THE BAR OF IRELAND

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Submission to the Committee on Children, Equality, Disability, Integration and Youth on the General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill 2021

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INTRODUCTION

The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advice of the highest professional standards.

The Bar of Ireland recognises the immense importance of the Assisted Decision Making (Capacity) Act 2015 ("**the 2015 Act**"), and this General Scheme, in protecting and vindicating the rights of vulnerable people in Ireland. While the submissions below outline some of the potential issues that remain within the current scheme, the purpose of highlighting these issues is to assist with the implementation of the Act, rather than to criticise the extensive work completed to date.

With that in mind, these submissions have focused on the issues that are regularly before the Courts. The independent referral bar has been instrumental in the development of practices, processes and safeguards both under the inherent jurisdiction and in wardship to ensure that those jurisdictions are exercised in a lawful manner, compatible with the Constitution and modern human rights standards, and which places the voice of vulnerable persons at the centre of proceedings, in order to vindicate the rights of those persons.

The Bar of Ireland urges the Joint Committee to ensure that as the structures enacted in the 2015 Act are commenced, those persons' rights are vindicated by an equally robust mechanism which has the flexibility to address unexpected issues which – in our members' experience – inevitably arise.

In that regard, The Bar of Ireland highlights, as its principal submission, that when Part 10 of the 2015 Act ("*Detention Matters*"), is commenced, it will set in train a process of removing the legal basis for regulating restrictions on the liberty of a large

cohort of vulnerable persons whom the High Court has assessed to be at risk absent those restrictions. For those persons, the absence of a mechanism for safeguarding and regulating such restrictions will, in the submission of the Bar of Ireland, place that cohort of persons at significant risk of harm.

The failure to provide for such a framework may be a deliberate legislative choice (and the Bar of Ireland notes in that regard, the removal in Heads 27 and 41 from ss.44 and 62 of the 2015 Act of permission to use restraint even in "exceptional emergency circumstances"), or it may be intended to provide that framework in other legislation. In either case, the Bar of Ireland flags that its absence has the potential to lead to uncertainty and potential for irremediable harm.

This submission also addresses what The Bar of Ireland suggests may be a *lacuna* in the 2015 Act and Scheme in relation to the Courts' power to confer ancillary powers under Part 5 of the 2015 Act (*"Applications to court in respect of relevant persons and related matters*"). For Courts to give effect to the intentions behind Part 5 of the Act, The Bar of Ireland suggests that the Courts should have broader discretion to make orders. As the Circuit Court is given the responsibility of determining welfare decisions for persons affected by the Act, the Circuit Court needs a statutory authority to support those welfare decisions.

Finally, this submission comments on the amendments to the General Scheme such as the powers conferred on attorneys in consenting and refusing treatment and the hearing of proceedings in public.

The Bar of Ireland is grateful for the opportunity to comment of this important General Scheme and would welcome the opportunity to engage with the Joint Committee further on any of the points raised in these submissions.

THE URGENT NEED FOR LEGISLATION FOR DEPRIVATION OF LIBERTY SAFEGUARDS (DOLS)

The need for liberty safeguards to accompany the commencement of the 2015 Act has long been recognised. In December 2017, the Department of Health approved the publication for public consultation purposes of preliminary draft Heads of the General Scheme to form Part 13 of the 2015 Act. On 8 December 2017 the Department of Health launched a public consultation on this draft legislation, which was published along with a consultation paper, 'Deprivation of Liberty: Safeguard Proposals', on the Department's website. The consultation paper stated:

> *"The central issue to be addressed is that existing legislation in the form of the Assisted Decision-Making (Capacity) Act 2015 and the Mental Health Act 2001 do not provide a procedure for admitting persons without capacity to relevant facilities in which they will be under continuous supervision and control and will not be free to leave, nor do they provide procedural safeguards to ensure that such persons are not unlawfully deprived of their liberty. The draft Heads seek to address this gap."*

The results of the consultation process were published by the Department of Health in July 2019. The Department's report stated:

> *"Neither the ADMC Act nor the Mental Health Act (MHA), 2001 provides procedural safeguards to ensure that people are not unlawfully deprived of their liberty in relevant facilities. In developing the legislative proposals, the Department of Health aims to address this gap in the existing legislation."*

However, insofar as the Bar of Ireland is aware, no further or updated legislative proposals have yet been published. This Government has committed to a June 2022 commencement date for the balance of the 2015 Act but has not, as of yet, taken

steps to address the "gap" which will be created upon commencement of the Act in the absence of appropriate "Deprivation of liberty safeguards" (DOLS).

