

Access to Justice

by At-Risk Adults



A Sage Advocacy Report
November 2023

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without you

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Sage Advocacy is the National Advocacy Service for Older People. It also supports vulnerable adults and healthcare patients in certain situations where no other service is able to assist.

Sage provides information, support and advocacy and our work on behalf of clients is independent of family, service provider or systems interests. The Sage team of experienced advocates is available right across the Republic of Ireland and our service is free of charge and confidential. Sage Advocacy ensures that a person's voice is heard, that their wishes are taken into account and that they are assisted, in whatever ways are necessary, to be involved in decisions that affect them. Our work is guided by Quality Standards for Support & Advocacy Work with Older People, the Guiding Principles of the Assisted Decision Making (Capacity) Acts and a Case Management Group.

Our motto is simple: Nothing About You/Without You.

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Foreword

I am honoured to have been invited to write a foreword to this important and thought-provoking report. The author and his assistant are to be commended for their dedication, scholarship and clarity in dealing with ideas and concepts which are not always easy.

This report constitutes a further step in the long road to vindicating rights for at-risk adults. Through its work for almost a decade, Sage has played a critical role in the arduous tasks of mapping that road and ensuring that it is built according to specification.

The authors rightly say that what they have found and written is 'timely and important'. That is no exaggeration. Their findings and conclusions are based on evidence drawn from the work of those dedicated persons who have founded, and worked for, Sage.

Groundbreaking legislation has been enacted and brought into effect. But the law must not be merely aspirational, or exist in a vacuum. Without means of vindication, such entitlements, however nobly motivated or expressed, will be nugatory, and of no significance. The words of a statute are of little use without the means to genuinely enforce what is contained there.

The enforcement of law is fundamental to the Rule of Law itself. If there are insurmountable bars to enforcement, then justice is denied.

This report places the focus squarely on the process for ensuring that the voices of persons at risk are truly heard and heeded. The process can take time. It can on occasion require independent advocates who have the time and opportunity to truly listen to those voices, removed from other background 'noise'.

Once a person's true needs and wishes are identified, then the process of giving expression to those needs in a concrete way can begin. Real access to justice in this vital area may be painstaking but it is fundamental.

Justice John MacMenamin

Access to Justice Committee
Supreme Court

Executive Summary

The Report contains ten chapters.

Chapter One: Background and Context

Chapter One sets out the context for and the main purpose of this report. Access to justice is broadly understood as including effective access to the systems, procedures, information, and locations used in the administration of justice in both the civil and criminal law systems, and for both victims and perpetrators of crime. Access to justice is understood in the report as also including issues experienced by at-risk adults relating to access to health and social care and their right to be free from abuse and exploitation generally.

An underlying perspective throughout the document is that any failure to recognise the agency and legal capacity of people with reduced decision-making capacity is fundamentally a denial of their access to justice. While this is relatively obvious in the case of decisions relating to wardship or detention under mental health legislation, it is also relevant in the case of decisions about places of care where a person is being de facto deprived of their liberty.

An at-risk adult is understood in this document as a person who is aged 18 years or over who needs help to protect themselves or their interests at a particular point in time, whether due to personal characteristics or circumstances, and who is at risk of experiencing harm at the hands of another party. It is generally acknowledged that there are certain risk factors that may increase an adult's likelihood of having their human and legal rights infringed, for example, dependency status, disability status, health status, domestic living arrangements and/or situational factors. All of these factors can have an impact on people's ability to access justice on an equal basis with others in society.

Chapter Two: Overarching Factors Relevant to Access to Justice by At-Risk Adults

Chapter Two sets out a number of key overarching factors relevant to access to justice. It notes that access to justice is an issue of critical importance for the enjoyment and fulfilment of all human rights. Translating this right into practice in relation to at-risk adults requires a clear understanding of the multi-faceted factors involved which present multi-faceted challenges which require understanding if the procedural adjustments, accommodations and remedies necessary for making the right of access to justice a reality for at-risk adults.

The barriers to ever reaching the legal environment can include societal and personal perceptions and recognition of what constitutes crime and injustice; the hidden nature of many aspects of the indignities, coercion and abuse to which at-risk adults can be subjected; the power that other people – often family, carers and institutions – exert over at-risk adults; and limitations on access that result from poverty, communication deficits, and poor access to information. The concept of legal capacity (the capacity to have rights and the power to exercise those rights) is identified as being at the very core of access to justice.

Reference is made to an under-developed understanding of disability and decision-making capacity on the part of some professionals, including legal practitioners.

The important implications of the Supreme Court Judgement in the AC Case are noted.

Chapter Three

Chapter Three outlines a number of pieces of legislation that impact on how adults at-risk are likely to interact with the legal system, and, in particular, how legislation provides for the supply of support and facilitation to the adult at-risk as victim. In addition, it is noted that commitments to improving access to justice are frequently outlined in government strategies, for example, as evidenced in the commitments regarding matters such as the support of vulnerable witnesses, protection against hate crime, appropriate Garda and Court supports, additional provisions for prisoners with mental health issues.

The EU Victims Directive 2015, which is reflected in the Criminal Justice (Victims of Crime) Act 2017 was identified as an important development. The Domestic Violence Act 2018 contains elements that would be especially valuable in providing legal protection and redress to at-risk adults. However, the Act is seen as having substantial shortcomings in this regard. The Assisted Decision-Making (Capacity) Act 2015, commenced as of April 26, 2023, will provide new and robust set of legal protections to many at-risk adults.

Chapter Four: *General Measures in Ireland to Enhance Access to Justice*

Chapter Four describes the existing supports that are available to at-risk adults (and others) in their interactions with both the civil and criminal justice system in Ireland. It identifies the resources and structures to which at-risk adults should have access, as well as suggesting the shortcomings that may exist. The chapter focuses mainly on the professional legal assistance and aid that people can potentially access, as opposed to the barriers and challenges that can, on the one hand, obstruct them in ever actually reaching the legal domain, and on the other hand, the challenges and barriers that they will encounter once they have entered the legal space in which justice is administered. The need for support for victims throughout the court process is identified as particularly important for people whose decision-making

capacity may be in question or who are experiencing mental health difficulties.

Having entered into the realm of the justice system, and even with access to legal assistance and representation, adults at risk face further problems in coping with the system, the legal environment, complex structures and procedures, and the persistence of negative attitudes and stigmatising behaviours. Accessing the justice system, while an essential step, may not necessarily guarantee that at-risk persons will achieve justice.

Chapter Five: *Access to Justice Issues Emerging from Sage Advocacy Casework*

Chapter Five outlines issues that have emerged from advocacy casework, which were identified by Sage advocates as actual or potential infringement of people's right to access justice on an equal basis with others. It is suggested that many of the issues experienced by at-risk adults relating to health and social care and their right to be free from abuse and exploitation generally have a legal aspect.

The right to choice and full recognition of legal capacity are paramount to effective access to justice. People who have engaged the services of Sage Advocacy typically experience a wide variety of challenges, many of which are related to the need for and/or experience of long-term care services. Many Sage Advocacy cases are indicative of an absence of access to justice in the health and social care domain relating, in particular to choice, having one's voice heard, the right to self-determination and, very importantly, de facto deprivation of liberty.

There is a perception by Sage advocates that some professionals, including lawyers, may not always recognise the right of a person to make a decision that does not make good legal sense. There is also a perception of a failure by professionals to maximise people's decision-making capacity by, for example, not using communication methods appropriate to an individual, or not spending sufficient

time with them to enable them to articulate their will and preferences, or not involving an independent advocate when the latter would be appropriate.

Chapter Six: *At-Risk Adults as Victims of Crime*

Chapter Five deals with the matter of at-risk adults as victims of crime with a particular focus on older persons and disabled people.

There is clear evidence that adults at risk are subjected to and vulnerable to a wide range of abuses and criminality. There is also substantial evidence that indicates that the level of crime to which they are subjected is greatly under-reported. While comprehensive data regarding the extent of criminal victimisation of adults at risk in Ireland is not available, the evidence from other jurisdictions and from research strongly suggests that at-risk adults in Ireland are likely to be subjected to forms of abuse that are frequently serious, violent and criminal. Many types of criminal exploitation of at-risk adults may be ignored or dismissed as simply being 'the way things are', and somehow acceptable, notably in the area of financial abuse by family members.

Many victims do not report crimes because of their dependence on the abuser for basic survival needs. When victims do report crimes, police and court officials may not take the person's allegations seriously or may be reluctant to get involved. Additionally, people at-risk often may not have access to the types of support and resources they need in order to ensure that the perpetrators of these crimes are brought to justice.

Chapter Seven: *At-Risk Adults as Perpetrators of Crime*

This chapter explores how adults at-risk, and, in particular, people with intellectual disability, interact with and are treated within the criminal justice system in the context of allegations of criminal activity. While there may be a substantially greater tendency to sympathise with and support victims of crime rather than perpetrators of crime –

whether suspected, charged or convicted – it is incumbent on the justice system to ensure that all the citizens of the land have access to justice. In order to maintain the integrity, fairness and dignity of the justice system, it is imperative that all those who come in contact with it can participate equally, meaningfully and effectively with the elements of the system. It is clear that considerable challenges continue to exist for both the individuals concerned and for the criminal justice system itself.

The chapter examines, primarily, the situation of people with a disability who are suspected, accused or found guilty of a crime. It is noted that mental health is an important issue in any discussion of crime, punishment and justice. It is evident that the supports and services that are required in this regard are seriously lacking.

The absence of comprehensive data regarding the prevalence of disability – and particularly intellectual disability – among people suspected or convicted of crime, or imprisoned, is noted. Intellectual disability features large in any discussion of crime and disability. There is considerable evidence that suggests that a key issue here is the scale of undiagnosed and/or unrecognised mild intellectual disability. The hidden or easily dismissed nature of the latter can increase the problems and challenges faced by such people in engaging with the justice system and being treated appropriately and fairly in the process.

The current understanding is that there are psychological and sociological reasons why people with disabilities – in common with people who are not disabled – commit crimes. Each individual's unique personal life experiences, environmental influences, and individual differences, circumstances and opportunities contribute to whether a person will engage in crime.

The relatively high proportion of people with disabilities within the prison population is a major cause for concern. There is internationally a growing belief that far more must be done in order to ensure that alternative diversionary approaches are

developed and provided, and that prison becomes an option of last resort for this population cohort.

Chapter Eight: *The Role of the Assisted Decision-Making (Capacity) Act 2015 in Enhancing Access to Justice*

The provisions of the Assisted Decision-Making (Capacity) Act 2015 (ADMC Act 2015), commenced in April 2023, are described as having particular relevance for access to justice by people with an intellectual disability and older people with reduced decision-making capacity as a result of dementia, stroke or traumatic injury and for people experiencing mental health difficulties. The Act introduces a new legal framework for supported decision-making in Ireland and includes new statutory principles and practical supports for persons who may have difficulties with their decision-making capacity. The commencement of the Act will bring about an end to wardship in Ireland. The Decision Support Service (DSS) has been established within the Mental Health Commission to oversee the operation of the Act.

The Assisted Decision-Making (Capacity) Act 2015 is a watershed piece of legislation that sets out to modernise a whole area of law for a very vulnerable population cohort. It places the person at the centre, with a move from ‘best interests’ to ‘will and preferences’. It provides for a tiered approach to supported decision-making along a continuum that moves from assisting a person with decision-making at one end, to making decisions on a person’s behalf at the other end, where the latter is deemed by the courts as being the only viable option. The Decision Support Service, which has distinct functions set out in the Act, will be a key component in the implementation of the legislation. The provision for Advance Healthcare Directives is a major development in that it enables people to indicate their will and preferences when they have decision-making capacity and to have these protected by law. With the commencement of the legislation, people can no longer be made a Ward of Court – this is a critically important

provision. Also, any current ward of court, or someone acting on their behalf, can apply to the wardship court to have their case reviewed.

Chapter Nine: *The Role and Potential of Independent Advocacy in Enhancing Access to Justice for At-Risk Adults*

Access to independent advocacy is crucially important for at-risk adults in the context of enabling them to have equal and full access to justice and to protect their legal and human rights. It is suggested that independent advocacy can play a significant role, not only in enhancing access to justice, but, also, in identifying access to justice issues arising out of advocacy casework. There is a strong argument that independent advocacy is at the very core of protecting people’s right to justice and their related human and legal rights. Independent advocacy is particularly important where people have complex support needs and where they may not have trusted relatives or networks and, even more so, for people who lack decision-making capacity.

The goal of independent advocacy for at-risk adults in facilitating access to justice is described as supporting people as individuals in having their voice heard at all stages of both the judicial process and the health and social care delivery infrastructure. While the role of legal professionals and health and social care professionals as advocates is crucially important, there is an additional and necessary perspective that independent advocacy can bring to ensure that the voice of the at-risk adult is clearly articulated in all circumstances, and, particularly, where crucial decisions are being made in relation to their freedom or their good name and reputation. Independent advocacy provides at-risk adults with an additional and necessary protection.

It is clear that people who are the victims of different forms of abuse (financial, physical, psychological or sexual) and/or are being subjected to coercive control, can benefit from the support of an independent advocate in order to ensure that they can be fully protected under the law. It is also important to recognise that independent advocacy has an

important role to play in getting due process in the criminal justice system for at-risk adults who are alleged perpetrators of crime.

It is suggested that there is a need for legal practitioners to be aware that there may be an important distinction between independent advocacy and legal advocacy as typically practiced and that the complementary and necessary role of an independent advocate is given due acknowledgment in all legal processes, including by the courts, lawyers and gardaí. The same point applies to health and social care professionals.

Chapter Ten: *Synthesis of Key Factors Relevant to Access to Justice by At-Risk Adults*

The Final Chapter presents an overview of what is contained in the report

The criminal justice system, in all its parts, is one that most people find daunting, confusing and difficult. This fear and challenge is compounded and magnified for people with a disability. Equally, staff working within the system must find it difficult to fully recognise, understand and deal with the needs of people with disabilities whom they encounter. There is a need to ensure that staff are adequately trained and supported in this regard.

Ten principles of access to justice for people with disabilities are identified. There is a clear need for more detailed and accessible information and analysis regarding the prevalence and nature of crimes against at-risk adults. Such information is essential if the problem is to be fully recognised, understood and addressed.

Components of an integrated framework for enhancing access to justice by at-risk adults have been outlined, as follows: need for an attitudinal and cultural shift; full implementation of the ADCM Acts; an enhanced Civil Legal Aid Scheme; recognition of the principle of access to justice in the long-term care system; increased participation by disabled people in administration of justice processes; addressing the challenges faced by people with mental health difficulties in

the prison system; need for enhanced data collection; training and education for justice administration personnel; an enhanced role for independent advocacy; a stronger collaborative approach; and, very importantly, the need for new legislative provisions.

It is suggested that there is a need to ensure that all available criminal law remedies are reviewed with a view to ensuring that their provisions can be accessed and be effective for people who experience considerable barriers and challenges in defending themselves and their human rights against people who would and do subject them to abuse and to criminal victimisation.

There are questions relating to participation in crime by at-risk adults that need to be considered further, including, in particular, why at-risk adults are disproportionately represented in the prison system. The absence of reliable and comprehensive data in this regard hinders attempts to have a balanced discussion about how best to proceed. Without robust evidence, there is a greater chance that unacceptable patterns of practice that have become established and normalised over time will continue. As a society that champions the human and legal rights of every individual, we need to ensure that we avoid the ongoing existence of arrangements and practices that are viewed as discriminatory in their operation and result in an undermining of the integrity of our justice system.

Access to justice is a core element of the rule of law, a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights. It encompasses the right to a fair trial, including equal access to and equality before the courts; and the right to seek and obtain just and timely remedies for rights violations, including in the manner that long-term care is delivered.

Given that many at-risk adults may experience barriers in having their voice heard by those charged with administering justice or delivering health and social care services, it is crucially important for people to have access to independent advocacy to ensure that each individual has equality of access

and is afforded due process. Legal provision in Ireland for the practice of independent advocacy is critical in this regard.

It is widely accepted that access to justice in legal or quasi-legal contexts contributes to the protection of people's human and legal rights and thus results in a fairer society. How the Assisted Decision-Making (Capacity) Act is implemented in practice will obviously depend on the extent to which the cultural and attitudinal change envisaged in the legislation takes place in practice, both in the courts system and by health and social care professionals. The quality of education and training of those who are tasked with its implementation at all levels will be of paramount importance.

Specific issues identified from Sage Advocacy casework

There are specific safeguarding issues faced by people with temporary or long term diminution or loss of decision-making capacity who are in congregated care settings, including, in particular, unnecessary use of incontinence wear and inappropriate use of sedation.

Chapter One

Background and Context

Introduction

This purpose of this report is to set out core issues relating to access to justice in Ireland for adults who are at risk. There are particular issues confronting adults who are at risk as a result of general frailty due to the ageing process, ageist attitudes in society, and, in many cases, their residential care living situation. As a support and independent advocacy organisation, Sage Advocacy is in the unique position of supporting people who are victims of crime and people who are the alleged perpetrators of crime.

Access to justice is broadly understood in the report as including effective access to the systems, procedures, information, and locations used in the administration of justice in both the civil and criminal law systems, and for both victims and perpetrators of crime. Access to justice is also understood in the report as including issues experienced by at-risk adults relating to access to health and social care and their right to be free from abuse and exploitation generally.

An underlying perspective throughout the report is that any failure to recognise the agency and legal capacity of people with reduced decision-making capacity is fundamentally a denial of their access to justice. While this is relatively obvious in the case of decisions relating to wardship or detention under mental health legislation, it is also relevant in the case of decisions about places of care where a person is being de facto deprived of their liberty.

An at-risk adult is understood in this document as a person who is aged 18 or over who needs help to protect themselves or their interests at a particular point in time, whether due to personal characteristics or circumstances, and who is at a greater risk of experiencing harm at the hands of another

party. While some at-risk adults have reduced decision-making capacity, there are many others who do not lack decision-making capacity but who are vulnerable and at risk because of a range of multi-faceted factors, including frailty associated with the ageing process, mental health difficulties, having an intellectual disability, having a physical/sensory disability or being on the autism spectrum. It is generally acknowledged that there are certain risk factors that may increase an adult's likelihood of having their human and legal rights infringed, for example, dependency status, disability status, health status, living arrangements (domestic and residential care settings).

Matters considered in the report

The following areas are considered in the report:

- Key factors relevant to access to justice by at-risk adults (disabled people generally, people with an intellectual disability, people on the autism spectrum and people experiencing mental health difficulties);
- Issues and concerns that impinge on access to justice identified in Sage Advocacy casework;
- Measures in place in Ireland to enhance access to justice;
- At-risk adults as victims of crime;
- At-risk adults as perpetrators of crime;
- The role of the Assisted Decision-Making (Capacity) Act 2015 in enhancing access to justice;
- The role and potential of independent advocacy in enhancing access to justice;
- What is required in terms of a systemic response to removing barriers to accessing justice by at-risk adults.

Why this report is important and timely

At-risk adults are likely to experience substantial barriers and challenges in accessing justice in both the criminal and civil justice spheres. These barriers can relate to the structural complexity of the system itself and of its procedures; attitudinal barriers arising from assumptions regarding people with disabilities and other at-risk people; barriers in the built environment; and problems in accessing and making sense of information. While people in general will experience difficulties in accessing and using the judicial system – and many aspects of the quasi-judicial system, such as tribunals – at-risk adults are likely to be faced with greater challenges due to their lack of financial resources, level of education, technical knowledge and competency, and weaker social-support networks.

For many at-risk adults, their cases may never be dealt with by the legal system. The barriers to ever reaching formal legal processes can include:

- Societal and personal perceptions and recognition of what constitutes crime and injustice;
- The hidden nature of many aspects of the indignities, coercion and abuse to which at-risk adults can be subjected;
- The power that other people – often family, carers and institutions – exert over at-risk adults;
- Limitations on access that result from poverty, communication deficits, and poor access to information.

It is important to focus attention on how at-risk adults are dealt with in the context of access to justice generally as well as in their engagement with formal justice processes. This focus applies to examining how at-risk adults are dealt with within the various stages of the criminal and civil justice processes, how they are likely to experience the various elements of the system, and the extent to

which they receive appropriate and adequate access to justice. The matter of access to justice is relevant to many people who may be at risk – victims of crime, complainants, suspects, offenders, perpetrators, defendants, prisoners. It is particularly relevant in the context of people who have reduced decision-making capacity.

Each citizen should be able to have confidence in our justice system and know that it will support them every time they need it and throughout all its processes. Access to justice is a basic principle of the rule of law – a fundamental right that allows individuals to use legal tools and mechanisms to protect their rights. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. Article 1 of the Irish Constitution provides that “all citizens shall, as human persons, be held equal before the law”. However, the procedural barriers to accessing justice that at-risk adults can experience may be compounded by barriers in the built environment, such as inaccessible courthouses or Garda stations, or failure to provide information in accessible formats, as well as the general legal and court environments.

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) is based on the premise that people with disabilities have equal legal capacity with all others in all aspects of life and must be enabled to participate fully in all decisions that affect them as well as in all aspects of civil society. Article 5 of UNCRPD recognises that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

Under the Covenant on Civil and Political Rights, States Parties are required to ensure that any person whose rights or freedoms are violated shall have an effective remedy.

The European Convention on Human Rights¹ (Art. 6, Para. 3), in asserting the right of every person to a fair trial, declares that everyone charged with a criminal offence has the right, *inter alia*,

- To be informed promptly, in a language that they understand and in detail, of the nature and cause of the accusation against them;
- To have adequate time and facilities for the preparation of their defence; and
- To have the free assistance of an interpreter if they cannot understand or speak the language used in court.

These rights are particularly important to at-risk adults who may not always be aware of or informed of these rights.

Relevant developments and initiatives in Ireland

It is considered timely to address the matter of access to justice by at-risk adults since a number of current initiatives in Ireland relating to access to justice more widely, are acting to create a context and dynamic. In recent years, there has been a general acknowledgement that more attention is required in order to ensure that equality of access to justice within the legal system generally is achieved.

The Chief Justice has established a Working Group on Access to Justice with representation from Law Society of Ireland, FLAC (Free Legal Advice Centres), The Bar of Ireland and the Legal Aid Board.

The Report of the Chief Justice’s Working Group on Access to Justice Conference, which took place on the 1st and 2nd October 2021, has highlighted a number of centrally important issues.

It notes that equality before the law is a fundamental principle in a democratic state. To achieve it, there must be equal access to justice. The Working Group was concerned

with what barriers are in place, what then is needed to improve access to justice and a discussion of unmet legal needs. There is an acknowledgement that “the range of issues is wide and potential improvement requires action across many strands”.

The report, while noting that access to justice is a basic human right, asserts that in order to achieve equality of access, there must be a balance of power on both sides. In a legal context, the balance of power almost always rests with those who can afford counsel. Redressing this balance requires the availability of free and low-cost legal services to those who need the advice of a qualified solicitor or barrister but who cannot afford the costs associated with it.

The Report makes reference to what is termed ‘clustered injustices’, for example, the cost of delivering access to justice and the related costs of not doing so. Experiencing one problem can lead to multiple problems. Predictive variables for multiple problems were identified as including age, disability, number of children, income and gender.² The study also found that justiciable problems were a trigger for health and social problems.

The need for accurate, accessible advice and information at the earliest possible stage was highlighted and the current level of unmet need was a concern. Importantly, information needed to be presented in clear, simple terms. The Report noted the need for a review and reform of the current system of civil legal aid. Disadvantaged groups, in particular Travellers and Roma, alongside vulnerable individuals are found to be most in need and will therefore benefit more from increased access. The importance of community law centres was highlighted in meeting those needs.

The Chief Justice’s Access to Justice Conference,³ organised in February 2023, highlighted the need for reforms to improve work practices, data collection, and case management, reflecting the evolving needs of both modern Ireland and the administration

¹ https://www.echr.coe.int/documents/convention_eng.pdf

² Professor Trevor Farrow

³ <https://www.lawsociety.ie/gazette/top-stories/2023/february/judge-jobs-boost-important-and-welcome-decision>

of justice. The Chief Justice stated that “If people do not know about their rights to begin with, or if they cannot get a hearing because of delays in the system, if they cannot afford to go to court if it is too expensive to obtain a lawyer, or if – as in many cases – lawyers are willing to act, nevertheless the risk of an adverse costs order is too great, then the quality of the justice in the courtroom falls short of providing the administration of justice that the Constitution requires, and that members of the public are entitled to expect.”⁴

The Courts Service⁵, has included in its strategic objectives for the service that it should be:

- **User-centric** with an enhanced experience for court users; services delivered through a range of channels that are most appropriate for any interaction, providing an easy to navigate, high-quality service and user experience. Provide services that are designed around the needs of users.
- **Simplified** provision of access to justice for individuals and organisations through reduced complexity and associated cost, particularly in lower value / lower complexity cases, with people only having to come to court to have their case dealt with where necessary.
- **Timely** in the administration of justice i.e. the progress of cases through the courts system will be optimised, with cases not unduly delayed due to administrative or case management issues.

The Review of the Administration of Civil Justice: Review Group Report (‘the Kelly report’)⁶, chaired by Mr. Justice Peter Kelly, former President of the High Court, made extensive and detailed recommendations concerning the overall civil justice system that are relevant to the issue of access to justice

by at-risk adults. These include advice on changes to court procedure and practice; and on improved physical and ICT facilities and new administrative arrangements. The report also made the very important point that the wardship jurisdiction (now obsolete) was to be exercised in accordance with fair procedures and constitutional justice. As will be shown later in this report, this was not always what happened.

Goal 2 of the Department of Justice Statement of Strategy 2021-2023⁷ was to improve access to justice and to modernise the courts system. Its accompanying Action Plan included a number of actions in that regard, among them a commitment to review the civil legal aid scheme and bring forward proposals for reform. In June 2022, the Minister for Justice established a Group to review the Civil Legal Aid Scheme and a public consultation on the scheme was carried out in December 2022/ January 2023.

The Courts Service has embarked on a Modernisation Programme⁸ that aims to bring new digital technology and modern ways of working to the administration of justice, making access to justice easier and quicker to navigate, and better responding to the needs of court users. Its 2021-2023 Strategy committed to working closely with Government to ensure the implementation of the new structure for family justice identified in the Programme for Government. There is also a commitment to adopting new collaborative ways of working, taking a court-user centred approach, to provide improved and enhanced service delivery.

The dearth of up-to-date and detailed data regarding issues such as the prevalence of crime against at-risk adults, the extent of disability and mental illness among the prison population, and other such related

matters, results in a diminished capacity to assess and respond to the needs of at-risk adults in accessing justice. The Oireachtas Joint Committee on Disability Matters Report, *Ensuring Independent Living and the United Nations Convention on the Rights of Persons with Disabilities*,⁹ expressed concern (Paragraph 197) about the lack of up-to-date Irish data in respect of people with psychosocial disabilities in the criminal justice system.¹⁰

The Assisted Decision Making (Capacity) Acts 2015 and 2022 (ADMC Acts), which have been commenced since April 2023, provide an important understanding of what is required in order to ensure that at-risk adults have access to justice in both judicial and quasi-judicial processes as well as in decisions about how care and support is to be provided. The Acts create a new decision-making system and approach that will be of particular importance to many at-risk adults. (The role of the ADCM Act 2015 in enhancing access to justice is discussed in Chapter 8 below).

It is almost certain that the Act will have significant implications for the legal position of adults at risk in that it includes a presumption of capacity and provides for supported decision-making to enable this. The legal requirement to engage in supported decision-making mechanisms and related provisions envisaged in the Act provides necessary impetus and a more robust system for ensuring that people are empowered to take control of their affairs to the greatest extent possible, including in their dealings with judicial processes and health and social care systems.

This introductory chapter has set out the context and main purpose of this report and the reasons why this matter is important. Despite a general acceptance of the need to act on the issue of access to justice for all, the processes, practices and provisions within the Irish legal system continue to present challenges and barriers for at-risk adults. The next chapter will set out a number of key overarching factors relevant to access to justice generally and will apply these to at-risk adults.

4 <https://www.lawsociety.ie/gazette/top-stories/2023/february/judge-jobs-boost-important-and-welcome-decision>

5 Courts Service, Supporting Access to Justice. Long Term Strategic Vision – 2030. <https://iwla.ie/wp-content/uploads/2020/11/Long-Term-Strategic-Vision.pdf> p.6.

6 Report of the Review of the Administration of Civil Justice (October 2020), available at http://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf

7 https://www.justice.ie/en/JELR/Department_of_Justice_Strategy_Statement_2021_-_2023.pdf/Files/Department_of_Justice_Strategy_Statement_2021_-_2023.pdf

8 https://www.courts.ie/acc/alfresco/2e50ae1f-a154-4a3e-861a-7ff2bf3ebab1/CourtsService%20CorporateStrat-Plan2021_2023.pdf/pdf#view=fitH

9 Joint Committee on Disability Matters Ensuring Independent Living and the United Nations Convention on the Rights of Persons with Disabilities https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_disability_matters/reports/2022/2022-03-10_report-on-ensuring-independent-living-and-the-united-nations-convention-on-the-rights-of-persons-with-disabilities_en.pdf

10 Houses of Oireachtas. Joint Committee on Justice debate (September 28, 2021) https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice/2021-09-28/2/?highlight%5B0%5D=act&highlight%5B1%5D=act&highlight%5B2%5D=act&highlight%5B3%5D=act&highlight%5B4%5D=disability&highlight%5B5%5D=act&highlight%5B6%5D=2005

Chapter Two

Key Overarching Factors Relevant to Access to Justice by At-Risk Adults

Introduction

This chapter outlines a number of overarching factors centrally relevant to access to justice by at-risk adults. These are:

- Legal capacity;
- Access to justice as an enforceable right;
- Barriers to equality of access within the criminal justice system;
- Need for diversity and inclusion in legal professions;
- The role of intermediaries in judicial processes;
- The principle of valid consent to any decisions affecting a person's health and social care;
- The concept of supported decision-making;
- The implications of the Supreme Court judgement in the AC case.

Legal capacity: A core consideration

The concept of legal capacity (the capacity to have rights and the power to exercise those rights) is at the very core of access to justice. Article 12 of the UNCRPD guarantees that persons with disabilities have a right to legal capacity, which means that the law should recognise their capacity to be bearers of rights. In other words, persons who have reduced decision-making capacity due to age,

disability or other factors have the very same legal rights as persons whose decision-making capacity is not under question.

The UN Committee on the Rights of Persons with Disabilities has stated that –

The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including...the right to liberty.¹¹

The Supreme Court judgement in the AC case¹² stated that the decision to deprive a person of legal capacity affects the autonomy of the individual in a fundamental way, and it should not be made upon the basis of evidence that cannot be challenged by the person concerned. (Par. 374).

A 2019 Centre for Disability Law and Policy (CDLP) Report,¹³ prepared for the UN Special Rapporteur on the Rights of Persons with Disabilities, highlighted the need to recognise the obligation to respect the legal capacity of persons with disabilities, including legal agency and standing. In discussing the negative impact of denial of legal capacity in this context, the report asserted that legislation alone would not be enough to overcome barriers. Attitudinal barriers and professional practices based on the outdated medical model of disability remain pervasive across many State parties. The report identifies the potential of intermediaries used as a form of accommodation to avoid the negative impact of a denial of litigation capacity.

Such supports, it was suggested, can further the development of supported decision-making in the context of State parties meeting obligations that arise from Articles 12 and 13 of the UNCRPD.

Access to justice as an enforceable right

A 2017 report of the UN High Commissioner on Human Rights stated that the right of access to justice acts as the guarantor for the effective enjoyment and exercise of all rights.

Failure to provide a procedural accommodation therefore constitutes a form of discrimination on the basis of disability in connection with the right of access to justice¹⁴.

Article 13 of the UNCRPD makes provision for people with disabilities to have effective access to justice on an equal basis with others, including through the provision of procedural and age-appropriate accommodations to courts for wheelchair users and others with physical disabilities. This means, in effect, that states are required to do *whatever it takes procedurally* to allow people with disabilities to access justice, unlimited by the concept of “disproportionate or undue burden”.

Article 13 does not apply only to court cases in which the person with a disability is a party to the litigation. It also applies to situations where the person is a witness in a case and “at all investigative and preliminary stages”, which would include investigations such as interviews conducted by gardaí. Article 13 also calls for training for professionals working in the administration of justice, specifically naming police and prison officers.

Barriers to equality of access within the criminal justice process

Many at-risk adults may not even know that there could be a legal aspect to their problems and that the law might provide solutions that would improve their situation. No matter how

accessible the courts system may be, it will be of little use to people who do not know or who cannot recognise in the first instance that there may be a legal solution to their problems. The issue is not just that people cannot gain access to their rights but that they do not know or believe that they possess them. In some cases, an at-risk adult may simply have accepted their circumstances – however unsatisfactory or intolerable – as being inevitable, somehow ‘normal’, and beyond rectification.

Research on access to justice for people with disabilities as victims of crime in Ireland¹⁵ noted that Ireland appeared to share much in common with other common law jurisdictions in terms of the challenges faced by people with disabilities as victims of crime. While this research was carried out more than ten years ago, it is reasonable to suggest that its findings continue to be centrally relevant.

Three sequential stages of the criminal justice process were identified:

1. The reporting of the crime
2. Accessing justice through the courts
3. Experiences after the trial

People with disabilities were reported as experiencing difficulties at each stage that were broadly grouped into four types of barriers: (i) structural, (ii) procedural, (iii) attitudinal, and (iv) barriers in the built environment and information.

Structural barriers

The criminal justice system can be understood as a structure comprising a number of interrelated institutions. Structural barriers can evolve where there is a lack of communication between institutions, or lack of clarity regarding who takes responsibility within an agency for dealing with victims of crime who may have a disability (for example, within An Garda Síochána when a crime has been reported).

¹¹ General comment on Article 12: Equal recognition before the law, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement> Par. 8.

¹² <https://www.casemine.com/judgement/uk/5dfc6a614653d042431b0cbc>

¹³ Flynn, Eilionóir; Moloney, Catriona; Fiala-Butora, Janos; Echevarria, Irene Vicente (2019): Final Report. Access to Justice of Persons with Disabilities, <http://www.nuigalway.ie/centre-disability-law-policy/news/cdlp-final-report-for-un-special-rapporteur-access-to-justice-for-persons-with-disabilities-21jan.html>

¹⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/406/73/PDF/G1640673.pdf?OpenElement> Par 35 p.10.

¹⁵ Claire Edwards, Gillian Harold, and Shane Kilcommins (2012), Access to Justice for People with Disabilities as Victims of Crime in Ireland, Accessed at <https://nda.ie/nda-files/access-to-justice-for-people-with-disabilities-as-victims-of-crime-in-ireland1.pdf>

The CDLP Report¹⁶, referenced above, highlighted a number of factors relevant to physical and structural barriers to accessing justice:

- Accessibility and relevant information on the rights of people with disabilities
- Access to physical infrastructure
- Access to information for persons with disabilities;
- Access to knowledge and information of disability issues among professionals;
- Access to legal advice and representation (ideally free or affordable);
- Accessible civil and criminal complaints mechanisms including reporting to police, civil/administrative authorities and monitoring and redress bodies;
- Equal participation in adjudicative process (including rights to be heard and rights to fair procedures);
- Procedural and age appropriate accommodations;
- Right to effective remedy and enforceability of such remedies;
- Stakeholder training in how to communicate with persons with disabilities.

