



OFFICE OF THE SECRETARY GENERAL, DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM
OIFIG AN ARD-RÚNAÍ, AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ

Ms Margaret Falsey
PAC Secretariat
Leinster House
Dublin 2

Ref: 1127160411

5 December 2014

Dear Ms Falsey

I refer to your letter dated 27 November 2014 regarding the updates required by the PAC in relation to the Civil Liability (Amendment) Bill and the Assisted Decision-Making (Capacity) Bill following the Committee's meeting of the 20 November 2014.

I am pleased to provide the attached briefing notes outlining the current state of play with regard to the above-mentioned legislation.

Should the Committee require further information please do not hesitate to contact my office.

Yours sincerely

Noel Waters
Acting Secretary General

Update on Periodic Payments Legislation

The Department of Justice and Equality is currently finalising legislative proposals on periodic payment orders which will provide the possibility for catastrophically injured persons to receive awards for damages in the form of annual payments rather than as a lump sum. Periodic payment orders will be available for those who have been catastrophically injured and are in need of long-term care. Those who will be able to avail of the facility will include those who have experienced medical negligence, including children.

It is intended that the annual payments will be paid for the duration of the person's life and that they will be index-linked.

The Department of Justice and Equality convened an inter-departmental working group to examine the technical aspects of this legislation and to consult key stakeholders. The working group has now completed its work and the Department of Justice and Equality expects to be in a position to publish legislative proposals early in 2015.

Update on the Assisted Decision-Making (Capacity) Bill 2013

The aim of the Assisted Decision-Making (Capacity) Bill 2013 is to ensure that people with capacity difficulties are enabled to take their own decisions to the greatest extent possible.

The Assisted Decision-Making (Capacity) Bill 2013 proposes a modern statutory framework to support decision-making by adults who have difficulty in making decisions without help. It will repeal the Marriage of Lunatics Act 1811 and cause the Lunacy Regulation (Ireland) Act 1871 (on which the wards of courts system is based) to cease to have effect.

The Bill proposes to provide for the replacement of the adult wards of court system by a less intrusive system. The proposed new system will offer a continuum of options to support people in maximising their decision-making capability.

Enactment of the Assisted Decision-making (Capacity) Bill is one of the prerequisites for the ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD).

Wards of Court and the Assisted Decision-Making (Capacity) Bill

Part 5 of the Bill provides for the phased transition from adult wardship to the new support framework. It provides for the review by the wardship court of the capacity of all current adult wards within three years of the commencement of that Part.

Following a review of his or her capacity, the ward will be discharged from wardship and depending on the outcome of the review the wardship court may:

- a) if it is satisfied that the ward has capacity, make such ancillary orders (including ancillary orders relating to the return to the former ward of his or her property, if any), or
- b) make a declaration that:
 - the ward lacks capacity unless the assistance of a suitable person as a co-decision-maker is made available to him or her, or
 - the ward lacks capacity even if the assistance of a suitable person as a co-decision-maker were made available to him or her.

If a declaration regarding lack of capacity ((b) or (c) above) is made by the wardship court, the former ward will be offered the support option most appropriate to his or her needs i.e. a co-decision-maker or decision-making representative is appointed to support the former ward (see note on Decision-Making Supports). The safeguards and procedures, including capacity reviews, contained in Part 2 and Part 4 of the Bill will then apply to the former ward.

The Bill proposes to give more autonomy to those who require assistance in exercising their decision-making capacity, including control over their financial affairs and property which is in line with Article 12.5 of the CRPD.

It is envisaged that control of the former ward's funds will rest either with the ward or with the person appointed as a decision-making representative. It is not envisaged that the Office of the Public Guardian would administer the funds of former wards or

relevant persons who lack capacity in such matters, other than as a last resort option.

Wards of Court Office and the Assisted Decision-Making (Capacity) Bill

The Bill proposes the establishment of an office referred to in the Bill as the Office of the Public Guardian within the Courts Service to manage capacity related matters for adults and to replace the Office of the Wards of Court (OWC).

The remit of the new office is much wider than the current remit of the OWC. It will supervise and handle complaints against decision-making assistants, co-decision makers, decision-making representatives and attorneys of enduring powers. It will also prepare codes of practice for specific groups and will promote awareness of the legislation among the general public.

The Bill completed second stage in Dáil Éireann on 11 December 2013. Committee stage amendments are currently being drafted by the Department of Justice and Equality in tandem with the Office of Parliamentary Counsel to ensure that the Bill complies with the requirements of the Convention on the Rights of Persons with Disabilities. In addition, provisions on Advance Healthcare Directives will be incorporated at Committee Stage. It is anticipated that committee stage will be scheduled for early next year.

Department of Justice and Equality
4 December 2014

Assisted Decision-Making Capacity Bill (2013) Background Note

The Assisted Decision-Making (Capacity) Bill 2013 proposes a modern statutory framework to support decision-making by adults who have difficulty in making decisions without help. It will repeal the Marriage of Lunatics Act 1811 and cause the Lunacy Regulation (Ireland) Act 1871 to cease to have effect.