That gap arises as follows:

There are currently many persons with disabilities living and being cared for in facilities, such as nursing home or houses in the community, who are subject to some form of restriction on or deprivation of their liberty because of the risks which they would face at large in the community, and the commensurate level of security or supervision involved in their packages of care.[1]

Vignette 1
Sarah is an 18 year old woman with no mental disorder under the MHA but a diagnosis of an emotionally unstable personality disorder deemed to impact on her decision making-capacity due to a high risk of engaging in impulsive and self-harming behaviour including suicide attempts when not supervised 1 to 1. She was raised by a single parent who has two other children with special needs and who therefore cannot manage Sarah's needs in the family home.
Sarah is a ward of court, and she currently has HSE funded packages of care that involve deprivation of liberty due to the levels of supervision and staff control. These measures are authorised and reviewed at least every 6 months by the wardship court.
Under s.108(4) of the 2015 Act these orders will have to be discharged. That means either the service provider will have to terminate the delivery of the service (leaving Sarah in a potentially life-threatening situation) or continue to provide a service which would involve an unlawful deprivation of liberty.

The key point in relation to these placements is that they are not "Approved Centres" within the meaning of the Mental Health Act 2001 (i.e. a specially registered "hospital or other in-patient facility for the care and treatment of persons suffering from mental illness or mental disorder"), nor in most cases do the persons living there suffer from the type of mental illness or mental disorder that would warrant their admission to such a facility.

At present, the only way in which these arrangements can be lawfully authorised, and the affected persons given rights of independent court review and related safeguards is through the mechanism of wardship in the High Court. The shortcomings in the wardship system are well known but as matters stand, it will, at the time of commencement of the 2015 Act, be the only legal means for reviewing,

[1] The National Safeguarding Committee, Review of current practice in the use of wardship for adults in Ireland, at p. 92.

scrutinising and authorising these placements and restrictions. Absent those safeguards, both the Supreme Court and the European Court of Human Rights have made clear that such living arrangements are not lawful.

If the 2015 Act (as it is to be amended) represents a deliberate legislative choice to bring to an end such types of protected placement, then the 2015 Act will, the Bar of Ireland considers, achieve that. If, on the other hand, that consequence is not foreseen, then the Bar of Ireland flags that urgent legislative steps appear to be needed to ensure that the commencement of the 2015 Act does not create a legal vacuum in respect of the care and protection of that cohort of vulnerable persons.

The mechanism by which this comes about is set out below.

Pursuant to s.108(4) of the 2015 Act, upon review of detention orders in respect of wards in placements which are not approved centres (most Nursing Homes would not be approved centres), where the wardship court determines that the person concerned does not meet the threshold of "mental disorder" as defined in the Mental Health Acts (MHA), it **must** order the discharge of the person from detention.

The mandatory terms of s.108(4) are striking. They leave a court with no discretion in this regard. Although it is not possible to anticipate every future case, the Bar of Ireland considers that the terms of the Act may well inhibit future recourse to the "inherent jurisdiction" of the High Court to continue such detention in cases where, although the detention cannot be continued under the 2015 Act, a future Court considers there to be a risk to the life of the ward if he or she is no longer detained.[2]

It is both foreseeable and likely that such cases will arise. There are many wards of court who are currently subject to detention orders, and who do not meet the

[2] Inherent jurisdiction should not be invoked where there is a satisfactory and existing regime available for dealing with the issue (*G.McG. v D.W. (No. 2)* [2000] 4 IR 1 at pp. 26 and 27 (Murray J); *Mavior v Zerko Ltd* [2013] 3 IR 268 at p. 275 (Clarke J); *Lopes v Minister for Justice, Equality and Law Reform* [2014] IESC 21 (unreported, Supreme Court, 27th March 2014) at para. 2.1 (Clarke J); and *In the matter of F.D.* [2015] IESC 83 at para. 32).