Procedural barriers

The criminal justice system comprises a complex number of procedures and processes. People with disabilities may often lack information about these procedures, from reporting a crime through to giving evidence and seeking compensation post-trial, where relevant. These procedures can appear intimidating and confusing to all crime victims. Lack of accommodation in terms of making these procedures accessible, including practical adjustments such as

ensuring court premises are accessible, or that communication supports are provided, have acted as barriers to people with disabilities. Also important is the fact that the common law justice system in Ireland, as in other jurisdictions (e.g., the UK, USA, Australia and New Zealand) is based on an adversarial process in which the principle of orality is key. This in itself can disadvantage people with disabilities who are not able to communicate in a clear and persuasive manner. As stated above, the UNCRPD emphasises the right of access to procedural accommodations¹⁷ and specifically clarifies that a state may not argue that it should or must avoid granting this right.

Attitudinal barriers

The criminal justice system involves numerous different professional groups and personnel, including gardaí, barristers, and the judiciary. Assumptions made by these groups about the abilities and capacities of people with disabilities have been shown to be problematic in terms of reporting a crime, or in terms of people with disabilities being seen as competent and credible witnesses in court. The continued existence of ‘medical model’ attitudes and practices on the part of professionals and others – such as insisting on an assessment of a victim’s cognitive ability prior to meeting with them following alleged sexual abuse, or a similar approach vis-a-vis the interviewing of an alleged perpetrator – raises concerns regarding how at-risk adults can be disadvantaged and discriminated against within the system. Such practices are, in addition, substantially at variance with the provisions and intentions of the Assisted Decision-Making (Capacity) Acts (2015 and 2022), commenced in April 2023 and which will be discussed in detail later in Chapter Eight of this report.

Barriers in the built environment and information

The procedural barriers that people with disabilities experience are often compounded by barriers in the built environment, such as inaccessible courthouses or Garda stations; or by the failure to provide information in accessible formats.

The CDLP Report identified a number of issues as requiring attention:

1. A lack of awareness on the part of persons with disabilities and their supporters of the relevant legal rights and obligations that apply to their circumstances;
2. Gaps within state law, policy and practice around accessing representation and information on rights and how to claim rights in the first instance, particularly for persons living in settings that increase their dependency on others;
3. People with disabilities being prevented from making complaints due to gaps in monitoring their living situations;
4. A lack of knowledge or misunderstanding about disability rights across the justice sector;
5. Negative attitudinal practices related to misunderstandings of disability is a key barrier to effective access to justice.

Need for diversity and inclusion in the legal professions

There is general acceptance that the various branches of the legal profession are more likely to appreciate, accommodate and provide for at-risk adults and other disadvantaged groups if the profession has, within its own ranks, people who are members of those groups.

Addressing the Chief Justice’s Working Group on Access to Justice Conference¹⁸ (2021), Minister Heather Humphries pointed to the

importance of –

...ensuring that our legal system and the people working within it better represent the Ireland of today. As part of our overall plan to increase diversity across the justice sector, I firmly believe there must be greater gender balance and diversity across the legal sector. We can achieve this through reform of legal education – by breaking down barriers that prevent a wider pool of people entering the legal profession.

Other contributors¹⁹ to the Conference, observed that making the legal profession more diverse does not necessarily promote access to justice if the students who go to law school simply absorb the existing norms of the legal profession. There is a need to facilitate the mainstreaming of human rights courses taught through clinical legal education. Law schools should consider adopting a national strategy whereby issues of access to justice are included in the core syllabus of legal education.

The Legal Services Regulatory Authority (LSRA) Report²⁰ (2020) stated that the training and education system for legal professionals should:-

Be open and accessible to new entrants, not only ensuring that there are no direct or indirect restrictions on numbers entering the profession, but also that the makeup of the profession reflects the diversity of society.

In their submission to the LSRA public consultation, the Legal Aid Board stated that it is extremely important that the legal profession is sufficiently diverse in personnel and in training. The Legal Aid Board, in its submission, recommended that there should be a greater focus on core skills, such as advocacy, drafting, negotiating, taking instructions and, in particular, taking

16 Flynn, Eilionóir; Moloney, Catriona; Fiala-Butora, Janos; Echevarria, Irene Vicente (2019): Final Report. Access to Justice of Persons with Disabilities, <http://www.nuigalway.ie/centre-disability-law-policy/news/cdlp-final-report-for-un-special-rap-porteuron-access-to-justice-for-persons-with-disabilities-21jan.html>

17 https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.docx

18 Chief Justice’s Working Group on Access to Justice Conference Report <https://www.courts.ie/acc/alfresco/e984951c-1782-484c-83a8-8efdf195af31/15032022%20Access%20to%20Justice%20Conference%20-%20Final%20Report.pdf/pdf-view=fitH>

19 Colin Smith, Ibid. p 97-99.

20 Setting Standards: Legal Practitioner Education and Training <https://www.lsr.ie/wp-content/uploads/2020/11/Section-34-ET-Final-Report-to-Minister.pdf>

instructions from clients who are distressed or may have difficulty communicating.²¹

The LSRA report recommended (Recommendations 4 & 5) that training and education for legal professionals should have regard to a series of statutory objectives, which could include –

- Promoting the highest standards of legal education and training;
- Promoting diversity in legal education and training;
- Encouraging the training of ethical standards in all aspects of legal education and training;
- Encouraging access to legal education and training.

In October 2021, the LSRA announced plans to carry out what it described as a “comprehensive” survey of young barristers and solicitors to consider the economic and other barriers faced by young barristers and solicitors, and to make recommendations. The LSRA undertook to complete the project after a request from the Minister for Justice, who stated that this research formed part of a plan to increase diversity across the justice sector, including the legal professions, and asked the LSRA to pay particular attention to equity of access and entry into the legal professions; and to the objective of achieving greater diversity within the professions; and to make recommendations for change. (It is not clear whether or not this research was completed and published).

The disAbility Legal Network, a group of legal professionals with disabilities in Ireland, has identified one of the key barriers for solicitors and trainees within the profession as a lack of awareness or understanding of disabilities.²² This was seen as having two facets:

1. A general lack of awareness about different disabilities within the profession; and
2. A lack of appreciation by colleagues and managers of the individual needs and accommodations required by a disabled person.

The group proposed that disability awareness training should be part of every solicitor’s annual continuing professional development (CPD) requirements, including a 1-hour minimum in a new category of diversity, equality, and disability. It was proposed that every trainee should also be required to complete diversity; equality; and disability awareness training in their Professional Practice Course, with a focus on working with colleagues with disabilities.

These recommendations and aspirations are very much in keeping with the *International Principles and Guidelines on Access to Justice for Persons with Disabilities*,²³ which aimed, inter alia, to provide a framework for –

The inclusion and participation of persons with disabilities in diverse roles within the administration of justice (e.g. judge, juror and witness) as a democratic imperative involving and reflecting all facets of society, in effect, shaping the society in which we live.

Barriers exist to the entry into, and retention of people with disabilities in the legal professions. Research²⁴ conducted in Wales by Cardiff University and the Law Society found that more than half of disabled lawyers had experienced “ill treatment” such as bullying or discrimination in the workplace, and most said it was because of their disability. Many respondents said they had experienced “ridiculing or demeaning language” and “exclusion or victimisation”. While most

respondents indicated positive experiences during their education, many said that university did not adequately prepare them for the level of stress in the profession, especially in the light of their disabilities.

Many disabled lawyers also stated that they were reluctant to disclose their disability or to ask for the adjustments they needed, both during the recruitment process and once in work. Some of those who did speak up said their disclosure made things worse.

The report argued that a ‘zero-tolerance policy’ is needed to address bullying of disabled people, as well as clearer disciplinary policies and reporting procedures. It recommended that employers redesign roles and working practices to include adjustments such as flexible and remote working. Staff and managers should also complete disability awareness training.

While there has been progress, there are also indications, as evidenced above, that not enough has been achieved since 1996, when the Report of the *Commission on the Status of People with Disabilities*²⁵ was published. That Report, inter alia, pointed out that –

A range of measures are needed to ensure the right of access to the law and the legal system for all Irish citizens. These should include an action programme by the Department of Justice to make all courts fully accessible to people with disabilities, consultation with the legal professional bodies in relation to access for people with disabilities to legal advice and to training as lawyers, and a general raising of awareness among the legal professions towards disability issues (15.2).

People with disabilities who wish to qualify as lawyers find themselves up against physical barriers in the two professional schools for lawyers, the Law Society in the case of solicitors and the Kings Inns in the case of barristers. Neither of these premises are easily accessible for

persons with mobility disabilities. Further difficulties may face them in relation to books and training materials. In addition, neither body appears to incorporate any element of disability awareness training or specific training on aspects of law likely to be relevant to people with disabilities (15.14).

Unlike the position in relation to jurors, there is no specific legal provision to disqualify persons with disabilities of any kind from becoming members of the judiciary. In order to be appointed as a judge, however, it is first necessary to have been a practising lawyer. The difficulties many people with disabilities face in entering the legal profession thus prevent full access for people with disabilities to judicial appointments (15.16).

The Commission recommended that there should be discussions with the Law Society, the Bar Council and the Kings Inns in relation to the provision of legal services to people with disabilities and that these discussions should also cover access by people with disabilities to their professional training courses (15.15).

The use of intermediaries in the Irish justice system

The availability and accessibility of individualised legal remedies across various contexts for at-risk adults is important. Such remedies need to be tailored and to avoid stereotyping based on group identity. Alternative forms of dispute resolution, including mediation, can offer choice for at-risk adults and help to avoid the need for court-based judicial processes.

In 2020, the National Disability Authority (NDA) published an Independent Advice Paper²⁶ on the use of intermediaries in the Irish justice system, targeted at implementing a model of supports for persons with disabilities who have communication difficulties.

²¹ Ibid. p.67

²² Submission to Invitation by the Legal Services Regulatory Authority for Written Submissions on Barriers for Early Career Solicitors and Barristers and Increasing Diversity http://www.disabilitylegalnetwork.ie/wp-content/uploads/2021/11/29949640_1Letter-to-LSRA-Disability-Network-submission-to-Consultation-dated-6-July-2021.pdf

²³ International Principles and Guidelines on Access to Justice for Persons with Disabilities. Special Rapporteur on the Rights of Persons with Disabilities. OHCHR 2020. <https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities>

²⁴ Legally disabled? The career experiences of disabled people working in the legal profession. <http://legallydisabled.com/wp-content/uploads/2020/01/Legally-Disabled-full-report-FINAL.docx>

²⁵ <https://nda.ie/disability-overview/key-policy-documents/report-of-the-commission-on-the-status-of-people-with-disabilities/a-strategy-for-equality/a-strategy-for-equality-report-of-the-commission-on-the-status-of-people-with-disabilities/>

²⁶ <https://nda.ie/publications/justice-and-safeguarding/access-to-justice/nda-independent-advice-paper-on-the-use-of-intermediaries-in-the-irish-justice-system.pdf>

The role of the proposed intermediaries would be to enable the provision of accommodation to people who may have communication difficulties affecting their ability to give evidence and to communicate with officials at different stages of the justice system. This was regarded as critical to ensuring equal access to justice for persons with disabilities and/or communication difficulties.

A registered intermediary is understood as a professional with specialist skills in communication, coming from backgrounds such as speech and language therapy and social work. In other jurisdictions their role is to facilitate communication during the police investigation and at trial between a person who communicates differently (which, for example, may be on account of a disability, stroke, disease or other factors) and others in the justice system. The NDA Advice Paper states that the Intermediaries Scheme should be available to witnesses, victims and accused persons who may be in need of support in order to give better evidence, at all stages of the criminal justice system, including in Garda stations and in court settings.

The announcement in 2022 by the Minister for Justice²⁷ of a training course for intermediaries is a welcome advancement in this regard. The new qualification programme at the University of Limerick aims to train intermediaries who will help vulnerable people, including sexual abuse victims and children, when giving evidence in the justice system.²⁸ The launch of the course has been seen as a milestone in delivering on the implementation plan for the O'Malley Review²⁹, where recommendations were made around making available a panel of registered, qualified intermediaries to work with vulnerable victims in sexual assault cases. The registered intermediary's role will be to

assist in the communication process, whether between lawyers and witnesses during trial or, earlier, during Garda interviews.

Data sharing

Criminal justice legislation that places an obligation on organisations to report certain offences to An Garda Síochána does not extend to sharing such information with other persons, entities or bodies as might be necessary in order to prevent abuse or harm from taking place or reoccurring. However, Article 6(1)(f) of GDPR³⁰ provides a legal basis for the sharing of data where this is necessary for the purposes of the legitimate interests pursued by a data controller or a third party.³¹ The legitimate interest basis can be invoked in the context of safeguarding people from abuse. The Data Protection Commission's Guidance Note³² indicates that legitimate interests may include individual interests, or broader societal benefits and that this legal basis could be appropriate in a wide range of situations. The Guidance states that legitimate interest is particularly relevant in safeguarding situations where an adult at risk is exposed to a risk of abuse.

The challenges associated with data sharing in the context of safeguarding and protection are compounded by the need for data controllers to carry out a balancing test to weigh up the impact of the disclosure on the rights of the data subject, against the benefit of sharing the information with the receiving party. In the context of suspicions of sexual abuse, or information that someone has a history of criminal convictions for sexual offences, the impact of disclosure to another can have serious consequences – on their constitutional right to a good name, their right to earn a livelihood, their right to receive care, their

right to access health and social care services. Organisations must also be cognisant of the principles of data minimisation, transparency and fairness. Where there is a risk to the safety and wellbeing of at-risk adults at risk due to the communal setting in which they might reside (and that risk is not serious or immediate in nature), it can, however, pose very challenging dilemmas for organisations making these decisions. The risk of being in breach of data protection laws can sometimes mean that no information is shared, which can give rise to serious safeguarding risks for adults at risk.

This also has relevance in light of the commencement in April 2023 of Assisted Decision-Making legislation, since there are implications with regard to data sharing of decision support arrangements. Similar concerns arise for some financial/legal professionals who are not comfortable sharing personal data of clients/customers with third party decision-making supporters.

Processing of personal data relating to criminal convictions

Section 55 of the Data Protection Act 2018³³ covers the processing of personal data relating to criminal convictions and 'offences'. This includes where processing is necessary to prevent injury or other damage to the data subject or another person or loss in respect of, or damage to, property or otherwise to protect the vital interests of the data subject or another person (Section 55 (1)(b)(iv)).

A question arises as to what this includes, for example, whether or not it would include complaints raised by a person to a nursing home provider about an incident of sexual abuse (that comes within the definition of a sexual offence) or whether this provision only covers where a complaint of sexual assault has been formally made to An Garda Síochána.

There is also a question about what happens where a complaint to An Garda Síochána is

withdrawn or not progressed and whether this means that this provision can no longer be relied upon for processing of this category of data. It is recognised that, in any of these scenarios, the organisation will still need a lawful basis to share the information.

The absence of data as a key issue

A key challenge identified in research in the context of assessing the experiences of people with disabilities and mental health difficulties in the criminal justice system in Ireland is the lack of data on the prevalence of crime perpetrated against people with disabilities in the State, on the experiences of people with disabilities who have experienced a crime, and on the extent to which supports put in place for people with disabilities are working to secure equitable access to justice. There is no current statistical information in Ireland on rates of crime and victimisation as they pertain to people with disabilities. Data is either old (Victims of Crime report (2012) referred to above or the Rape Crisis Network Ireland Report 2011³⁴) or fragmented in that it only covers certain stages of the justice journey, or specific disabilities.

A centrally important issue is that the Irish Prison Service does not currently systematically provide data on the number of persons in custody with a diagnosis related to a physical condition, mental illness or a disability. For example, information on the level of mental health conditions in the prison population is currently derived from studies completed in 2003 and 2005, which found that drugs and alcohol dependence were by far the most common problems (present in between 61% and 79% of all prisoners). The Director General of the prison service has acknowledged that, while there are "lots of data on lots of systems", it is hard to extract the data and join it up.³⁵ Currently, there are a number of systems – a system for psychology data, a system for education data, a healthcare system and an operational system – that do

27 <https://www.justice.ie/en/JELR/Pages/PR22000078>

28 The Professional Diploma in Intermediary Studies is a part-time course run over one year. Graduates will be eligible to be placed on a panel from which the courts can draw, to work within the Irish justice system

29 https://www.justice.ie/en/JELR/Review_of_Protections_for_Vulnerable_Witnesses_in%20the_Investigation_and_Prosecution_of_Sexual_Offences.pdf/Files/Review_of_Protections_for_Vulnerable_Witnesses_in%20the_Investigation_and_Prosecution_of_Sexual_Offences.pdf

30 <https://gdpr-info.eu/art-6-gdpr/>

31 For a detailed discussion of this, see Ní Leathlobhair, N. in Browne, M. et al (2022), ps. 149 and following in Browne, M. et al (2022), Identifying RISKS – Sharing RESPONSIBILITIES: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults, Safeguarding Ireland, https://www.safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_lowres.pdf.

32 <https://www.dataprotection.ie/sites/default/files/uploads/2020-04/Guidance%20on%20Legal%20Bases.pdf>

33 <https://www.irishstatutebook.ie/eli/2018/act/7/enacted/en/pdf>

34 Sexual Violence Against People with Disabilities, <https://www.rcni.ie/wp-content/uploads/SexualViolenceAgainstPeople-WithDisabilities2011.pdf>

35 Joint Committee on Disability Matters 2 March 2023, https://www.oireachtas.ie/en/debates/debate/joint_committee_on_disability_matters/2023-03-02/2/

not talk to each other and, in many cases, particularly with healthcare, the information, including diagnosis, is contained in free-text clinical notes.

The 2020 *Sharing the Vision Report*³⁶ stated that the profile of the mental health needs of the prison population needs to be explored to gather data on the prevalence of autism, intellectual disability and needs relating to addiction and dual diagnosis. “Such data will allow for a more joined-up approach by all professionals delivering care in a prison setting.”³⁷ It was suggested that in order to support this joint approach, mental health advocacy groups could be encouraged and assisted to connect into prison settings to ensure that individuals are aware of and can access the services they need to aid them in their recovery.

With a couple of exceptions, few agencies involved in the criminal justice system in Ireland appear to be monitoring or keeping records of people with disabilities who are victims of crime. The fact that there is no systematic recording of cases that come to trial at District and Circuit Court level also makes it difficult to identify cases where a person’s disability or mental health status may have been significant. These data absences need to be acknowledged as serious gaps that undermine our knowledge of people with disabilities’ experiences as victims of crime. There is, it should be noted, some evidence of collection of statistical data regarding parents with disabilities and children with disabilities engaging with the family court system³⁸.

Complex policy and legislative contexts

A number of different policy and legislative contexts shape encounters by people with disabilities with the justice system in Ireland.

The anti-discrimination legislation and affirmative action measures contained in the Equal Status Acts 2000-2008 and Disability Act 2005 are relevant. For example, the Disability Act 2005 requires public service providers (including An Garda Síochána, Director of Public Prosecutions and Courts Service) to make information and premises accessible. Also, centrally relevant is the legislative responsibility of public bodies in Ireland under Section 42 of the Irish Human Rights and Equality Act 2014 to promote equality, prevent discrimination and protect the human rights of their employees, customers, service users and everyone affected by their policies and plans.

People with disabilities are subject to criminal law in the same way as other citizens. In some instances, the law has sought to provide extra ‘protection’ for people with disabilities. Section 5 of the Criminal Law (Sexual Offences) Act 1993³⁹ is one example of this – it aims to protect persons who are ‘mentally impaired’ from sexual assault.⁴⁰

Law relating to criminal procedures, such as the Criminal Evidence Act 1992, puts in place special measures for vulnerable witnesses, including children and those deemed to have a ‘mental handicap’. These measures include use of intermediaries in court, removal of wigs and gowns, and use of video-link to give evidence.

In considering the matter of access to justice by people with disabilities, it is useful to restate the fact that the 1996 Report of the Commission on the Status of People with Disabilities called for a range of measures to ensure the right of access to the law and the legal system for all Irish citizens. Measures sought included an action programme by the Department of Justice to make all courts fully accessible to people with disabilities; consultation with the legal professional bodies

in relation to access for people with disabilities to legal advice and to training as lawyers; all public documents to be provided in a range of appropriate formats, including large print, braille and computer disc; and a general raising of awareness among the legal professions of disability issues. It is not at all clear how much of this has been implemented. There is little or no evidence of the inclusion of direct reference to disability in the educational materials for solicitors or barristers.

While there was no explicit reference in the Legal Services Regulatory Authority’s report on *Setting Standards; Legal Practitioner Education & Training (2020)*⁴¹ to the need to ensure that legal practitioners are adequately prepared for dealing with accessibility issues for disabled people and other at-risk persons, the report did indicate, in a general manner, the need to encourage access to and diversity in legal education and training (e.g., Section 3.317).

Pilot training and awareness raising courses have been conducted by An Garda Síochána⁴², and a new course in Policing and Human Rights Law in Ireland has been launched by An Garda Síochána in collaboration with the University of Limerick (UL). The aim of this course is to provide participants with an introduction to the workings and jurisprudence of the European Convention on Human Rights, particularly as it relates to policing in Ireland. The course also examines relevant Irish jurisprudence and case law. Topics include Human Rights & Equality, Rights and Vulnerable Witnesses & Suspects, Diversity & Human Rights, and Hate Crime & Policing. Over 1,000 Garda personnel completed the course in 2021, with participation across all ranks.

Jury service and people with disabilities

Since court hearings may involve disabled witnesses, plaintiffs or defendants, having a disabled person on a jury can contribute to a person’s sense they are being tried by a jury of their peers.

Despite many changes in recent years, including provisions in courts for interpretation, people with disabilities may continue to face barriers to serving on juries.⁴³ This is an important matter both from equality and social inclusion perspectives and in helping to break down stereotypes and attitudinal barriers.

Obstacles that remain include the eligibility of people with intellectual and learning disabilities for jury service and the need for some people to have a Personal Assistant in attendance. It is noted that Section 96 (a) of the Assisted Decision-Making (Capacity) Amendment Act 2022 amends the Juries Act 1976 by the insertion of the following subsections:

A person who is deaf shall not be ineligible for jury service by reason only of his or her requiring the services of a sign language interpreter for the purpose of enabling him or her to perform the duties of a juror effectively.

While issues have been raised about the ability of people with some sensory disabilities to participate in a jury, e.g., the ability of a visually impaired person to read a map or watch CCTV evidence, it is reasonable to suggest that most of those can be addressed by provision of appropriate materials and technical aids. It is also reasonable to suggest that people with a sensory disability know their own limitations and would point them out to the judge before being empanelled. The Juries Act 1976⁴⁴

36 <https://assets.gov.ie/76770/b142b216-f2ca-48e6-a551-79c208f1a247.pdf>

37 Ibid. p.51.

38 Coulter, C. (2015) Final Report. Child Care Law Reporting Project. https://www.childlawproject.ie/wp-content/uploads/2015/11/CCLRP-Full-final-report_FINAL2.pdf

39 <https://www.irishstatutebook.ie/eli/1993/act/20/enacted/en/html>

40 The Act defines “mentally impaired” as meaning: ‘suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation’.

41 <https://www.lsr.ie/wp-content/uploads/2020/11/Section-34-ET-Final-Report-to-Minister.pdf>

42 Gulati, Gautam, Cusack, Alan Murphy, (2021) The evaluation of a training course to enhance intellectual disability awareness amongst law enforcement officers: a pilot study. <https://www.lenus.ie/bitstream/handle/10147/634443/the-evaluation-of-a-training-course-to-enhance-intellectual-disability-awareness-amongst-law-enforcement-officers-a-pilot-study.pdf?sequence=1&isAllowed=y>

43 <https://www.irishtimes.com/news/crime-and-law/jury-service-many-with-disability-would-like-to-do-their-civic-duty-1.3780755>

44 First Schedule, Part 1. <https://www.irishstatutebook.ie/eli/1976/act/4/enacted/en/print.html>

defines as ineligible for jury service:

- *Incapable persons*
- *A person who because of insufficient capacity to read, deafness or other permanent infirmity is unfit to serve on a jury.*
- *A person who suffers or has suffered from mental illness or mental disability and on account of that condition either—(a) is resident in a hospital or other similar institution, or (b) regularly attends for treatment by a medical practitioner.*

Section 96(b)n of the Assisted Decision-Making (Capacity) Amendment Act 2022 amends the Juries Act 1976 by the substitution of:

“A person who does not, in the opinion of the court, have sufficient mental or intellectual capacity to serve as a juror” for “A person who suffers or has suffered from mental illness or mental disability and on account of that condition either—

(a) is resident in a hospital or other similar institution, or

(b) regularly attends for treatment by a medical practitioner.”.

The Assisted Decision-Making (Capacity) Act 2022 also references jury participation in Section 138

Unless otherwise expressly provided, nothing in this Act shall be construed as altering or amending the law in force on the coming into operation of this section relating to the capacity or consent required as respects a person in relation to, inter alia, ‘serving as a member of a jury’.

Valid consent

Consent is at the very core of human rights protection and is centrally relevant in ensuring that people are treated justly. The UN Independent Expert on the enjoyment of all human rights by older persons has stated that: “Safeguards to free and informed consent should be adopted through legislation, policies and administrative procedures in conformity with international and regional standards. Particular attention should be given to older persons with underdeveloped literacy skills or persons with less formal education.”⁴⁵

The three foundational principles of what is valid consent have been identified as: voluntariness, information giving and decision-making capacity.⁴⁶ The matter of undue influence has also been raised in the context of giving consent in Irish law.⁴⁷ It has been suggested that undue influence can come from many sources within the health care system. This phenomenon has been described⁴⁸ as ‘hostage bargaining syndrome’ whereby people tend not to speak up to assert their views in the presence of clinicians whom they would view as a higher authority. In such situations, an individual may become disempowered and unable to control their own situation thus allowing significant decisions to be made by others on their behalf.

Another issue that arises in relation to voluntariness is the availability of choice. In effect, consent without choice is meaningless as then it becomes a form of coercion. Also, it is likely that in many instances, people may not be advised that consent to a residential placement may also involve consent to loss of autonomy, deprivation of liberty, loss of functional independence and loss of privacy.

The HSE National Consent Policy⁴⁹ states that a service user should have the capacity to

make that decision and not act under duress in making their choice. Consent is defined in the HSE Policy as:

*“... the giving of permission or agreement for a treatment, investigation, receipt or use of a service or participation in research or teaching (intervention). Consent involves a process of communication about the proposed intervention in which the person has received sufficient information to enable them to understand the nature, potential risks and benefits of the proposed intervention”.*⁵⁰

‘Informed consent’ has been defined as having the competence to consent and making a voluntary decision to do so, while in possession of the core information necessary to the process of making that decision.

The inter-relationship between informed consent and autonomy has been noted.⁵¹ The HSE National Consent Policy⁵² affirms (6.3.1) that “no other person such as a family member, “next of kin”, friend or carer and no organisation can give or refuse consent to a health or social care service on behalf of an adult person who lacks capacity to consent unless they have specific legal authority to do so, e.g., in the form of an Enduring Power of Attorney (EPA). The policy notes that this is not widely known, and that family members, for example, may assume that they can provide or refuse consent when a person lacks capacity to make a decision.

This scenario has changed fundamentally with the commencement of the assisted decision-making legislation where a presumption of capacity and a related ability to give valid consent must operate unless the contrary is shown by means of a decision-making capacity assessment.

Realising the implications of the Supreme Court Judgement in the AC Case⁵³

The AC case, which concerned a woman who was being “detained” by Cork University Hospital (CUH) against her wish (allegedly) and against the wishes of her adult children, is of considerable relevance to the matter of access to justice by at-risk adults.

At High Court (Wardship) level, orders were made to detain AC. Her adult son appealed these Orders to the Court of Appeal. At Court of Appeal level, the Court held that the hospital had unlawfully detained AC in breach of her Constitutional right to liberty. The HSE appealed the case to the Supreme Court.

The reason given for AC’s “detention” was to protect her from what was perceived as the rather unorthodox behaviour of her adult children concerning her care, which included the fact that her son believed that the HSE would pay for her care in her own home. The case went all the way to the Supreme Court, the first time the Supreme Court has given judgement on such matters.

The Supreme Court held that under the doctrine of necessity a hospital had the right to lawfully detain a person briefly in circumstances where there was a concern that a person would be put at risk if they were discharged, but that such a right is only temporary while further investigations are made. The Court set out the procedure to be followed in circumstances such as AC’s.

45 Ibid. Par. 101.

46 Mills, S. and Mulligan, A. (2017), *Medical Law in Ireland* cited in Duffy, M. (2019), *The Nursing Home Scheme and Respect for Applicant Autonomy*, Dissertation submitted in partial fulfilment of the requirement for the Masters in Healthcare Ethics and Law, Department of General Practice RCSI.

47 Ibid.

48 Berry L., Danaher T., Beckham D., Awdish R. and Mate S. (2017) When Patients and Their Families Feel Like Hostages to Health Care, <https://www.mayoclinicproceedings.org/action/showPdf?pii=S0025-6196%2817%2930394-4>

49 <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/consent/documents/hse-national-consent-policy.pdf>

50 Ibid. p. 118.

51 O’Keefe, S. (2008), *A Clinician’s Perspective: Issues of Capacity in Care*. *Medico-Legal Journal of Ireland*,14:41-50. https://www.researchgate.net/publication/255568576_Clinician's_perspective_on_issues_of_capacity_in_care

52 <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/consent/documents/hse-national-consent-policy.pdf> <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/consent/documents/hse-national-consent-policy.pdf>

53 <https://www.casemine.com/judgement/uk/5dfc6a614653d042431b0cbc>

Relevant Supreme Court findings

Key findings of the Supreme Court in the AC Case have been synthesised as follows⁵⁴:

1. Whether a person has decision making capacity or not does not in any way diminish their constitutional rights, including their right to liberty (Para 322);
2. The fact that a person may not have the capacity to make a decision about a particular matter does not mean that their wishes in relation to it can be totally disregarded (Par. 394);
3. A person always has the right to have their voice heard or represented in any process concerning them. If the person cannot speak for themselves, then they must have a legal representative or other advocate who is otherwise not involved in the dispute to hear their voice and then have it heard in court (Par. 6);
4. In principle, when the risk to a person is from a third party (for example, a family member) it is far better that any legal measures are taken against that party rather than restricting the rights of the person at risk in order to deal with it (Par. 381).

Legality of the detention of a person by a hospital/healthcare facility

The following are further points that arise from the Supreme Court judgement:

1. A hospital has no overriding legal right to appoint itself as a substitute decision maker for a patient, no legal right to decide how a patient's right to liberty is to be balanced against other rights and general welfare of the patient and no general right to detain (Par. 348).
2. A hospital has, however, a duty of care (in the context of discharging a patient) to ascertain whether the patient themselves wants to leave or is being pressured into leaving by a third party. Where a hospital has reasonable grounds for believing that

a patient may be being pressured into leaving the hospital, or that the patient does not have sufficient decision-making capacity to decide where to go for themselves post-discharge, the hospital should consult the courts and, pending that, can prevent the patient's departure for a short period, but "two weeks would in most cases be too long" (Pars. 351 and 392).

3. The fact that a patient does not have the ability to decide for themselves whether they want to leave or not does not mean that the hospital can make the decision for them – the hospital must seek the assistance of the courts (Par. 393).

Practical changes and steps needed as a result of AC Supreme Court judgement

1. A hospital needs to ensure that there is a mechanism in place so that the voice of the patient is heard independently. This can be achieved by the appointment of an intermediary or independent advocate for the patient.
2. Hospitals and families should listen to the voice and wishes of the patient through that intermediary or advocate.
3. If a hospital believes that a patient would, on discharge, be unsafe and either the patient is unable to understand and accept that for themselves or a patient is incapable of making the discharge decision for themselves or is under the influence of a third party to discharge themselves, then a hospital can briefly detain the patient under the "doctrine of necessity".
4. A hospital must then seek the assistance of the courts where it is alleged that the person does not have the capacity to make the discharge decision for themselves.

While the practice of wardship has been discontinued following commencement in April 2023 of the Assisted Decision-Making (Capacity) Act 2015, the Supreme Court judgement in the AC case has ongoing and important implications for access to justice and protecting people's human and legal rights in the long-term care and support system.

It is important to note that the Department of Health had commenced work on Protection of Liberty safeguards and that a draft Heads of Bill was developed and published for public consultation in 2018/2019. Progress on this process was interrupted by the Covid-19 pandemic and has been dormant since then. However, it is noted that the Department of Health has now (March 2023) set up a Protection of Liberty Safeguards Experts Advisory Group to support the Department in establishing a policy direction and a preliminary policy proposal.

The National Disability Inclusion Strategy 2017-2022⁵⁵ committed to introduce statutory safeguards to protect residents of nursing homes and residential centres, and ensure that they are not deprived of liberty, save in accordance with the law as a last-resort measure in exceptional circumstances.

Overview and conclusion

Access to justice is an issue of critical importance for the enjoyment and fulfilment of all human rights. Translating this right into practice in relation to at-risk adults requires a clear understanding of the multi-faceted factors involved, which present multi-faceted challenges. This chapter has set out a number of overarching contextual factors that require understanding of the procedural adjustments, accommodations and remedies necessary for making the right of access to justice real in practice for at-risk adults.

The concept of legal capacity (the capacity to have rights and the power to exercise those rights) is identified as being at the very core of access to justice. The need for a better understanding of disability among legal professions has been identified, as has been the need for greater participation by people with disabilities in these professions. The concept of valid consent was identified as an integral component of access to justice. The implications of the Supreme Court Judgement in the AC Case have been noted.

The next chapter will provide a synthesis of legislative and policy provisions in Ireland relevant to accessing justice.

⁵⁴ Mary Condell, Legal Advisor Sage Advocacy, <https://www.sageadvocacy.ie/media/1675/notes-on-ac-v-cork-university-hospital-v2.pdf>

⁵⁵ <https://assets.gov.ie/162923/96990962-f41f-4844-b784-e9ccf8cbfa42.pdf> P.13

Chapter Three

Relevant Legislative and Policy Provisions

Introduction

At-risk adults have, in theory, access to the same range of legal provisions and the same obligations under the law as all other citizens of Ireland. At-risk adults are also, in practice, quite likely to need to engage with the legal and justice systems in a myriad of ways and circumstances, ranging from being questioned by a Garda at a traffic checkpoint to appearing in court as a defendant, witness or complainant. Unlike the vast majority of people, at-risk adults can also find themselves in situations where they are more vulnerable to abuse or criminal behaviour; where their liberty is restricted; where they are exploited by others; and where they are more dependent on others in managing their lives.

Adults at-risk are also more likely to find themselves in positions where they are unaware of their relevant legal rights; where they experience challenges in accessing legal information; and where access to the law is restricted as a result of their circumstances or by the actions of others.

This chapter examines some aspects of the law that, it is felt, are particularly relevant to the position of at-risk adults. It takes into account the fact that many of the problems and issues that confront adults at-risk will not require engagement with judicial processes but rather the presence of a supportive infrastructure where people are enabled to assert their rights and to seek redress.

EU Victims Directive 2015

The EU Victims' Directive⁵⁶ provides substantial legal rights to victims of crime and is at the heart of a comprehensive EU legislative

package that seeks to ensure that all victims of crime have procedural rights to information, support, protection and access to justice. It establishes minimum standards and ensures that persons who have fallen victim to crime are recognised and treated with respect.

It provides for information to be given to victims from first contact with criminal justice agencies. It also means that a victim can request and receive additional information during the course of the investigation and court process. The Directive also provides that victims of crime are able to:

- Receive an individual assessment to identify their specific protection needs
- Access victim support services
- Access protection
- Enjoy safeguards in the context of restorative justice services
- Enjoy privacy in the context of the criminal proceedings

The Directive sets out broad provisions on the right to access information. It includes a right to understand and to be understood (Article 3), a right to information about victims' rights (Article 4), a right to be informed when making a complaint, and about the case (Articles 5 and 6) and a right to interpretation and translation (Article 7).

