

**Note on Mental Capacity Bill
to Joint Committee on Justice,
Defence and Equality**

August 2011

Introduction

The IHRC is Ireland's National Human Rights Institution, established pursuant to the Human Rights Commission Acts 2000 and 2001. The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in law and practice. Its functions include keeping under review the adequacy and effectiveness of the law and practice in the State by reference to Constitutional and international human rights standards.

The IHRC welcomes the opportunity to make a submission to the Joint Committee on Justice, Defence and Equality in relation to proposed legislation regarding mental capacity. The IHRC previously made formal observations on the provisions of the Scheme of Mental Capacity Bill 2008 (2008 Scheme), which was referred to the IHRC pursuant to Section 8(b) of the Human Rights Commission Act 2000 by the Department of Justice, Equality and Law Reform in September 2008. The 2008 Scheme was intended to provide the basis for an Act to reform the existing Wards of Court system and replace the existing Lunacy Regulation (Ireland) Act 1871, but ultimately did not progress to Bill stage. A copy of the said Observations is enclosed for reference purposes.

The IHRC recommends the immediate enactment of legislation which broadly reflects the recommendations of the 2006 Law Reform Commission ("LRC") report *Vulnerable Adults and the Law (LRC 83 – 2006)* and the international acceptance of the functional approach to capacity. In its 2006 Report, the LRC describes the functional approach as involving an "issue-specific and time-specific assessment of a person's decision making ability". It recognises, for example, that a person may have the capacity to decide their living arrangements but not have the capacity to enter into a financial arrangement. This is in stark contrast to the current wards of court system whereby a finding of incapacity is applied to every decision and legal transaction a person may make. The functional approach to capacity is informed by the human rights values of dignity and autonomy. It is given clear expression in Article 12 of the UN Convention on the Rights of Persons with Disabilities ("CRPD")¹ and is also reflected in the evolving jurisprudence of the European Court of Human Rights ("ECtHR") and in the development of policy at European level, including in a number of Recommendations by the Council of Europe Committee of Ministers.

Any determination that a person lacks capacity, and a substituted (as opposed to a supported) decision making regime on a person's behalf has a far-reaching impact upon the individual's basic rights and freedoms, including the rights to liberty, autonomy and privacy. A finding that a person lacks capacity has a fundamental impact on their ability to live their lives independently (as required under Article 19 of the CRPD) and is thus an extremely serious matter. For this reason, the process employed in making an assessment of capacity and in determining the decision or decisions that may be taken on the person's behalf is of fundamental importance. It is crucial that appropriate and effective safeguards

¹ See Appendix.

exist to ensure that any interference in individual autonomy is no greater than absolutely necessary, thereby protecting the individual from an arbitrary or unjustified interference. The European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) has been at the forefront of developing adequate and effective safeguards in this area of law. The ECtHR has indicated that special procedural safeguards may be called for in order to protect the interests of persons who are not fully capable of acting for themselves.

Recommendations

There are a number of recommendations which the IHRC would like to make to the Committee, in order to ensure compliance with national and international human rights standards. The IHRC’s principle recommendations are based on, *inter alia*, its previous IHRC recommendations to Government. These broad recommendations are grouped under five headings as set out below.

1. Guiding Principles

In order for the State to be in compliance with the CRPD, it is clear that the proposed Mental Capacity legislation must be informed by Article 12 of the said Convention in addition to Constitutional and European Convention standards.

In this regard the IHRC recommends that a number of overarching principles be included in the legislation, and which should reflect the normative values of the legislation:

- a) It should be stressed that there is a presumption of one’s capacity as set out under Article 12 of the CRPD. The legislation should thus include a presumption that every person has legal capacity (or decision making capacity), unless it can be proven otherwise;
- b) The legislation should acknowledge that a person may need support to exercise their legal capacity and that positive provision should be made in this regard, but that the absence of such support should never be a basis for depriving a person of their legal capacity;
- c) Deprivation of capacity (leading to substituted decision making) should only be considered where supported decision making is demonstrated to be impossible before the adjudicative body;
- d) Subject to the above, even where there is a form of substituted decision making, such as under a guardianship arrangement, the person should still be involved to the greatest extent possible in all decisions concerning them and their wishes should be taken into account;
- e) The “best interests” of the person must be the guiding principle in relation to all decisions (including any determinations concerning capacity) under the legislation, but this should be framed in a manner that acknowledges the inherent dignity and autonomy of the person by stipulating that “best interests” is, *inter alia*, based on the functional approach.

