in compliance with this Part, regulations made under section 79 and specifications made by the Director under section 79A, to register the instrument creating the enduring power of attorney [..]”

The Explanatory Note states that:

“The Bill provides for a change in the process of registering an Enduring Power of Attorney (EPA). Currently the process involves registering the EPA when the donor

loses capacity. The proposed new process requires that the EPA be registered while the donor has capacity and is in a position to discuss the EPA with DSS. The second stage is where the attorney notifies the DSS that the donor has lost capacity and at that stage the EPA is activated.”

It is anticipated that a donor, having created an EPA, would engage with the Director.

We note that there is no proposal to amend section 60 (1) (b) which provides for the involvement of a solicitor in making the EPA. We would emphasise that, where an EPA is created with the assistance of a solicitor, there is an obligation on that solicitor to properly create the instrument and to fully explain the consequences of the creation of same.

We are concerned that the discussion of an EPA with the Director following the creation of such an instrument with the assistance of legal advice, would represent an interference with the solicitor client relationship. It could also create a situation where a donor client could no longer rely on their right to sue the advising solicitor in negligence if, subsequent to such discussion with the Director, the EPA was amended without reverting to the advising solicitor.

Further, it appears it is intended to impose a fee on registration of the instrument which would introduce an additional burden on Donors. Under the current system for registration of EPAs under the 1996 Act, there are no registration fees.

Recommendation

We are extremely concerned that a two-step registration process is being proposed.

An EPA is created by a person with full capacity. It is therefore quite different from assisted decision-making agreements or co-decision making agreements where the capacity of the person is dependent on such agreements. Accordingly, an EPA should not be subject to the oversight of the Director once created.

The Society strongly recommends that no amendments are made to Sections 68 or 69 of the Act.

6. Amendment to Section 73 - Revocation or amendment of EPA

It is intended that section 73(7) would provide that:

“An application to vary may not be made less than 6 months from the date of registration of the enduring power of attorney which it varies, and thereafter at intervals of not less than 12 months, unless a shorter period is agreed by the Director.”

The Explanatory Note states that:

“The proposed new subsection (8) [presumably this is a typographical error] provides that an application to vary may not be made less than 6 months from the date of registration of the enduring power of attorney which it varies, and thereafter at intervals of not less than 12 months, unless a shorter period is agreed by the Director.”

Currently, a donor may immediately change their EPA should their circumstances change and in accordance with their will and preference.

The Society is concerned that the proposed amendment could operate to disenfranchise a client in relation to their wishes and, at the very least, could delay creation of a new instrument if that is the wish of the donor.

This constitutes an infringement on the rights of a person to make decisions regarding their property and affairs which could be challenged on constitutional grounds.

In addition, Section 73(7) presumably requires an application to the Director for permission to reduce the time period in which a new instrument is created. This could also delay the making of an amended EPA.

The proposal takes no account of changing family circumstances in later life.

Recommendation

We are greatly concerned that these proposals could fetter the freedom of an individual to deal with their property and affairs as they wish, which is likely to be contrary to a person's constitutional rights to do so.

The Society strongly recommends the deletion of subsection 73(7).

7. Head 87 Amendment of Part 4 of the Nursing Homes Support Scheme Act 2009

The Society notes the proposal that Part 4 of the Nursing Homes Support Scheme Act, 2009 would be substituted by a new section which would effectively end the distinct, independent and statutory role of the 'Care Representative'.

It is further noted that a Care Representative pursuant to the Nursing Homes Support Scheme legislative framework would be either a decision-making representative, an attorney appointed under that Act, or an attorney under the 1996 Act, where power to make decisions relevant to an application for ancillary state support, the creation of a charge and the ability to make an application to the Land Registry or Registry of Deeds has been conferred on them and the agreement has been registered and activated with the Decision Support Service.

If a decision-making representative or attorney does not have the relevant powers to make an application for ancillary state support, it is not clear how this situation could be rectified in circumstances where the long-term residential care placement of the person needing care services could be compromised by delay in an application for ancillary State support.

It is noted that the proposed amendment to Part 4 of the Nursing Homes Support Scheme Act, 2009 does not appear to consider the enhanced role of the Care Representative which only came into effect on 20 October 2021 with the commencement of the Nursing Homes Support Scheme (Amendment) Act, 2021. This legislation made no reference to the 2015 Act.

Ethical issues are likely to arise for practitioners where the 'family successor' pursuant to the Nursing Homes Support Scheme Act, 2009 (as amended) is also the decision-making representative or attorney, and it may be a greater safeguard for vulnerable adults if the role of Care Representative was retained as a separate and distinct role pursuant to the Nursing Homes Support Scheme, not substituted as proposed.

Similarly, Section 19 of the Nursing Homes Support Scheme (Amendment) Act, 2021 envisages a role for the Care Representative in being apprised of any 'material change in circumstances' in relation to the 'family successor'.

These further proposals to amend the Nursing Homes Support Scheme, which come on foot of recently commenced significant change, have ramifications for the profession and raise ethical issues for practitioners relating to confidentiality, independence and the avoidance of conflict of interest.

Recommendation

The Society recommends that careful consideration is given to the proposed amendments in the context of the recently commenced Nursing Homes Support Scheme (Amendment) Act, 2021 and the above concerns.

Conclusion

Given that the proposed changes to the legislation are far reaching with extensive implications, we would recommend that a consolidated Act be made available, contemporaneous with enactment of the Bill.

We hope that the Committee will find these comments and recommendations to be helpful to its consideration of the issue 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: 01 672 4800

Email: f.cullen@lawsociety.ie