Article 3 requires Member States to take appropriate measures to ensure effective communication with victims. Such communication should be in simple language and with a consideration of personal characteristics of the victim, including any disability.

Article 3 (1) of the EU Directive requires that victims must be able to understand and be understood. Article 3 (2) of the Directive indicates that any information should be provided in 'simple and accessible language orally or in writing' having regard to the 'personal characteristics' of the victim and any disability that 'may' affect their ability to understand. Article 4 requires that victims are offered without unnecessary delay a set of information from their first contact with competent authorities.

The Directive considerably strengthens the rights of victims and their family members to information, support and protection. It further strengthens the victims' procedural rights in criminal proceedings. The Directive also requires that EU countries ensure appropriate training on victims' needs for those officials who are likely to come into contact with victims.

The Criminal Justice (Victims of Crime) Act 2017

The Criminal Justice (Victims of Crime) Act 2017 transposes EU legislation on the rights of victims of crime into Irish law and broadly mirrors the content of the EU Directive. The enactment of this legislation was the first major step in putting victims at the heart of the Irish criminal justice system.

The Act places obligations on key state agencies such as An Garda Síochána, the Director of Public Prosecution (DPP) the Courts Service and the Irish Prison Services. It sets out the minimum rights, supports and protections for victims of crime, including, in Part 2:

- The right to be given detailed information about the criminal justice system
- The right to be given information on victim support services
- The right to be kept informed of the progress of the investigation and any court proceedings
- The right to have protection needs assessed and have measures put in

place to stop further victimisation and intimidation

- The right to be told of a decision not to prosecute and the right to ask for a review of that decision
- The right to be given information in clear language and to have access to interpretation and translation services if needed

Section 22 (1) of the Act stipulates that any communication, both oral or in *writing*, with a victim must be in 'simple and accessible language' and have regard to the personal characteristics of the victim, including any disability that the victim may have. This is in keeping with Article 3 of the EU Directive, and information provided to victims of crime, including children, should be provided in a manner having regard to their ability to understand and be understood.

This section places an obligation on relevant agencies (An Garda Síochána, the Ombudsman Commission, GSOC, the DPP, the Courts, the Courts Service and the Irish Prison Service) to ensure, when dealing with a victim, "that any oral or written communications with the victim are in simple and accessible language and take into account the personal characteristics of the victim including any disability, which may affect the ability of the victim to understand them or be understood".

Section 22(3) of the Act stipulates that where a victim needs assistance to be understood, then the victim should get access to an interpreter or translator, as the case may be where (a) a victim requests assistance (Section 22 (3)(a)); (b) where it appears to member of the Garda or DPP that assistance is required (Section 22 (3)(b)); or where the court directs (Section 22 (3)(c)).

Section 15 (2) of the Act outlines a list of factors that An Garda Síochána should have regard to when conducting an individual assessment of a victim of crime. This includes the nature and type of crime; the circumstances around the offence; the harm suffered by a person as a result of the offence; the personal characteristics of the victim,

⁵⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=EN>

which include ‘the personal characteristics of the victim, including their age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, communications difficulties, relationship to or dependence on, the alleged offender or any previous experience of crime. The legislation also requires that “the particular vulnerability of victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crimes and victims with disabilities”.

Special protection measures in the Act

If a victim is identified as having special protection needs, then they are also entitled to additional protection measures under the *Criminal Justice (Victims of Crime) Act 2017*. These include avoiding contact with the offender by giving evidence via other means, which would include via communication technology.¹⁵⁸ Measures should be available to enable a victim to be heard in a courtroom without being present, again via the use of communication technology.

Section 30 of the Act amends the *Criminal Evidence Act 1992* to expand the current use of video link evidence, intermediaries and screens by permitting their use in circumstances where a victim has special protection needs (identified during the course of an individual assessment)¹⁶⁰ and having regard to the victim’s vulnerability to repeat and secondary victimisation, retaliation and intimidation.¹⁶¹

One of the most important measures of the EU Directive provides that a victim who has special protection needs should be provided with measures to ‘avoid unnecessary questioning concerning the victim’s private life not related to the criminal offence’.¹⁶² This provision is included in Section 21 of the *Criminal Justice (Victims of Crime) Act 2017*. Under Section 21 a court may give directions in relation to ‘any evidence adduced or sought to be adduced and any questions asked in cross-examination at the trial, which relates to the private life of a victim and is unrelated to the offence’; if due to the circumstances of the

case it is necessary to protect a victim from repeat victimisation, intimidation or retaliation and it is not contrary to the interests of justice.

Another special protection measure is what Article 23 (3) (d) of the Victims Directive refers to as ‘measures allowing a hearing to take place without the presence of the public’. This has been transposed in Section 20 of the *Criminal Justice (Victims of Crime) Act 2017*. Section 19 (2) (a) clarifies that this is a special protection measure.

It provides that ‘if the court is satisfied’

“(a) that the nature or circumstances of the case are such that there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and

(b) it would not be contrary to the interests of justice in the case, the court may, on the application of the prosecution, exclude from the court during such proceedings—

- (i) the public or any portion of the public, or
- (ii) any particular person or persons, except officers of the court and bona fide representatives of the Press.”

It is important to note that Section 20 (2) is without prejudice to the ‘right’ of a victim to have certain people in court with them, namely:

- (iii) A parent, relative or friend of the victim
- (iv) A support worker of the victim’s choice
- (v) Where the accused person is under the age of 18 years, a parent, relative or friend of the accused person, or
- (vi) An appropriate person under section 18

There have been challenges in transposing the Victims Directive into Irish law, but that should not take away from the significance of the rights set out in the EU Victims Directive with particular reference to at-risk adults. The inclusion of a provision requiring state agencies to keep statistics on the implementation of the *Criminal Justice (Victims of Crime) Act 2017* is an important

one and will help in ensuring the rights under the EU Victims Directive are better protected.

Domestic Violence Act 2018

The *Domestic Violence Act 2018* consolidates previous domestic violence legislation. It provides protection where there is a violent family member. The main kinds of protection available are safety orders and barring orders. A safety order prohibits the violent person from further violence or threats of violence. It does not, however, oblige the person to leave the family home. If the person does not live with the victim, it prohibits them from watching or being near the victim’s home or communicating with the victim (including electronic communication). A barring order requires the violent person to leave the family home. The order also prohibits the person from further violence or threats of violence, and from watching or being near the victim’s home or communicating with the victim (including electronic communication).

The *Domestic Violence Act 2018* is particularly important in three respects. Firstly, it recognises and attempts to tackle the violence and abuse that occurs in situations and locations that are frequently hidden from public view, especially in the home. Secondly, it provides a range of safeguarding measures that are aimed at deterring and prohibiting any continuation of violence and abuse. Thirdly, the Act recognises coercive control as a criminal act.

The *Domestic Violence Act 2018* is particularly important in that it recognises coercive control as a criminal act. While many forms of violence and abuse are, in themselves, considered criminal, the criminalisation of coercive control per se removes any level of doubt that may have existed up until now and gives a clear message as to how society views *coercive control* as an unacceptable form of abuse.

Furthermore, controlling or coercive behaviour can involve acts that amount to criminal offences in their own right or behaviour

that falls short of criminal offending but, nevertheless, has a serious effect on a vulnerable victim. The recognition of coercive control as a criminal act, not only provides a new level of protection to victims, but can also be seen as useful in demonstrating an aggravated aspect of other crimes.

The creation of the offence of coercive control has undoubtedly placed into the consciousness of professionals – who are involved in safeguarding matters – the existence of the concept of coercive control, particularly in family-type situations. Its existence as both a crime and a risk factor offers professionals a resource and a motivation in dealing with abuse situations and removes some aspects of doubt and caution that may have previously hindered safeguarding actions.

While the criminalisation of coercive control is still rare in international terms, there is a growing acceptance that it is an important, necessary and effective tool in tackling abuse, especially in the domestic sphere.⁵⁷

Throughout the world, legislative responses to domestic and intimate partner violence have, until now, focused largely on physical violence such as assault and threats. That limited vision of the issue blurs the fact that victims are often subjected to ongoing patterns of psychological abuse and control that cause harm beyond a one-time incident of physical violence and that often involve what is effectively a deprivation of liberty.

The Irish legislation, in common with similar legislation in other jurisdictions, is framed primarily in the context of the violence (both physical and psychological) that sometimes occurs or is threatened within intimate domestic relationships. It also targets abuse that persists or erupts after the breakdown of intimate relationships. While the legislation offers protection equally to both men and women, the origins of the legislation are closely linked with combatting domestic violence against women. While it can be argued that this limited focus is valuable in

⁵⁷ For an examination of US legislative developments, see Mahoney and Lieberman (2021), <https://www.law360.com/articles/1380900/legally-recognizing-coercive-control-can-help-abuse-victims>

signalling that domestic, intimate partner violence of any kind is unacceptable, it leaves a vacuum in the area of safeguarding adults at risk from abusers who are not intimate partners.

The definition used in framing the offence of coercive control is quite restrictive and limited. Section 39(4) is quite specific in its wording and clearly does not encompass perpetrators who are not/were not intimate partners of the victim.

The Act provides inadequate legislative protection for people who are subject to abuse from an extended family member or a non-family 'friend'. While the Domestic Violence Act 2018 sets out provisions for safety orders, protection orders and barring orders, these orders, in general terms, are aimed at prohibiting behaviour that can be viewed as violent, threatening and causing fear – as opposed to the less visible but equally abusive behaviours that are associated with the concept of coercive control. A further limitation of the use of these orders is that it does not include extended family members such as children, siblings, nieces and nephews except where they are resident with the victim. Similarly, the use of the orders against non-family persons, such as so-called 'friends', is only possible where the perpetrator resides with the victim.

A typical example of a coercive control not covered under the 2018 Act is where a person is living with their niece, nephew, brother, sister or cousin and there is alleged emotional, physical and/or financial abuse. For example, it may be that coercion is used to access the person's account or ATM card. A safety order would not adequately protect the at-risk person in such instances and it is not at all clear that the Domestic Violence Act 2018 is adequate to prevent a person from engaging in threatening and abusive behaviour and engaging in coercive control. Also, the Act does not support the person to have their relative removed from the house, with the result that they remain open to ongoing abuse.

The importance of the classification of coercive control as a crime is that it offers a real prospect of safeguarding adults at risk from abuse that may be interpreted by some as 'low-level', 'normal', or somehow not deserving of attention. However, this safeguarding mechanism for adults at risk is not presently available under Irish law, unless the perpetrator is or was an intimate partner.

This shortcoming in the law also creates a further difficulty in that it increases the caution with which safeguarding services will approach cases where there is an absence of the intimate partner relationship. Personnel will be reluctant to take action against, for example, siblings where the abuse evidently comprises coercive control but where it cannot be defined as such under the law.

The shortcoming outlined above is not unique to the Irish situation. While there are minor differences, for example, between the Irish Domestic Violence Act 2018 and the corresponding legislation in England and Wales (Serious Crime Act 2015) and in Scotland (Domestic Abuse Act 2018), all three demonstrate a focus that is primarily domestic, intimate partner-oriented. The England and Wales legislation does, however, extend the definition of persons considered as perpetrators. In defining coercive behaviour, it refers to coercive or controlling behaviour in an intimate or family relationship and, in addition to intimate partners, includes people who are members of the same family providing that they live together. This addition would appear to deal, to a certain extent, with the shortcomings mentioned earlier. However, as it only relates to family members who are living together, it would appear to exclude, for example, siblings or other family relations who are not living in the same home as the victim. It does not include perpetrators who are not family members.

While it is accepted that at-risk adults may be victims of domestic violence and of coercive control within domestic and family situations, there are also many incidents of abuse of at-risk adults that do not constitute domestic

violence. Adults at risk can be the victims of abuse perpetrated by individuals whose relationship or connection with them does not fall within the scope of the relationships prescribed under the *Domestic Violence Act 2018*.

Coercive control can be perpetrated in residential care settings and by home care providers. There is a clear need for access to better legal protection for people in residential care facilities where staff and other residents perpetrate abuse in the form of coercive control. There is a similar need to provide legislative safeguards where coercive control is perpetrated by a home care provider.

It is crucial in the context of providing access to justice to adults at risk that the law be not only broadened to protect all potential victims, but also that the law be interpreted, understood and applied in a manner that recognises the full spectrum of behaviours of a coercive controlling nature that can impact on adults at risk.

The Domestic Violence Act 2018 performs a very important task in criminalising coercive control. However, if the Act is to provide the protection of the law to the full range of adults at risk who are subjected to coercive control, then the definition of 'relevant person' (i.e. the perpetrator of coercive control) must be expanded to include any person who engages in coercive control.

The referencing of the additional risks confronting disabled people in the Draft Third Domestic, Sexual and Gender-Based Violence Strategy 2022-26⁵⁸ is a welcome and important development.

The strategy also recognises and acknowledges the need to provide support for all victims/survivors of gender based violence, (irrespective of any characteristics they might have), the need to reflect the lived experiences and particular victims/survivors, including Migrants, Travellers and Roma, People with Disabilities; LGBTI+ and acknowledging the additional risks factors created by overlapping forms of discrimination.

It is noted that Section 23 of the Criminal Justice (Miscellaneous Provisions) Bill 2022⁵⁹ provides for an amendment to the Non-Fatal Offences Against the Person Act 1997 to provide (10 (1)) that a person shall be guilty of the offence of harassment where that person persistently, intentionally or recklessly,

- (i) *seriously interferes with another's peace and privacy, or*
 - (ii) *causes alarm, distress or harm to the other*
- and (10(2))
- Where without lawful authority or reasonable excuse causes another to fear that violence will be used against them or against another person connected to them or serious alarm or distress that has a substantial adverse impact on a person's usual day-to-day activities.*

Non-Fatal Offences Against the Person Act 1997

The Non-Fatal Offences Against the Person Act 1997 updated and modernised existing law relating to various forms of assault, threats to kill or cause serious harm, poisoning, false imprisonment and abduction of children. The Act has also introduced a number of new offences. The Act has measures dealing with:

- Assaults
- Offences relating to violence or threats of violence involving syringes and/or blood
- The offence of harassment, which is aimed at what is commonly known as "stalking"
- Debt collection with threats or menace
- Coercion
- Endangerment
- Poisoning or the administration of substances intended to interfere with bodily functions
- The use of reasonable force in protecting yourself, your family and your property from criminal activity.

⁵⁸ Department of Justice (2022). <https://assets.gov.ie/216213/3626d86d-3618-416c-b8d5-5a65beec60a1.pdf>

⁵⁹ https://data.oireachtas.ie/ie/oireachtas/bill/2022/83/eng/ver_a/b83a22d.pdf

While the 1997 Act is not restricted by any insistence on, for example, an intimate partner relationship, it is nevertheless clear that only the most severe, blatant and violent examples of coercive control are likely to be prosecuted under this provision. The insidious nature of coercive control is very often hidden and hard to detect. This means that the value of Act is compromised with regard to the many types of coercive control that can be observed in practice in Ireland at present. The amendments to the Act proposed in Section 23 of the Criminal Justice (Miscellaneous Provisions) Bill 2022, referred to above, have the potential to provide additional protection for people who experience coercive control.

Assisted Decision-Making (Capacity) Acts

The Assisted Decision-making (Capacity Acts (2015 and 2022) have created a new assisted decision-making system for people who do not have the capacity to take decisions. (The role of the assisted decision-making legislation in enhancing access to justice is discussed in Chapter 8 below.)

It had been expected that the commencement of the Acts would bring added and clearer emphasis to the public, institutional and legal awareness of the rights of at-risk adults. In keeping with Ireland's commitments under the UN Convention on the Rights of Persons with Disabilities (UNCRPD), and in particular with reference to Article 13 of the UNCRPD – the right to access justice – the Act is seen as vital in addressing the historic issue of the non-recognition of legal capacity with the consequent restrictions on legal standing and access to justice by many at-risk persons.

The provisions of other pieces of relevant legislation are summarised in an Appendix.

Victims Charter

The Department of Justice published a new and expanded Victims Charter in 2020.⁶⁰ The updated Charter takes account of the *Criminal Justice (Victims of Crime) Act 2017*, which sets out the rights of victims of crime, and seeks

to assist victims of crime in locating services available to them. The Charter was developed by the Department of Justice in consultation with all relevant state agencies and organisations including An Garda Síochána, the Courts Service and the DPP, as well as a wide range of non-governmental organisations and groups representing victims themselves.

The Victims Charter outlines the rights of victims throughout the different stages of the criminal justice system, following the reporting of a crime. It provides information on the services available to victims and sets out:

- The role of each relevant service;
- What victims can expect from that service (the services they offer victims and how they can expect to be treated);
- What a victim can do if a service does not meet their expectations.

A victim in this context (as provided for in the 2017 Act) refers to:

- A person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by a criminal offence;
- A family member of a person whose death was directly caused by a criminal offence and who has suffered harm as a result of that person's death. (This does not include family members who have been charged with or are under investigation in connection with the death.)

The Victims Charter and its associated website are envisaged as helping victims by explaining, step by step:

- ✓ How to report a crime to An Garda Síochána;
- ✓ What to expect during the investigation;
- ✓ How a decision is made whether or not to prosecute;
- ✓ What to expect from the court process.

The Charter outlines the supports that are available for victims at each point throughout the criminal justice process, including after a trial has ended. Information is provided about organisations offering support, including for specific types of crime. Information is provided regarding what action a victim can take if they feel they have not been treated properly.

The website also has a dedicated section providing specialist information for victims of sexual offences. This section aims to inform users about a range of topics such as:

- Support available to them from Sexual Assault Treatment Units (SATUs) and Rape Crisis Centres in the immediate aftermath of sexual violence;
- Support in coming to terms with sexual violence that happened, whether recently or in the past, and how that can be reported;
- The availability of specially trained gardaí to provide support;
- What will happen if victims are asked to attend Court as a witness and the supports available to help them to do so;

The development of the Victims Charter and its associated website is seen as a key deliverable in '*Supporting a Victim's Journey*,'⁶¹ which set out a detailed roadmap for implementing the recommendations of the O'Malley Report.⁶²

Overview and conclusion

This chapter has outlined a number of pieces of legislation that impact on how adults at-risk are likely to interact with the legal system, and, in particular, how legislation provides for the provision of support and facilitation to at-risk adults as victims of crime.

The EU Victims Directive 2015, which is reflected in the Criminal Justice (Victims of Crime) Act 2017, was an important development. The *Domestic Violence Act 2018* contains elements that would be especially valuable in providing legal protection and redress to at-risk adults in the context of them being subjected to coercive control. However, the Act is seen as having substantial shortcomings due to restrictions to the relationships covered. The Assisted Decision-Making (Capacity) Acts 2015 and 2022 are viewed as providing a new and robust set of legal protections to many at-risk adults.

Chapter Four will examine the supports that exist to help people of limited financial means participate in and have access to justice.

⁶⁰ <https://www.victimscharter.ie/>

⁶¹ https://www.justice.ie/en/JELR/Pages/Supporting_a_Victims_Journey

⁶² Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences, <https://assets.gov.ie/83514/cc917997-ad32-4238-9468-29a6bccd76c1.pdf>

Chapter Four

General Measures In Ireland to Enhance Access to Justice

Introduction

This chapter sets out the supports that exist to help people of limited financial means to participate in judicial processes. It is obvious that, even assuming a perfect court system, justice for all cannot be achieved if a section of the population finds it impossible or difficult to access the justice system for financial or other reasons. In this context, the chapter describes the range of legal aid, legal advice and legal information services currently available in Ireland. The chapter also describes in some detail the shortcomings of the free civil legal aid scheme as it currently operates.

Statutory legal support infrastructure

There are a number of services that enable access by people to the justice system. These encompass access to both the civil and criminal justice systems. A range of organisations and agencies offer assistance to people who are experiencing difficulties that may, or may not, require some form of legal action. This can include the provision of information and advice, advocacy and support, and, in some instances, legal aid and representation. These services can also provide direction toward more advanced supports such as formal legal aid and thereby act as facilitators of access to justice.

The organisations providing these services and supports can be NGOs, such as Free Legal Advice (FLAC) Centres, Threshold, Irish Refugee Council, Sage Advocacy, Mercy Law Resource Centre, Community Law & Mediation (CLM) and Ballymun Community Law Centre. Other services with a legal advice and information remit are funded by the Citizens Information Board (CIB) – Citizens Information Services (CISs), the Money Advice and

Budgeting Service (MABS) and the National Advocacy Service for People with Disabilities. The extent to which these services enhance access to justice is, clearly, constrained by the extent of their resources.

FLAC operates a legal information and referral telephone line, runs a nationwide network of legal advice clinics where volunteer lawyers provide basic free legal advice, and provides specialist legal advice to advisers in the Money Advice and Budgeting Service (MABS) and in Citizens Information Services (CIS) on social welfare, personal debt and consumer credit law. Family law and employment law cases tend to predominate. In 2021, FLAC had 13,147 calls to its Telephone Information & Referral Line and 2,729 consultations at Phone Advice Clinics. The vast majority of these clinics are operated in collaboration with local Citizens Information Services who provide premises, facilities, administrative and organisational support. The Citizens Information Board funds FLAC to provide legal clinics and helpline services through CCISs. This service is somewhat limited, however, in that it does not at present offer an email service, which would be important for people who cannot use a telephone.

CISs provide information, advice and advocacy support to members of the public. For many this will be the ‘first-stop’ on their journey towards finding a legal remedy for their issues. Interaction with the CIS will often result in the person being signposted or referred to more specialist legal supports. The collaboration between CISs and FLAC is an example of an important crossover or linkage point in the process of accessing justice. The local nature and presence of CISs makes for good visibility and public awareness.

Civil legal aid and legal advice

The Legal Aid Board (LAB) was established under the Civil Legal Aid Act 1995. It is responsible for the provision of civil legal aid and advice to those unable to pay for such services from their own resources in civil cases. The Legal Aid Board is not directly responsible for the provision of criminal legal aid but has a role in the administration of certain criminal legal aid schemes, as noted below.

Legal aid

Legal aid means representation by a solicitor or barrister in civil proceedings in the District Court, Circuit Court, High Court, Court of Appeal and Supreme Court and in certain instances before the Court of Justice of the European Union. It also applies to appeals to the International Protection Appeals Tribunal. It is also available for certain inquests where a request has been made to the Board by the coroner.

This means that the person concerned has engaged the Board to act on their behalf in the proceedings, including sending correspondence on their behalf, drafting court documents, giving advice, representation in court and all the background preparatory work required.

Generally, legal aid is provided by solicitors employed by the Board in its law centres. However, legal aid may also be provided by a solicitor in private practice from a panel of solicitors that has been established by the Board. This is particularly the case for family law matters and international protection cases.

In principle, legal aid and legal advice are available for all civil matters, other than those that are specifically excluded by law. Those excluded by law include:

- Defamation
- Disputes concerning rights and interests in or over land
- Small claim cases
- Alcohol/club licensing
- Conveyancing

- Election petitions – where a person challenges the result of an election
- Applications made in a representative, fiduciary or official capacity
- Group/class actions

With few exceptions, the legal aid scheme does not include representation at quasi-legal tribunals such as Workplace Relations Commission (WRC) the Residential Tenancies Board (RTB) and the Personal Injuries Assessment Board (PIAB). There are, it should be noted, some exceptions to the above exclusions.

Legal advice

Civil legal advice is any oral or written advice given to a person by a solicitor or a barrister about how the law applies in civil matters. It can also include writing letters on a person’s behalf or acting for them in negotiations with other people. Legal advice is provided by LAB solicitors in their law centre network. While in practice most of the work of the law centres is in the area of family law, they do have a more wide-reaching role.

- Even though most types of criminal cases are excluded from the provision of civil legal advice, an alleged victim of a sexual offence, rape or human trafficking may be granted legal advice.
- Legal advice will not be given in relation to any legal matter that in the opinion of the Board could be dealt with by obtaining appropriate advice other than state-assisted legal advice.
- LAB may decide to stop providing advice where it considers it is no longer reasonable to do so or that the person receiving the advice is no longer eligible to receive it because of changes to their means.

Eligibility criteria

In order to qualify for legal aid, a person must generally pass both a merit test and a means test.

Merit test

This is an initial test to ensure that the person's case is a legitimate one and that a reasonable person would take the case and would be advised to take the case. A person will pass the merit test, if, in the Board's opinion:

- The person has, as a matter of law, reasonable grounds for instituting, defending or being a party to the proceedings for which legal aid is sought;
- The person is reasonably likely to be successful in the proceedings;
- The proceedings for which legal aid is sought are the most satisfactory means of achieving the result sought by the person;
- Having regard to all the circumstances (including the probable cost to the Board, measured against the likely benefit to the person), it is reasonable to grant the application;
- The person's case does not fall within the excluded areas;
- If the proceedings concern the welfare of a child, including custody or access, or a sex offender order, the second and fourth bullet points do not apply.

Means test

In order to qualify for legal aid or legal advice, a person must undergo a means test. If a person qualifies for legal aid, they will have to make some contributions to the overall costs of the proceedings. There are a limited number of exceptions to the requirement to make a financial contribution, including child-care and domestic violence cases. The rules that apply to eligibility for free civil legal aid can be perceived by citizens as technically complex and difficult to understand. Details of financial eligibility criteria and the means test are included in Appendix Two of this report.

Criminal Legal Aid

A constitutional right to legal representation

applies in Ireland and legal representation must be provided by the State to those who do not have the means to pay for it. The Supreme Court has held that there is a need to put the defendant on equal terms with the prosecution. Without legal representation, an ordinary person without any experience of criminal law and court proceedings would be at a serious disadvantage up against the legal resources of the prosecution. However, there is no *absolute* constitutional right to such legal aid.

The main legal aid available to someone accused of a crime is the legal aid provided under the Criminal Justice (Legal Aid) Act 1962⁶³. Criminal legal aid, unlike civil legal aid, is free.

If a judge considers that it is appropriate that a person be granted criminal legal aid, they will be issued a legal aid certificate. Where a legal aid certificate is not granted, a person may be entitled to apply for free legal representation under another scheme such as the Criminal Assets Bureau's Ad-Hoc Legal Aid Scheme or the Legal Aid – Custody Issues Scheme. (See *Other legal aid schemes in Ireland below*).

Rules governing legal aid in the criminal justice system

All criminal cases in Ireland start in either the District Court or the Special Criminal Court. The majority of cases start in the District Court. It is at this stage that the accused person is entitled to apply for legal aid.

If a charge carries a possible prison sentence and the defendant is not legally represented, the District Court judge is required to inform the defendant that they may be entitled to legal aid. If the defendant wishes to be legally represented and claims that they cannot afford it, the judge must consider whether they qualify for free legal aid.

Qualification criteria

In deciding whether or not a person qualifies for free legal aid under the criminal legal aid scheme, the judge must consider the following:

- Whether the person has enough means to pay for their own legal aid
- Given the seriousness of the charge or offence, whether it is in the interest of justice that the person should have legal aid in the preparation and conduct of their defence.
- Where the judge decides that the matters before the court are not serious enough. For example, road traffic offences and other minor offences;
- Where the judge decides that the person has enough means to pay for their own legal representation;
- Extradition proceedings;
- Most judicial review proceedings.

Normally an application for legal aid will be as straightforward as explaining to the judge that, for example, the person is unemployed and giving details of their social welfare payments, or if the person is on a low income, their salary. Sometimes the judge will ask a prosecuting Garda if An Garda Síochána has any objections to legal aid being granted. Gardaí will rarely object unless they have proof that the person is being untruthful to the court about their means. In the case of a young person, the court will look at the means of the parents or guardian to see if they can afford to pay for the legal advice.

The court may require a written statement from the defendant setting out their income, family circumstances and any other relevant details. This written statement must be made on a form that is available from the District Court clerk at the District Court offices.

There are no financial eligibility guidelines against which an application is assessed. Generally, the rule is that if the offence is a serious one and the defendant cannot afford to pay for their own legal advice, then the court grants a legal aid certificate. In assessing the seriousness of the case, the judge considers the possibility of the person receiving a prison sentence or large fine if convicted.

If the offence is not a serious one, the judge may grant legal aid in exceptional circumstances. Such exceptional circumstances include if the defendant is very ill; is immature; lacks any formal education; is emotionally disturbed or lacks the mental capacity to understand the process of the court case.

A District Court judge will normally refuse to grant a legal aid certificate in the following circumstances:

Legal aid granted in the District Court only covers District Court proceedings. If a person is sent forward to a higher court by the District Court to have their case dealt with and the person has already been granted free legal aid, it will be necessary for them to apply to that higher court for legal aid for their trial. It is very unlikely that the higher court would refuse to grant a legal aid certificate if the District Court has already granted a certificate.

Freedom to choose a solicitor

If a person has been granted criminal legal aid, the judge assigns a solicitor to their case from the legal aid panel. If the person expresses a desire to be represented by a particular solicitor from the panel, the judge assigns that solicitor if they are available. However, the constitutional right to free legal aid for certain defendants does not extend to an absolute right to choose a particular solicitor or barrister.

There is no specific legal obligation on either solicitors or barristers to take part in the free legal scheme. Each county registrar is obliged to compile and maintain a list of solicitors who are willing to take part in the scheme in the courts within their area. The Minister for Justice also maintains a similar list of barristers (nominated by the Bar Council) as being willing to take part in the legal aid scheme.

Although there is no absolute right to choose a solicitor, the courts very rarely refuse to assign the solicitor sought by a defendant. The assigning of a solicitor nominated by the defendant is dependent on the solicitor being on the legal aid panel and being available. If a judge refuses to

63 <http://www.irishstatutebook.ie/1962/en/act/pub/0012/index.html>

assign a solicitor nominated by a person, the court must state the reason and should then enquire whether the defendant wants to nominate any other solicitor.

Costs covered by the scheme

When a legal aid certificate is granted for court proceedings it entitles a person to free legal aid for the fees, costs or expenses to prepare and conduct their defence. Legal aid certificates can also be granted to cover the cost of an appeal or a case stated. The fees included are those of a solicitor and in certain circumstances, up to two counsel or barristers.

The legal aid certificate also covers the fees of non-legal professionals who may be required to prepare and conduct a defence. Examples of these are doctors, psychiatrists, engineers, forensic scientists, language experts.

If a defence solicitor or barrister thinks the services of such experts are necessary, their expenses are covered by the legal aid certificate.

Other legal aid schemes in Ireland

As noted earlier, in those cases where a person is not entitled to a legal aid certificate under the criminal legal aid scheme, they may be entitled to apply for free legal representation under another scheme.

Legal Aid - Custody Issues Scheme

The Legal Aid - Custody Issues Scheme (formerly known as the Attorney General's Scheme) is a non-statutory scheme that covers the fees for a solicitor and barrister to represent a person in certain criminal matters where that person cannot afford to pay the fees themselves. The scheme is administered by the Legal Aid Board and to apply for funding under the scheme, the person concerned or their legal representative, must apply to the court at the start of proceedings.

The scheme applies to the following matters:

- Applications for bail in the High Court, Court of Appeal or the Supreme Court;
- Judicial review proceedings that are concerned with criminal matters or matters where the liberty of the person is at issue;

- Applications under the Extradition Act 1965 and the European Arrest Warrant Act 2003;
- Habeas Corpus applications (brought by a person who claims that they are being unlawfully detained by the state).

Legal aid is available under the scheme whenever the applicant's means are not enough to get the appropriate and necessary legal representation, and the court considers it necessary and proper that a solicitor and barrister are assigned to make submissions on behalf of that person in their application to the court.

Criminal Assets Bureau Ad-Hoc Legal Aid Scheme

The Legal Aid Board also operates the Criminal Assets Bureau (CAB) Ad-Hoc Legal Aid Scheme, which provides legal aid to people who are defendants in any court proceedings brought by the Criminal Assets Bureau, including court proceedings under the Proceeds of Crime Act 1996, Revenue Acts or Social Welfare Acts.

The scheme also includes:

- Social welfare appeals made to the Circuit Court under Section 307 of the Social Welfare Consolidation Act 2005;
- Tax appeals made to the Circuit Court under the Taxes Acts where the Criminal Assets Bureau is the respondent;
- Applications made by the Director of Public Prosecutions under Section 39 of the Criminal Justice Act 1994;

Garda Station Legal Advice Revised Scheme

Under the Garda Station Legal Advice Revised Scheme, free legal advice can be provided to those detained under certain legislation in Garda stations, providing they satisfy a means test. The scheme is operated by the Legal Aid Board.

The scheme applies to those detained in a Garda station in relation to the investigation of

certain types of offences. The scheme applies to the following offences:

- Offences under Section 30 of the Offences Against the State Act 1939 as amended;
- Offences under Section 4 of the Criminal Justice Act 1984 as amended;
- Offences under Section 2 of the Criminal Justice (Drug Trafficking) Act 1996 as amended;
- Offences under Section 50 of the Criminal Justice Act 2007 as amended;

Those detained under Sections 16 and 17 of the Criminal Procedures Act 2010 or Section 42 of the Criminal Justice Act 1999 can also apply for legal advice under the scheme as if detained under Section 4 of the Criminal Justice Act 1984.

Under the scheme, fees are paid to a solicitor for:

- Telephone and in-station consultations
- Attendance of the solicitor at a formal interview between gardaí and the detainee
- Attendance of the solicitor at an identity parade

The number of consultations the scheme covers for each individual depends on the legislation they are detained under. The scheme also covers payments to a solicitor who attends an extension hearing held in the District Court where gardaí apply to extend the time limit for holding a suspect under the Offences Against the State Acts, under the Criminal Justice (Drug Trafficking) Act 1996 or under the Criminal Justice Act 2007.

The scheme is confined to those who are in receipt of social welfare payments and those whose annual earnings are less than €20,316.

Legal assistance provided by the Irish Human Rights and Equality Commission

The Commission's legal functions are set out in law under the Irish Human Rights and Equality

Commission Act 2014. The Commission's legal powers include the power to apply to the High Court, Court of Appeals or the Supreme Court for liberty to appear before the courts as amicus curiae (friend of the court) in proceedings that involve or are concerned with human rights or equality.

The Commission can also provide practical assistance, including under specific circumstances, legal representation, to persons in vindicating their rights under human rights and anti-discrimination legislation, in particular under the Employment Equality Acts 1998-2015, the Equal Status Acts 2000-2015, the European Convention on Human Rights Acts 2003 and 2014, and more generally in relation to the protection and promotion of human rights and equality.

Legal services in asylum and related matters

The Legal Aid Board can provide assistance in cases involving asylum and related matters. If a person makes an application for legal services in relation to an asylum, subsidiary protection or related matter, they will be provided with assistance including advice relevant to their interactions with International Protection Office (IPO), appeals, deportation orders, and applications for leave to remain.

Legal Aid and Mental Health Tribunals

Since November 2006, if a person is admitted to hospital against their will (involuntary patient), they are entitled to have a mental health tribunal within 21 days of their admission. (The Report of the Expert Group on the Review of the Mental Health Act 2001⁶⁴ proposes reducing the 21-day period to 14 days).

The Mental Health Commission is responsible for establishing these tribunals. A mental health tribunal consists of three people -

- A legal member (a barrister or solicitor who will act as Chairman)
- A lay person
- A consultant psychiatrist

⁶⁴ <https://assets.gov.ie/15986/af32aee7c6ce4747aef4962b11d716d8.pdf> (page 44). The Mental Health Act 2001 is currently under review.

The function of the mental health tribunal is to either revoke or affirm an admission or renewal order. Mental health tribunals can also consider proposed transfers to the Central Mental Hospital and proposals related to the use of psycho-surgery.

People have the right to be represented at the mental health tribunal by a legal representative who is appointed by the Mental Health Commission. The Commission also arranges for an independent medical examination to be carried out by a Consultant Psychiatrist. Patients have the right to attend their tribunal if they want to.

Relevant general provisions under Irish law

The needs and special circumstances of at-risk adults are provided for, in a general manner, by various provisions of Irish law.