Vignette 2
John is 72 years old and lives in a nursing home. In 2016, he was diagnosed with dementia. He was soon after made a ward of court.
As a result of his dementia, John gets confused in the evenings and has often left his own home and wandered the streets. His family were unable to meet his care needs and keep him safe, so he was admitted to a nursing home. Since his admission to the home, John is more content but will sometimes express a strong wish to leave and return to his parents' home (though his parents are long deceased, and their old family house was demolished) and may try to exit the nursing home to give effect to this wish.
The HSE sought orders from the wardship court that the nursing home would not have to give effect to John's expressed wishes to leave, that they could use a locked keypad to prevent John exiting the unit and for permission for An Garda Síochána to return John to the nursing home if he did leave the home.
There is no provision under the 2015 Act to authorise a deprivation of liberty in this way or to confer powers on An Garda Síochána to return John into the custody of the nursing home.

threshold of "mental disorder" as defined in the MHA, yet where the High Court has found that orders authorising restriction or deprivation of liberty are necessary and appropriate to vindicate the ward's rights because of the severity of the impact on their decision making-capacity and behaviour of their conditions, notwithstanding those conditions fall outside the MHA definition.

These individuals may not meet the definition of "mental disorder" because, either:

- They do not have a mental illness as defined under the MHA.
- Their developmental or intellectual disability or dementia is not significant; and/or
- The detention and treatment of them in an acute psychiatric setting would not be clinically appropriate or beneficial.

While the nature of the relevant underlying condition may fall outside the narrow confines of s.3 of the MHA, those persons may still lack decision-making capacity (as understood under the 2015 Act) and the risks that they face in the community may be every bit as acute—and in some cases more acute—than those faced by persons with a "s.3 mental disorder".

As noted above, the Department of Health recognised in 2019 that "[n]either the ADMC Act or the Mental Health Act (MHA) 2001 provides procedural safeguards

to ensure that people are not unlawfully deprived of their liberty in relevant facilities."[3]

However, legislation providing for DOLS does not appear to have been developed at the same pace as the 2015 Act. The Bar of Ireland is concerned that this mismatch will bring about a legal vacuum where extremely vulnerable persons will either be unlawfully deprived of their liberty or released from detention orders which are a necessary element of their care and treatment.

The need for safeguards identified by the Department of Health in 2019 remains. The consequences of the legislative gap identified under this heading are, in the view of the Bar of Ireland, potentially stark, but could easily be unintentional.

The Bar of Ireland hopes, as a result of this portion of its submission, to ensure that there is no question of those consequences arising inadvertently, and without having been drawn to the attention of the Joint Committee.

THE NEED FOR A COURT TO BE ABLE TO MAKE ANCILLARY ORDERS UNDER PART 5

In the experience of our members, many care placements are dependent on orders made by the High Court in wardship, conferring specific ancillary powers on certain third parties (e.g. carers for vulnerable persons) to support the care of vulnerable wards of court.

The 2015 Act does not appear to provide for a lawful basis for many of the interventions which support many existing residential placements of persons who lack decision-making capacity with respect to important care and welfare decisions.

The 2015 Act provides a framework for assisting relevant persons with decisions about, among other things, personal welfare. Part 5 of the Act empowers the Court

[3] Department of Health, The Deprivation of Liberty Safeguard Proposals: Report on the Public Consultation, July 2019, at p. 7.

and a Decision-Making Representative to make decisions on behalf of a relevant person in relation to those matters.

However, in certain cases, a decision or consent on behalf of a relevant person will not be sufficient to give effect to the Court's decided course of action. Additional orders conferring certain powers on third parties may also be necessary.

