

## **SUBMISSION REGARDING THE ASSISTED DECISION MAKING (CAPACITY) BILL 2014**

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4<sup>th</sup> April 2014

### ***Background***

The Irish Association of Social Workers (IASW) welcomes the opportunity to give feedback on the Assisted Decision Making (Capacity) Bill 2013. While broadly welcoming the Bill, there are a number of key amendments the Association would like to see.

The Irish Association of Social Workers was founded in 1971 and is the national organisation of professional social workers in the Republic of Ireland. The Association's objectives include representing the views of social workers on matters of social policy and advocating for the interests of social work clients at national level. The profession is founded on the principles of social justice and human rights, so social workers often work with the most marginalised and vulnerable people and communities.

The values and principles that underpin social work practice position the profession to make a valuable contribution to the Assisted Decision Making (Capacity) Bill 2013.

### ***Introduction***

The IASW welcomes the proposed legislation and the principles underpinning the Bill. The following areas are particularly welcome:

- the abolition of the out-dated wards of court system and review of capacity of all existing wards;
- the move from a 'status' based view to a 'functional' view of capacity';
- the establishment of the Office of Public Guardian;
- the detention related safeguards in Sec. 67

### ***Definition of capacity***

Individuals who lack mental capacity should not be denied the right to exercise legal capacity. The Bill takes the position that mental capacity is a precondition for legal capacity, a position that does not fit with the UN Convention on the Rights of People with Disabilities which views legal capacity as an intrinsic human right.

The Convention is clear that all people have a right to legal capacity as a basic and fundamental human right. This is quite different to the concept of mental capacity whereby a person's decision-making ability can be assessed and, if found lacking, removed. Yet, the Bill proposes to legislate for the denial of legal capacity based on an assessment of mental capacity as persons found to be lacking in mental capacity following a functional assessment, can then be denied legal capacity through the appointment of others to make legal decisions on their behalf. The UN Convention on the Rights of People with Disabilities is clear that people with disabilities have the right to legal capacity on an equal basis with others and prohibits the use of mental capacity as a justification for denying or restricting a person's legal capacity.

### ***Assessments of capacity***

The IASW recommends that decisions about capacity are based on the assessments and views of a range of health and social care professionals, further reflecting a move away from a narrow focus on legal definitions of capacity. The IASW suggests that a line be inserted into the proposed legislation stating that assessments of capacity should not be made on the basis of age, appearance or disability.

In addition, we ask that the Bill be amended to include a statutory right to the supports needed to demonstrate capacity. Many of those whose capacity is being assessed are coping with stressful experiences and life changes. Perhaps they have suffered a recent traumatic event such as being unable to return home from hospital. We ask that all people are given a statutory right to the supports needed for their capacity to be assessed. Those supports could include social work, occupational therapy and/or speech and language therapy and these supports should be led by the needs of the person concerned rather than focused on when and for how long the support can be provided.

### **Section 14**

There should be a mechanism to allow for legal representation of persons who lack capacity similar to that found in the Mental Health Act 2001.

### **Section 19**

The conditions for the appointment of a co-decision-maker are too severe in that they treat the 'assisted person' differently to others in society who take for granted that they can make unwise or

'risky' decisions without losing legal capacity. It is essential that co-decision making does not become substitute decision-making particularly when the powers of the co-decision maker are so extensive. Co-decision makers can be appointed by either the person or the courts. However, they are only required to support the decisions made by the person involved when

- a) a reasonable person could have made that relevant decision
- b) no harm to the appointer or to any other person is likely to result from that relevant decision

The IASW is of the view that safeguards in this section need to be strengthened to protect the legal capacity of all persons.

### **Sections 23-27**

Need move towards supported decision-making as opposed to substitute decision-making

Support Eilionoir Flynn's (Senior Research Fellow at the Centre for Disability Law and Policy, NUIG) comments that *'the practice of substituted decision-making has repeatedly been criticized by the UN Committee on the Rights of Persons with Disabilities, who has called on every country it examined to date to 'review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences.'*

### **Sections 53-54**

Another problematic aspect of legislation is the role of informal decision maker. In effect a person may be able to make a substituted decision relating to another person's personal welfare, healthcare or treatment without any formal agreements, any authority vested by courts, without any monitoring arrangements. In addition, there is no requirement to establish whether there could be a conflict of interests between the informal decision-maker and the relevant person. This does not reflect the requirements of the UNCRPD.

The proposals relating to informal decision-making need to be much tighter as there exists a real danger that the role could be abused. For example, the power of restraint needs to be removed from this section as informal decision-makers are not governed by the Office of Public Guardian. Informal decision makers may be seen as the easiest contact and decision-making option for organisations and authorities who may want to expedite decisions, particularly with regard to people who may have difficulties with verbal communication or need support express their decisions.

The IASW recommends that safeguards relating the informal decision-makers are greatly increased.

### **Section 67**

The IASW welcomes the safeguards introduced in this section, it would be important that the review of the Mental Health Act 2001 reflects the important independent role that the HSE Authorised Office applicant could play in assessing individual wards and ensuring the principles of the least restrictive alternatives to the involuntary admission in an Approved Centre are adhered to.

## **General**

It is essential that the proposed Codes of Practice are produced within the same timeframe as this legislation. This is particularly important considering the wide range of options legislated for in the Bill as well as the processes accompanying each option.

The development of Codes of Practice would greatly benefit from the involvement of social workers and other health and social care professionals who can bring a practice perspective informed by the experiences of service users and of the professions who support them. Multi-disciplinary expertise can ensure that the Codes capture the diverse range of needs presented by service users including those with disabilities, mental health needs and older people. This expertise can also inform the training needed for assessors to carry out their statutory functions within the spirit and principles of the legislation.

The interface between this Bill and the Nursing Homes Support scheme Act should be clarified, particularly in relation to 'Care Representatives' in the Nursing Homes Support Scheme.

In addition, the interface between the Bill and the Mental Health Act needs to be clarified. A key area to consider is advance directives.

The Bill does not set out a mechanism to respond to situations where an individual is unlawfully deprived of their liberty. Although mentioned in Article 5, the Bill fails to legislate in this regard.

And finally, the Bill makes no legislative provision for independent advocates. Many social work service users do not have strong social support networks from which supportive decision-makers can be sourced. As such, the role of advocate is one that needs to be legislated for.

## **Conclusion**

The Irish Association of Social Workers welcomes this proposed legislation. However, amendments to strengthen safeguards are necessary. The Association would like to highlight the contribution that the social work profession can make to assessments of capacity and to the development of Codes of Practice, informed by the experiences of service users.

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