The Disability Act 2005⁶⁵ provides that public buildings should be accessible to people with disabilities and should meet certain standards. Section 25 of the Act states that –

Subject to subsection (4) and section 29, a public body shall ensure that its public buildings are, as far as practicable, accessible to persons with disabilities.

The Act also provides for access to sites and buildings that are classed as heritage sites. Section 29 of the Act provides that –

The head of a public body shall, as far as practicable, ensure that the whole or a part of a heritage site in its ownership, management or control to which the public has access is accessible to persons with disabilities and can be visited by them with ease and dignity.

This latter provision is important in that many older court buildings could be considered heritage sites.

The Irish Sign Language Act 2017⁶⁶ places a duty on all public bodies to provide Irish Sign Language translation where necessary. It stipulates that a person may use Irish Sign Language in any pleading or in any court and that in order to ensure that no person is placed at a disadvantage, the court should make provision for the simultaneous or consecutive interpretation of proceedings into Irish Sign Language and that the provision of interpretation shall be at no cost to the person concerned.

The Web Accessibility Directive (Directive (EU) 2016/2102), transposed into Irish law in September 2020⁶⁷, provides people with disabilities with better access to websites and mobile apps of public services. The Directive obliges websites and apps of public sector bodies to meet specific technical accessibility standards. There are a limited number of exceptions that include broadcasters and live streaming.

The Directive requires an accessibility statement for each website and mobile app; a feedback mechanism so users can flag accessibility problems or request information published in a non-accessible content; and regular monitoring of public sector websites and apps by member states, and reporting on the results.

Shortcomings of the Civil Legal Aid Scheme

It is widely acknowledged that there are a number of basic issues with access to the civil legal aid scheme, including, in particular:

- Limitations on the types of cases people can be represented at;⁶⁸
- The requirement for a minimum financial contribution;
- Non-indexation of the means test resulting in many people on low incomes failing to meet the test;

- Waiting time for an appointment with a solicitor (typically four months).⁶⁹

The Civil Legal Aid Scheme is hampered significantly by the restrictions placed on the types of cases that are eligible, the jurisdictions that are covered, and the stringent and outdated financial and means testing procedures that apply at present.

Review of Civil Legal Aid Scheme

In June 2022, the Minister for Justice established a Group to review the Civil Legal Aid Scheme.⁷⁰ The Review Group is considering, inter alia, the types of cases that should be covered by the scheme, the jurisdictions that should be covered, questions of eligibility, financial contributions payable, mode of delivery, accessibility, and how awareness of the scheme could be raised.

Many of the areas for civil legal aid that are stated or implied in the Civil Legal Aid Act 1995 are not included in the implementation of the scheme in practice. Cases may be excluded by virtue of legislation-based regulations or because of eligibility criteria. For example, there is minimal or no service being provided in many civil law areas, including homelessness, housing, social welfare, employment, equality, discrimination, children's rights, or environmental issues. Even where civil legal aid is available, there appears to be a somewhat narrow lens applied to the types of issues included under specific headings.

Family-related issues are a significant component of the work of the LAB and the application of the Civil Legal Aid Scheme. The Legal Aid Board's 2021 Annual Report⁷¹ shows that more than half (59.6%) of applications referred to general family law matters, almost one-fifth (19.5%) to divorce/

separation/nullity, almost one-tenth (9.7%) to international protection and human trafficking and almost 5% to cases involving possible state care of children.

There are aspects of legal protection relating to family matters that are typically not the subject of civil legal aid. These include, for example, where an older person or person with an intellectual disability whose decision-making capacity may be in question is subject to coercive control, financial abuse, or other abuses by a family member. The HSE National Safeguarding Office Annual Report 2021⁷² indicates that issues of concern relating to those over the age of 65 years and those over the age of 80 years are at a much higher rate than concerns raised for persons between the ages of 18-64 years. That report also shows that the person allegedly perpetrating abuse against a person over the age of 65 was, in most cases, an immediate family member or another relative. This is an area where people should be able to have easy access to free legal aid in order to ensure that they are able to take whatever actions are required to address the situation.

Another issue is the relatively significant number of court applications to have a person taken into wardship,⁷³ taken by the HSE without the person who was the subject of the application having the benefit of independent legal advice and legal aid. On the latter point, the Supreme Court judgement in the AC Case⁷⁴ commented (Par. 239 and Par. 367) on the impact of the lack of legal aid by way of advice or representation in relation to wardship hearings.

It is noted that provision has now been made in the Assisted Decision-Making (Capacity) Act 2015 (as amended by the Assisted Decision-Making (Capacity) (Amendment) Act 2022), to

65 <http://www.irishstatutebook.ie/2005/en/act/pub/0014/index.html>

66 <https://www.irishstatutebook.ie/eli/2017/act/40/enacted/en/html>

67 S.I. No. 358/2020 – European Union (Accessibility of Websites and Mobile Applications of Public Sector Bodies) Regulations 2020 <https://www.irishstatutebook.ie/eli/2020/si/358/made/en/print>

68 Currently the Legal Aid Board cannot represent a person before a quasi-judicial tribunal.

69 The Legal Aid Board the Board gives priority to certain categories of cases, such as domestic violence, childcare, child abduction and cases where there is a danger that the time limits for issuing proceedings may expire.

70 The Review Group carried out a public consultation at the end of 2022 and beginning of 2023.

71 <https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/annual-report-2021.pdf>

72 National Safeguarding Office Annual Report 2021, <https://www.hse.ie/eng/about/who/socialcare/safeguardingvulnerableadults/national-safeguarding-annual-report-2021.pdf>

73 The current system of wardship will cease on commencement of the Assisted Decision-Making (Capacity) Act 2015. A recent amendment to the Act means that an application for wardship that has been initiated prior to commencement will not lapse and may continue to conclusion.

74 Supreme Court Judgement in AC v Cork University Hospital & others, <https://www.casemine.com/judgement/uk/5df-c6a614653d042431b0cbc>

amend the Civil Legal Aid Act 1995 to provide for legal aid for applications to court under Parts 5 and 6 of the Act.⁷⁵

The commencement of the Assisted Decision Making (Capacity) Act 2015 has specific implications regarding the legal requirements in relation to supported decision-making. There is a need to ensure that legal practitioners operating within the Civil Legal Aid Scheme are trained and competent in communicating with people who lack decision-making capacity or whose decision-making capacity may be in question. Best practice guidelines need to be developed for LAB solicitors and private solicitors engaged by the LAB in this regard.

Where it is necessary to defend personal rights such as the right to protection of liberty, the right to bodily integrity and the right to have valid consent obtained (for example, in relation to place of care decisions), a person should have access to legal advice and representation without the imposition of any financial eligibility criteria.

It is noted that the Assisted Decision-Making (Capacity) Act 2015, as amended by the Assisted Decision-Making (Capacity) (Amendment) Act 2022, provides for the amendment of the Civil Legal Aid Act 1995. This means that a relevant person and a ward of court (as defined in the 2015 Act) do not have to satisfy the criteria in respect of financial eligibility specified in Section 29 of the 1995 Act. Furthermore, where a relevant person or a ward does not satisfy the criteria in respect of financial eligibility, the Legal Aid Board may seek to recover some or all the costs of providing the Legal Aid to the relevant person or ward. (This relates to persons who lack capacity to give relevant information about their own finances).

Easy access to civil legal aid is likely to be a key component in protecting the rights of people with disabilities and necessary to comply with the State's obligations under the

UN Convention on the Rights of Persons with Disabilities. It is important in the context of the Assisted Decision-Making (Capacity) Act 2015 that the Legal Aid Board has access to skilled legal practitioners in this area. It is important that such practitioners are fully conversant with the various arrangements provided for supported decision-making in the 2015 and 2022 Acts. A centrally important point is that, irrespective of what mode of delivery is used, a person seeking legal aid and legal advice has the benefit of lawyers who are expert in law where the service is required.

It has been acknowledged that there is potential for poverty traps to arise⁷⁶. The financial eligibility criteria for legal aid have not changed substantially since 2006. There is no discretion to provide assistance to those who might be marginally outside the financial limits.

Need to address gaps in the operation of the Civil Legal Aid Scheme

Underdeveloped mediation services

There is a need for alternatives to the courts process. Mediation should be the first option explored in most cases where there is conflict. It can play a very necessary and important role in resolving family issues associated with divorce and separation. It also has the potential to make a significant contribution in matters relating to coercive control where adult children are making decisions against the wishes of their aged parents and/or where there is alleged financial abuse. It can provide a first-stage resolution of disputes relating to employment rights, housing rights and social welfare appeals. However, mediation should not be a substitute for the protection of legal rights that need to be realised through the courts, for example in situations of child custody.

Mediation can play a significant role in facilitating dispute resolution, and early and appropriate intervention can make a

substantial difference to the achievement of positive outcomes without recourse to the courts. However, its availability in Ireland tends to be patchy in provision and not well integrated, resourced or understood. Mediation services provided by LAB are limited in practice to couples who have decided to separate or divorce or who have already separated, to come to agreement in relation to decisions about the children, the family home, finances, and the future. There is clear potential for a much wider application of mediation through the Civil Legal Aid Scheme although it is recognised that it should not substitute for access to the courts system to realise justiciable rights.

Legal advice

While the Civil Legal Aid Act 1995 (1995 Act) provides for both 'legal advice' as defined in Section 25 and 'legal aid' as defined in Section 27, there appears to be little focus in practice on the provision of legal advice.⁷⁷

The availability of appropriate legal advice in a timely manner can avoid the escalation of issues and related stress and costs to the individual and would almost certainly have clear financial advantages for the State in reducing the need for costly court litigation.

Prioritising legal advice and mediation over legal aid

It would seem of the utmost importance that the provision of legal advice and mediation should be prioritised over legal aid in some circumstances and that where any or all of them are required that the professionals involved should be sufficiently skilled as to enable them to engage with clients who may need support with decision-making or have difficulty in communicating their concerns and their will and preference. It would be important that there be not just understanding of the key principles of the ADMC Acts but an appreciation with regard to the right of people to make what, to some legal practitioners (and others), may seem unwise decisions.

Need for a broader understanding of 'family law'

Sage Advocacy has reported many instances where people have sought to defend applications brought by the HSE to have them made a Ward of Court.⁷⁸ While these were clearly civil law matters, they did not seem to fit within LAB's definition of the type of family law they will deal with. The Assisted Decision Making (Capacity) Acts 2015 and 2022 (ADMC Acts), which have been commenced recently, provide opportunities for a more developed understanding of vulnerability in the context of family. There is a need to consider the challenges and conflicts that arise for people with limited or diminishing capacity, people with disabilities or people experiencing mental health difficulties and the particular needs that they may have with regard to the need for: (a) legal advice; (b) mediation; and (c) legal aid.

As a general point, there is a strong argument for allowing greater access to a much wider range of case types and applicant circumstances than is currently the case. While this applies to civil legal aid for cases involving housing and homelessness issues and employment rights matters, it also equally applies to the need for civil legal aid in situations where a person is seeking to plan for their future or where a place of care is being determined.

This suggests that a continuum of legal advice and legal aid services should be available in various situations, including, in particular:

- People creating an Enduring Power of Attorney (EPA);
- People experiencing coercive control in intimate and non-intimate relationships;
- People experiencing financial abuse or exploitation;
- People protecting their property rights, e.g., in relation to property transfers and succession;

⁷⁵ Part 5 stipulates that a relevant person, or any person who has attained the age of 18 years and who has a bona fide interest in the welfare of a relevant person, may make an application to the court. Part 6 of the Act provides for a review of capacity of wards of court who are adults.

⁷⁶ John McDaid, Chief Executive Legal Aid Board in the Irish Examiner 6th October 2020: <https://www.irishexaminer.com/news/arid-40060196.html>

⁷⁷ Legal Aid Board Annual Report 2021, <https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/annual-report-2021.pdf>

⁷⁸ The shortcomings of the wardship applications process have been set out in detail in the Supreme Court judgement in the AC case. Also, the practice of wardship has been discontinued under the recently commenced assisted decision-making legislation.

- Deprivation of people's liberty in places of care;
- Long-term care contracts;
- People's right to self-determination and a related need to uphold the principle of valid consent.

There are circumstances where access to legal advice and legal representation is necessary to ensure a fair balance between the client and the other party who may have, as a matter of course, engaged legal representation. Such circumstances can frequently extend to proceedings that are presently excluded from the Civil Legal Aid Scheme such as quasi-judicial settings dealing with tenancy, social welfare and employment issues. Also, excluded in practice are broader family-related matters that have been discussed above.

Many at-risk adults face problems that are complex and multi-faceted and these often exist simultaneously. However, civil legal aid is only available to help them address some of these issues, which means, in effect that there is unmet need for legal supports to enable people to have equality of access to justice.

Addressing shortcomings in the Civil Legal Aid Scheme

The present means test is totally out-of-date and is severe and unfair in its implementation. Eligibility for civil legal aid is complex and income thresholds have not kept pace with inflation or changes to the social welfare code, resulting in many on low incomes not being eligible. People living at the present Civil Legal Aid threshold of €18,000 p.a. disposable income are highly likely to be already experiencing substantial economic hardship in making ends meet.

There is also a strong case for doing away with a financial eligibility test for persons who are dependent on social welfare payments. This should apply especially to people who are living in residential care.

The method of determining eligibility and the delivery of legal aid does not adequately allow for the targeting of services at particularly vulnerable groups or individuals such as those

living in institutions or prisoners.

While minimum contributions may be a necessary feature generally of a civil legal aid scheme, the present calculation method for contributions fails to recognise the financial constraints under which people on low incomes live.

There is a strong case for eliminating, or at least minimising to a token amount, the contributions that should be made by certain categories of applicants such as people with disabilities, victims of domestic violence, and representatives/guardians of children.

Other costs can be incurred by people involved in legal proceedings – such as those relating to sworn documents, medical reports and valuations – which can be a significant burden on people on low incomes. It is important that such expenses should not act as a deterrent to at-risk persons who are seeking justice.

There is a need to consider the establishment of dedicated and purpose-built modes of delivery aimed at meeting the needs of particular groups of potential users of legal aid services. These groups would include persons living in residential care settings, prisoners, and persons with disabilities generally. Such groups could be directly supported through dedicated and specialised channels that could involve existing specialist advocacy and support organisations.

Despite continued investment, demand for civil legal aid continues to outstrip supply. Waiting times, which can be lengthy, can aggravate problems, dishearten applicants, and can result in justice delayed for some.

For people with disabilities, a number of actions within the courts system and in provision by the Legal Aid Board would greatly improve accessibility, including, in particular:

- The introduction of intermediaries or court mentors to support people in court;
- The provision of access officers and assistive technology in courts;
- The exploration of opportunities

for collaborative working between LAB and independent advocacy organisations such as Sage Advocacy and the National Advocacy Service for People with Disabilities;

- Ensuring that all LAB solicitors and those engaged by it are trained and competent in communicating with at-risk adults, including, in particular, people experiencing communication difficulties and those with an intellectual disability;
- Greater provision of assistive technology and interpretation and translation services, as well as the use of Plain English in all court documents;

The full implementation of the Assisted Decision-Making (Capacity) Acts will be an integral requirement for the Legal Aid Board as well as the Courts Service.

Public awareness and understanding of the Civil Legal Aid Scheme and how it operates is affected negatively by the continued use of specialised and often archaic language and procedures that are frequently inaccessible and incomprehensible to most people. For example, the convoluted use of exclusions and exceptions to exclusions in determining access to civil legal aid is indicative of a system that lacks clarity for ordinary citizens. This difficulty is compounded for people with an intellectual disability and others whose decision-making capacity may be reduced. It is also evident that a significant section of at-risk adults – those who live in residential care settings or who are highly dependent on others for access to information and advice – are highly likely to lack awareness and knowledge of the very existence of civil legal aid and are, therefore, unlikely to pursue legal remedies.

A system of triaging of cases for access to civil legal aid should be developed, informed by the following considerations:

- Safety, safeguarding and extent of vulnerabilities;
- Involvement of existing supports indicative of wider need e.g. independent advocates or health/

social care professionals;

- Urgency and the need to ensure that future decision making and capacity to influence decisions are not compromised by delays in the system;
- Potential of a case to address a systemic issue that would benefit a number of individuals or a specific group;
- Necessity to promote, protect and defend human rights and liberties;

Quasi-judicial settings are intended by the State to protect and defend the individual citizen's rights. A person who cannot afford to defend their rights in such settings should not be excluded from state provided legal advice and aid.

The present exclusions, both legislative and administrative, require substantial easing, with access being allowed for a much wider range of case types and applicant circumstances. Specifically, there is a real need to include as eligible and widen eligibility for cases involving social welfare appeals, eviction, and repossession proceedings (where there is a valid defence), employment rights issues, and housing/homelessness issues. Many of these issues are referenced in the European Convention on Human Rights and in aspects of Irish equality legislation that has much of its origins in European law.

As is widely known, Section 42 of the Irish Human Rights and Equality Act 2014 introduced the Public Sector Duty by imposing a positive obligation on a broad range of statutory and public bodies to have regard in the performance of their functions – to eliminate discrimination, promote equality of opportunity and protect the human rights of its members, staff, and persons to whom it provides services. There is a strong case to be made that the reform and possible expansion of the Civil Legal Aid Scheme should take cognisance of the implications of the Public Sector Equality and Human Rights Duty for public bodies and its implementation requirements and provide civil legal aid for people seeking to assert their rights under this legislation.

There is potential for greater integration between free legal advice provided by FLAC and Community Law Centres and the provision of legal advice under the Civil Legal Aid Scheme. FLAC legal advice phone clinics are available on a limited basis, in conjunction with CIB⁷⁹ and CISs, and provide first stop assistance, basic legal information, advice, such as the next steps a person needs to take and a referral to another appropriate service.

There is a strong argument for the lifting of the blanket exclusion of group actions under the scheme. While there may be a need to ensure that cases lacking merit are not allowed to enjoy unrestricted access to limited legal aid resources, it should be possible to ensure that group actions involving the rights of disadvantaged groups such as disabled persons, homeless people, or other such sections of the population who may experience discrimination or exploitation, can be supported, and enabled. Civil legal aid for group actions could be permitted for those who would otherwise qualify for civil legal aid thus helping to remove the barrier to group/class actions.

Overview and Conclusion

This chapter has described the existing supports that are available to at-risk adults (and others) in their interactions with both the civil and criminal justice system in Ireland. It has described the resources and structures to which at-risk adults should have access, as well as suggesting the shortcomings that may exist. The chapter has focused mainly on the professional legal assistance and aid that people can potentially access. The need for support for people whose decision-making capacity may be in question or who are experiencing mental health difficulties throughout judicial processes has been highlighted.

The chapter has outlined some of the shortcomings of the Civil Legal Aid Scheme, which is currently under review, and has suggested ways in which some of these shortcomings might be addressed. Aspects of the various issues involved here, and suggestions regarding how access to and the achieving of justice can be improved and become a reality will be discussed further in the chapters that follow.

The next chapter will discuss the experience of Sage Advocacy of clients' experience of inequality in accessing justice.

⁷⁹ The Citizens Information Board funds FLAC to provide legal clinics and helpline services through Citizens Information Centres.

Chapter Five

Access to Justice Issues: The Sage Advocacy Experience

Introduction

The Sage Advocacy experience was explored through consultation with Sage Advocacy personnel who were asked to identify actual or potential infringement of people's right to access justice on an equal basis with others that has emerged from casework. Sage advocates reported that their casework experience indicates that many Sage Advocacy clients experience inequality in accessing justice in the broadest sense of the meaning of the term. Independent advocacy support is frequently required in order to ensure that people's rights are upheld.

Issues identified based on feedback from Sage Advocates

The following section describes a number of issues relating directly or indirectly to access to justice identified by Sage advocates based on their casework experience.

Issue 1: Obtaining valid consent from people in decisions relating to health and social care

Valid consent to decisions affecting them is a key factor in the protection of a person's human rights generally and in ensuring that the principle of access to justice is upheld. The following matters have been identified by Sage advocates as relevant to valid consent and to the manner in which consent is obtained:

- A person may consent to receive care and treatment but not consent to be in a particular place of residence;
- A person may consent to receive care and treatment in a residential care service but not consent to the

restrictions on liberty that the place of residence has in place;

- A person may consent to receive care and treatment in a particular place of residence and may subsequently change their mind;
- A person may consent to receive care and treatment in a residential unit for a respite period but not to this becoming a long-term arrangement;
- A person may consent to receive care and treatment without having all relevant information and all options being explained to the person in a way that is understandable to them and in a manner that gives them choice;
- An assessment of care needs, an assessment of capacity to consent to care and an assessment of capacity to consent to a living arrangement where there is a potential deprivation of liberty are clearly separate assessments and determinations but are not always treated as such;
- A lack of resources for appropriate care and supports in the community, and a lack of a statutory right to homecare, can result in a person being forced to live in a residential facility against their wishes.

Issue 2: Enabling the 'voice' of the individual to be heard

Sage Advocacy casework indicates that a difficulty sometimes arises because the communication with the person requiring care is inadequate. This can arise because the person has communication difficulties

(e.g., associated with a particular condition or cognitive impairment), insufficient time for professionals to engage with and listen to people, under-developed skills relating to the latter and an over-reliance on the views and perspectives of relatives.

People with complex care and support needs frequently have difficulty in verbal communication but yet are fully capable of understanding and communicating in other ways. This is an important factor in establishing both people's decision-making capacity and their preferences in relation to how care and support is provided.

An underlying issue reported by Sage advocates is that key professionals (those with a decision-making role in relation to care) typically do not spend sufficient time to build a relationship with people to fully ascertain their will and preferences and their ability or otherwise to make informed choices and to give consent. This deficit is regarded by Sage advocates as particularly important when a person wishes to return home or find other suitable accommodation after hospitalisation following a stroke, an accident or other adverse incident that affected a person's mobility and ability to communicate.

Sage Advocacy experience is that in some instances the voice of the individual involved was not fully heard by professionals. There is a perception among Sage advocates of there being only a vague understanding of the need to ensure that people's decision-making capacity is maximised and a perception that people whose decision-making capacity may be in question are sometimes not encouraged or facilitated to articulate their will and preferences because of a risk aversion approach.

A view expressed by Sage advocates was that in some instances there had been a lack of consultation with the people most likely to be impacted upon by decisions relating to support and care options generally. In other words, decisions were made for a person

rather than with them. The result in some instances, for example, was that a person ended up in a nursing home without choosing to do so.

Issue 3: Presumption of capacity not evident in some instances involving at-risk adults

A key factor in ensuring that a person's human rights are protected is that people are presumed to have capacity unless it is determined otherwise. Sage advocates reported instances where health and social care professionals seemed to ignore the principle of presumption of capacity contained in the Assisted Decision-making (Capacity) Act 2015 on the basis that the Act had not yet commenced.

Sage Advocacy casework suggests that the presumption of capacity may not always be the starting point and that sometimes other factors intervene to undermine this presumption. These factors include people having made what appeared to be 'unwise' decisions in the past, engaging in high-risk behaviour or anecdotal information provided by relatives. The absence of a strong presumption of capacity results in an approach to decision-making where a person may be marginalised and where other people make decisions about what is regarded as in the 'best interests' of a person. This approach also undermines the basic principle that all people have legal capacity⁸⁰ even if their decision-making capacity is reduced. Article 12 of the UNCRPD guarantees that persons with disabilities have a right to legal capacity, which means that the law should recognise their capacity to be the bearers of rights, and their capacity to act. In other words, persons who have reduced decision-making capacity have the very same legal rights as persons whose decision-making capacity is not under question.

There were a number of cases reported by Sage advocates where people's decision-making capacity was called into question even

though it had never been formally assessed. (It should be noted that research⁸¹ has shown that almost 28% of patients in acute hospitals in Ireland lacked decision-making capacity for treatment decisions.)

Issue 4: Assessment of capacity

Sage advocates have reported encountering situations in which decisions regarding the future treatment of a client are made by a number of professionals – medical and social – without providing any meaningful opportunity for the wishes and preferences of the client to be voiced, either directly by the individual or by an independent advocate.

Assessing a person as not having decision-making capacity is clearly a major decision that has major consequences for the person involved. Sage advocates suggest that assessing capacity is sometimes not carried out as thoroughly or comprehensively as it should be given its central importance in a person's life. In some cases, it was unclear who did the capacity assessment and in others it appeared to have been carried out without due effort to communicate with the person.

Other instances identified by Sage advocates referred to situations where the person's capacity had not been questioned by anyone and yet decisions were being made on their behalf by other parties, usually next-of-kin who have no right to make any such decisions. In some instances, the person involved only became aware of such decisions when informed by the Sage advocate involved.

Issue 5: Right to self-determination

Some Sage Advocacy cases involve supporting people to exercise their right to self-determination and their right to take reasonable risks (that they are aware of) in accordance with their will and preferences. For example, there are cases where relatives exert significant control by insisting that a person should not be allowed to return home 'for their own safety', or by controlling the person's

finances in such a manner as to make these unavailable for the purchase of home care.

The experience of Sage Advocacy is that there is an in-built practice of preventing people returning home because of a hospital's concern about things going wrong and the hospital being held legally accountable for any adverse outcomes.

Health care staff and legal teams are perceived by Sage Advocacy as sometimes being reluctant to acknowledge that people are knowingly willing to accept the risks involved in living at home rather than being detained in a hospital or sent to a nursing home. This is a critical component in the protection of liberty and a key question is how to achieve the proper balance between protecting a person's liberty and ensuring that they are protected from risk. Some Sage Advocacy clients state explicitly that they are fully aware of the risks involved in living at home but want to make that choice, a choice that they believe is rightfully theirs to make.

Issue 6: Applications for wardship

Consideration of or planning for wardship when a person has some decision-making capacity, and without exploring other options, has led to unnecessary interference and restriction on people's rights. Sage advocates reported instances where a decision to apply for wardship was made by health professionals in consultation with family members against the express wishes of the individual. Sage advocates identified instances where a client who was the subject of a wardship application was unaware of the process, which was managed by a relative. Instances were also identified where information or documentation relating to the wardship application were sent to relatives and not to the person who was the subject of the application. Also there were instances identified where the Sage Advocacy client was not supported to attend court where the application was heard or offered the services of an independent advocate.

⁸⁰ 'Legal capacity' means the capacity to have rights and the power to exercise those rights. Article 12 of the UNCRPD guarantees that persons with disabilities have a right to legal capacity, which means that the law should recognise their capacity to be the bearers of rights, and their capacity to act. In other words, persons who have reduced decision-making capacity have the very same legal rights as persons whose decision-making capacity is not under question.

⁸¹ Ruth Murphy, Sean Fleming, Aoife Curley, Richard M. Duffy & Brendan D. Kelly (2019), Convergence or Divergence? Comparing Mental Capacity Assessments Based on Legal and Clinical Criteria in Medical and Surgical Inpatients, *Journal of Legal Medicine*, <https://www.tandfonline.com/doi/full/10.1080/01947648.2019.1622476?scroll=top&needAccess=true>

Health and social care and legal practitioners are generally seen by Sage advocates as being aware of their obligation to take a person's wishes into consideration when making a decision about their future. However, Sage advocates believe that in many instances where a person's decision-making capacity is in question, the option of wardship has been the only one explored especially when there were conflicting opinions about a person's decision-making capacity and the potential risks involved in acting in accordance with a person's wishes.

Because of concerns of health and social care services (understandable) regarding a person's capacity to assess risk, Sage advocates believe that in practice there has been a default position of applying for wardship as the only viable alternative where there was a question about a person's capacity, for example, where a person wanted to discharge themselves against a hospital's wishes.

Issue 7: Lack of 'appropriate accommodation' for vulnerable adults within the courts system

Article 13 of the UNCRPD requires state parties to provide 'appropriate' accommodations within the courts system for vulnerable adults. The evidence from Sage Advocacy casework is that such provision is not always made. For example, people with an intellectual disability and/or experiencing mental health difficulties may not be able to cope with cases being adjourned for reasons that they do not fully understand. Should they then fail to show up for a rearranged hearing, they are then faced with the issuance of a bench warrant.

Issue 8: Inappropriate involvement of relatives

An area where human rights may be curtailed is where relatives exercise coercive control over a person by controlling their finances or by influencing key decision-makers in relation to a person's care and support options. Sage Advocacy casework indicates that in some instances there is an inappropriate dynamic between relatives and health and social care professionals. This is manifested in an

application being made for the NHSS or for wardship or for both simultaneously. While Sage advocates report that some families do their utmost to enable a relative to return home or to find alternative appropriate accommodation, there are others who seek to thwart the process of supporting a person to return to live in the community. Some Sage Advocacy cases involved relatives providing what appeared to the Sage advocate to be inaccurate or misleading information to services in order to ensure that a person did not return home.

Issue 9: People's right to liberty not protected

Sage advocates reported that clients have experienced an actual or potential infringement of liberty due to insufficient services in the community to enable and support a person to remain living in their own home. The shortfalls in community care provision for vulnerable adults in effect result in people being detained in hospital or a residential care facility against their will. A key underlying issue is that there is grossly inadequate home care support provision in some areas and, to compound the matter, nursing home residents tend not to be prioritised for home support, which means their liberty continues to be compromised by the fact that they must remain in a nursing home setting against their wishes.

Sage advocates suggest that their case evidence shows that some people required relatively little assistance to live in the community, e.g., night-time support or Personal Assistance, but could not do so because such support was not available.

Related issues include lack of suitable assisted or supported living accommodation, lack of suitable technology to assist people with disabilities to remain living in their own home. Frequently, it is the case that the easiest option is the only one seriously pursued, viz. placing a person in a nursing home and telling them that there are no suitable alternatives available. The long-term care and support infrastructure that currently exists in Ireland is fundamentally at odds with people's right to

choose. A related issue is that some services (for example, Personal Assistance) tend not to be even envisaged if the disability is acquired after the age of 65.

The main factors associated with deprivation of liberty identified by Sage advocates were:

- Hospital discharge delayed due to a person wanting to return home but not being facilitated to do so;
- A risk aversion approach by health care professionals where a person's will and preference to remain at home is not supported despite the fact that the person is fully aware of the risks;
- Lack of suitable housing, lack of suitable home support services and a shortage of home support workers resulting in people being de facto detained in a nursing home;
- Lack of independent advocacy support.

Issue 10: Deprivation of liberty as a feature of nursing home care facilities

Sage advocates highlighted the fact that their casework has demonstrated that many so-called voluntary residents in nursing homes are de facto detained: they live in a closed unit and are not allowed to leave the institution without prior permission. Buildings are commonly secured by key code locks as a safety mechanism, requiring residents to ask permission to leave the premises. In the experience of Sage advocates, the de facto detention can extend as far as limiting people's access to recreational grounds outside of the building, justified by an assessment that the resident is a "falls risk" or likely to "escape". While explanations for policies point to efforts to introduce safety measures to protect some of the people in a residential care centre, the impact of such measures can be the de facto detention of all the people who reside within that centre.

Issue 11: 'Substitute' decision-making

Cases were identified by Sage advocates where decisions regarding a client's future

care were made by relatives and supported by a hospital multi-disciplinary team that were contrary to the will and preferences of clients. This was sometimes done on the basis that the person involved lacked the capacity to follow through and implement their will and preference. In some such situations, the role of the Sage advocate was challenged and questioned, as was any suggestion that an independent advocate should be allowed to participate in the proceedings of the multi-disciplinary team where decisions would be made. (It should be noted that many instances have been identified where Sage advocates were allowed to participate and to support a client at MDT meetings).

Issue 12: Independent advocacy and the role of lawyers

Sage Advocacy has encountered cases where considerable confusion and misunderstandings have arisen regarding the distinction that exists as between legal advocacy and independent advocacy. Some lawyers are reported as refusing to engage with a Sage advocate on the basis that they (the lawyer) are providing the necessary advocacy or that the person lacks capacity to consent to the involvement of an independent advocate. In some instances, the lawyer's view is seen by Sage Advocacy as being based on what a client's relative has told the lawyer.

There is a perception by Sage advocates that some lawyers may not always recognise the right of a person to make a decision that does not make good legal sense, dismissing such decisions as indicative of a lack of decision-making capacity rather than a person placing value on something other than not wishing to engage with legal processes.

Sage advocates have also suggested that some lawyers do not have the time or skills to communicate with the person they are representing in the particular manner that that person requires in order to understand information, or allow the extra time that a person with dementia or autism or other disability may need to absorb information in order to give informed instructions.

Issue 13: Poor understanding by professionals of communication challenges

A potential rights infringement identified by Sage advocates referred to the fact that a proportion of clients would have difficulty in receiving, comprehending and responding to official communications and documentation as a result of issues such as intellectual ability, housing arrangements, attitudes of care providers, and other such factors. In some cases, the breakdown in communications related to errors and omissions on the part of other parties including the legal profession. Instances were identified where professionals, including lawyers, gardaí and others lacked an adequate appreciation and understanding of the particular challenges that some people face in formulating and communicating information, especially when they are in stressful or traumatic situations. It was sometimes the case that people were regarded as ‘confused’ because they had difficulty in communicating their views or because they changed their minds. These failures in communication were perceived by Sage advocates as impacting on the ability of some people to protect their rights. This sometimes resulted in an application for wardship being made without other avenues of support being explored. The involvement of a Sage advocate regularly facilitated a person in convincing professionals, including solicitors, that a person could articulate their wishes provided the appropriate communication mechanisms and time were in place. However, the involvement of a Sage advocate was sometimes resisted by legal practitioners.

Issue 14: People’s finances inappropriately controlled by others

Managing and dealing with financial affairs can be challenging for many adults living in vulnerable situations. The complexities of dealing with property, inheritance matters, nursing home charges, and debt were identified by Sage advocates as particularly challenging for people with reduced decision-

making capacity. Instances were identified where inappropriate control was being exercised over an adult by another family member not living in the same household as the person. In such situations, there is potential for people to be manipulated into handing over money or property without wanting to do so.

The matter of financial abuse also emerged in cases in the form of, for example, bank or credit card fraud and the manipulation of the ownership and inheritance of properties. There was a sense on the part of some Sage advocates of clients being afraid to make a complaint about potential abuse within the household that affects them because of fear of repercussions.⁸²

Issue 15: The way ‘transitional care’ operates

Sage advocates highlighted what they regarded as an emerging trend in health services that is giving rise to de facto deprivation of liberty issues. This trend refers to what appears to have been a recent policy shift to establishing ‘transitional care units’ under the governance of the HSE as a place of care for those previously referred to as ‘bed blockers’ in acute hospitals. These units are set up by nursing home groups and although the residents there are said to be “in transition”, they are in reality living in long-term care units under a different name.

While, in theory, the residents can leave these units, in practice they cannot do so as they are all people who need assistance to live in their own homes. Since home care packages and/or care assistants are not available commensurate with their support needs, the reality is that these people are left in such units indefinitely.

Sage advocates also highlight the fact that although notionally the residents of these units still come under the jurisdiction of the hospital that transferred them to the units, the reality is that there are no therapies being provided for people in those units to prepare them for going home. This, Sage advocates believe,

leads to deconditioning and institutionalisation of residents so that when they do eventually transition out of these units, it will have to be to a nursing home.

Sage advocates raised a number of questions about the role and functioning of such units:

- Where is it envisaged that these residents are to transition to, and have they given their consent to be “held” in the unit?
- If the resident wishes to transition home what efforts are the HSE making to achieve this both by training carers themselves to provide the home care packages and by preparing the residents to care for themselves?
- Are these units fulfilling the statutory duty of the HSE to look after older people according to their needs and ensure that a person’s ability to perform the activities of daily living does not deteriorate while in these units?
- Is it acceptable that the HSE, knowing that the cohort of older people upon leaving the hospital will not be able to return home without a home care package, offload this responsibility to private providers through Service Level Agreements?
- Are there any procedures for reviewing the residents who find themselves “stuck” in these units for long periods?