2. Determinations re capacity

The safeguards included in the legal process by which a person may have their decision making capacity restricted, or indeed have it restored, are crucial to ensuring that the State keeps within its margin of appreciation under the ECHR and the provisions of the CRPD. In this regard the IHRC considers, in addition to ensuring the guiding principles above are adhered to, that the following minimum provisions should also be included:

- a) **Fair Hearing:** The IHRC recommends that the Mental Capacity Bill (“the Bill”) should provide for a fair hearing with appropriate adversarial procedures, given the fact that a determination of a person’s civil rights under the ECHR is at issue. Such a procedure should make provision for the sensitive nature of the adjudication concerned and minimise formality without losing the requirements of natural justice and fair procedures, such as the requirement for an independent and impartial tribunal to make decisions. All decisions should be subject to a right of appeal that should not be unduly restrictive. The decision-making body does not necessarily have to be a court but must be an independent and impartial body.
- b) **Legal Aid:** The IHRC recommends that there be an express right for the person to be legally represented in all procedures leading to a determination regarding their capacity, including any periodic review or appeal. This right to legal representation should be coupled with a specially tailored legal aid scheme, which ensures equality of arms in the procedure including access to an independent expertise regarding capacity.
- c) **Assessing Capacity:** The IHRC recommends that the Bill include specific provision for methods of assessment of capacity; identification of the criteria to be used when determining capacity; and qualifications and expertise of the person(s) assessing capacity. Best international practice should inform the criteria for assessment. Again, it should be stressed that there is a presumption of one’s capacity as set out under Article 12 of the CRPD.
- d) **Duration and Review of Decisions:** The IHRC recommends that the Bill should include a time limit for automatic periodic review of any determination of incapacity and should also make provision for the adjudicative body to set a shorter timeframe for a review of its decision, where the general presumption of capacity and the individual circumstances of the case merit such a shorter period for review. In addition, there should be provision for an application to be made by certain designated persons (such as the Guardian, the person the subject of a guardianship order and close relatives) to seek a review of any determination that the person lacks capacity.

3. Guardianship

Where a person is deprived of decision making capacity, this involves placing the person under a form of guardianship, which allows for *substituted* decision making. In line with the general presumption of capacity and the principle that any interference with personal autonomy should be kept to a minimum, guardianship should be both subject specific (i.e. the capacity to make financial decisions will not necessarily be determined in the same way or with the same result in relation to another matter, for example, the capacity for human relations) and time specific, and not a blanket system of substituted decision making. Accordingly the IHRC reiterates its former recommendations in this regard:

- a) **Scope of Guardianship Orders:** that the Bill expressly requires that any guardianship order sets out precisely the scope of the decision-making authority of the personal guardian and what matters are governed (e.g. financial decisions) and that such scope be limited to the greatest extent possible, in line with the capacity assessment undertaken.
- b) **Periodic Review:** that all guardianship orders be subject to automatic periodic review (and a right of appeal).
- c) **Oversight and Accountability:** that all guardians duly appointed be required to report on the discharge of their duties on a periodic basis to an independent oversight body.

In addition, it is recommended that close scrutiny be maintained by a supervisory body over the fees and expenses arising from guardianship if payable from the funds of the person under guardianship.

4. Mental Health Act 2001 and Psychiatric Detention

The IHRC is aware that currently Wards of Court may be the subject of psychiatric detention outside the safeguards in the Mental Health Act 2001 and has previously made recommendations to Government in this regard.² The IHRC considers that specific provisions should be introduced, to ensure that a person who is the subject of a guardianship order is not arbitrarily deprived of their liberty.

- a) **Healthcare Decisions:** The IHRC recommends that any person who has been determined to lack legal capacity to make health care decisions and is proposed to be admitted to an approved centre should be deemed to be an involuntary patient under the 2001 Act with all the ensuing safeguards, or alternatively that the Bill ensures that equivalent safeguards are afforded to such persons.

² IHRC Policy Paper on Section 2 of the Mental Health Act 2001, February 2010. A copy of the Policy Paper is also enclosed for reference purposes.

- b) **Safeguards regarding Detention:** The IHRC recommends that the Bill should explicitly state that a personal guardian does not have the authority to deprive a person of his or her liberty in any circumstance.
- c) **Doubt Regarding Capacity:** The IHRC recommends that in the event that there is any doubt under the Mental Health Act 2001 whether a person has capacity to consent or object to their admission to an approved centre, there should be a link between the 2001 Act and the proposed mental capacity legislation such that it should be possible for an approved centre to seek a determination of capacity under the proposed legislation, under an expedited procedure if necessary. This may require that interim measures be available in the interests of the health and welfare of the person concerned or the safety of others, if at risk.

5. General

While the drafting of capacity legislation is a complex process, taking into account a broad range of circumstances and human rights concerns, the IHRC would highlight three particular categories of person that should be carefully considered within the proposed legislation:

- a) **Wards of Court:** The IHRC would recommend that all existing wards of court prior to the enactment of the proposed legislation be dealt with under transitional arrangements, such that they are brought within the procedural safeguards of the capacity legislation as soon as possible.
- b) **“Voluntary compliant” patients:** The IHRC would recommend that “voluntary compliant” patients in approved centres who are in fact accommodated in situations of de facto detention be similarly dealt with under transitional arrangements, pending amendment of Section 2 of the Mental Health Act 2001, expanding the categories of “involuntary patient” as recommended above.
- c) **Children:** The IHRC would recommend that specific issues which arise in relation to the legal capacity of minors be given particular attention in the legislation.

The recommendations above are a summary of the principle human rights considerations that arise in the context of the proposed capacity legislation, and are not intended to be exhaustive. The IHRC would be pleased to meet with the Committee to discuss in detail the points outlined above if that is considered useful or to otherwise provide assistance to the Committee to ensure that the Bill complies with Ireland’s national and international human rights obligations.

Appendix

Article 12 of the CRPD is entitled “Equal recognition before the law” and provides:

“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.