



Assisted Decision-Making (Capacity) Bill 2013

This Assisted Decision Making (Capacity) Bill 2013 provides for the reform of the law relating to persons who require or may require assistance in exercising their decision-making capacity, whether it is at the present moment or sometime in the future. It also provides for the appointment of other persons who can assist such people in decision-making or (subject to the approval of the Circuit Court) to make decisions jointly.

Under the Bill, people who require assistance will be able to make an application to the Circuit Court or (in more serious cases) in the High Court. In the Circuit Court, people can seek the approval of co decision-making agreements or seek the appointment of decision-making representatives.

The Bill aims to provide for the amendment of the law relating to enduring powers of attorney and to provide for the ratification by the State of the Convention on the International Protection of Adults and for related matters.

This Bill will replace the long outdated Lunacy Act of 1871. The Lunacy Regulations Act 1871 termed people with an intellectual disability, those with mental health problems and older people with dementia, as 'Lunatics' and facilitated a system that took away a person's right to make their own decisions about their lives. It will also update Ireland's decision-making legislation to be more human rights compliant, and enable the government to take a step forward in fully adopting the UN Convention of the Rights of Persons with Disabilities (CRPD). Ireland is one of just three EU member states yet to ratify the Convention on the Rights of Persons with Disabilities. The other two are Finland and the Netherlands.

Current Difficulties

Most people with disabilities have capacity and are able to manage their affairs and decisions on the same basis as others. However, there are three groups who are in need of protection:

- Older adults with diminished capacity who are in residential care or being cared for at home,
- Adults with intellectual disabilities who are in residential care or are being cared for at home,
- People with mental health difficulties who have episodes of incapacity.

At present, the official processes open to families who have a member with limited mental capacity are Wardship and Enduring Power of Attorney. Wardship is often complex and expensive and is usually undertaken where there is property involved and/or a conflict between other family members. Enduring Power of Attorney requires that the person have capacity at the time of taking it out and thus is more suited to older people or those with a definite diagnosis.

In practice, family members and carers frequently make day to day decisions, including decisions on the spending of money, on behalf of people who do not have capacity. There is no legal right to make such decisions for adults or any protection for the person making the decision. In particular, there is a legal vacuum in respect of routine decision-making on behalf of people over the age of 18 who have intellectual disabilities and lack capacity.

Important Reforms

Legal Approach to Mental Capacity:

The current law provides for an ‘all or nothing’ approach to mental capacity. The Bill will replace this approach with a ‘functional test’ of capacity. This means that capacity will be assessed on the basis of an individual’s ability to understand the nature and consequences of a decision in the context of available choices at the time of the decision.

Replacement of Wards Of Court System:

Under the new regime, the current Wards of Court system will be abolished and replaced by a legal framework which will support individuals in exercising their decision-making capacity. This will facilitate better management by those individuals of their personal affairs and allows them the greatest level of autonomy possible. Decision-making capacity will be assessed on an issue and time specific basis and individuals will be given support which is tailored to the circumstances. Everyone who was a ward before the Act will be reviewed within 3 years but can apply to court for review as soon as the Act is passed. Everyone who was a ward will be discharged eventually, and a different order will be made (e.g. co decision-making or representative) but the court will decide when this will happen and will base this on the person’s capacity.

Office of Public Guardian

The Bill provides for the establishment of an independent office of Public Guardian. The Public Guardian will have a supervisory function and will oversee those appointed to assist vulnerable individuals in the decision-making process, including court appointed decision making assistants, co decision-makers, decision-making representatives and those appointed under enduring powers of attorney. The Public Guardian will also keep a register of agreements, deal with complaints and start investigations, read reports, give advice to courts, and be tasked with promoting public awareness of matters pertaining to mental capacity.

Mental capacity

A person is deemed to be unable to make a decision if they cannot :

- Understand the information relevant to the decision,
- Retain that information long enough to make the decision,
- Use or weigh that information as a part of the process of making a decision, or
- Communicate the decision.

Decision-Making

People can make agreements to be appointed decision-makers(s) once they are over the age of 18 and think that their mental capacity 'is in question or shortly may be in question'. More than one decision-maker can be appointed to a person but there can only be one for each area of decision-making. The following agreements can be made:

Assistance Agreements:

A person can choose someone they trust then make an agreement of what decisions they want help with and who will help them, and finally give notice to public guardian. They can make changes to the agreement as they wish. The appointed assistant does not make the decision for the individual but can advise on decisions, help communicate decisions, and make sure that the individual's wishes are adhered to. The assistant will also have access to relevant documentation.

Co-decision making Agreements:

A person can also apply to make an agreement to appoint a co decision-maker. Even if a person does not apply to make an agreement, another person may apply to court to say that the individual lacks capacity without a co-decision-maker and the court will decide if one is needed. The court cannot appoint the co decision-maker without the individual's agreement. The co decision-maker must advise and make decisions together with the person. They must write a report and submit it to the office of public guardian annually. The co decision-maker must agree with the decision unless it is unreasonable or is likely to cause harm.

Powers of Attorney:

A person can make a 'power of attorney' once they are over 18. It is an agreement that someone they choose will make decision(s) for them once they consider that their capacity is, or shortly may be in question. The person must choose someone and make them power of attorney. They must say what decisions are to be made and who will make them. The attorney must then register with the office of public guardian and give notice to others who can object the appointment. The attorney must also write a report annually to the public guardian and has the power to make any decisions to do with personal welfare on behalf of the individual.

Decision-making Representative:

A person must apply to court to say that an individual should have a decision-making representative. The court will decide to appoint a representative if the person does not have the capacity to make a decision on their own, but would with a co decision-maker (but none is available), or they would not have the capacity even with a co decision-maker. The court will also decide what decisions the representative can make. The representative can be someone known to the person or someone from a panel of the public guardian. The representative will have the power to decide where the person will live, who they have contact with, consent to treatment, diet and dress, employment, rehabilitation, training, whether they travel outside the state, etc.

Further information and reading can be found at:

www.oireachtas.ie/documents/bills28/bills/2013/8313/b8313d.pdf