Summary and Conclusion

What is particularly notable from the analysis carried out is the interrelatedness of the key issues presenting that can be broadly stated to refer to access to justice⁸³. As outlined above, the right to choice and full recognition of legal capacity are paramount to effective access to justice. People who have engaged the services of Sage Advocacy typically experience a wide variety of challenges, many of which are related to the need for and/or experience of long-term care services. Many cases are indicative of an absence of access to justice in the health and social care domain relating to choice.

The issues outlined in this chapter based on the experience and perspective of Sage advocates provide a valuable insight into the nature and extent of actual and potential access to justice issues in the health and social care domain.

The next chapter will discuss crime perpetrated on at-risk adults – its extent and nature, the social context within which crimes against at-risk adults occur and the groups most likely to be victims of crime.

⁸² This matter is dealt with in detail in the 2022 Safeguarding Ireland Report, Identifying RISKS: Sharing RESPONSIBILITIES, https://www.safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_low-res.pdf

⁸³ Park, B., Greene, M., and Colaresi, M., Human Rights are (Increasingly) Plural: Learning the Changing Taxonomy of Human Rights, *American Political Science Review*, 114(3), 888-910. <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/F202F327EA8F4CF52D2E65EB48D409D3/S0003055420000258a.pdf/human-rights-are-increasingly-plural-learning-the-changing-taxonomy-of-human-rights-from-large-scale-text-reveals-information-effects.pdf>

Chapter Six

At-Risk Adults as Victims of Crime

Introduction

While the average person may well be at risk of exposure to criminal behaviour, to exploitation, and to abuse at different times and in various contexts, it is clear that some groups of the population are at particular risk as a result of their age, health, social position, disability or living situation. This can be associated with their limited ability to protect themselves or their property, difficulties in making their wishes known, or limitations on their ability to assert their rights. They may be living in situations where they are socially isolated, lacking supports, or highly dependent on others and/or on institutions. People with reduced decision-making capacity can be subjected to a range of criminal activities, from the seemingly minor or petty to those that are extremely serious.

This chapter discusses a number of aspects of crime perpetrated on at-risk adults:

- The social context within which crimes against at-risk adults occurs;
- The extent and nature of crime perpetrated on at-risk adults;
- Older persons as victims of crime;
- Disabled people experiencing crime;
- Financial crime against at-risk adults;
- Domestic violence and coercive control;
- Hate crime.

The social context within which crimes against at-risk adults can occur

International research⁸⁴ suggests that there is no one reason why disabled people and older people are particularly vulnerable to crime. It is suggested that increased risk of victimisation is a combination of factors in the environment (such as chaotic, poorly run residential care homes), the motives of the offender (such as sexual gratification), and characteristics of the victim (the person may depend on the offender for help with daily living, such as bathing). One strength of these types of multi-factor explanations is the recognition of the complexity of victimisation, which is unlikely to be the product of a single cause.

It is important to take cognisance of the social context within which crimes against at-risk adults can occur. The Australian Disability Discrimination Commissioner has suggested⁸⁵ that society often views crimes against people with disabilities as less serious than crimes against others in the population generally. For example, if people with a disability are seen to be less competent as witnesses or cannot access support to navigate the complex court system, this creates barriers to the prosecution of offenders, and perpetuates abuse cultures.

In addition, there is substantial evidence⁸⁶ that crimes, including sexual crimes, tend to have to be very serious to be reported to police. It would appear that, for a variety of reasons many offenses are not reported or are not pursued by the authorities. It is possible that many offenses are not seen as necessarily meeting a “threshold” for reporting to police or for being prosecuted.

Abuses may not be reported because of fear of a loss of services for the person. This is especially true if the service where the assault happened is the only local option, or the perpetrator is a family member. A person with disability, able and given the opportunity to self-report, may be discouraged by fear of losing their home, being placed in a more restrictive or unfamiliar setting, fear of reprisal, fear of not being believed, an assumption that the crime was not important enough to report, a belief that no remedial action could or would be taken, and even an unwillingness to get the offender into trouble.

The Australian data is reflected strongly in data from the United States⁸⁷. In the 2011 to 2015 period, the rate of violent victimisation against persons with disabilities was 2.5 times higher than the rate for persons without disabilities. In every year from 2009 to 2015, the rate of violent victimisation against persons with disabilities was at least twice the age-adjusted rate for persons without disabilities.

As in the Australian data, less than half of crimes were reported to police, with reasons given for not reporting including:

- Did not want to get offender in trouble with the law;
- Was advised not to report to police;
- Was afraid of reprisal;
- Reporting was too inconvenient;
- Believed that police would not think it was important enough;
- Police would be inefficient, police would be biased, offender was a police officer.

Among both males (55.4 per 1,000) and females (60.3 per 1,000), those with cognitive disabilities had the highest rate of total violent victimisation among the disability types measured.

While almost half (49%) of persons with disabilities involved in the research had multiple disability types, almost two-thirds

(65%) of rapes or sexual assaults against persons with disabilities were committed against those with multiple disability types, the highest percentage among the crime types examined.

Factors identified as increasing vulnerability to victimisation were reduced cognitive abilities and judgement, physical disabilities, insufficient adaptive behaviours, constant interactions with “protectors” who exploit them, lack of knowledge on how to protect themselves and living and working in high-risk environments.⁸⁸

Extent and nature of crime perpetrated on at-risk adults

While the media stories that attract most public attention in this regard often involve cases that are criminal, extreme and distressing, the reality is that adults at risk are liable to experience forms of abuse and exploitation that many people may not perceive as serious or deserving of attention, and that may be dismissed as ‘trivial’. While it is difficult to ascertain the precise linkages between criminal activity and abuse, it is worth exploring the context, extent and nature of abuse of at-risk adults in Ireland in that abuse may be the ‘thin end of the wedge’ and that some abuse is criminal even though it may not be regarded as such.

At-risk adults (individuals with disabilities, some older people and some people experiencing mental health difficulties) are particularly vulnerable to crime for a variety of reasons, including but not limited to high reliance on caregivers, social isolation, living in institutional settings, frailty, and limitations in their abilities. While people with disabilities experience the same types of crime as people without disabilities, they may also experience unique forms of these crimes. For example, intimate partner violence victims with disabilities may be subject to denial of care or assistance, destruction of medical equipment, destruction of equipment for communication purposes, or manipulation of medications,

84 https://www.researchgate.net/publication/258854897_Violence_against_people_with_disabilities_A_conceptual_analysis

85 <https://www.humanrights.gov.au/news/speeches/equal-law-how-criminal-justice-system-failing-people-disability>

86 Van Den Bergh, P and Hoekman, J. *Sexual Offences in Police Reports and Court Dossiers: A Case-File Study*. Journal of Applied Research in Intellectual Disabilities <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-3148.2006.00291.x>

87 <https://bjs.ojp.gov/content/pub/pdf/capd0915st.pdf>

88 Luckasson 1992 referenced by The Arc at <https://thearc.org/wp-content/uploads/forchapters/Criminal%20Justice%20System.pdf>

in addition to more common controlling and abusive behaviours. These vulnerabilities not only increase opportunities for abuse and neglect, but they also make reporting of victimisation more difficult for adults at risk.

Safeguarding concerns reported

In Ireland the HSE National Safeguarding Office (NSO) oversees the implementation, monitoring, review and ongoing evaluation of the HSE's Safeguarding Policy. NSO Annual Reports⁸⁹ identify a significant level of reported concerns regarding the physical, sexual, psychological and financial abuse of adults at risk in Ireland, with over 10,000 concerns being recorded every year since 2017.

The total number of safeguarding concerns reported to the HSE Safeguarding and Protection Teams in 2021⁹⁰ was 11,640. This represented a 10% increase on reported figures from 2020. In 2021 there were 13,791 abuse types alleged in relation to the 11,640 concerned reported. Psychological and physical abuse remain the main types of abuse reported.

Almost half of the concerns reported for those 18-64 years had a psychological component. Concerns of alleged physical abuse decrease with age but remain significant across all age categories.

In both the 65-79-year age category and in the 80+ there are an increasing levels of financial abuse and neglect reported.

For those under 65 years two out of every three concerns reported document "other service users" being the person allegedly causing concern. In contrast in the over 65-year age category almost half of concerns relate to immediate family members (spouse/partner/son/daughter) allegedly posing a risk. Overall in 17% of cases a staff member was the person allegedly causing concern.

The age profile of adults that are the subject of notifications is 67% for those under 65 years of age, and 33% for those aged over 65.

The total number of notifications for persons aged over 65 was 3,671; of these, 1,320 were over 80 years. While the overall number of concerns reported for those over 65 years has increased on previous years, it is still significantly below what would be expected for both community and residential settings.

For adults aged under 65, the most significant category of alleged abuse is psychological (46%), followed by physical abuse (34%). This replicates the figures from 2020 and indicates an increase in instances of psychological abuse being associated with another alleged abuse type.

For adults aged 65-79 years, the most significant category of alleged abuse is psychological abuse (42%), physical (25%) and financial abuse (16%).

For adults over 80 years, the most significant category of alleged abuse is psychological (36%), financial (21%), and physical (17%).

In relation to the person allegedly causing concern, in those under 65 years, two out of three cases identified "another service user". In contrast, for those over 65 years, almost half of the concerns report "immediate family members".

In seven out of ten cases the outcome agreed with the Safeguarding and Protection Team was "reasonable grounds for concern".

Service-related concerns for those aged 18-64 years dipped in 2020 but increased in 2021. Service-related concerns for those over 65 years showed a sharp increase in 2021 going from 1,163 in 2020 to 1,663 in 2021. This represents those in disability services that are over 65 years and those in receipt of older person's services.

As indicated in Table 1 below, the reporting rate per 1,000 population in 2021 varied depending on age and gender. The reporting rate for adults aged 65 years or over at 5.34 was more than double that for adults in the 18-64 years' category (2.3) and was even higher for females aged 65 or over (6.13).

Table 1. Reporting rate per 1,000 of adult population by age group and gender, 2021

Age group	Male	Female	Total
18-64 Years	2.80	2.58	2.69
65+ Years	5.16	6.44	5.84
80 + Years	7.71	9.64	8.88

Source: NSO Annual Report 2021

It is worth noting that the proportion of concerns that are reported as being made by the victim themselves is quite low, at 2% in both 2020 and 2021, suggesting that victims are highly unlikely to voice complaints, for a variety of reasons.

Reported concerns are subjected to a preliminary screening. Preliminary screening assessment concludes with a determination of outcome. There are three possible outcomes:

- Reasonable grounds for concern
- No grounds for concerns
- Additional information required (a holding position until either of the two options above are reached)

In 2021 seven out of ten concerns reported reached an agreed outcome with the SPT of "reasonable grounds for concern". A further 23% documented "no grounds", which was down from 26% in 2020. In 2020 almost two-thirds (65%) of preliminary screenings were agreed as containing reasonable grounds for concern, with 9% warranting additional information. Just over one quarter (26%) were assessed as having no grounds for concern.

It is difficult to assess the extent to which the reports that were agreed as having reasonable grounds for concern could be viewed as being serious enough or appropriate for criminal

investigation. Data from Wales⁹¹ suggests that just over a quarter of cases (27%) that warranted further action led to a criminal investigation.

Information regarding cases of abuse of at risk adults does, on occasions, emerge from the actions of whistle-blowers. However, data relating to the Irish situation, as published by Transparency International Ireland⁹² indicates relatively low levels of such reporting of abuse. It appears likely that attitudes, ignorance and a failure to recognise abuse, as well as fear or unwillingness to reveal cases or patterns of abuse, all contribute to masking the real situation.

While data relating to criminal assaults, sexual assaults and homicide in Ireland⁹³ indicates that older people are less likely to be victims than other age groups, the level of reported assaults is nevertheless a matter of concern. International studies⁹⁴ relating to homicide in domestic settings have noted a paucity of research – and therefore evidence – regarding the extent, nature and consequences of violence against older people. It is suggested that ageist assumptions often hide the true levels of violent abuse that exist, especially in domestic contexts.

Older people as victims of crime

According to WHO estimates,⁹⁵ one in six people aged over 60 suffers from abuse. This number could be a substantial underestimate as violence, abuse and neglect of older persons are the most hidden and underreported violations of human rights. The experience of Covid-19 has put a spotlight on older persons and brought to the forefront distressing reports of instances of abuse and neglect of older persons, particularly in long term care institutions, but also in the community where the majority of older persons live.

89 HSE National Safeguarding Office. Annual Report 2020, <https://www.hse.ie/eng/about/who/socialcare/safeguardingvulnerableadults/nationalsafeguardingofficereport2020.pdf>

90 <https://www.hse.ie/eng/about/who/socialcare/safeguardingvulnerableadults/national-safeguarding-annual-report-2021.pdf>

91 Welsh Government. Experimental Statistics: Adult safeguarding 2016-17. 2017. Accessed at <https://gov.wales/sites/default/files/statistics-and-research/2018-12/181025-adult-safeguarding-2017-18-en.pdf>

92 <https://transparency.ie/resources/whistleblowing/speak-report-2020>

93 <https://www.cso.ie/en/releasesandpublications/ep/p-rcco/recordedcrimevictims2020andsuspectedoffenders2019-recordedvictims2020/>

94 See, for example, Bowes, H. Domestic Homicide of Older People (2010-15): A Comparative Analysis of Intimate-Partner Homicide and Parricide Cases in the UK <https://academic.oup.com/bjsw/article/49/5/1234/5211414?login=true>

95 <https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2021/06/2021.05.31-Concept-note-WEAAD-2021-Access-to-Justice.pdf>

The range of abuse types to which older people are subjected are well documented.⁹⁶ They include physical, sexual and psychological abuse, financial abuse, and neglect. Older persons constitute a significant and growing group who may also need specific support and protection from the legal system.

Research,⁹⁷ which examined bank staff's experiences of financial abuse of vulnerable adults, found that almost 70 per cent of survey respondents had had a suspicion of financial abuse of a vulnerable adult. Bank managers and National Safeguarding staff highlighted particular issues in relation to capacity, family assumption of entitlements to a vulnerable adult's finances and difficulty in relation to PIN numbers being used fraudulently to access people's money. There was also some evidence from Sage Advocacy casework of financial abuse being perpetrated on at risk adults who had power of attorney orders in place and where powers of attorney had been abused.

Vulnerable older people are covered by the law in relation to crime, tort, domestic violence, breach of trust and other relevant areas in exactly the same way as other people, but the exercise of their rights under the law may not always be practicable. While the majority of older people do not need any special legal support or protection, there is a significant minority who, because of illness or disability, reduced decision-making capacity or social and economic dependency do need additional protection in the implementation of the law in order to vindicate their right to protection from all forms of abuse.

While legal protections and remedies are essential for the protection of older people, these must be seen in the context of health and social care supports because the protection of vulnerable older people cannot be guaranteed by legal mechanisms alone. The need for protection would be considerably lessened if adequate health and social care supports were available.

It has been suggested⁹⁸ that violence, abuse and neglect of older persons are the most hidden and underreported violations of human rights. Older persons continue to face disproportionate cases of age-based discrimination, stigmatisation and are subjected to multiple violations of human rights. Also, older persons who have experienced situations of violence, abuse and neglect often face multiple barriers in accessing judicial remedies such as issues of accessibility, affordability, reasonable accommodation, excessive delays and backlogs in judicial processes, impact of digitalisation, cultural norms, gender bias, discrimination, and entrenched ageism in policy, norms and practices.

Disabled adults as victims of crime

As with any victim of crime, people with disabilities may be victims of domestic violence, child abuse, sexual assault, homicide, fraud and other types of crimes. They can be victimised by family members, acquaintances, strangers, institutional personnel, and caregivers. Many are victimised multiple times. Disabled people may fall prey to both serious and 'trivial' exploitation by people and organisations that, for example, target them through aggressive sales techniques; through manipulative online and other scams; through offers of dubious services and products; through exploitative 'professional' services; and through criminal fraud. The perpetrators of these crimes and abuses can be strangers, family members, or people and institutions charged with the provision of care.

Individuals with a disability are particularly vulnerable to crime for a variety of reasons, including (but not limited to) reliance on caregivers, limited transportation options, underdeveloped digital literacy and social isolation. There is also the factor that the personal characteristics and social circumstances of disabled people may render them more appealing to a potential offender.

A disabled person with communication difficulties, for example, may require help with dressing and may have trouble reporting the offence. This provides an opportunity to offend with a low risk of detection.

People with a disability experience and are at a far greater risk of violence than others in the population. This violence often goes unrecognised and unaddressed. Australian research⁹⁹ provides data regarding a litany of violent crimes against disabled persons, including, for example:

- Almost one in five (18%) of people with a disability reported being victims of physical or threatened violence compared to 10% without disability;
- People with disability experience and are a greater risk of crimes from both strangers and people who are known to them;
- Over two-thirds (71%) of people with disability reported feeling very unsafe 'after dark' compared to 47% of people without disability;
- People with an intellectual disability are ten times more likely to experience violence than people without disability and are three times more likely to be victims of assault, sexual assault and robbery compared with people who do not have an intellectual disability;
- Three-quarters of reported elder abuse cases involved the abuse of an older person with cognitive impairment;
- The gendered nature of violence against people with disability sees more than 70% of women with disability having been victims of violent sexual encounters at some time in their lives;
- More than a quarter of rape cases reported by females in Australia are perpetrated against women with disabilities.

Research conducted by Rape Crisis Network Ireland (RCNI) in 2011¹⁰⁰ describes the disturbing and serious nature and extent of sexual violence against people with disabilities in Ireland. It also reveals the reality of the extent to which survivors are reluctant or unable to report instances of sexual violence. The under-reporting of sexual violence and all forms of abuse is considered to be a particular problem for people with disabilities.

*"Abuse perpetrated by a carer or person in authority is particularly hard to disclose, as a double vulnerability is in play. The survivor often remains dependent upon or in the control of the abuser after the incident and may be reluctant to complain or be unable to access a complaints mechanism."*¹⁰¹

Some 30% of these (survivors of sexual violence) had never told anybody about the violence. Nine in ten of those who reported being subjected to sexual violence were female and one in ten was male (90% and 10% respectively). Seven in ten of all respondents said that nobody had ever asked whether they had suffered sexual violence (71%). Just under half of all respondents had never been given any information on where to go for support surrounding sexual violence (48%), with seven in ten of the male respondents never receiving any information (71.4%).

The RCNI research found, inter alia, that:

- Almost a quarter (23%) of survivors had been subjected to multiple incidents of sexual violence and that of these 41% had experienced these assaults as children, 15% as adults and 44% as both children and adults;
- Respondents often did not tell anyone until years later, citing periods of up to 50 years before disclosure;
- Respondents were sometimes not believed when they disclosed the violence and some suffered further violence as a consequence;

⁹⁶ For example, see Australian Institute of Family Studies. 2021_National Elder Abuse Prevalence Study. http://aifs.gov.au/sites/default/files/publication-documents/2021_national_elder_abuse_prevalence_study_final_report.pdf

⁹⁷ Amanda Phelan, Deirdre O'Donnell and Sandra McCarthy (2021), Financial abuse of older people by third parties in banking institutions: a qualitative exploration, <https://www.cambridge.org/core/journals/ageing-and-society/article/financial-abuse-of-older-people-by-third-parties-in-banking-institutions-a-qualitative-exploration/8CB9EF-01B3A1DC261D0DE177A89E671B>

⁹⁸ 2021 World Elder Abuse Awareness Day: Access to Justice 28 May 2021.

⁹⁹ https://wwda.org.au/wp-content/uploads/2013/12/ACDA_Sub_Sen_Inquiry_Violence_Institutions.pdf

¹⁰⁰ <https://www.rcni.ie/wp-content/uploads/SexualViolenceAgainstPeopleWithDisabilities2011.pdf>

¹⁰¹ Ibid. p.

- When respondents were subjected to multiple incidents of sexual violence, they did not always tell about every incident;
- Respondents sometimes tried to tell but were not able to fully disclose the extent of their experiences;
- The highest percentage of sexual violence was disclosed by people with sensory and mental health disabilities;
- Two in three respondents who identified with sensory and mental health disabilities disclosed sexual violence (67% and 65%, respectively);
- More than eight in ten perpetrators were known to the survivor:
 - One third of perpetrators were friends, acquaintances or neighbours (33%)
 - Over one quarter disclosed that the perpetrators were family members (27%)
 - Partners and ex-partners were named as the perpetrators in more than one in ten single incidents of sexual violence (14%)
 - Strangers were reported as the perpetrators in one in ten incidents (10%).

Financial crimes against at-risk adults

Financial abuse can include having money or other property stolen, being defrauded, being put under pressure in relation to money or other property, having money or other property misused, being pressurised to give away assets or gifts, and being put under pressure to accept lower-cost/ lower-quality services in order to preserve more financial resources to be passed to beneficiaries on death.

The nature of current financial services – the emphasis on online banking, the closure of local bank branches, the withdrawal of the Ulster Bank and KBC from the Irish market and the gradual move towards a cashless economy – creates additional vulnerabilities for adults at risk, particularly for some older people in controlling and managing their own finances.

While it is likely that the majority of people who support adults at risk to manage their finances (e.g., those acting as Agents for social welfare payments for people unable to do so themselves) act out of a genuine caring disposition and in good faith, there is an increasing awareness and evidence of the financial abuse of adults at risk, which has been documented in research.¹⁰² This is a critically important issue in that financial abuse in all its forms can have a profound effect on individuals and also undermines their basic right to control and manage their own affairs.

Financial abuse is widely regarded as a significant issue for older populations and was identified as the most common form of maltreatment in a 2010 Irish prevalence study.¹⁰³ National Centre for the Protection of Older People (NCPOP) research¹⁰⁴ has shown that financial abuse is the most common type of abuse reported in relation to older persons. The number of financial abuse alleged incidents reported to the HSE National Safeguarding Office (NSO) in 2021¹⁰⁵ was 1,299 (9% of all concerns reported). In both the 65-79 age category and in the 80+ category, the number of financial abuse and neglect incidents reported were higher than in the previous year.

Department of Social Protection data shows that three-quarters of the cases brought to the Department's attention in 2020 involved financial abuse. In the majority of cases, the

reports related to alleged abuse by a family member.¹⁰⁶

People most likely to be at risk of financial abuse

A synthesis of international research evidence on financial abuse carried out by Age UK¹⁰⁷ shows that the risk increases with age, meaning that older people are more at risk than younger cohorts.¹⁰⁸ Those who have reduced decision-making capacity are a specific subgroup of people who are most at risk of being victims of financial abuse compared to any other risk factor. Similarly, those who have poor health and have (or are at risk of) clinical depression and other illnesses have also been reported as being at a substantial risk of financial abuse.

Social risk factors associated with financial abuse identified in research include low levels of social support and needing help with Activities of Daily Living such as bathing, feeding, or showering; and needing help with Instrumental Activities of Daily Living, for example, managing money, shopping and housework. Other social risk factors identified include being dependent on the abuser.

Another context for financial abuse is where adults at risk are manipulated by people who position themselves as 'friends' and then use the 'friendship' to gain access to the person's money or property. A 2021 court decision in respect of a person who engaged in manipulative financial abuse of an adult at risk is significant.¹⁰⁹ The Judge found that the friendship of an innocent, vulnerable man had been abused by a person who eventually took control of his finances and tried to acquire his €275,000 home and contents through a disputed homemade will. This case is highly important for a number of reasons, including, in particular:

1. It is illustrative of the insidious and manipulative nature of financial abuse that takes place and the manner in which perpetrators attempt to 'normalise' such behaviour;
2. The Court Judgement referenced the activity of the perpetrator for what it was – the whole domination and control by one person over another.

Coerced debt

'Coerced debt' is debt incurred by an abuser, in the name of a victim of domestic violence, through threat, force, or fraud. It is a form of coercive control, identity theft, and economic abuse. (Surviving Economic Abuse, 2019). While there is no research in Ireland on this issue, it is noted that the Banking Federation have referenced it recently in the context of domestic violence. However, the practice of coercive debt is likely to exist outside intimate partner relationships, most obviously where an adult incurs debts (personal loans, credit card debt) under pressure/duress from a third party, or defaults on mortgage, utility or rent payments because a third party is misusing their money. It is also likely to occur in situations where older parents acting as guarantors on an adult child's mortgage are left to pay-off the debt when an adult child deliberately defaults, drug debts (where a parent pays-off the debt to protect themselves, other children and the adult child who 'owes the debt',) and illegal money lending.

Since financial abuse can have serious impact on at-risk adults, not just financially but also psychologically, especially on those who are on limited incomes, it is important that its criminal nature is highlighted and addressed accordingly in the justice system.

While there have been a number of high-profile criminal cases involving financial

¹⁰² Browne, M., Ní Leathlobhair, N., Mac Eochaidh, G., O'Mahony, A. (2022), Identifying RISKS – Sharing RESPONSIBILITIES: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults, Safeguarding Ireland, https://www.safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_lowres.pdf

¹⁰³ Naughton, C; Drennan, J; Treacy, M.P (2010), Abuse and Neglect of Older People in Ireland, <https://www.lenus.ie/bitstream/handle/10147/115375/Prevalence%20study%20summary%20report.pdf?sequence=1&isAllowed=y>

¹⁰⁴ Fealy, G., Donnelly, N., Bergin, A., Treacy, M.P., Phelan, A. (2012) Financial Abuse of Older People: A Review, NCPOP, University College Dublin, <https://www.lenus.ie/bitstream/handle/10147/300701/599NCPOP.pdf?sequence=1&isAllowed=y>

¹⁰⁵ HSE National Safeguarding Office. Annual Report. 2020

¹⁰⁶ See Browne, M. et al., (2022), Identifying RISKS – Sharing RESPONSIBILITIES: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults, Safeguarding Ireland, https://www.safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_lowres.pdf

¹⁰⁷ https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/mon-ey-matters/financial_abuse_evidence_review-nov_2015.pdf

¹⁰⁸ https://www.eapu.com.au/uploads/research_resources/VIC-Financial_Elder_Abuse_Evidence_Review_JUN_209-Monash.pdf

¹⁰⁹ Judge John O'Connor Judgement in Conroy vs. O Ceallaigh -- see <https://www.thejournal.ie/taxi-driver-seamus-conroy-disputed-will-court-5636620-Dec2021/>

exploitation and abuse of an at-risk adult, these cases have largely hinged on DSP-connected frauds, often involving the illegal drawing down of social welfare payments in the name of either living or deceased persons. However, in many of these cases the crime was committed against the DSP rather than an adult at risk. Cases involving exploitation of the financial or property assets of living or deceased adults at risk have, by and large been dealt with through the civil courts rather than the criminal system.

Domestic violence and coercive control of at-risk adults

As noted earlier in this report, the Domestic Violence Act 2018 consolidates previous domestic violence legislation and is seen as having particular importance in that it recognises and attempts to tackle the violence and abuse that occurs in situations and locations that are frequently hidden from public view, especially in the home. The Act provides a range of safeguarding measures aimed at deterring and prohibiting any continuation of violence and abuse; and it recognises coercive control as a criminal act, which is critically important notwithstanding the fact that its provisions are limited to intimate relationships.

It is crucial in the context of providing access to justice to adults at risk that the law be not only broadened to protect all potential victims, but also that the law be interpreted, understood and applied in a manner that recognises the full spectrum of behaviours of a coercive controlling nature that can impact on at-risk adults.

Hate crime

There is a growing awareness of hate crime against a wide range of people, including disabled people. The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022,¹¹⁰ as of 21 June, 2023, is at

Seanad Third Stage. It will be the first specific legislation in Ireland to deal with hate crime and will repeal and replace the Prohibition of Incitement to Hatred Act, 1989, which deals with hate-based offences. The new legislation will criminalise any intentional or reckless communication or behaviour that is likely to incite violence or hatred against a person or persons because they are associated with a protected characteristic. The penalty for this offence will be up to five years' imprisonment.

The Bill includes a general provision to further protect genuine freedom of expression and clarifies that a communication is not taken to incite violence or hatred solely on the basis that it involves discussion or criticism of matters relating to a protected characteristic. Also included is a demonstration test for hate crimes to make it easier to secure prosecutions and convictions for crimes motivated by hate.

The protected characteristics in the proposed legislation are: race; colour; nationality; religion; national or ethnic origin; descent; gender; sex characteristics; sexual orientation; and disability.

Scottish data regarding hate crime¹¹¹ reveals that, in the 2021-22 period the number of disability aggravated charges increased by 44%. With the exception of 2016-17, there had been year on year increases in charges reported since the legislation introducing this aggravation came into force in 2010. Disability aggravated charges comprised 12% of all hate crime charges, in comparison to 9% of charges being religion-related. Most hate crime involving disability was perpetrated by persons aged between 21 and 30 (34%), with 29% perpetrated by persons aged 31-40, and 25% by those aged 40+. Over 82% of reported incidents went to court.

While the Scottish data mainly refers to community settings, there is concern that hate crime also exists and is perpetrated in institutional settings.¹¹²

People with intellectual disabilities, particularly those in congregated settings, are more likely to experience abuse, violence and neglect because they are often isolated, in vulnerable situations and without the possibility to report hate crime or incidents. These forms of violence can particularly impact on their wellbeing: trauma, depression, violent behaviours. It would often lead to more isolation and overprotection, which is an added punishment for the victims. The introduction of hate crime legislation will enable a more systematic protection of minorities who are more at risk than others.

Unlike Irish legislation dealing with equality generally, the Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 does not list 'age' as a protected characteristic.

Overview and conclusion

There is clear evidence that at-risk adults are subjected to and vulnerable to a wide range of abuses and criminality. There is also substantial evidence that indicates that the level of crime to which they are subjected is substantially under-reported. While comprehensive data regarding the extent of criminal victimisation of at-risk adults in Ireland is not available, the evidence from other jurisdictions strongly suggests that at-risk adults in Ireland are very likely to be subjected to forms of abuse that are criminal even if not regarded as such.

Crimes committed against people with intellectual disabilities and against older at-risk people may sometimes be labelled as abuse or neglect (rather than as criminal activity per se, which indicates that the real level of criminality is understated). Many types of criminal exploitation of at-risk adults may be ignored or dismissed as simply being 'the way things are', and somehow acceptable, notably in the area of financial abuse by family members.

Many victims do not report crimes because of their dependence on the abuser for basic survival needs. When victims do report crimes, police and court officials may not take the person's allegations seriously or be reluctant to get involved. Additionally, people at-risk often do not have access to the types of support and resources they need in order to ensure that the perpetrators of these crimes are brought to justice.

Older persons who have experienced situations of violence, abuse and neglect face multiple barriers in accessing judicial remedies. These barriers involve issues of accessibility, reasonable accommodation, affordability, excessive delays and backlogs in judicial processes, impact of digitalisation, cultural norms, gender bias, discrimination, and entrenched ageism in policy, norms and practices. Inadequate access to justice impacts older persons' ability to fully exercise all their human rights including the right to health, adequate social protection and to live in dignity. The preservation or restoration of dignity and respect for older persons is crucial in such situations.

The shortcomings of the Domestic Violence Act 2018 with regard to coercive control of at-risk adults result in many people not having due protection within the criminal law system.

There is also the possibility that many professionals charged with safeguarding the interests of at-risk adults are not well equipped, especially with regard to legal literacy, to take on the task of using the criminal justice system to protect people in their care.

The next chapter will discuss the matter of at-risk adults as perpetrators of crime.

¹¹⁰ <https://www.oireachtas.ie/en/bills/bill/2022/105/>

¹¹¹ <https://www.copfs.gov.uk/media/d3jnt5t2/hate-crime-2021-22-publication-final.pdf>

¹¹² Inclusion Ireland Submission to Joint Committee on Justice - see https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2022/2022-04-08_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-criminal-justice-hate-crime-bill-2021_en.pdf p.19

Chapter Seven

At-Risk Adults as Perpetrators of Crime

Introduction

As discussed in previous chapters, at-risk adults (people with disabilities, some older persons and some people experiencing mental health difficulties) are likely to be victims of crime and abuse to a far greater extent than other sectors of the population. However, there is also the reality that some at-risk adults will engage with the criminal justice system as suspects in or perpetrators of criminal activities.

This chapter summarises some relevant international and Irish research. It discusses the challenges and issues for people with disabilities and people with mental health difficulties in engaging with the criminal justice system.

International evidence on at-risk adults as perpetrators of crime

At-risk adults come into contact with the criminal justice system not only as victims of crime but also as alleged offenders or witnesses to crime. Australian studies¹¹³ point to the fact that particular groups of people with a disability are more likely than others to have contact with agencies in the criminal justice system. These include alleged offenders who have a cognitive disability and people with psychosocial disability and physical/sensory disabilities, such as reduced hearing or being Deaf. The majority of people with a disability who come into contact with the Australian criminal justice system have some form of cognitive disability, an acquired brain injury or are on the autism spectrum.

The Australian data indicates that up to 15% of prisoners have an intellectual disability,

while 25-30% of prisoners are estimated to have a borderline intellectual disability, while, in the general Australian population, only 2.9% of people have an intellectual disability. The majority of criminalised people with cognitive disability have co-morbid or co-occurring mental health and substance abuse issues. The combination of issues experienced by people with cognitive disability results in what is commonly referred to as cumulative or corrosive social disadvantage or complex needs.

The Australian research further suggests that, while most disabled people who have been victims of crime do not engage in crime, the majority of criminalised people with a disability have been victims of frequent and recurring forms of violence, both in institutions and in the community. The research noted a strong correlation between various forms of victimisation and unresolved trauma and survival techniques that tend to be labelled as offending behaviour.

Other Australian research¹¹⁴ suggests that, while people with intellectual disability (ID) were not any more likely than people without a disability to offend, people with intellectual disability violently offended and sexually offended at a much higher rate than non-disabled people living in the community. The research estimated that around 1 in 10 people with ID would come into contact with the police or courts as a perpetrator of crime. Findings revealed that complexities such as childhood neglect, physical health problems, mental health problems and perinatal adversity were particularly common among offenders with intellectual disability. It noted that offenders with intellectual disability may be less

effective at evading police and more visible as perpetrators and that this may contribute to increased prevalence rates. It also noted a relationship between crime perpetration and intellectual disability/mental health difficulties comorbidity. Thomas et al (2019)¹¹⁵ reported that, in Australia, the 'dual-disability' group was three times more likely than those with an intellectual disability alone to have a history of criminal charges.

A US Department of Justice study¹¹⁶ revealed that in 2011-12 an estimated 32% of prisoners and 40% of jail inmates¹¹⁷ reported having at least one disability. Prisoners were nearly three times more likely and jail inmates were more than four times more likely than the general population to report having at least one disability. About two in 10 prisoners and three in 10 jail inmates reported having a cognitive disability, the most common reported disability in each population. More than half of prisoners (54%) and jail inmates (53%) with a disability reported a co-occurring chronic condition. Compared to those without a disability, prisoners with a disability were about four times more likely and jail inmates with a disability were nearly 2.5 times more likely to report past 30-day serious psychological distress.¹¹⁸

The pattern in other countries bears strong similarities to that in Australia and the US. A Swedish study¹¹⁹ concluded that – compared

to people without an intellectual disability, autism or Attention Deficit Hyperactivity Disorder (ADHD) – men and women with mild or moderate/severe intellectual disability and comorbid ADHD had elevated risks of violent crimes. Women with mild intellectual disability without comorbidities or with comorbid autism also had elevated risks of violent crimes compared to women without an intellectual disability, autism or ADHD. The highest risks for sexual offending in men related to intellectual disability and comorbid ADHD. The study concluded that the elevated risk of violent offending in people with intellectual disability is largely explained by comorbid ADHD. Other Swedish studies¹²⁰ confirmed these conclusions. ID offenders were more likely than non-ID offenders to have a sexual crime as an index crime as well as previous convictions regarding sexual offending.