The Act appears already to recognise this in principle. S.38(8) provides that, "in making a decision-making order or decision-making representation order, the court shall make provision for such other matters as it considers appropriate, including - … the conferral of powers on a decision-making representative".

However, there does not appear to be any provision of the 2015 Act which would enable the Court to make orders empowering other relevant third parties to take necessary steps to support or give effect to a decision made by the Court or a decision-making representative in respect of the relevant person. Applications under Part 5 of the 2015 Act will fall under the jurisdiction of the Circuit Court, which will extend only as far as it is provided for in the Act. The Circuit Court does not have any inherent jurisdiction as its jurisdictions is prescribed and limited to the powers conferred upon it by Statute. Therefore, if the Circuit Court is to have power to enable third parties to give effect to the orders made, provision should be made for same.

If that is to happen, the Bar of Ireland suggests that the Joint Committee might recommend that the General Scheme include an amendment expanding this section to provide that the Court may confer powers on any other person or class of persons as it considers appropriate.

OTHER COMMENTS ABOUT 2021 BILL GENERAL SCHEME

Head 23 - Amendment of section 36 of the Act of 2015

Parties exempted from requirement to make an *ex parte* application for permission to bring an application under Part 5

Head 23 will amend s.26(4) to add an attorney under the Powers of Attorney Act 1996, a cohabitant of the relevant person and an adult child of the relevant person to the list of parties permitted to make a Court application under Part 5 without having first made an *ex parte* application to the Court seeking permission to do so.

It appears likely that there will be significant implications in terms of additional legal costs, delay and increased use of limited court time/resources in requiring relevant State services (such as HSE social workers) to make an *ex parte* application to the Court to obtain permission to bring an application under Part 5 in relation to a relevant person. This appears to be a cumbersome process that could have a chilling effect on timely and appropriate action under the 2015 Act being taken by State agencies for the benefit of vulnerable adults, as well as increasing the cost to such agencies of such interventions.

The Committee should recommend that this Head be redrafted to amend s.23 to address this issue. One possibility would be to allow the Minister to add to the list of parties who are exempted from the requirement to be make an *ex parte* application. This will give greater flexibility to the Minister to respond to issues as they become apparent in the operation of the Act.

Proceedings otherwise than in public

The Bar of Ireland welcomes the proposed deletion of s.36 (10)(b) of the 2015 Act, as proposed in Head 23. The proportionality of a blanket *in camera* rule is questionable and its constitutionality should also be the subject of fresh consideration considering the Supreme Court's decision in *Zalewski v An Adjudication Officer* [2021] IESC 24. Moreover, it brings intended future practice under the 2015

Act into line with present practice in wardship, where cases are only exceptionally heard otherwise than in public.

The problems that can arise from an absolute and blanket imposition of the *in-camera* rule became evident in the context of childcare hearings and these resulted in the establishment of the Child Care Law Reporting Project.[4]

The Bar of Ireland notes the following observations of Prof Mary Donnelly in this regard:

> *"The in-camera requirement raises important issues. While there is an undoubted need to protect the privacy of the people in respect of whom applications are made, there is also a significant need for transparency and for justice to be seen to be done. Moreover, given (as discussed below) the very broad way in which the principles underpinning the ADMCA are formulated, there is a clear need for further clarification and for judicial guidance to be made available to those people, including healthcare professionals, who are dealing with the ADMCA in practice. In England and Wales, the relevant court—the Court of Protection—received a great deal of criticism in its early days because of its lack of transparency, and in 2014, the President of the Court issued Practice Guidance for increased transparency in the Court. This Guidance emphasised the publication of (anonymised) judgments as a source of guidance and transparency. It is essential both to the reputation of the courts and to the effective delivery of the ADMCA that a similar model is put into effect in respect of both Circuit and High Court judgments under the ADMCA."*[5] [footnotes omitted]

In addition, with no public reporting of any decisions or outcomes, the Bar of Ireland notes the potential for significant discrepancies to emerge in practice between different circuits now that the Circuit Court will be the court with jurisdiction for the majority of applications under the Act. Concerns for the privacy of persons affected by the Court process, may be addressed by proportionately

[4] Child Law Reporting Project, see more at: https://www.childlawproject.ie/faqs/.
[5] Mary Donnelly (2016) "The Assisted Decision-Making (Capacity) Act 2015: Implications for Healthcare Decision-Making" *Medico-Legal Journal of Ireland* 22(2), at p. 69.

framed anonymising orders framed in a manner which strike a balance between the individuals' rights, while facilitating transparency.