The Bill provides for the replacement of the adult Wards of Court system by a less intrusive system. This system offers a continuum of options to support people in maximising their decision-making capability.

Guiding Principles

The Bill sets out guiding principles that are intended to safeguard the autonomy and dignity of the person with impaired capacity. They apply to each and every intervention, including by the court that is made under the proposed legislation.

- there is a presumption of decision-making capacity unless the contrary is shown.
- no intervention will take place unless it is necessary.
- a person will be treated as unable to make a decision only where all practicable steps to help that person to make a decision have been unsuccessful.
- any act done or decision made under the Bill must be done or made in a way which is least restrictive of a person's rights and freedoms.
- any act done or decision made under the Bill in support or on behalf of a person with impaired capacity must give effect to the person's will and preferences.

Capacity Assessment

The Bill proposes to change the law from the current all or nothing status approach to a flexible functional definition, whereby capacity is assessed only in relation to the matter in question and only at the time in question. If a person is found to lack decision-making capacity in one matter, this will not necessarily mean that s/he also lacks capacity in another matter. The Bill recognises that capacity can fluctuate in certain cases.

The Circuit Court will have jurisdiction for assessing the person's decision-making capacity. It can use expert reports to assist it in assessing the person's capacity and in deciding what type of capacity declarations that it should make. There are two types of declaration the court may make: firstly, that a person lacks capacity to make a decision unless s/he has a co-decision-maker to assist him or her; and secondly, that a person lacks capacity to make a decision even if s/he has a co-decision-maker to assist him or her.

Decision-Making Support Options

The Bill proposes three types of decision-making support options to respond to the range of support needs that people may have in relation to decision-making capacity.

Assisted decision-making: a person may appoint a decision-making assistant – typically a family member or carer – through a formal decision-making assistance agreement to support him or her to access information or to understand, make and express decisions. Decision-making responsibility remains with the person. The Minister will make Regulations to specify the content of decision-making assistance agreements.

Co-decision-making: a person can appoint a trusted family member or friend as a co-decision-maker to make decisions jointly with him or her under a co-decision-making agreement approved by the Circuit Court. A co-decision-maker will help to access and explain information relevant to a decision. The co-decision-maker will also help the person to make and express a decision. A co-decision-maker cannot oppose a decision made by the person where it is reasonable and will not cause harm to another person. The co-decision-maker will be supervised by the Office of the Public Guardian.

Decision-making representative: for the small minority of people who are not able to make decisions even with help, the Bill provides for the Circuit Court to appoint a decision-making representative. A decision-making representative will make decisions on behalf of the person but must abide by the guiding principles and must reflect the person's will and preferences where possible. The functions of decision-making representatives will be as limited in scope and duration as is reasonably practicable. The decision-making representative will be supervised by the Office of the Public Guardian.

Enduring Powers of Attorney

Under the Powers of Attorney Act 1996, a person can create an enduring power of attorney appointing an attorney to make decisions on his or her behalf in relation to financial and business affairs and personal care. The Bill will expand these powers to include health care matters. It will require attorneys to abide by the guiding principles. The Bill will require attorneys to be subject to supervision by the Office of the Public Guardian which will also have the role of registering enduring powers of attorney.

Informal decision-making

The Bill, recognising that informal assistance takes place on a daily basis, provides protection from liability for informal decision-makers in relation to personal welfare and healthcare decisions made on behalf of a person with impaired capacity where such decisions are necessary and no formal decision-making arrangements are in place. Informal decision-makers are bound by the guiding principles.

Office of Public Guardian

An Office of Public Guardian (OPG) will be set up within the Courts Service to replace the Wards of Court Office to manage capacity-related matters for adults. The OPG will supervise and handle complaints against decision-making assistants as well as against the co-decision makers, decision-making representatives and

attorneys of enduring powers appointed by the court. It will also prepare codes of practice for specific groups and will promote awareness of the legislation among the general public.

Current wards of court

Each ward will be reviewed in accordance with the new system and discharged from wardship. A ward who continues to have capacity difficulties will be offered the support option most appropriate to his or her needs.

Role of Courts

The Bill provides that the Circuit Court will have jurisdiction on most issues arising under this legislation. The specialist judges provided for in the Personal Insolvency Act 2012 will undertake this work.

The Bill provides that the High Court will continue to have jurisdiction in relation to enduring powers of attorney and matters relating to non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment and organ donation.

Advance Healthcare Directives

The Government approved the text of the General Scheme and Heads of provisions for advance healthcare directives at its meeting on 4 February 2014. The Department of Health published the General Scheme as part of a public consultation. The provisions are currently being drafted by the OPC and will be ready in time for insertion into the Bill at Dáil committee stage.