Research from the UK mirrors the situation elsewhere. The UK Ministry of Justice in a 2012 report¹²¹ estimated that 36% of prisoners were considered to have some type of disability (in comparison with 19% in the general population). Over a quarter of the survey sample were reported as suffering from a mental health condition. The UK Penal Reform Trust¹²² estimates that between 20% and 30% of people in prison have learning disabilities or difficulties that interfere with their ability to cope with the criminal justice system.

115 Thomas SDM. et al (2019) Crime and victimisation among people with intellectual disability with and without comorbid mental illness. *J Appl Res Intellect Disabil.* Sep;32(5):1088-1095. <http://dx.doi.org/10.1111/jar.12598>

116 Bronson, J. et al (2015) Disabilities Among Prisoners and Jail Inmates, 2011-12. U.S. Department of Justice. Bureau of Justice Statistics. <https://bjs.ojp.gov/content/pub/pdf/dpji112.pdf>

117 US data differentiates between jail and prison inmates. Jail and Prison are often used interchangeably, but they serve different purposes. The key difference is that jails are intended for short sentences and temporary confinement, including detention pending trial (remand), while prisons are for felony sentencing longer than a year. Jails generally offer fewer facilities for inmates, such as education and training opportunities.

118 This is based on a screening scale for psychological distress and consisted of six questions that asked inmates to report how often during the past 30 days they felt— nervous; hopeless; restless or fidgety; so depressed that nothing could cheer them up; everything was an effort; worthless.

119 Latvala, A., Tideman, M., Søndena, E., Larsson, H., Butwicki, A., Fazel, S., & Lichtenstein, P. (2022). Association of intellectual disability with violent and sexual crime and victimisation: A population-based cohort study. *Psychological Medicine*, 1-9. doi:10.1017/S0033291722000460

120 Edberg, H. et al (2022). Crimes and sentences in individuals with intellectual disability in a forensic psychiatric context: A register-based study. *Epidemiology and Psychiatric Sciences*, 31, E2. <https://www.cambridge.org/core/journals/epidemiology-and-psychiatric-sciences/article/crimes-and-sentences-in-individuals-with-intellectual-disability-in-a-forensic-psychiatric-context-a-registerbased-study/2FEE162BA9AD71A2D9113BFAF6FCECC7>

121 Ministry of Justice (2012) Research Summary 4/12. Estimating the prevalence of disability amongst prisoners: results from the Surveying Prisoner Crime Reduction (SPCR) survey. London: Ministry of Justice. <https://www.gov.uk/government/publications/estimating-the-prevalence-of-disability-amongst-prisoners>

122 Prison Reform Trust (2015). Prison: the facts. Bromley Briefings Summer 2015. https://www.thegriffinsociety.org/sites/default/files/documents/pages/prison_the_facts_may_2015_0.pdf

113 Dowse, L. et al (2021). Research Report – Police Responses to People with Disability. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. <https://disability.royalcommission.gov.au/system/files/2021-10/Research%20Report%20-%20Police%20responses%20to%20people%20with%20disability.pdf>

114 Fogden, B.C. et al. (2016) Crime and victimisation in people with intellectual disability: a case linkage study. *BMC Psychiatry* 16, 170. <https://doi.org/10.1186/s12888-016-0869-7>

Young et al (2013)¹²³ noted significant rates of ID, Attention Deficit Hyperactivity Disorder (ADHD), and Conduct Disorder (CD) among suspects being detained at a large London metropolitan police station.

The situation in Ireland

International findings regarding the extent to which people with disabilities are perpetrators of crime is, as would be expected, reflected in the Irish situation. Equally, there remains considerable debate and an amount of confusion regarding the accuracy and reliability of available data. The Murphy Report (2000)¹²⁴, commissioned by the Irish government involved psychological assessment¹²⁵ on 264 prisoners (255 male, nine female), which represented 10% of the Irish prisoner population at that time. The sample was randomly drawn from 14 prisons. Results showed that 28.8% of the sample population scored below 70 on the the Kaufman Brief Intelligence Test (KBIT), which was interpreted as being suggestive of a “significant degree of intellectual disability”. The report noted that results from other tests were consistent with those of the KBIT Test.

The report noted that, as a group, the prisoners with varying degrees of intellectual disability were likely to have been exposed to the same risk factors as most of their non-disabled peers, having, for example, experienced childhoods characterised by chronic financial disadvantage and instability. It was noted, however, that the nature of their disability presented additional challenges to services for the prevention and management of criminal behaviour. It proposed that there was a need within the criminal justice system for specialised services that would take into account the unique needs of people with

learning disabilities. These would include; early identification and support services – reaching back into childhood; post-release support services; specialised prison programmes; and the development of diversion (from incarceration) services.

A more recent systematic review of the prevalence of intellectual disability among prisoners in Irish jails¹²⁶ found that, while there was little data to accurately estimate the prevalence of intellectual disability in the Irish prison system, the limited data available suggested that the prevalence is likely to be higher than international estimates.

Challenges and issues for people with an intellectual disability engaging with the criminal justice system

Communication barriers

The nature of intellectual disability results in the individual having difficulties absorbing new information, learning new skills, remembering information, processing information, developing coping and problem-solving mechanisms, especially when placed in new and challenging situations. This creates particular challenges for the individual when they become involved in the complex criminal justice system.

Intellectual disability can negatively affect a person’s ability to communicate. This can mean that they will have problems understanding and responding to instructions – for example, from a police officer, giving accurate accounts of events, understanding legal matters, and, indeed, defending themselves verbally. They may, therefore, come across as uncooperative, non-compliant, or even indicating guilt in their manner.

They may be confused about dates, times and places, and may find it difficult to recall or describe sequences of events. Gulati (2021)¹²⁷ emphasises that ‘even a modest degree of cognitive impairment has been shown to have a reasonable impact on an individual’s ability to deliver clear, complete and comprehensive accounts of events to legal authorities’. They may, for example, fail to appreciate and understand the importance of directions given to them or restrictions with which they are expected to comply. People with an intellectual disability may also be more likely to find it more difficult to fully understand their rights – for example, the right to silence – and may more easily be encouraged to waive those rights.

US research¹²⁸ suggests that people with an intellectual disability have a considerably higher probability of arrest by police. A cognitive disability may affect compliance and other behaviours resulting in escalation of tensions and increased likelihood of arrest. Without proper training, criminal justice personnel may misinterpret the conduct of individuals with mental health difficulties or ID as intentionally disrespectful or disobedient, with resulting avoidable involvement with the criminal justice system.

Acquiescence and suggestibility

Some people with intellectual disability may be prone to being suggestible and acquiesce to suggestions or signals being offered by someone in authority.¹²⁹ Their urge to please others combined with poor understanding may lead them to agree rather than disagree, regardless of the real facts involved. This can, and has, resulted in false confessions¹³⁰, false self-incrimination, and – in some cases – conviction. Some persons with ID may also

be prone to confabulation and the creation of false narratives.

Sensory-stimulating behaviours

Some people with intellectual disability, particularly those with co-occurring autism, may engage in sensory-stimulating behaviours such as rocking, hand-flapping or spinning as a result of difficulties in processing sensory signals in order to relieve anxiety or to provide sensory stimulation¹³¹. These behaviours can sometimes be interpreted as challenging, aggressive acts. People with intellectual disability and autism can find busy, loud, crowded, brightly lit criminal justice environments stressful, and overwhelming, which is likely to compound their already stretched ability to engage and communicate.

Service-level barriers

While there have been some improvements in physical access to criminal justice system facilities, many of these environments are frenetic, busy and possessing of physical and security barriers that can be extremely challenging, not only to people with ID, but also to others with physical or sensory disabilities. These are compounded within the prison system.

The prison environment

The prison environment within which persons with a disability can be incarcerated presents considerable challenges and barriers for those concerned. These difficulties apply across the whole range of people with disabilities. Research conducted by the Irish Penal Reform Trust found that:

Disabled people face challenges in all areas of prison life, from navigating the prison environment to engaging with prison

123 Young S. et al (2013) The effectiveness of police custody assessments in identifying suspects with intellectual disabilities and attention deficit hyperactivity disorder. *BMC Med.* 2013 Nov 21;11:248. doi: 10.1186/1741-7015-11-248. PMID: 24261542; PMCID: PMC3879086.

124 Murphy, M. et al (2000) A Survey of the Level of Learning Disability Among the Prison Population in Ireland. Dublin. Department of Justice, Equality and Law Reform. http://www.iprt.ie/files/learning_disability_report.pdf

125 Assessments included the Kaufman Brief Intelligence Test (KBIT), the Wide Range Achievement Test, the Vocabulary sub test from the Weschler Adult Intelligence Scale- Revised, and the National Adult Prisoner Survey https://www.iprt.ie/site/assets/files/5983/learning_disability_report.pdf

126 Gulati, G., Murphy, V., Clarke, A., Delcellier, K., Meagher, D., Kennedy, H., Fistein, E., Bogue, J. and Dunne, C.P. (2018), “Intellectual disability in Irish prisoners: systematic review of prevalence”, *International Journal of Prisoner Health*, Vol. 14 No. 3, pp. 188-196. <https://doi.org/10.1108/IJPH-01-2017-0003>

127 Gulati, G. et al (2021) Challenges for people with intellectual disabilities in law enforcement interactions in Ireland; the-matic analysis informed by 1537 person-years’ experience. *International Journal of Law and Psychiatry*. Vol.75 March-April 2021, <https://doi.org/10.1016/j.ijlp.2021.101683>

128 McCauley, E.J. (2017), The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender. *American Journal of Public Health* 107, 1977_1981, <https://doi.org/10.2105/AJPH.2017.304095>

129 McNamee, G. (2017) Supports for Offenders with Learning Disabilities in the Irish Judicial System: A Critical Review. *Irish Journal of Applied Social Studies*. Vol. 17: Iss. 1, Article 8. <https://arrow.tudublin.ie/ijass/vol17/iss1/8>

130 Gulati cites the 1997 Dean Lyons case in which the suspect confessed to two murders that he had not committed.

131 Marshall-Tate K et al (2019) Learning disabilities: supporting people in the criminal justice system. *Nursing Times* [online]; 115: 7, 22-26. <https://www.nursingtimes.net/roles/learning-disability-nurses/learning-disabilities-supporting-people-in-the-criminal-justice-system-17-06-2019/>

*services, to complying with prison rules and discipline and in reintegrating in their communities after prison. The experiences shared by prisoners with disabilities over the course of this research have made it clear that having a disability makes prison significantly more difficult to navigate.*¹³²

The research also revealed that prisoners with disabilities had a very poor understanding of their rights and were unaware of the obligations on prison authorities to provide them with reasonable accommodation and accessibility related to their disability.

Coercion, exploitation and undue influence

Persons with an intellectual disability may sometimes be drawn into criminal activity in order to achieve social or group acceptance¹³³. Equally, they may be targeted by criminal elements and coerced into cooperating in illegal activities, such as allowing their residence to be used for illegal purposes. Even where the individual has some understanding of the fact that an activity is illegal, they may not have the skills necessary to resist undue influence or threat. Such involvement in crime may occur without any full appreciation of the level of criminality involved or of the possible consequences for the individual.

Sexual abuse

Sexual abuse perpetrated by persons with intellectual disability, usually of other people in residential care settings, such as the Donegal ‘Brandon’ case, has evoked considerable concern in Ireland in recent years. While it may be wrong to portray such abuse as ‘criminal’ on the part of the perpetrator (given the likelihood of significant reduced decision-

making capacity), a presumption of capacity required under the Assisted Decision-Making (Capacity) Acts would require a considered approach. Also, while it is clear that persons and institutions other than the perpetrator are highly likely to have been negligent, it is important to consider whether there are learnings that can be drawn from such occurrences.

The National Safeguarding Office (NSO) Annual Reports¹³⁴ provide the main sources of data regarding abuse of vulnerable adults in Ireland. Each annual report provides information regarding the level of reported abuse, the types of abuse, the age of victims, the settings of abuse, by whom the referrals were made, and the persons allegedly causing the concerns. While it is difficult to extract accurate data from Annual Reports regarding the extent of sexual abuse perpetrated by at-risk adults on other at-risk persons, there are indications that sexual abuse within institutional settings is predominantly committed by service users.

International studies¹³⁵ indicate that other users are twice as likely to be responsible for the sexual abuse of other at-risk service users as compared to care professionals and staff. There is an understanding that lack of sexual knowledge, poor social skills, limited opportunities and sexual naivety results in an increased risk of people with intellectual disability committing sexual abuse and sexual crimes. Equally, as noted earlier, there is evidence for the linking of experience as a victim of sexual violence with later experiences as a sexual offender. It has been suggested that the lack of sexuality and relationship education among both young people and adults with disabilities can contribute to the risk of such offending.¹³⁶

People with autism and the criminal justice system

People with autism can experience difficulties in their interactions with the justice system, particularly in their interactions with police, as victims or witnesses of crime, as offenders or suspected offenders, or as citizens seeking assistance from police¹³⁷. Individuals with autism present with a number of social communication differences that can impact their interactions with people generally as well as with people in the criminal justice system. These differences can lead to misunderstandings when communicating, on the part of the autistic person and also on the part of the person they are interacting with. For example, some autistic individuals find it difficult to maintain eye contact during conversation, which may be misinterpreted by police as lack of interest, or as a signal of deception. Some individuals with autism may also interpret speech literally leading to misunderstandings when other people’s communications are not clear or direct – for example, when joking behaviour is used or metaphors or figures of speech. They may also have difficulty in understanding other people’s intentions and can be vulnerable to manipulation and coercion, as discussed earlier. Such social communication differences may sometimes lead to misunderstandings and increased vulnerability in the context of police interactions and interactions with other criminal justice system personnel.

Young people with an intellectual disability

People with an intellectual disability generally are more likely to be arrested, convicted, sentenced to prison and then, victimised in prison. Once in the criminal justice system, these individuals are less likely to receive probation or parole and tend to serve longer

sentences due to an inability to understand or adapt to prison rules.

International studies¹³⁸ suggest that young people with an intellectual disability are over-represented in the criminal justice system. There is a danger that such young people can become trapped in a cycle of continual police contact as a result of failing to comply with directives.

Addressing this issue within the criminal justice system requires that the personnel involved are trained to interact and engage in a manner that recognises the particular challenges involved for the young people concerned and thereby reduces the risk of escalation.

People with mental health difficulties and the criminal justice system

The prevalence of mental health issues among people who interact with the criminal justice system and, in particular, those within the prison system is well described and recorded. This includes people who are experiencing both physical, sensory and/or intellectual disabilities in addition to mental health difficulties. Not all those who are incarcerated find themselves in prison and, in Ireland, a proportion are confined for varying periods to the Central Mental Hospital.

A 2021 report of the Inspector of Mental Health Services on Access to Mental Health Services for People in the Criminal Justice System (2021)¹³⁹ identified the many serious shortcomings that exist in these services, the unequal and inadequate access to these services by offenders, and the breaches of the human rights of offenders in this regard. It points to the reality that we still have people who are severely mentally ill locked in isolation units and other areas of prisons awaiting mental health care in appropriate settings, in particular in the Central Mental Hospital.

132 Irish Penal Reform Trust (2020) Making Rights Real for People with Disabilities in Prison, https://www.iprt.ie/site/assets/files/6565/people_with_disabilities_in_detention_-_single_pages.pdf p.57.

133 Salekin, K. et al (2010) Offenders with Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment. *Journal of Mental Health Research in Intellectual Disabilities*, 3:97-116, 2010 DOI: 10.1080/19315861003695769

134 See, for example, HSE National Safeguarding Office. Annual Report 2020, <https://www.hse.ie/eng/about/who/social-care/safeguardingvulnerableadults/nationalsafeguardingofficereport2020.pdf>

135 See, for example, Amelink, Q., Roozen, S., Leistikow, I., & Weenink, J. W. (2021). Sexual abuse of people with intellectual disabilities in residential settings: a 3-year analysis of incidents reported to the Dutch Health and Youth Care Inspectorate. *BMJ open*, 11(12), e053317. <https://doi.org/10.1136/bmjopen-2021-053317>

136 Davis, L.A. (n/d), Victim or Offender? People with I/DD Accused of Sex Offending Behaviors. <https://www.elevatustraining.com/victim-or-offender/>

137 Vicki Gibbs, Abigail M. A. Love, Ru Ying Cai & Kaaren Haas (2021) Police interactions and the autistic community: perceptions of procedural justice, *Disability & Society*. <https://www.tandfonline.com/doi/abs/10.1080/09687599.2021.2007359>

138 Richards, K. & Ellem, K. (2018): Young people with cognitive disabilities and overrepresentation in the criminal justice system: service provider perspectives on policing, *Police Practice and Research*. <https://doi.org/10.1080/15614263.2018.1473771>

139 Finnerty, S. (2021) Access to mental health services for people in the criminal justice system. Dublin. Mental Health Commission. <https://www.mhcirl.ie/sites/default/files/2021-11/Access%20to%20mental%20health%20services%20for%20people%20in%20the%20criminal%20justice%20system%20FINAL.pdf>

“This fundamentally breaches their human rights and we have been rightly criticised by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) for this”.¹⁴⁰

The report further notes that in some prisons, the in-reach teams are substantially under-resourced and that the waiting list for a place in the Central Mental Hospital continues to grow and that catchment area restrictions mean that homeless people have insurmountable difficulties in accessing local mental health care following release and are often lost to follow-up and likely to reoffend.

Prisoners with mental health difficulties

Prisons must cater for cohorts of prisoners with diagnoses of psychosis, PTSD, anxiety, dementia, head injury, ADHD, intellectual disability, and personality disorder. Some 70% of people who come to custody have an active addiction and, in many cases, that addiction has arisen out of self-medicating against the effects of childhood trauma. When the addiction leads to shoplifting and drug dealing, for example, the person can end up in a custodial setting.¹⁴¹

In addition to recommending new, integrated and more focused policy approaches, the Report of the Inspector of Mental Health Services report recommends, inter alia, that prisoners with severe mental health difficulties should have timely access to treatment; that gardaí be provided with mental health advice, training and assistance at pre-arrest, arrest, custody and initial court hearing stages; that a comprehensive pre-arrest and court diversion service be provided; and that a specialist team be created that would accept referrals for assessment for people with intellectual disability in the prisons.

The Final Report of the High Level Task Force to consider the mental health and addiction challenges of those who come into contact with the Criminal Justice Sector¹⁴² made a

number of important recommendations, including, in particular:

- The proposed extension and expansion of the Adult Caution Scheme to prevent a ‘person in crisis’ from entering the criminal justice system and instead be signposted to appropriate health services (Recommendations 1.1, 1.2 and 1.3).
- Where a person has a mental health or addiction problem, the promotion of flexible responses to individual cases that maximise opportunities to divert people away from the criminal justice system (Recommendation 1.4).
- Increased training and reforming guidelines and practices for An Garda Síochána to ensure a more progressive, empathic and inclusionary approach including with regard to mental health, addiction, homelessness, lack of maturity or other circumstances that may contribute to some offending behaviours (Recommendations 1.6 and 1.8).
- Full resourcing of the pilot crisis intervention team in Limerick and development of the concept of “community hub” as focus for providing assistance to people who come to Garda attention (Recommendation 1.9).
- Expansion of spent convictions legislation and recognition of the impact of previous convictions history on a person’s potential ability to be diverted (Recommendation 1.13).
- Recognition of importance of dual diagnosis services nationally to assist diversionary practices (Recommendation 1.21) and decision to pilot a dual diagnosis programme within prison (Recommendation 2.14).
- Prisoners should have timely access to the full range of specialist forensic mental health services where clinically required (Recommendation 2.1).

- Every person with mental health difficulties coming into contact with the forensic system should have access to comprehensive stepped (or tiered) mental health support that is recovery-orientated and based on integrated co-produced recovery care plans supported by advocacy services as required (Recommendation 2.7).
- The piloting and establishment of a Dual Diagnosis programme and specialist service across the prison estate with the appointment of a Mental Health & Addiction Lead within the Irish Prison Service (Recommendations 2.13, 2.14 and 2.15).
- Development of a problem-solving court framework, such as the Drugs Court, to enable positive treatment and behavioural outcomes for persons appearing before the Court (Recommendation 3.3).
- Training for all staff across the criminal justice sector on mental health (Recommendation 3.5) and introducing supports for judiciary to support them in applying alternatives to imprisonment (Recommendation 3.8).
- The expansion of the Prison In-reach and Court Liaison Service (PICLS) to all prisons nationwide (Recommendation 3.14).

People with disabilities being interviewed as suspects in Garda stations

Research published in 2021,¹⁴³ which focused on the operation in practice of the right to silence in Garda interviews, is relevant in the context of how people with an intellectual disability and/or those experiencing mental health difficulties are treated by gardaí during interrogation.

Participants in the study reported that suspects with intellectual disabilities or mental health issues are sometimes more susceptible to Garda interviewing tactics, which can range from rapport building to threatening to arrest family members or stop social welfare payments. Participants reported vulnerable suspects may therefore be more likely to waive their right to silence, and the important protection therein.

The report identified some positive changes introduced in more recent years, including, in particular, the operationalisation in 2014 of the Garda Síochána Interview Model. This involved a shift in how interviews are conducted, moving from a process based on seeking confessions, to an information-gathering approach. The report highlighted the need for ongoing Garda training in interview techniques.

A 2023 book, Criminal Defence Representation at Garda Stations¹⁴⁴, has drawn attention to the fact that little has been done in Garda stations in Ireland to formalise the requirement of Article 13 of the UNCRPD which requires “effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations”.

The report notes that the rules and procedures about how a person should be treated while in custody state (in Section 22)¹⁴⁵ that those with a ‘mental handicap’ should receive the same safeguards as children (under 17 years), including the possible presence of a parent/guardian, other adult relative, or other ‘responsible adult’ during the Garda interview. In the case of an interview involving a person with a ‘mental handicap’, which remains undefined in the legislation, if a ‘responsible adult’ is to be present the Regulations require, as far as practicable, that it be a person ‘who has experience in dealing with the mentally

140 Ibid. p.5

141 Caron McCaffrey

142 Final Report of the High Level Task Force to consider the mental health and addiction challenges of those who come into contact with the Criminal Justice Sector <https://www.justice.ie/en/JELR/Pages/final-report-of-the-high-level-task-force-to-consider-the-mental-health-and-addiction-challenges-of-those-who-come-into-contact-with-the-criminal-justice-sector>

143 Yvonne Daly, Aimée Muirhead, Ciara Dowd, (2021), The Right to Silence and Related Rights in Pre-Trial Suspects’ Interrogations in the EU: Legal and Empirical Study and Promoting Best Practice Ireland, <https://empriseproject.files.wordpress.com/2022/06/ab912-emprise-ireland.pdf>

144 Vicky Conway and Yvonne Daly (2023), Criminal Defence Representation at Garda Stations, <https://www.bloomsburyprofessional.com/ie/criminal-defence-representation-at-garda-stations-9781526522627/> Chapter 6 and Chapter 8.

145 Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987

handicapped'. The report notes that the lack of detailed, modernised regulation of this matter (including the use of outdated terminology) is problematic. This is a critically important point in the context of the recently commenced assisted decision-making legislation (discussed in detail in Chapter 8 of this report) with its focus on the presumption of capacity and the provision of decision-making supports to enable a person to maximise their decision-making capacity.

The report further notes (6.35) that, while enhanced training for Gardaí could help significantly in this space, it must be remembered that, for various reasons, a detainee may not have received a formal diagnosis of any specific disability, or they may have a diagnosis/diagnoses which they are unwilling to disclose.

Clearly, An Garda Síochána should consider how the principles of the ADMC Acts 2015 and 2022 can be implemented in the organisation and in its dealings with the public. Equally important is the need for appropriate mechanisms to support people with mental health difficulties who do not have a disability per se.

Parents with disabilities in the child care legal system

It would be wrong to view parents with disabilities who are required or choose to engage with the child care legal system as being criminal. Their status as respondents is quite different to that of defendants. However, it is reasonable to suggest that their position closely resembles that of people who are accused of wrong-doing, and that their experience of the system may for them be one in which they stand as accused of an offence.

The Child Care Law Reporting Project (CCLRP)¹⁴⁶ points to the fact that the role of the courts can seem contradictory. On the one hand, they perform an inquisitorial role,

inquiring into the appropriate protection and care for children while, on the other hand, they are engaged in an adversarial system where the State, through Tusla, is seeking to prove that on the balance of probabilities the parents have failed in their duty towards their child or children, and where the parents are fully entitled to contest this. Child care court proceedings are, therefore, sometimes described as hybrid – combining aspects of both an inquiry and an adversarial process.

The CCLRP identified parental disability as a major factor in one in six cases. The vast majority of these involved cognitive disability or mental health problems, and sometimes both. The mental health of one or both parents, usually the mother, was the largest single factor in 10% of all cases. A cognitive disability on the part of the parent featured in 7.5% of cases. This was considered likely to be an under-representation, as in some cases where alcohol abuse, drug abuse or severe neglect dominated the proceedings, undiagnosed cognitive disability may also have been a factor.

The CCLRP Report also pointed to issues with the capacity of parents with mental health and/or cognitive disability to engage in court proceedings, or, indeed, to consent to voluntary care where that occurred. The report noted that there was only patchy evidence of such parents receiving appropriate assistance in engaging in the legal proceedings.

In discussing the provision of legal and advocacy supports to parents with intellectual disability and/or mental health issues engaging in in the child protection court system it has been noted¹⁴⁷ that the system as it operates makes it difficult for such parents to engage with the process in a meaningful manner, e.g., insufficient time to consider documentation and present their perspective as parent and inadequate provision for independent advocacy (as distinct from that provided by a lawyer). There is a power

imbalance in the system that is likely to have a significant impact on the ability of parents with an intellectual disability and/or experiencing mental health difficulties to have their voice heard.

The impact of accommodation and homelessness on re-offending

Accommodation and homelessness play a role in re-offending¹⁴⁸ and while accommodation cannot be looked at in isolation, targeted support with accommodation on release that is based on an awareness of the offender's housing circumstances pre-custody may reduce recidivism. Even though the Irish Prison Service funds the Irish Association for Social Inclusion Opportunities (IASIO) to provide resettlement services for prisoners, unplanned releases or prisoners on short sentences may not receive support in time and CISs had queries from such callers who had difficulties accessing accommodation and social welfare entitlements.

Research shows that that inadequate accommodation and homelessness play a role in re-offending.¹⁴⁹ While accommodation cannot be looked at in isolation, targeted support with accommodation on release that is based on an awareness of the offender's housing circumstances pre-custody may reduce recidivism. Even though the Irish Prison Service funds the Irish Association for Social Inclusion Opportunities (IASIO) to provide resettlement services for prisoners, unplanned releases or prisoners on short sentences may not receive support in time. Sage Advocacy has encountered clients who have difficulties in accessing accommodation on release from prison.

Overview and Conclusion

This chapter has explored how at-risk adults and, in particular, people with intellectual disability and people with autism interact with and are treated within the criminal justice

system as suspects, perpetrators or prisoners. It is clear that considerable challenges continue to exist for both the individuals concerned and for the criminal justice system itself. While this chapter has looked primarily at the situation of people with a disability who are suspected, accused or found guilty of a crime, it has also noted the difficulties of people who encounter the legal and justice system in other ways, such as respondents in child care proceedings. Many of the challenges faced by people with a disability in the criminal justice process are mirrored in these other settings.

It is clear that mental health is an important issue in any discussion of crime, punishment and justice. It is evident that the supports and services that are required in this regard are seriously lacking.

The current understanding is that there are psychological and sociological reasons why people with disabilities – in common with people who are not disabled – commit crimes. Each individual's unique personal life experiences, environmental influences, and individual differences, circumstances and opportunities contribute to whether a person will engage in crime.

Intellectual disability features large in any discussion of crime and disability. There is considerable evidence that suggests that a key issue here is the scale of undiagnosed and/or unrecognised mild intellectual disability. The hidden or easily dismissed nature of mild intellectual disability can increase the problems and challenges faced by people in functioning and being treated appropriately within the criminal justice system.

There are also issues and challenges that may arise for people with autism arising from the environmental factors that frequently come into play in the physical settings where the criminal justice system operates, such as the confused and sometimes chaotic

146 Coulter, C. (2015) Final Report. Child Care Law Reporting Project. https://www.childlawproject.ie/wp-content/uploads/2015/11/CCLRP-Full-final-report_FINAL2.pdf

147 See National Advocacy Service for People with Disabilities Submission to Department of Children and Youth Affairs- Issues facing parents with disabilities in child protection cases (for Review of Child Care Act 1991 process). <https://assets.gov.ie/73959/75aa7e7889d041d18bfc5482a99255c6.pdf>

148 Williams, K., Poyser, J., Hopkins, K., 2012, 'Accommodation, homelessness and re-offending of prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) survey', Ministry of Justice, UK Research Summary 3/12. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/278806/homelessness-reoffending-prisoners.pdf

149 Williams, K., Poyser, J., Hopkins, K., 2012, 'Accommodation, homelessness and re-offending of prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) survey', Ministry of Justice, UK Research Summary 3/12.

nature of public spaces, Garda stations, and prisons. There is clearly a need to ensure that relevant staff are trained to recognise and respond appropriately to incidents and interactions involving individuals with autism. In addition, there is a strong case for providing individuals who experience sensory issues with appropriate adjustments and accommodations in the sensory environment.

The relatively high proportion of people with disabilities within the prison population is a major cause for concern. There is internationally a growing belief¹⁵⁰ that far more must be done in order to ensure that alternative diversionary approaches are developed and provided, and that prison becomes an option of last resort.

The next chapter will discuss the provisions of the Assisted Decision-making Acts 2015 and 2022 and will explore the potential of this legislation to enhance access to justice for at-risk adults.

¹⁵⁰ See for example in the United States – Legal Reform for the Intellectually and Developmentally Disabled. <https://iridd.org/about-iridd-legal-reform/>

Chapter Eight

The Role of the Assisted Decision-Making (Capacity) Acts in Enhancing Access to Justice

Introduction

The provisions of the Assisted Decision-Making (Capacity) Act 2015 (ADMC Act 2015), commenced in April 2023, have particular relevance for access to justice by people with an intellectual disability and older people with reduced decision-making capacity as a result of dementia, stroke or traumatic injury and for people experiencing mental health difficulties. The Act introduces a new legal framework for supported decision-making in Ireland and includes statutory principles and practical supports for persons who may have difficulties with their decision-making capacity. The commencement of the Act has brought about an end to wardship in Ireland. The Decision Support Service (DSS) has been established within the Mental Health Commission to oversee the operation of the Act.

It is widely accepted that access to justice in legal or quasi-legal contexts contributes to the protection of people's human and legal rights and thus results in a fairer society. However, it is also the case that many of the issues experienced by at-risk adults relating to health and social care and their right to be free from abuse and exploitation generally have a legal aspect. For example, any failure to recognise the agency and legal capacity of people with reduced decision-making capacity is fundamentally a denial of their access to justice. While this is relatively obvious in the case of decisions relating to wardship or detention under mental health legislation, it is also relevant in the case of decisions about places of care where a person is being de facto deprived of their liberty. Clearly, there needs to be a balance of power not only

between professionals and people seeking protection or redress through the formal legal system but also in ensuring that there is fairness and justice in people's access to health and social care services. In the formal legal system, the imbalance in power can be addressed to some extent by the availability of free and low-cost legal services to those who need the advice of a qualified solicitor or barrister but who cannot afford the costs associated with it. In the context of health and social care provision, other interface and support mechanisms are required, for example, independent advocacy or social work support. For people with reduced decision-making capacity, engagement with legal and quasi-legal systems and with the health and social care infrastructure generally should be greatly enhanced by the provisions of the ADCM Act 2015. This chapter outlines some of the main provisions of the Act and its role in enabling access to justice both in the courts and in health and social care domains.

Focus of ADCM Act 2015

The ADCM Act 2015 applies to all regardless of physical or mental health/disability/age. It requires that, when there are doubts about decision-making capacity, assessment should be done at highest level of functioning and only if it is necessary. It puts the onus/burden of proof of lack of decision-making capacity on the person who is alleging lack of capacity. It requires that the decision-making capacity be construed functionally – that is, it is time specific and issue specific and refers to a person's ability to understand at a time a decision has to be made as well as the nature

and consequences of the decision to be made by a person in the context of available choices at that time. The fact that a person lacks capacity in respect of a decision on a particular matter at a particular time does not prevent them from being regarded as having capacity to make decisions on the same matter at another time. Also, the fact that a person lacks capacity to make a decision on a particular matter does not prevent him/her from being regarded as having capacity to make decisions on other matters.

The legislation further requires that a person is not to be regarded as unable to understand information relevant to a decision if they are able to understand an explanation of it given in a manner appropriate to their circumstances and communication style – clear language, visual aids or any other appropriate means. The fact that a person is able to retain information relevant to a decision for a short period only does not prevent him/her from being regarded as having capacity to make the decision. Under the legislation, a person will be regarded as lacking capacity to make a decision only if they are unable to undertake any one of the following four aspects of the decision-making process:

- (i) Understand the information relevant to the particular decision;
- (ii) Retain that information long enough to make a voluntary choice;
- (iii) Use or weigh that information as part of the process of making the decision;
- (iv) Communicate a decision by any means (including sign language/assistive technology).

Here, it is important to distinguish between decision-making autonomy and autonomy of execution in that a person may have the capacity to make a decision but may not be able to execute that decision without additional support.

Key provisions of the Act

The three main purposes of the Act are to: (i) improve decision supports for people who lack decision-making capacity; (ii) update the procedure for creating, registering and the coming into effect of an Enduring Power of Attorney (EPA)¹⁵¹ and (iii) introduce Advance Healthcare Directives into Irish law. It is the first piece of Irish legislation to use a ‘will and preferences’ approach in contrast to the ‘best interests’ approach typically used in supporting people who lack decision-making capacity.

Depending on a relevant person’s¹⁵² level of capacity, the Act creates new decision support roles: a Decision-Making Assistant, a Co-Decision-Maker, or a Decision-Making Representative. Respectively, they may be appointed to assist a Relevant Person to make a decision, to make a decision with the Relevant Person, or to make a decision on behalf of the Relevant Person. These different levels of decision supporters with increasing levels of function and responsibility are aimed at enabling a person to receive support at the appropriate level to ensure that there is limited restriction on their autonomy. It should be noted that, although the Act is titled “Assisted Decision-Making”, decisions will not always be “assisted”, as it will be possible for the Court or a Decision-Making Representative to unilaterally make decisions regarding a Relevant Person’s personal welfare and/or their property and affairs. The UN Committee on the Rights of Persons with Disabilities has interpreted Article 12 of the Convention as prohibiting this kind of unilateral decision making, which the Committee called “substitute decision-making”.¹⁵³ However, when ratifying the Convention, Ireland included a declaration and reservation to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards”.¹⁵⁴

Under Section 37 of the Act, the Court can make one of two possible declarations as to capacity, that the Relevant Person lacks capacity: (i) unless a Co-Decision-Maker is appointed or (ii) even if the assistance of a Co-Decision-Maker were made available. In the case of the latter, the Court may make the decision or appoint a Decision-Making Representative.

Section 38 applies if there is no Co-Decision-Maker available or a co-decision-making agreement has not been registered. Under Section 38, the Court can make a decision for the Relevant Person, in the form of a decision-making order.

Under Section 48, practitioners may apply for interim orders in relation to a Relevant Person where an application has been brought, such as a request for a capacity review, but has not yet been determined.