Head 32 - Amendment of section 54

The correction of the disparity between the positions of relevant persons and current wards with respect to their representation contained in Head 32 is to be welcomed. Further, the proposed substitution of s.54(1) to remove the necessity for a ward of court to seek leave for review is a positive development. It makes matters more straight-forward for existing wards and should also assist to reduce legal costs, delay, and use of limited court time.

However, there appears to be an error in subsection 3A which refers to a Ward being assisted by a Court Friend where no legal practitioner is instructed. According to the explanatory note in this section, the purpose of this amendment is to allow a Ward to have the assistance of a Court friend. It is not clear how a legal representative would be entitled to take instructions from a Ward, nor is it clear why a Court friend would only be provided to a Ward where there was no legal practitioner. This section lacks clarity and should be amended.

Head 38 and 41 - Amendments to the Powers of Attorney provisions

These amendments will remove the possibility for persons to confer authority to their attorneys to consent to or refuse treatment. The individual will be deprived of the opportunity to have a substituted decision maker where capacity is lost.

The Bar of Ireland is concerned that removal of this provision may deprive both the donor and care providers of certainty and clarity. The more information and decision making that is provided by a donor while he or she has capacity, the greater certainty there is. Many difficult wardship cases involve disputes between family members as to medical treatment of an incapacitous loved one. The enduring power of attorney

has an opportunity to provide great clarity and protection for the capacitously-expressed will and preference of the donor and to offer an opportunity to avoid factual conflicts.

The Explanatory Note to Head 38 states that the purpose of the exclusion of treatment from EPAs is that treatment decisions will only be included in Advanced Healthcare Directives (AHD). The Bar of Ireland notes that AHDs do not have the same safeguards as EPAs. As the Act stands, AHDs will not require registration and there is no guidance concerning the drafting, executing, reviewing and safe keeping of such agreements. This creates a risk that the validity or form of these agreements will be more vulnerable to challenge than a corresponding power of attorney, which would be subject to these additional safeguards and widely used. The Bar of Ireland therefore submits that EPAs offer a greater opportunity to vindicate the will and preference of the donor and consideration should be given to the retention of treatment within their scope.

Head 72 - Amendment of section 139 of Act of 2015

The Bar of Ireland welcomes the proposed amendment to s.139 of the Act in order to expand the entitlement of relevant persons to participate in hearings by providing expressly for a ward to have the right to be present in the wardship court when his or her capacity is being reviewed under Part 6 of the Act (Wards), and to place the ward on an equal footing with the relevant person in relation to court proceedings under the Act.

Our members, many of whom have extensive experience supporting vulnerable witnesses and litigants, work diligently to ensure the meaningful participation of vulnerable persons in wardship and inherent jurisdiction proceedings which concern them. Sometimes it has been necessary to insist on this entitlement to participate by reference to ECHR caselaw. The proposed insertion in Head 72 provides an accessible and clear domestic legislative basis for supporting this important right of

vulnerable persons, and if enacted will represent a clear statement by the Oireachtas of the importance which it attaches to such participation.

CONCLUDING REMARKS

The Bar of Ireland are grateful for the opportunity to comment on this important piece of legislation. The Bar of Ireland wish to acknowledge the work of Aisling Mulligan BL, David Leahy BL and Paul Brady BL in compiling these submissions. Particular recognition must be given to Ciara Dowd BL for her extensive research and input, without which, these submissions would not be possible. Should the Joint Committee require a greater expansion of matters raised in this submission, The Bar of Ireland would welcome the opportunity to engage with the Joint Committee further on the points raised in these submissions.