

A hand is shown in a sketchy, brown-toned style, holding a vertical line that connects to the fulcrum of a balance scale. The scale has two pans hanging from it, one on the left and one on the right. The background is a light beige color with a white rectangular area containing the text.

# Equality, Dignity and Human Rights

Does the Assisted Decision-Making  
(Capacity) Bill 2013 fulfil Ireland's human  
rights obligations under the Convention on  
the Rights of Persons with Disabilities?



## **In its Programme for Government, the Irish Government has committed to introducing a capacity bill “that is in line with the UN Convention on the Rights of Persons with Disabilities.”**

A number of interest groups who work in this area came together to advise the Government on what this would entail and how they could achieve it. We produced a document called *Essential Principles*, based on best international practice, international human rights standards and on the guiding principles of the UN Convention on the Rights of Persons with Disabilities (CRPD).

The Assisted Decision-Making (Capacity) Bill 2013 is a significant improvement on the Scheme of the Mental Capacity Bill published in 2008, and introduces a number of important reforms – including the opportunity for individuals to make legally binding agreements with others to assist and support them in making their own decisions. Importantly, the guiding principles of the Bill are also clear that intervenors must give effect to the will and preferences of the person when making decisions, in so far as is reasonably practicable. However, significant concerns remain that certain provisions, such as the authority provided to informal substitute decision-makers, could undermine the positive support provisions (assisted and co decision-making agreements) of the legislation.

In order to ensure the will and preferences of the person are fully respected in all areas of decision-making, there are some areas of the Bill where amendments could be made to secure equal human rights for all those subject to the legislation.

**The key issues for reform can be summarised as follows:**

# 1

## ISSUE 1: Everyone should have the right to benefit from assisted decision-making.

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- A.** The opportunity to benefit from the positive support measures in the Bill (assisted decision-making agreements which stem from a person's natural support network) must be open to all, accessible and inexpensive, easy to use, and flexible enough to accommodate an individual's needs. Clarity on the legally binding nature of assisted decision-making agreements (e.g. obligations on third parties to respect decisions made using an agreement) must be provided.
- B.** Access to supports should not be based on a functional assessment of mental capacity. The Bill could use a lower threshold for ability to make an assisted decision-making agreement that has been successfully adopted in British Columbia. This would make such support measures accessible to more people while retaining safeguards to protect against abuse.
- C.** Individuals who currently have a good network of support will benefit enormously from this Bill. The impact of the Bill could be significantly enhanced by introducing a positive obligation on state bodies to provide individuals with opportunities for developing natural supports which can then be used as the basis for creating legally binding agreements.

# 2

## ISSUE 2: People should have more choice and control in deciding who will assist them with making decisions.

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- A.** People should also have more flexibility in terms of the number of supporters they wish to use for each area of decision-making. This has been very successful in British Columbia in the context of Representation Agreements.

Other positive examples can be found in circles of support and microboards used in the UK.

- B.** The substantive provisions dealing with decision-making representatives and informal decision-makers should be amended to place a stronger emphasis on the will and preferences of the person – e.g. in terms of selecting the decision-maker, the process of decision-making, and the content or outcome of decisions made.
- C.** The provisions relating to Wards of Court require review to ensure that all Wards have the benefit of the provisions of the capacity legislation.

# 3

## **ISSUE 3: Informal decision-making could undermine assisted decision-making and should be significantly restricted in scope.**

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- A.** The Bill provides a broad range of powers to informal substitute decision-makers, who are not subject to the same scrutiny as other kinds of substitute decision-makers under the Bill. There is a risk that the wide scope of powers given to informal decision-makers could undermine the positive support provisions of the legislation, i.e. the assisted and co-decision making agreements. At a minimum, these powers must be significantly restricted in scope, and accompanied by a duty to explore assisted or co decision-making with the individual as an alternative.

# 4

## ISSUE 4: People should have a real ability to challenge decisions made under the Bill.

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- A.** In particular, people who are subject to more restrictive measures under the Bill must have a real ability to challenge the appointment of substitute decision-makers, as well as the decisions they make. This should include the right to independent advocacy for people subject to the Bill (including the immediate and full commencement of the Personal Advocacy Service provided for in the Citizens Information Act 2007), and learning from the valuable experience of the National Advocacy Service.
- B.** Further safeguards are needed to address conflicts of interest between the individual and substitute decision-makers. There should also be an obligation on state bodies to investigate cases where there may be a conflict between the person and their substitute decision-maker.
- C.** The legal aid provisions of the Bill must be strengthened to ensure that there is an automatic right to legal representation, regardless of means, when an application is made to court for a declaration of an individual's mental capacity for a decision. This is essential to ensure effective access to justice for people affected by the Bill.
- D.** The costs of court applications and expenses of decision-making assistants, co-decision makers, and decision-making representatives, should not be automatically taken from the individual's estate. This will pose a significant financial barrier to people seeking to realise their rights under the Bill.

# 5

## **ISSUE 5: The Bill must interact with the Mental Health Act and other relevant areas of law.**

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- A.** The lack of interface between the Assisted Decision-Making (Capacity) Bill and the Mental Health Act 2001 must be addressed, ensuring that people treated in approved centres can benefit from the positive provisions of the Assisted Decision-Making (Capacity) Bill. The Mental Health Act should be amended to reflect the provisions of the capacity legislation.
- B.** A commitment to reform other laws relating to legal capacity currently excluded from the provisions of the Bill must be made by Government, in order to ensure compliance with the UN Convention on the Rights of Persons with Disabilities. This includes laws on consent to sex, voting, jury service, marriage and civil partnerships.

# 6

## **ISSUE 6: The Bill must provide safeguards for people who are detained against their will, no matter where the detention happens.**

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- A.** The Bill does not acknowledge that people who are not wards or detained under the Mental Health Act, can be unlawfully detained e.g. people *de facto* detained in residential services. Neither does it provide any safeguards or mechanisms for the individual to challenge this deprivation of liberty. This needs to be amended to comply with recent jurisprudence of the European Court of Human Rights.

# 7

## **ISSUE 7: The Bill must have a strong review clause so that it can be amended to reflect best international practice.**

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- A.** The review clause of the Bill should be strengthened to ensure that amendments to the Bill are considered after the five year review period in light of new international thinking on legal capacity, and emerging good practice in assisted decision-making.

# 8

## **ISSUE 8: The Office of Public Guardian should be renamed to better reflect the purpose of the Bill which is assisted decision-making.**

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- A.** The purpose and name of the Office of Public Guardian should be amended to the Office of Assisted Decision-Making to reflect the true purpose of the Bill, which is to enable individuals to have greater autonomy in decision-making.

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These issues do not form an exhaustive list and other points must be considered, details of which will be included in an extensive submission to the Department of Justice and Equality. With the adoption of amendments we believe that the Bill can achieve its stated purpose – to support people with disabilities in the exercise of their legal capacity, and preserve their autonomy to the greatest extent possible. Ireland has a great opportunity to show leadership in this field, as one of the first countries to introduce legislation to support people with disabilities in the exercise of their legal capacity.



**NATIONAL FEDERATION OF VOLUNTARY BODIES**  
*Providing Services to People with Intellectual Disability*