Under Section 49 of the Act, it is possible to ask the Court to review a capacity declaration that it has made under Section 37. Section 37 capacity declarations will be reviewed every twelve months, or every three years if the Relevant Person is unlikely to regain capacity, but a section 49 application can request a review at any time.

Section 50 empowers the Court to order expert reports, such as medical reports or financial reports, to assist the Court in reaching a decision.

Enduring Power of Attorney

It is already possible to create an Enduring Power of Attorney (EPA) under the Powers of Attorney Act 1996, and these relate to a donor’s property and affairs as well as to what were termed personal care decisions.¹⁵⁵ The 2015 Act brings Enduring Powers of Attorney under the supervision of the DSS. The enduring power is created via a written instrument that is registered by the Attorney with the Director of the Decision Support Service. An enduring power of attorney shall not enter into force until –

- the instrument creating the EPA has been registered;
- the donor lacks capacity in relation to one or more of the relevant decisions that are the subject of the power;
- the Director has been notified that the donor lacks capacity;
- the Director accepts the notification of lack of capacity of the donor.

An Enduring Power of Attorney cannot cover decisions regarding consent to or refusal of life-sustaining treatment. (See Section 51 (e) of 2022 Act). Advance Healthcare Directives

Part 8 of the Act is titled Advance Healthcare Directives (AHDs) and, as the name suggests, these relate only to healthcare related decisions. The “directive-maker” is the person who makes the directive when they have capacity regarding their wishes on future healthcare treatment, which is defined as an intervention that is or may be done for a therapeutic, preventative, diagnostic, palliative or other purpose related to the physical or mental health of the person, and includes life-sustaining treatment” (Section 4(f) of the Amendment Act 2022).

A directive must be made in writing and “writing” includes “voice and video recording and speech recognition technologies”. Section 83 of the 2015 Act explains the two-pronged purpose of AHDs as being to: (i) enable people to be treated according to their “will and preferences”; and (ii) provide healthcare professionals with information on the person’s “will and preferences”.

Section 84 states that anyone over 18 with capacity can make an AHD. Such a Directive will only take effect when the directive-maker lacks capacity. It must clearly define treatment to be refused and the circumstances in which such treatment is to be refused. Section 85(3) states that an AHD is not applicable to life-sustaining treatment unless this is explicitly stated by the directive-maker in the AHD, for example with the wording “even if his or

¹⁵¹ An EPA will now be registerable when a person still has capacity and will come into effect at a later stage when the person lacks capacity and the attorney has notified the Director and the Director has accepted the notification.

¹⁵² The Act uses the term ‘Relevant Person’ to refer to a person whose decision-making capacity is in question.

¹⁵³ <https://www.ohchr.org/Documents/HRBodies/CRPD/GC/DGCArticle12.doc>

¹⁵⁴ Joint Committee on Disability Matters Dáil Debate, 20th May 2021, https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_disability_matters/2021-05-20/debate/mul@/main.pdf

¹⁵⁵ It should be noted that a number of personal care decisions contained in Section 4 of the 1996 Act have not been carried over to ‘personal welfare’ decisions in the ADMC Act 2015

her life is at risk”. Section 85(4) states that an AHD does not apply to basic care, which is defined as including warmth, shelter, oral nutrition and hydration, and hygiene.¹⁵⁶ While basic care does not include artificial nutrition or hydration, an AHD can state that artificial nutrition or hydration are not to be given.

Section 86(2) excuses healthcare professionals from any civil or criminal liability whether or not they comply with AHDs. Section 86(2)(a) states that they cannot be liable for complying with an AHD provided they had “reasonable grounds to believe, and did believe, that the AHD was valid and applicable”.

Wardship

The repeal of the wardship system provided for under Section 5 of the ADMC Act 2015 is widely regarded as a significant step forward in the context of Ireland’s national and international commitments to protect a person’s fundamental human and legal rights. The practice in making a person a ward of court has typically not given due respect to the right of the person to exercise control over their affairs to the greatest extent possible. The 2015 Act brings about fundamental and necessary changes in the manner in which people who lack decision-making capacity are cared for and supported. People, irrespective of their decision-making capacity, will have the right to participate when any decision is being made that involves them and they should be involved as far as practicable in the formation of any decision pertaining to their care.

The Act makes provision for a review of all existing wards within a period of three years from date of commencement of Part 6 of the Act – i.e., by 26 April, 2026; and all existing wards are to be discharged by this date. Review can be prompted in a number of ways, by various parties:

- Application by ward or the committee of the ward
- With the consent of the court
 - A relative or friend of the ward (where a relationship of trust exists)

- Such other person who is deemed to have sufficient interest or expertise in the welfare of the ward

Decision Support Service

The functions of the Director of the DSS, outlined in Section 95 of the Act, include that he or she will provide information to Decision-Making Assistants, Co-Decision-Makers, Decision-Making Representatives, Designated Healthcare Representatives and Attorneys in relation to the performance of their functions. Section 95(1)(e) states that the Director will supervise compliance by Decision-Making Assistants, Co-Decision-Makers, Decision-Making Representatives and Attorneys.

Functions of the Director of the Decision Support Service

The main functions of the DSS Director will be:

- To promote public awareness of the Act and matters (including the UNCRPD) relating to the exercise of their capacity by persons who require or may shortly require assistance in exercising their capacity;
- To promote public confidence in the process of dealing with matters that affect persons who require assistance;
- To provide information to relevant persons in relation to their options for exercising capacity;
- To provide information to decision-making assistants, co-decision-makers, decision-making representatives, designated healthcare representatives, and attorneys in relation to the performance of their functions;
- To supervise in accordance with the Act, compliance by decision-making assistants, co-decision-makers, decision-making representatives and attorneys in the performance of their functions under the Act;
- To provide information in relation to the management of property and financial affairs to relevant persons

and to decision-making assistants, co-decision-makers, decision-making representatives and attorneys;

- To provide information and guidance to organisations and bodies in the State in relation to their interaction with relevant persons and all interveners;
- To identify and make recommendations for change in practices in organisations and bodies in which the practices may prevent a relevant person from exercising his/her capacity;
- To establish a website/or electronic means to disseminate information to members of the public to assist public to understand operation of the Act and the Director’s role in relation to it;
- To make recommendations to Minister on any matter in relation to the operation of Act;
- To establish and maintain a Register of:
 - Co-Decision Making Agreements
 - Decision Making Representation Orders
 - Enduring Powers of Attorney;
- To establish a panel of suitable persons willing and able to act as –
 - Decision-making representatives
 - Special visitors
 - General visitors and;
- To develop Codes of Practice for various interveners.

Codes of Practice have been published by the DSS for various interveners. A Code of Practice shall be admissible in legal proceedings where it appears to a court, tribunal or body concerned, conducting any proceedings that the provision of a Code of Practice, or a failure to comply with a Code of Practice is relevant to a question arising in the proceedings.

Under Section 96, the Director may investigate “either on his or her own initiative or in response to a complaint made to the Director by any person” “a Decision-Making Assistant, Co-Decision-Maker, Decision-Making Representative, Designated Healthcare Representative or Attorney”. Section 96(2) bestows power to the Director to summon witnesses to attend before him or her, examine witnesses on oath, require any such witness to produce any document in their control. Those who fail to comply “shall be guilty of an offence” under section 96(7). Part 9 outlines the Director’s powers to appoint Special Visitors, General Visitors, Court Friends, and Panels. A Special Visitor may or may not be a medical practitioner and has “particular knowledge, expertise and experience as respects the capacity of persons”. A General Visitor is a suitably qualified person appointed to “assist the Director in performing his/her supervisory function”.

Under the 2015 Act, it is possible for a person to specify what decisions they would like made about their person and or property in the event that they lack capacity, via an Enduring Power of Attorney or/and an Advance Healthcare Directive. In the event that a person does not have an EPA or an AHD, and they lack capacity, decision supports can be put in place. Depending on the severity of the lack of capacity function and degree of support needed, a Decision-Making Assistant, Co-Decision-Maker, or Decision-Making Representative could be appointed. That person may be a next-of-kin, but not purely by virtue of being a next-of-kin. It would be done via a Court application to be made a Decision-Making Representative or by signing an agreement with the Appointer to be a Decision-Making Assistant or Co-Decision-Maker (and registering that agreement with the DSS). If the Relevant Person does not have anyone who could or would step into one of these roles or who would not be a suitable person to act, the Court can make a decision for the Relevant Person or choose a Decision-Making Representative from nominees provided by the Director of the DSS.

¹⁵⁶ The ‘including’ category was inserted deliberately to catch any unforeseen care issues that would not come within the definition of ‘treatment’.

Guiding principles of the Act

Part 2 (Section 8) of the Act contains the Guiding Principles of the legislation. These principles guide interactions, decisions, and interventions with a person whose capacity is in question or will shortly be in question, and who may lack functional capacity to make a specific decision. The Guiding Principles will apply to all interveners (see below). As the principles are essentially human rights principles, they create best practice guidance for all interactions with a person whose capacity is in question, or may shortly be in question and also with a person who may be in vulnerable circumstances.

The Act contains nine principles¹⁵⁷, the critical baseline principle being that **everyone is presumed to have capacity unless the contrary is shown in accordance with the provisions of the Act** (Section 8 (2)). This ensures that each person is treated individually and that no cohort of people is automatically deemed to lack capacity.

Other important Guiding Principles contained in the Act – 8(3) to 8(9) – are:

- All practical steps taken to support decision-making;
- Respect for a person’s right to make an unwise decision;
- Intervention only when necessary;
- An intervention where required to be the least restrictive possible and which respects a person’s rights;
- Facilitate participation and the articulation of a person’s will and preferences;
- Consider the views of others who have a **bona fide** interest in the welfare of the person;
- Consider the likelihood of recovery and urgency of the matter;
- Maintain strict confidentiality in the collection and use of personal information.

A critically important provision of the ADMC Act is that an intervener should act at all times in good faith and for the benefit of the relevant person, and consider all other circumstances of which he or she is aware and that it would be reasonable to regard as relevant (Section 8 (7) (e) and (f)).

Supported decision-making

At the core of the 2015 Act is the principle (Section 8(3)) that a person **‘shall not be considered as unable to make a decision in respect of the matter concerned unless all practicable steps have been taken, without success, to help him or her to do so’**.

Under the legislation, in circumstances where a person may be finding it difficult to exercise their decision-making capacity, they are entitled to support to help them to make their own decisions. The type of support should be tailored to the person’s individual circumstances, their means of communication and to the specific decision to be made. There is a responsibility on all those involved to ensure that the person is provided with all reasonable supports to help them to make choices and decisions about matters that affect them.

Supporting decision-making includes providing relevant information and ensuring that all available options are explained in a manner that the person can understand, working to the person’s pace and giving the person enough time to understand and consider their options. It may include the use of communication aids, getting support from other people, using other professions and expertise, and engaging an independent advocate.

The ADMC Act 2015 provides for a range of Interveners, who can be appointed to support a person whose capacity is in question to make their own decisions regarding their personal welfare, property or affairs. All Interveners must follow the Guiding Principles set out in Section 8 of the Act when carrying out any action, decision or intervention relating to a person whose capacity is in question, or who

lacks capacity. Codes of Practice have been developed by the Decision Support Service for the Intervener roles.

The following is an indicative list of interveners:

- The Circuit Court and High Court
- A decision-making assistant, co-decision-maker, decision-making representative, attorney or designated healthcare representative
- A healthcare professional
- The Director of the Decision Support Service
- A special visitor or general visitor
- A Court friend
- Another person, in respect of whom the court is satisfied that such person is suitable, willing and able to assist the relevant person during the course of the hearing.¹⁵⁸ (This ‘another person’ can be an independent advocate).

A relevant person, or any person who has attained the age of 18 years and who has a **bona fide** interest in the welfare of a relevant person, may make an application to the court under Part 5 of the Act. This includes:

- The relevant person
- The DSS Director
- The spouse or civil partner of the relevant person
- A decision-making assistant for the relevant person
- A co-decision-maker for the relevant person
- A decision-making representative for the relevant person
- An attorney for the relevant person
- A designated healthcare representative for the relevant person

- A person who falls within paragraph (b) of Section 36(8) in respect of a relevant person (i.e. ‘another person, in respect of whom the court is satisfied that such person is suitable, willing and able to assist the relevant person during the course of the hearing.’)

Certain decision supporters under the 2015 Act are required to report to the DSS on their activities. Where there is a failure to report or the reporting is incomplete, or gives rise to concerns, the Director may take action against the decision supporter.

Complaints

An interested party may complain to the DSS Director about a decision supporter, and the Director may then investigate the complaint. The Director may also choose to investigate a decision supporter at her own initiative.

Complaints may arise on the basis that, **inter alia**, a decision supporter is acting outside of the scope of the agreement or court order or in breach of the 2015 Act¹⁵⁹, or that a decision supporter is unsuitable, or that the decision support is not appropriate to the capacity needs of the relevant person, or that the decision supporter is not acting in line with the guiding principles of the act.

As part of her investigation, the Director may commission a visitor or meet with the person being supported in their decision-making, summon witnesses, and may take evidence under oath.

Under the 2015 Act, where the Director deems a complaint to be well founded, she may apply to the Circuit Court for a determination in respect of the decision supporter, which may, in turn, order that decision supporter to no longer act in that capacity in relation to the Relevant Person.

Under the 2015 Act when a complaint is made to the Director of the Decision Support Service (DSS), she was required to undertake

¹⁵⁷ Sage Advocacy has developed a Quick Reference to the Guiding Principles, available at [guiding-principles-easy-reference_14012019.pdf](https://www.sageadvocacy.ie/guiding-principles-easy-reference_14012019.pdf) (sageadvocacy.ie)

¹⁵⁸ Section 36(8)(b) of the 2015 Act (included in amendment to Section 2(1) of the 2015 Act in the Assisted Decision-Making (Capacity) Amendment Act 2022).

¹⁵⁹ This is included in the 2022 Act under complaints for each of the decision supporters.

an investigation into the complaint. The 2022 Amendment Act introduces the option for the Director to review a complaint or investigate a complaint as she considers appropriate. This amendment allows the Director to form a view on a complaint from a review of same, without the need for a full investigation.

It is expected that the latter provision will be utilised in situations where a complaint is particularly comprehensive and presented with all the necessary supporting evidence such that the Director can form a view on the complaint without the need for an investigation. Similarly, it is expected that it may be utilised where a complaint is submitted that is considered to be frivolous, vexatious or manifestly unfounded, such that an investigation would be a futile waste of resources.

The Assisted Decision-Making (Capacity) Amendment Act 2022

The Assisted Decision-Making (Capacity) Amendment Act 2022¹⁶⁰, signed into law in December 2022 made important amendments to the 2015 Act, including, in particular, giving greater powers to the Director of the DSS with a view to ensuring that authority is vested as far as possible in the DSS, thereby reducing court applications on an already overburdened courts system. For example, the amendment to section 24(3)(ii) means that the Director of the DSS can make the determination to refuse to register a co-decision-making agreement if she has concerns. Similarly, the amendments to sections 27(4)4A and 75(7) empower the Director to remove co-decision-makers and attorneys due to incomplete reporting.

The 2015 Act provided that hearings under Part 5 were to be heard and determined otherwise than in public, i.e., *in camera*. This would have, *inter alia*, covered all proceedings relating to declarations as to capacity, appointment of Decision-Making Representatives and complaints against Decision-Making Representatives, among other matters. The 2022 Amendment Act has

introduced the right for any barrister, solicitor or person specified in regulations laid by the Minister, to report on the proceedings, provided that the report or decision does not contain any information that would enable the parties to the proceedings or any person to whom the proceedings relate to be identified.

Section 36 of the 2015 Act provides that prior to making an application to court under Part 5, the applicant must obtain the consent of the court to the making of the application. The section goes on to provide a list of persons who are not required to obtain leave. The 2022 Amendment Act has added an additional section to include 'being someone over the age of eighteen years, who has a *bona fide* interest in the welfare of the relevant person, as may be prescribed by regulations laid by the Minister'. This allows for the Minister to add to the list, should it become apparent in practice that there are omissions from the list, without the necessity for amendments to the legislation.

Under the 2015 Act, a Decision-Making Representative (DMR) is entitled to have his/her fair and reasonable expenses incurred in the performance of his/her duties paid out of the estate of the relevant person. Where the DMR is a professional, most likely appointed as a result of nomination from the DMR panel held by the Director, they are entitled to reasonable remuneration. The 2022 Amendment Act provides that the fair and reasonable expenses paid to DMRs must be either approved by the Director of the DSS or provided for by way of regulations made by the Minister. The regulations are also to provide for the circumstances in which the Director may authorise payments in excess of the prescribed limits.

The 2022 Act amends Section 56 of the 2015 Act to ensure that section 7(2) of the Lunacy Regulation (Ireland) Act 1871 shall remain in force for the purpose of any wardship proceedings in being prior to the commencement of the 2015 Act. However, the court may at the same time make an

Order under s.55(1), *viz.*, that a person either lacks capacity unless they have a co-decision maker (CDM), or that they lack capacity even with a CDM.

The 2022 Amendment Act provides for the insertion of new section 54A into the Principal Act to refer to "Assistance to ward during proceedings", which may allow the ward, if he or she has not instructed a legal practitioner, and subject to section 100(13), to be assisted in court by a court friend for the ward unless, subject to sections 100(14) and 103(15A), there is another person (in this section referred to as a 'court assistant') in respect of whom the court, having regard to the known will and preferences of the ward, is satisfied that such person is suitable, willing and able to assist the ward during the course of the hearing.

Assessment of capacity under the ADMC Act 2015

Under the 2015 Act, as already stated, everyone is presumed to have capacity at all times. In some circumstances there may be a reason to question a person's capacity to make a specific decision. Section 3(1) of the Act states that "A person's capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time".

Broadly speaking, the legislation is based on the premise that the person who requires the decision to be made will often be the best person to do the capacity assessment. This could be, for example, a lawyer, doctor, or a person providing financial services. Under the Act, there are also limited circumstances where the capacity assessment has to be undertaken by healthcare professionals, for example, during the process of creating an EPA. In line with the functional assessment approach (time specific and issue specific) and only when it is necessary to assess depending on the

particular decision to be made, generally it will be the person who needs the decision to be made who will carry out the assessment. The following are some indicative examples of who will do the capacity assessment:

- Consent to medical treatment – healthcare professional;
- Legal transaction (selling property, EPA, making a will) – solicitor handling the transaction;
- Financial transaction – financial services staff;
- Day to day decisions – carers and support personnel.

A statutory statement of capacity by a medical practitioner/healthcare practitioner may sometimes be required, for example, if an assessment is challenged

Need for objective capacity assessments

The comments of Mr Justice Baker are centrally relevant in the context of capacity assessment under the ADMC Act 2015. He highlighted the need for objectivity in capacity assessments and warned against what he called the 'protection imperative'.

"There is, I perceive, a danger that professionals, including judges, may objectively conflate a capacity assessment with a best interests analysis and conclude that the person under review should attach greater weight to the physical security and comfort of a residential home and less importance to the emotional security and comfort that the person derives from being in their own home. I remind myself again of the danger of the "protection imperative" identified by Ryder J in Oldham MBC v GW and PW (supra).¹⁶¹ These considerations underpin the cardinal rule, enshrined in statute, that a person is not to be treated as unable to make a decision merely because she makes what is perceived as being an unwise one.¹⁶²

160 <https://data.oireachtas.ie/ie/oireachtas/act/2022/46/eng/enacted/a4622.pdf>

161 <https://www.familylawweek.co.uk/site.aspx?i=ed703>

162 CC and KK v STCC [2012] EWCOP, <https://www.casemine.com/judgement/uk/5a8ff75060d03e7f57eab29a>

Also centrally relevant is the judgement by Ms Justice Laffoy in the F.K. case in 2008,¹⁶³ which stated that in assessing capacity, it is necessary to distinguish between a person's misunderstanding or misperception of the relevant information on the one hand and an irrational decision or a decision made for irrational reasons on the other hand. The former, she stated, may be evidence of lack of capacity and the latter is irrelevant to the assessment of capacity.

Jurisdiction of the courts

The Circuit Court has exclusive jurisdiction under the ADMC Act 2015 except in the following instances that will be determined by the High Court.

- Any decision regarding the donation of an organ from a living donor, where the donor is a person who lacks capacity;
- Where the application in connection with the withdrawal of life-sustaining treatment from a person who lacks capacity comes before the courts for adjudication;
- An application in relation to an AHD (where it involves consideration of life-sustaining treatment) as to validity, applicability or a question as to whether a designated healthcare representative is acting within the relevant powers contained in the AHD;
- Issues arising in relation to validity of EPAs and other matters under the Powers of Attorney Act 1996 except in relation to complaints against an attorney.

Presence of Relevant Person in Court

Under the Act, an application to the court or High Court under Part 5, 7 or 8 (including an application for an interim order) shall be heard in the presence of the Relevant Person (the subject of the application) unless, in the opinion of the court (Section 139)

- The fact that the relevant person is not or would not be present in court would not cause an injustice to the relevant person;

- Such attendance may have an adverse effect on the health of the relevant person;
- The Relevant Person is unable, whether by reason of old age, infirmity or any other good and substantial reason, to attend the hearing; or
- The Relevant Person is unwilling to attend.

Court declarations as to capacity

- The Court may make one or both of the following declarations:
- That the Relevant Person lacks capacity, unless the assistance of a suitable person as a co-decision-maker is made available to the relevant person, to make one or more than one decision specified in the declaration relating to the relevant person's personal welfare or property and affairs or both.
- That the Relevant Person lacks capacity, even if the assistance of a suitable person as a co-decision-maker was made available to the relevant person, to make one or more than one decision specified in the declaration relating to the relevant person's personal welfare or property and affairs or both.

Unless it is clear that the Relevant Person does not intend to enter into a co-decision-making agreement, the court will allow the relevant person such time as the court considers necessary to register a co-decision-making agreement.

In making an order, the court shall have regard to the terms of any EPA/AHD made by the relevant person and ensure that the terms of the order are not inconsistent with the terms of the EPA/AHD or that the functions of the decision-making representative are not inconsistent with powers exercisable by attorney/designated healthcare representative.

In appointing a Decision Making Representative, the Court will have regard to:

- The known will and preferences of the relevant person;
- Desirability of preserving existing relationships within family;
- Relationship/compatibility between the relevant person and the proposed representative;
- Whether the proposed representative will be able to perform functions to be vested in him/her;
- Any conflict of interest;
- The size, nature and complexity of the relevant person's financial affairs;
- Any professional expertise, qualification or experience required to manage the financial affairs;
- The capability of the proposed representative to manage the relevant person's property and affairs.

Decision-Making Representation Order

Under a Decision-Making Representative Order, the Court will set out powers of a decision-making representative, which will:

- Impose duties and attach conditions and time period to apply;
- Ensure that powers are limited in scope and duration as necessary;
- May appoint one or more than one person for different decisions.

Decision-Making Representative

The Court shall require representative/s to sign a statement that he/she:

- Understands and undertakes to act in accordance with powers conferred and duties imposed on him/her by the court;
- Understands and undertakes to act in accordance with the Guiding Principles.

If no suitable person is willing to act, the court will require the DSS Director to nominate two or more persons from a panel for consideration by the court. The DSS Director will be required to establish a panel of suitable persons willing and able to act as decision-making representatives and to maintain a Register of DM Representation Orders;

The role of the ADMC Act 2015 in enhancing access to justice

By reflecting and giving effect to the provisions of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), the ADMC Act 2015 is a significant milestone in enhancing access to justice by people whose decision-making capacity may be in question. The following UNCRPD provisions are particularly relevant in ensuring access to justice:

- State parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability (Art 4)
- State parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law (Art 12.1)
- State parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (Art 12.2)
- State 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 (Art 12.4)

Informing the implementation of the ADMC Act 2015: Building on the Supreme Court Judgement in the AC Case

The Supreme Court Judgement in the AC case¹⁶⁴ (discussed in Chapter 2 above) is very informative in the context of Ireland’s approach to wardship to date and can be built upon in implementing the ADMC Act 2015. A significant and relevant learning point arises from the comment in the judgement that the approaches of both the High Court and Court of Appeal involved in the making of decisions about Mrs C., and assumptions about her wishes or her best interests, were made without investigation of or assessment of her own views.

“This is in fact the most striking feature of all of the litigation and all of the court-mandated procedures to date – that it proceeded to this point on the basis of arguments between third parties, and decisions of courts, as to what Mrs C wants and what is in her best interests, without her voice being heard. (Par. 326).

The judgement further stated that the notice given for the wardship hearing in the case “was simply too short to allow for any meaningful arrangements to be made for her views to be conveyed to the court” (Par. 371). and further held that “the process lacked certain fundamental safeguards for the interests of the proposed ward” (Par. 366).

The Supreme Court judgement made clear the need for the person to be involved in decisions that impact directly upon them. Paragraph 327 of the Judgement states that:

There does not appear to have been any person not involved in the disputes who could have taken on the role of ascertaining, so far as possible, Mrs. C.’s wishes and if necessary advocating in favour of the proposal that she go home with her family... it might have assisted in resolving the matter if there had been an independent person through whom her views could have been put forward (Par. 327).

The court judgement also raised specific concerns about the absence of legal aid in cases such as these, to ensure that the person’s will and preferences are protected, stating that this “is a matter of real concern, given the consequences of a wardship order” (Par.396).

The judgement in this case has significant implications for the rights and protections afforded to people whose ability to make significant life decisions may be in question, speaking, as it does, to their right to have their voice heard, and to be afforded the dignity of being consulted on decisions that impact on their lives. It is an important benchmark to guide both the courts and health and social care services in implementing the 2015 Act and in ensuring that people with reduced decision-making capacity have equal access with others to justice in decision-making about their affairs, in particular, with regard to their involvement in health and social care decisions.

Implementation to date of the ADMC Acts

Sage Advocacy casework suggests that the application of the provisions of the assisted decision-making legislation to date (September 2023) has not been a seamless process with several difficulties arising, particularly in relation to assessment of decision-making capacity.

The Sage Advocacy experience is that the content and requirements of the legislation are not well known by professionals (including legal) and/or by other litigants. Even where it is the case that the legislation is well understood, difficulties are being experienced in putting it into effect.

The main issues identified relate to:

Legal Statement of Capacity

Sage Advocacy casework indicates that on occasions, there is evidence of the Statement of Capacity not being based on the functional approach to capacity assessment as required in the legislation but rather ‘old’ methods for

capacity assessment, e.g., Common Summary Assessment Report (CSAR) and the Mini-Mental State Examination (MMSE), being used. In some instances, in addition to lay litigants, it appeared that legal representatives did not see or understand the need to comply with Section 3 of the 2015 Act which requires that a legal statement of capacity is necessary as distinct from a medical diagnostic test. Despite the “issue specific” approach provided for in the legislation, applications continue to be stated in terms of general management of personal welfare or management of all financial affairs, instead of for the specific matter in respect of which a decision now needs to be made, e.g., putting a charge on a person’s house in order to get Ancillary State support under the NHSS.

Voice of the Person

Section 139 of the 2015 Act states that applications must be heard in the presence of the Relevant Person except in exceptional circumstances where this is not possible. (The courts can have the person present by video link if this arrangement is possible). Again, it would appear that this requirement is not well understood by legal representatives, the HSE or relatives.

Supporting people to give effect to their will and preferences

The requirement under Section 36(5)(c) of the Act for the court to ascertain the will and preferences of people before making decisions does not appear to be well understood and court applications are being made without decision-making capacity being properly or at all assessed (the old wardship approach). There is clear evidence from Sage Advocacy casework that the Decision-Making Representative option is frequently the first option sought rather than the last one as required by the legislation. Sage advocates have noted that, in some such instances, it became clear as the application process progressed that some of the individuals involved could in fact make decisions on their own; others were able to do so with a decision-making assistant or by entering

into a co-decision-making agreement; others had the capacity to make an ordinary power of attorney and an enduring power (EPA) for a future time. This suggests that there is unnecessary use of costly legal intervention through the courts. It should, of course, be noted that even in cases where it is likely that a Decision-Making Representative may need to be appointed by the Circuit Court, there is still a need for a person’s will and preference (their wishes) to be independently ascertained. In some instances, the need for independent evidence to be put before the Court did not appear to be understood by family members, health care workers or lawyers.

Protection of liberty

The right to personal liberty is enshrined in the Irish Constitution (Article 40.4.1) and in various UN and European Charters. While this right is in no way diminished by a person’s decision-making capacity, this is not adequately catered for in Irish law. Pending the enactment of promised deprivation of liberty legislation, (see Chapter 10 below) it is necessary to understand that an application to the High Court is required if a person is to be deprived of their liberty.

The need to use the full provisions of the legislation, in relation to establishing people’s will and preferences and ensuring that the voice of the person is heard fully, is critically important in this regard. However, the experience to date of Sage Advocacy is that the right to personal liberty is not well acknowledged in the manner in which various applications to the Circuit Court are being made to it when it does not yet have jurisdiction in relation to this issue. This gap in the legislation is now an urgent matter.

Limited understanding of the concept of supported decision-making

There appears to be an underdeveloped understanding of the concept of supported decision-making. The skills required to provide effective and appropriate decision-making supports and to give effect to the voice of the person are not always present, which

164 <https://www.casemine.com/judgement/uk/5dfc6a614653d042431b0cbc>

points to the need for detailed training of all professionals, to ensure that the rights of the person are fully respected and implemented in accordance with the requirements of the Act.

Addressing the emerging issues

The above issues clearly point to the need for a detailed and focused conversation involving all stakeholders to take place if the Acts are to be implemented as envisaged. This requires a radical change in culture from the wardship approach to separate legal and other independent representation for persons that applicants consider need to be made Relevant Persons under the legislation. Legal representatives need to be absolutely clear as to who their client is, an applicant or the proposed Relevant Person (RP) – each may require separate legal representation.

There is a need to ensure that correct information about what is required under the legislation is available to and acted on by all agencies and professionals involved in making decisions about people who come under the remit of the 2015 Act. The documentation required under the legislation must be available before an application is made to the court.

In order for the legislation to work as intended, decision-making capacity assessment certificates must be based on the current rather than the outmoded approach to capacity. It is noted that there is now a Template¹⁶⁵ to be used for evidencing the processes used with the person being assessed. In order to ensure consistency, this Template should be used by all professionals (including healthcare and legal professionals) and should be sought by the Court in considering applications.

Overview and Conclusion

The commencement of the Assisted Decision-Making (Capacity) Acts 2015 and 2022 is a watershed moment, modernising the whole area of law for a very vulnerable population cohort. It places the person at the centre, with a move from ‘best interests’ to ‘will and preferences’. It provides for a tiered approach to supported decision-making along a continuum that moves from assisting a person with decision-making to making decisions on a person’s behalf, where the latter is deemed by the courts to be the only viable option. The Decision Support Service, which has distinct functions set out in the Act, will be a key component in the implementation of the legislation. The provision for Advance Healthcare Directives is a major development in that it enables people to indicate their will and preferences when they have decision-making capacity and to have these protected by law. With the commencement of the legislation, people can no longer be made a Ward of Court – this is a critically important provision. Also, any current ward of court or someone on their behalf can apply to the wardship court to have their case reviewed.

How the legislation is implemented in practice will obviously depend on the extent to which the cultural and attitudinal change envisaged in the legislation takes place in practice both in the courts system and among health and social care professionals. The quality of education and training of those who are tasked with its implementation at all levels will be of paramount importance.

The next chapter will discuss the role of independent advocacy in enhancing access to justice by people who are at risk or who are living in vulnerable situations.

Chapter Nine

The Role and Potential of Independent Advocacy in Enhancing Access to Justice for At-Risk Adults

Introduction

Access to independent advocacy is crucially important for at-risk adults in the context of enabling them to have equal and full access to justice and to protect their legal and human rights. The role of independent advocates has been referenced in Chapter Seven in the context of identifying access to justice issues arising out of Sage Advocacy casework. There is a strong argument that independent advocacy is at the very core of protecting people’s right to justice and their related human and legal rights. Independent advocacy is particularly important where people have complex support needs and where they may not have trusted relatives or networks and, even more so, for people who lack decision-making capacity. There is no current effective mechanism to compel service providers (including services administering justice) to support people with reduced decision-making capacity to exercise their legal capacity. While decision-making supports will be available under the Assisted Decision-Making (Capacity) Act 2015 as discussed in the previous chapter, there will be an ongoing need for independent advocacy to ensure that such supports are provided to all who need them and at the appropriate level.

This chapter outlines the critical importance of independent advocacy in ensuring that people’s legal capacity is acknowledged and respected both in the delivery of health and social care services and in the administration of justice in all matters relating to law enforcement and the courts system.

Defining and understanding independent advocacy

There are multiple definitions and types of advocacy. It is important to recognise that many of those who provide social and health care services to people – nurses, doctors, social workers – see advocacy as part of their role. The principles and values of advocacy resonate closely to those espoused by these professions and the relationship between the client/patient and advocate is an important component of the role of many professionals. Legal advocacy is obviously provided by lawyers to their clients as required. However, given that vulnerable adults may experience barriers in having their voice heard by professionals (and also by family members), it is crucially important for people to have access to an independent advocate in order to support them and enable them to speak for themselves, or, where appropriate, to have an advocate speak on their behalf. The independent advocate can be particularly valuable in creating a bridge between the service providers/professionals and people seeking services or due judicial process.

The following definition encompasses the core components of independent advocacy:

“The process of pleading the cause and/or acting on behalf of another person (or persons) to secure services they require and/or rights to which they and their advocate believe them to be entitled. Advocates owe those they represent a duty of loyalty, confidentiality, and a commitment to be zealous in the promotion of their cause.”¹⁶⁶

¹⁶⁵ <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/part-5-capacity-statement-template-june-2023.pdf>

¹⁶⁶ Kerr, L. and Kerr, V. (2003), Older People Doing it for Themselves: Accessing Information, Advice and Advocacy. York: Joseph Rowntree Foundation, <https://www.jrf.org.uk/report/older-people-doing-it-themselves-accessing-information-advice-and-advocacy>, p.11.

Also, centrally important in the practice of independent advocacy is the concept of empowerment, which refers to a process where, through the provision of information and support, people are enabled to assert their rights, make choices and decisions and contribute to wider policy-making in the areas that affect their lives.¹⁶⁷ Building on the concept of empowerment, it is now established best independent advocacy practice that self-advocacy should always be the goal, in other words, *'nothing about you/without you'*.

The role of independent advocacy has been stated comprehensively in the Sage Advocacy Quality Standards for Support and Advocacy Work with Older People.¹⁶⁸ The six standards and related components outlined provide a useful framework for developing a role for independent advocacy in decision-making processes and in ensuring that people's human and legal rights are protected, to the greatest extent possible. The core underlying principles of the Standards are:

1. **Respect** – reflecting the right of every person to be treated with dignity and respect, including each individual's right to privacy, confidentiality and self-determination;
2. **Social justice** – promoting equal treatment with other people in respect of access to basic services and protections;
3. **Competence and compassion** – demonstrating high levels of skill, competency, compassion and consistency in the support provided;
4. **Accessibility** – advocacy available in a manner that is convenient and easily accessible to people who require support;
5. **Independence** – the advocacy role is structurally, operationally and psychologically independent from health and social care service providers and represents only the will and preferences of

the people to whom advocacy is provided;

6. **Accountability** – acting with integrity and responsibility and engaging with people who use the service and with other stakeholders in an honest and transparent manner.

Non-instructed advocacy

While independent advocacy usually requires the consent and agreement of the person in order for an advocate to become involved, there are instances where a person who may not be able to consent to an advocacy intervention may require the intervention of an advocate to have their human and legal rights protected. This is referred to as 'non-instructed advocacy'. A non-instructed advocacy approach may be appropriate when a person has complex communication needs or has a long term illness or disability that prevents them from forming or clearly stating their wishes and desires (Scottish Independent Advocacy, Alliance 2009:4).

Non-instructed advocacy has been defined as:

*"Taking affirmative action with or on behalf of a person who is unable to give a clear indication of their views or wishes in a specific situation. The non-instructed advocate seeks to uphold the person's rights; ensure fair and equal treatment and access to services; and make certain that decisions are taken with due consideration for their unique preferences and perspectives."*¹⁶⁹ (Scottish Independent Advocacy Alliance 2009:5).

If people lack capacity or have such profound communication difficulties that they cannot tell an advocate what they want in life, they are additionally marginalised and therefore have a greater need for independent advocacy. The role of the advocate in such a situation involves gathering as much information as possible about the person and their past and present wishes (if appropriate). This may be from family, friends, care staff and other people

involved in that person's life. It is important to acknowledge that a person's capacity can vary from day to day depending on their condition and/or the issue with which they are dealing.

Ensuring access to justice may sometimes require that an independent advocate intervenes in order to ensure that those dealing with such individuals are at all times guided by their legal and human rights. This is essential in order to fully implement UNCRPD provisions and will be critical in ensuring that the provisions of the ADMC Act 2015 are applied to all, irrespective of their place of residence or their decision-making capacity. Non-instructed advocacy can play a centrally important role in this regard.

Why independent advocacy is important

The case for independent advocacy in the context of enabling both older persons living in vulnerable situations and other at-risk groups has been strongly argued in recent years.¹⁷⁰ In recent advocacy discourse, the principle of enabling people to assert their will and preferences has replaced the notion of representing people's 'best interests'. This is accompanied by a growing emphasis on the concept of supported decision-making in ensuring that each individual's voice is heard in all decisions affecting their wellbeing, health, place of residence and finances.

Areas in which advocacy has been to the fore include the promotion of the rights and voice of people with disabilities and users of mental health services and, more recently, users of health and social care services generally. It has become increasingly recognised that many older people need advocacy support in order to assert their legal and human rights.¹⁷¹

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) is based on the premise that people with disabilities have equal legal capacity with all others in all aspects of life and must be enabled to participate fully in all decisions that affect them as well as in all aspects of civil society. However, the reality is that some people, due to circumstances such as frailty associated with ageing, isolation or disability, may be less able to defend their rights and interests and, indeed, sometimes may not be aware of the abuse to their rights and may not know or have access to a means of dealing with, for example, violations to their liberty. In addition, in many cases where abuse or violation of rights occur, such people are under the control of the perpetrator of the abuse or violation, and fear retaliation.

Role of independent advocacy in enhancing access to justice

Independent advocacy has a potentially significant role to play in enhancing access to justice by people who are at risk because of a disability or a mental health difficulty. Typically, independent advocacy supports people in having care plans reviewed and in ensuring that all avenues were explored and all potential resources were factored into the decision. The involvement of an independent advocate frequently resulted in better liaison and communication between the HSE and the Local Authority, between the hospital and community care services and between professionals involved in making decisions and allocating resources. There were also cases where the Sage advocate was able to assist a person in accessing and regaining control over their finances. In some cases, there were, however, significant obstacles to the involvement of an independent advocate put in place by relatives or health and social care professionals.

167 Reed, J. (2004). "Involvement, Empowerment and Advocacy", in Nies, H., and Berman, P., (Eds.), Integrating Services for Older People: A Resource Book for Managers, Dublin: European Health Management Association http://catalogue.iugm.gc.ca/GEIDFile/19367.PDF?Archive=196566891474&File=19367_PDF

168 <https://www.sageadvocacy.ie/media/1336/quality-standards-for-support-and-advocacy-work-with-older-people-final-061015.pdf>

169 Scottish Independent Advocacy Alliance (2009), Non-Instructed Advocacy Guidelines, <https://www.gain.org.uk/documents/siaanoninstructedadvocacyguidelines.pdf> P.5.

170 See, for example, Browne, M. et al (2022), Identifying RISKS, Sharing RESPONSIBILITIES, Safeguarding Ireland, https://www.safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_lowres.pdf
Browne, M. (2020), "Giving Voice to Vulnerable Older Persons: The Role, Potential and Limitations of Advocacy" in Phelan, A. and O'Shea, D., Changing Horizons in the 21st Century: Perspectives on Ageing, Cambridge Scholars Publishing.

171 Browne, M. (2018), Advocacy in Ireland: A Scoping Document, Safeguarding Ireland, <https://www.safeguardingireland.org/wp-content/uploads/2018/10/Advocacy-Scoping-Document-Final-310818.pdf>

Independent advocacy: key considerations

The right of access to an independent advocate and a clear process for engaging an advocate is critically important for at-risk adults both at the outset and throughout the justice process. This is particularly important where there is any question about a person's decision-making capacity. The engagement of an independent advocate as early as possible in criminal or civil law processes would help to ensure that person's human and legal rights are at the centre of the process. This obviously includes situations where a person's liberty may be under threat.

Given that at-risk adults may experience barriers in having their voice heard by those charged with administering justice, it is crucially important for people to have access to an independent advocacy service to support them and enable them to speak for themselves, or, where appropriate, to speak on their behalf. The independent advocate can be particularly valuable in creating a bridge between the professionals and at-risk individuals. While it is important, of course, to recognise that legal professionals see advocacy as a core component of their role, it is reasonable to suggest that they may not focus much on the empowerment of individuals, which is at the core of independent advocacy. There is an additional and necessary perspective that independent advocacy can bring to ensure that the voice of the person is clearly articulated in all circumstances, and, particularly, where crucial decisions are being made in relation to how matters should proceed in court cases or related interventions.

The following are identified as key considerations relating to the role of independent advocacy:

- People who lack decision-making capacity who require support in engaging with the 'system' may be vulnerable, not only because of their individual needs, but also because historically the system of service

provision has tended to be based on a dependency model rather than on an approach that maximises choice, supported decision-making and independence;

- Whether a person has the capacity to give instructions or not, the advocate's role is to ensure that their voice is heard at all stages of the judicial process;
- There is a crucial and important distinction between decisional autonomy and the ability of a person on their own to execute those decisions;
- For many people with reduced decision-making capacity, there are likely to be some aspects of their lives where they can make decisions and others where they are unable to so do – recognising these aspects and providing support accordingly is at the very core of independent advocacy work;
- The principle that the individual and the advocate work together to ensure optimum outcomes for the individual is particularly important where the individual's desired outcomes are difficult to ascertain clearly;
- It is crucially important from an access to justice perspective and in the context of the ADMC Act 2015 that support is provided at the appropriate level – in other words, adequate but the least restrictive in terms of enabling individuals to maintain independence and autonomy to the greatest extent possible.

Legal provision for independent advocacy in Ireland

The absence of any legislative remit for independent advocacy, other than under the Mental Health Act 2001, resulted in an advocacy environment that was unclear, and in a varied understanding of what advocacy is and is not. New regulations for nursing homes, Health Act 2007 (Care and Welfare of Residents in Designated Centres for

Older People) (Amendment) Regulations 2022¹⁷², introduced in March 2023, have changed the situation with regard to access to independent advocacy. Regulation 9 of the Principal Regulations was amended by inserting after paragraph (4) the following paragraph: "(5) A registered provider shall ensure that a resident has access to independent advocacy services, including access to in-person awareness campaigns by independent advocacy services and access to meet and receive support from independent advocacy services. These services should be made available to residents in the designated centres and in private, as required."

These Regulations were brought in to facilitate the expansion of the Patient Complaints Advocacy Service into private nursing homes. The extent to which these regulations will be observed remains to be seen. Of particular importance will be the mechanisms put in place to compel service providers to facilitate access to an independent advocate.

A critically important point that should be noted is that, despite the concept of independent advocacy coming much more to the fore in policy discourse in recent years and, notwithstanding the legal provision for independent advocacy in nursing homes introduced recently, the Assisted Decision-Making (Capacity) Acts 2015 and 2022 make no provision in law for independent advocacy. There is provision in the legislation for the Director of the Decision Support Service (DSS) to develop a Code of Practice "*for the guidance of persons acting as advocates on behalf of relevant persons*" (Section 103 (2)). The reference to the Code of Practice is the only reference to advocacy in the 2015 and 2022 Acts. A Code of Practice for Independent Advocates has recently (April 2023) been published by the DSS. This code provides guidance for independent advocates on how to engage and interact with, and advise, clients who are relevant persons under

the Act. It also provides guidance on working with decision supporters and interveners¹⁷³ in accordance with provisions of the Acts.

It is noted that the code does not include guidance on the role an independent advocate may play as 'another person' assisting a relevant person in court proceedings under Part 5 of the Act, or as a court assistant assisting an adult who is currently a ward of court in court proceedings under Part 6 of the Act. It is likely that independent advocates will play an important role in both of these processes.

Under the Adult Safeguarding Bill 2017¹⁷⁴, the Safeguarding Authority (as proposed) can arrange for a person who is independent (an "independent advocate") to be available to represent and support an individual. The condition for appointment of an independent advocate as set out in Article 12(3) of the Bill is that the Authority considers that, were an independent advocate not to be available, the individual would experience substantial difficulty in doing one or more of the following: Understanding relevant information;

- a) Retaining that information;
- b) Using or weighing that information as part of the process of being involved;
- c) Communicating the individual's views, wishes or feelings (whether by talking, using sign language or any other means).

It should be noted that these factors are broadly similar to the guidelines for assessing decision-making capacity contained in the ADMC Act 2015 (see Chapter 8 above).

172 S.I. No. 628/2022 – Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022, <https://www.irishstatutebook.ie/eli/2022/si/628/made/en/print>

173 Independent advocates are not interveners under the Act.

174 <https://data.oireachtas.ie/ie/oireachtas/bill/2017/44/eng/initiated/b4417s.pdf> That Bill fell with the dissolution of the 32nd Dáil in January 2020.

Overview and Conclusion

The goal of independent advocacy for at-risk adults in facilitating access to justice is to support people as individuals in having their voice heard at all stages of both the judicial process and the health and social care delivery infrastructure. While the role of legal professionals and health and social care professionals as advocates is crucially important, there is an additional and necessary perspective that independent advocacy can bring to ensure that the voice of the at-risk adult is clearly articulated in all circumstances, and, particularly, where crucial decisions are being made in relation to their freedom or their good name and reputation. Independent advocacy provides at-risk adults with an additional and necessary protection.

It is clear that people who are the victims of different forms of abuse (financial, physical, psychological or sexual) and/or are being subjected to coercive control, can benefit from the support of an independent advocate in order to ensure that they can be fully protected under the law. It is also important to recognise independent advocacy has an important role to play in getting due process in the criminal justice system for at-risk adults who are alleged to have committed a crime.

There is a need for legal practitioners to be aware that there may be an important distinction between independent advocacy and legal advocacy as typically practiced and a need for the complementary and necessary role of an independent advocate to be given due acknowledgment in all legal processes, including by the courts, lawyers and gardai. The same point applies to health and social care professionals.

Given that many at-risk adults may experience barriers in having their voice heard by those charged with administering justice or delivering health and social care services, it is crucially important for people to have access to independent advocacy to ensure that each individual has equality of access and is afforded due process. Legal provision in Ireland for the practice of independent advocacy is critical in this regard.

Chapter Ten

Synthesis of Key Factors Relevant to Access to Justice by At-Risk Adults

Introduction

This report has explored a number of aspects of access to justice by at-risk adults relating to both criminal law and civil law. It has set out the nature and extent of the issue as well as current mechanisms in Ireland for enhancing access to justice. The matter of at-risk adults as both victims of crime and perpetrators of crime has been explored as has the need for both to have adequate and equal access to judicial processes at all stages of the system.

Legislation and policies that impact on citizens' access to justice generally have been outlined and assessed. Aspects of legislation and international conventions that impact especially on the ability of at-risk adults to access justice on an equal basis with others have also been explored and discussed.

A number of positive developments in recent years that improve access to justice for all have been outlined. These include legislative provisions, including, in particular, the Assisted Decision Making (Capacity) Acts 2015 and 2022, the Criminal Justice (Victims of Crime) Act 2017, (which gives effect to the EU Victims' Directive), the Domestic Violence Act 2018. Other notable developments have been the publication by the Department of Justice of a Victims Charter, the Review of the Administration of Civil Justice Report, the establishment by the Chief Justice of a Working Group on Access to Justice, the Review of the Administration of Civil Justice Report and the Review of the Civil Legal Aid Scheme currently under way.

A number of gaps in current legislative provisions and deficiencies in some legislation have been identified as well as some of the

blockages in the justice system that exist, especially for people with disabilities.

While progress has been made with regard to equal participation by at-risk adults in society generally, the report has identified many areas in which deficiencies persist and where work remains to be done in relation to equality of access to justice.

There is strong supporting evidence that at-risk adults are treated less favourably in the current Irish justice system. Research evidence strongly suggests that at-risk adults are regularly and systematically the victims of crime through, for example, financial abuse and coercive control. It is also the case that some such criminal activity remains under the radar in that it is not reported or, if reported, is not systematically followed through. In many instances, such behaviour may not be perceived as 'criminal' *per se* or may be dismissed as trivial or of no real consequence.

General access to justice issues arising from Sage Advocacy casework have been outlined. These point to aspects of the health and social care delivery infrastructure that, broadly speaking, undermine the concept of natural justice and the need to act fairly. People's voice is frequently not heard, valid consent is not obtained in relation to long-term care decisions or people are *de facto* deprived of their liberty, e.g., in nursing homes.

The provisions of the Assisted Decision-Making (Capacity) Acts 2015 and 2022 have been summarised with particular emphasis on the presumption of decision-making capacity and people's right in law to be supported in their decision-making and in articulating their will and preferences.

The important role of independent advocacy in enhancing access to justice generally has been outlined as has the related need for legislative provision for the practice of independent advocacy in Ireland.

Key issues identified in the report

Data and evidence

Reporting of adult abuse in Ireland may not reflect the true nature and extent of such abuse and exploitation.¹⁷⁵ There is a dearth of data (aggregated and disaggregated) in Ireland on the nature and extent of abuse of at-risk adults, which undermines the potential to identify criminal activity.

There is a clear need for more detailed and accessible information and analysis regarding the prevalence and nature of crimes against at-risk adults. Such information¹⁷⁶ is essential if the problem is to be fully recognised, understood and addressed.

The absence of adequate data is particularly evident in matters relating to participation in crime by at-risk adults, including, in particular, the question as to why at-risk adults are disproportionately represented in the prison system. The absence of reliable and comprehensive data in this regard hinders attempts to have a balanced discussion about how best to proceed. Without robust evidence, there is a greater chance that unacceptable patterns of practice that have become established and normalised over time will continue.

The civil legal aid system

The report has identified a number of basic issues with access to the Civil Legal Aid Scheme. The scheme is hampered significantly by the restrictions placed on the types of cases that are eligible, the jurisdictions that are covered, and the stringent and outdated

financial and means testing procedures that apply at present.

The criminal justice system: disabled people and people with mental health difficulties

The report has highlighted the challenges faced by disabled people and people experiencing mental health difficulties in engaging with criminal justice system, which, in all its parts, is one that most people find daunting, confusing and difficult. Equally, staff working within the system may find it difficult to fully recognise, understand and deal with the needs of people with disabilities whom they encounter, especially those with an intellectual disability.

Justice in the health and social care delivery infrastructure

The report has explored the need to ensure that all staff in both the judicial system and the health and social care delivery system are adequately trained and supported to enable a rights-based approach where equality of access to justice is a key component in practice for at-risk adults. Given that many at-risk adults may experience barriers in having their voice heard by those charged with administering justice or delivering health and social care services, it is crucially important for people to have access to independent advocacy in order to ensure that they are afforded due process. Legal provision in Ireland for the practice of independent advocacy is critical in this regard.

Ten principles of access to justice for people with disabilities

Having examined the various aspects of access to justice by at-risk adults, it is suggested that principles rooted in a human rights approach can provide a guide to developing best practice. The UN International Principles and

Guidelines on Access to Justice for Persons with Disabilities¹⁷⁷ sets out ten underlying principles that can (in conjunction with the provisions of the ADMC legislation) usefully inform mechanisms to enhance access to justice by at-risk adults:

Principle 1

All persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice on the basis of disability.

Principle 2

Facilities and services must be universally accessible to ensure equal access to justice without discrimination of persons with disabilities.

Principle 3

Persons with disabilities, including children with disabilities, have the right to appropriate procedural accommodations.

Principle 4

Persons with disabilities have the right to access legal notices and information in a timely and accessible manner on an equal basis with others.

Principle 5

Persons with disabilities are entitled to all substantive and procedural safeguards recognised in international law on an equal basis with others, and states must provide the necessary accommodations to guarantee due process.

Principle 6

Persons with disabilities have the right to free or affordable legal assistance.

Principle 7

Persons with disabilities have the right to participate in the administration of justice on an equal basis with others.

Principle 8

Persons with disabilities have the rights to report complaints and initiate legal proceedings concerning human rights violations and crimes, have their complaints investigated and be afforded effective remedies.

Principle 9

Effective and robust monitoring mechanisms play a critical role in supporting access to justice for persons with disabilities.

Principle 10

All those working in the justice system must be provided with awareness-raising and training programmes addressing the rights of persons with disabilities, in particular in the context of access to justice.

What implementing these principles will mean in practice

There are a number of areas where action is required in Ireland in order to translate these principles into practice, including, in particular,

- Provision for specialist training (in relation to disability) for all those working in the field of administration of justice as provided for under Article 13 of the UNCRPD;
- Enabling the court processes to better facilitate people with different types of disability, e.g., language used, timely availability of documents, pace of court hearings;
- Exploring how the role of the Courts Service Disability Liaison Officer could be enhanced;
- Easier access to civil legal aid generally for at-risk adults;
- A greater emphasis on resolving disputes before courts processes commence – this would reflect the principle of minimum intervention, which is a core tenet of the ADMC legislation;
- Formal and structured participation by independent advocates in the whole of the judicial process;
- Increased and more effective public education regarding the rights of at-risk adults – particularly as applied to access to justice;

¹⁷⁵ See Browne, M. et al, (2022), Identifying RISKS, Sharing RESPONSIBILITIES, Safeguarding Ireland

¹⁷⁶ Note Parliamentary Questions to the Minister for Justice 15 February 202222 from Deputy Fergus O'Dowd "if figures are available relating to concerns raised with An Garda Síochána in respect of sexual abuse, physical abuse, psychological abuse, financial abuse, institutional abuse or neglect of residents living in nursing homes or disabilities centres which have been received since 2015". <https://www.justice.ie/en/JELR/Pages/PQ-15-02-2022-562>. The Minister for Justice has not to date been able to provide figures but is keeping the matter under review.

¹⁷⁷ https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf

- The exploration of opportunities for collaborative working between the Legal Aid Board and independent advocacy organisations.

Enhancing access to justice by at-risk adults: Key components identified

Figure 10.1 identifies a number of components that, it is suggested, constitute a framework for an integrated and comprehensive approach to addressing the multi-faceted needs of at-risk adults who engage directly or indirectly with the formal justice system or with the health and social care support infrastructure.

Need for an attitudinal and cultural shift¹⁷⁸

Access to justice is a core element of the rule of law, a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights. It encompasses the right to a fair trial, including equal access to and equality before the courts, protection from exploitation, abuse and criminality, the right to seek and obtain just and timely remedies for rights violations, including in the manner by which long-term care is delivered, and the right to participate in decisions that will impact on a person's quality of life.

Much of the potential for abuse, neglect and exploitation of at-risk adults, especially in subtle forms, is rooted in a culture that accepts and condones certain attitudes, practices and behaviours that deprive people of their basic human rights. This suggests a need for a cultural shift in attitudes to crimes perpetrated on at-risk adults. Specific forms of adult abuse, such as financial abuse and coercive control are frequently dismissed as trivial and are effectively normalised by society.

While there may be a substantially greater tendency to sympathise and support victims of crime rather than perpetrators of crime – whether suspected, charged or convicted – it is incumbent on the justice system to ensure that there is equality of access to justice for all citizens. In order to maintain the integrity, fairness and dignity of the justice system it is imperative that all those who come in contact with it can participate equally, meaningfully and effectively with the elements of the system. The cultural and attitudinal shift required is one where at-risk adults who experience considerable barriers and challenges in defending themselves and their human rights can have confidence in a system in which to date the human and legal rights of such people have frequently not been to the fore.

Realising the potential of the Assisted Decision-Making (Capacity) Acts (ADMC) 2015 and 2022

The provisions of the Assisted Decision-Making (Capacity) Acts 2015 and 2022, commenced in April 2023, will have particular relevance for access to justice by at-risk adults. The Acts introduce a new legal framework for supported decision-making in Ireland and include new statutory principles and practical supports for persons who may have difficulties with their decision-making capacity. The commencement of the legislation is a watershed moment, modernising the whole area of law for a very vulnerable population cohort. It places the person at the centre, with a move from 'best interests' to 'will and preferences'. It provides for a tiered approach to supported decision-making along a continuum that moves from assisting a person with decision-making to making decisions on a person's behalf where the latter is deemed by the courts as being the only viable option.

The provision for Advance Healthcare Directives is a very significant part of the legislation in that it enables people to indicate their will and preferences when they have decision-making capacity and to have these protected by law. With the commencement of the legislation, people can no longer be made a Ward of Court – this is a critically important provision. Also, any current ward of court or someone on their behalf can apply to the wardship court to have their case reviewed.

How the ADMC legislation is implemented in practice will obviously depend on the extent to which the cultural and attitudinal change envisaged in the legislation takes place in practice both in the courts system and among health and social care professionals. The quality of education and training of those who are tasked with its implementation at all levels will be of paramount importance.

As stated in Chapter Eight above, the Guiding Principles of the ADMC legislation are: a presumption of capacity, all practicable steps must be taken to support a person

with making a decision; no intervention unless necessary and, where necessary, be proportionate and limited in duration. These principles require, *inter alia*, minimal restriction on a person's rights and freedom of action, due regard to a person's rights to dignity, bodily integrity, privacy, autonomy and control over their financial affairs and property. Supporting decision making requires facilitating participation, taking into account past and present wishes and a person's beliefs and value – this is in essence working on the basis of '*nothing about you/without you*'.

Sage Advocacy has developed an ALERT system for supported decision-making¹⁷⁹:

ASK: What is your understanding of what you have to decide;

LISTEN: Pay attention to words, feelings, body language and other forms of communication;

EXPLAIN: Explain everything, including all the choices, in a way that the person can understand OR ask someone else to help such as a key worker or independent advocate;

REALITY: Go through all the possible choices and consequences, summarise;

TELL: Tell me about your decision, why that particular choice is important for you and how you made this decision.

Figure 10.1 Enhancing access to justice by at-risk adults: Key components identified



Need for an enhanced Civil Legal Aid Scheme

Easy access to civil legal aid is likely to be a key component in protecting the rights of people with disabilities and is necessary in order for the State to comply with its obligations under the UN Convention on the Rights of Persons with Disabilities.

Many of the areas for civil legal aid that are stated or implied in the Civil Legal Aid Act 1995 are not included in the implementation of the scheme in practice. Cases may be

178 See Browne, M. et al., Identifying RISKS – Sharing RESPONSIBILITIES: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults, Safeguarding Ireland, Forthcoming.

179 <https://www.sageadvocacy.ie/media/2466/sage-advocacy-fortnightly-forum-adm-acts-overview-final-190423.pdf>

excluded by virtue of legislation-based regulations or because of eligibility criteria. For example, there is minimal or no service being provided in many civil law areas, including homelessness, housing, social welfare, employment, equality, discrimination, children's rights, or environmental issues.

There are aspects of legal protection relating to family matters that have typically not been the subject of civil legal aid in Ireland. These include, for example, where an older person or person with an intellectual disability whose decision-making capacity may be in question is subject to coercive control, financial abuse, or other abuses by a family member.

There is a clear need for civil legal aid for cases where people are seeking redress in relation to housing, social welfare and employment rights. There is also a need for civil legal aid in family-related matters other than divorce and separation. Very importantly, there is an equally important need for civil legal aid in situations where a person is seeking to plan for their future or where a place of care is being determined.

A continuum of legal advice and legal aid services should be available in various situations, including, in particular:

- People creating an Enduring Power of Attorney (EPA);
- People making an Advance Healthcare Directive;
- People who are the subject of applications under Part 5 (capacity application) and Part 6 (review of wards of court);
- People experiencing coercive control in non-intimate relationships as well as in intimate relationships;
- People experiencing financial abuse or exploitation;

- People protecting their property rights, e.g., in relation to property transfers and succession;
- Deprivation of people's liberty in places of care;
- Drawing up of long-term care contracts;
- People's right to self-determination and a related need to uphold the principle of valid consent.

Recognition of the principle of access to justice in the long-term care system

A key factor in ensuring that a person's right to justice is protected is that people are presumed to have capacity unless it is determined otherwise. To date, this presumption may not always be the starting point and sometimes other factors intervene to undermine this presumption. These factors include people having made what appeared to be 'unwise' decisions in the past, engaging in high-risk behaviour or a reliance on anecdotal information provided by relatives. The absence of a presumption of capacity has resulted in an approach to decision-making where a person may have been marginalised in decision-making processes and where other people made decisions about what was regarded as in the 'best interests' of a person. This approach also undermines the basic principle that all people have legal capacity¹⁸⁰ even if their decision-making capacity is reduced. The provisions of the ADMC Acts bring into sharp focus the shortcomings of this approach and the legislation will require a fundamental change of approach.

Another factor relevant to access to justice in the long-term care system is the concept of valid consent. Consent is at the very core of human rights protection and is centrally relevant in ensuring that people are treated justly. Another issue that arises in relation to consent is the availability of choice. In effect, consent without choice is meaningless as

then it becomes a form of coercion. Also, it is likely that, in many instances, people may not be advised that consent to a residential placement may also involve consent to loss of autonomy, deprivation of liberty, loss of functional independence and loss of privacy.

There are specific human rights issues faced by people with temporary or long term diminution or loss of decision-making capacity who are in hospitals and congregated care settings. Sage Advocacy casework indicates that these include in particular:

- The use of (in)continence wear for convenience reasons and the near impossibility of restoring continence after a period of enforced use of continence pads;
- The use of convenience medication/chemical restraint sometimes associated with shortage of staff at certain times of the day or night.

This scenario can reasonably be expected to change fundamentally with the commencement of the assisted decision-making legislation where a presumption of capacity and a related ability to give valid consent will operate unless the contrary is shown by means of a decision-making capacity assessment. Health and social care professionals will be required to ensure that there is a mechanism in place so that the voice of the individual is heard independently. This can be achieved by, for example, the appointment of an independent advocate for the person.

Enhancing supports for prisoners with mental health difficulties

The Irish prison service forms a key component of the criminal justice system providing secure custody and care for all those committed to prison. The prison system generally in Ireland has come under some criticism recently, in

particular in relation to overcrowding. A more specific and ongoing issue, however, is the fact that a high proportion of people in Irish prisons have mental health issues and that the Irish prison system is ill-equipped to deal with their support needs. Particular areas of concern that have been identified include:

- The high number of prisoners (estimated at up to 70%) in Irish prisons who have mental health challenges;
- The growing number of homeless persons (around 10%) committed to prison with severe mental health problems ending up in Irish prisons with many having very complex needs around mental illness and addiction;
- The fact that many people with mental health difficulties end up in prison due to a shortage of beds and accommodation in suitable hospitals or institutions;
- The significant number of people in prison who have issues in terms of learning disabilities and literacy difficulties but who have never had in a diagnosis in the community;
- Prisons not appropriately equipped to provide for the support, integration and education/training needs of people with mental health difficulties and people with an intellectual disability;
- The prison environment not at all conducive to delivering treatment for people with severe and enduring mental health difficulties;
- The fact that most prisons are currently working with significant over-capacity¹⁸¹ is likely to present additional problems for people with mental health issues;

A 2020 Council of Europe Anti-Torture Committee (CPT) report¹⁸² noted that progress had been made in the treatment and living conditions of Irish prisoners. However, it was

¹⁸⁰ Legal Capacity means the capacity to have rights and the power to exercise those rights. Article 12 of the UN Convention on the Rights of Persons with Disabilities guarantees that persons with disabilities have a right to legal capacity, which means that the law should recognise their capacity to be the bearers of rights, and their capacity to act. In other words, persons who have reduced decision-making capacity have the very same legal rights as persons whose decision-making capacity is not under question.

¹⁸¹ On 2nd March 2023, all closed prisons, with the exception of Wheatfield Prison, were operating at over capacity. That might range from 102%, which is the global figure, to 117% in some prisons.

¹⁸² The report was based on Committee's seventh periodic visit to Ireland, which took place from 23 September to 4 October 2019. <https://rm.coe.int/1680a078d0>. [The Irish Government response has also been published and is available at https://rm.coe.int/1680a078d1](https://rm.coe.int/1680a078d1)

critical of the care afforded to vulnerable prisoners, particularly those with mental health difficulties. The report found that Irish prisons “offer poor conditions and inadequate treatment” for mentally ill prisoners, and added that prisons “must be provided with sufficient resources”.

The CPT report highlighted the need for urgent steps to be taken, including of a legislative nature, to ensure that mentally ill homeless persons in prison, who the courts are willing to bail, can be transferred rapidly to a psychiatric facility in the community to receive appropriate treatment. This, the report suggested, should also include the development of additional psychiatric beds in the community.

Lack of up-to-date comprehensive data on prisoners’ health status or disability status

A centrally important issue is that the Irish Prison Service does not currently systematically provide data on the number of persons in custody with a diagnosis related to a physical condition, mental illness or a disability. For example, information on the level of mental health conditions in the prison population is currently derived from studies completed in 2003 and 2005, which found that drugs and alcohol dependence were by far the most common problems (present in between 61% and 79% of all prisoners). The Director-General of the prison service has acknowledged that, while there are “lots of data on lots of systems”, it is hard to extract the data and join it up.¹⁸³ Currently, there are a number of systems – a system for psychology data, a system for education data, a healthcare system and an operational system – that do not talk to each other and, in many cases, particularly with healthcare, the information, including diagnosis, is contained in free-text clinical notes.

The 2020, *Sharing the Vision* Report¹⁸⁴ stated that the profile of the mental health needs of the prison population needs to be explored to gather data on the prevalence of autism, intellectual disability and needs relating to addiction and dual diagnosis. “Such data will allow for a more joined-up approach by all professionals delivering care in a prison setting.”¹⁸⁵ It was suggested that, in order to reinforce this joint approach, mental health advocacy groups could be encouraged and supported to connect into prison settings to ensure that individuals are aware of and can access the services they need to assist them in their recovery.

On a positive note, the Director-General has reported¹⁸⁶ that a significant data analytical process has been ongoing in the background for some time in order to develop an integrated system where staff will enter the data that will generate important management reports both at local level and at national level.

It is anticipated that levels of mental health conditions in the prison population will be updated in the coming years through a mental health needs analysis, as recommended in *Sharing the Vision 2020*.¹⁸⁷ This focuses on developing a broad based, whole system mental health policy for the whole of the population and on achieving better outcomes for people experiencing mental health difficulties to bring about tangible changes in their lives and achieve better results.

Prisoner mental health issues that need to be addressed

- There are some people who are not formally diagnosed with mental health difficulties in advance of coming into prison;
- Many people with mental health difficulties who commit a crime may not have done so if they had received proper

support in their communities and/or were able to assess a psychiatric unit;

- The long waiting lists to see a psychologist (six months to a year);
- Inadequate availability of in-patient services for people with severe mental health difficulties;¹⁸⁸
- Half of the prisoners who have been sent to the central mental hospital have been there for more than five years, which leaves insufficient scope for new referrals;
- While between 8% and 10% declare homelessness on committal, it is likely that there is a cohort of people that does not declare itself to be homeless;
- While people with mental health difficulties in prison often have a lot of support, including psychologists, a healthcare team, friends and peer support, when they go back to the community, those supports may not exist in the same holistic manner;

The Final Report of the High Level Task Force to consider the mental health and addiction challenges of those who come into contact with the Criminal Justice Sector¹⁸⁹ highlighted the need for a focus on diversion -- where a Garda comes in contact with people whose predominantly presenting issue is a mental illness, there is a diversionary pathway to take them to access appropriate services (including non-prosecutorial practices and appropriate therapeutic and/or personal supports) so that they do not have to be taken into a custodial setting to ensure their safety and the safety of the public. The report also supports the recommendation in *Sharing the Vision* that persons with mental health issues will be cared for in the least restrictive and most clinically appropriate environment.

It is noted that the Office of the Inspectorate of Prisons (OIP)¹⁹⁰ has recently completed a thematic inspection of the provision of mental health care to people in prisons and the adequacy of supports in dealing with people with severe and enduring mental illness in an environment where they should not be in the first instance.

The Final Report of the High Level Task Force¹⁹¹ acknowledges the widely held public view that people with mental health difficulties who commit an offence should be treated in a mental health facility instead of being sent to prison and that those with an addiction issue should receive appropriate treatment.

The Report acknowledges the role of all actors within the criminal justice system in ensuring that people with mental health or addiction issues are diverted from prison where this is possible and appropriate. In the absence of adequate quality mental health and addiction treatment services in the community, prison has been the default option for people who experience these challenges. The Task Force also acknowledges that often mental health and addiction issues are the result of earlier trauma experienced by an individual.

The High Level Task Force report provides clear, evidence-based solutions to take an individually-tailored approach, reduce the number of people who should not be in prison in the first place and ensure that people with significant mental health and/or addiction needs get the help that they require. It contains 61 recommendations, which emphasise the shared responsibility of a number of government departments and agencies to deliver on meeting the needs of those with mental health and addiction challenges who come into contact with the criminal justice system. The emphasis

183 Joint Committee on Disability Matters 2 March 2023, https://www.oireachtas.ie/en/debates/debate/joint_committee_on_disability_matters/2023-03-02/2/

184 <https://assets.gov.ie/76770/b142b216-f2ca-48e6-a551-79c208f1a247.pdf>

185 Ibid. p.51.

186 Joint Committee on Disability Matters 2 March 2023, https://www.oireachtas.ie/en/debates/debate/joint_committee_on_disability_matters/2023-03-02/2/

187 <https://assets.gov.ie/76770/b142b216-f2ca-48e6-a551-79c208f1a247.pdf>

188 While a new Central Mental Hospital was opened in November of last year, it has been stated that this has done little to alleviate the problem, with many prisoners spending an unacceptable length of time on the waiting list for a bed there. Prison Officers Association President, Tony Power, quoted in *The Journal*, <https://www.thejournal.ie/irish-prisons-mental-health-issues-6055309-Apr2023/>

189 Final Report of the High Level Task Force to consider the mental health and addiction challenges of those who come into contact with the Criminal Justice Sector <https://assets.gov.ie/236035/Ode04b4d-817a-41cf-9779-771ab57703ac.pdf>

190 <https://www.oip.ie/watchdog-focuses-on-mental-health-in-prisons/>

191 Final Report of the High Level Task Force to consider the mental health and addiction challenges of those who come into contact with the Criminal Justice Sector <https://www.justice.ie/en/JELR/Pages/final-report-of-the-high-level-task-force-to-consider-the-mental-health-and-addiction-challenges-of-those-who-come-into-contact-with-the-criminal-justice-sector>

in the Task Force Report on multi-agency responses and interdepartmental working will be key to the successful roll-out of the recommendations and will signal a welcome coordinated approach. This will require the proactive involvement of the Department of Health, Health Service Executive and other mental health support agencies. The availability of appropriate housing in the community will also be a factor.

Key actions identified include:

- An empathetic approach by gardaí to dealing with offenders with mental health and addiction challenges, informed by mental health and addiction awareness training for gardaí;
- Efficient and effective means of implementing a prosecution avoidance policy when Garda members come in contact with adults with mental health difficulties and addiction, through the adult caution scheme;
- The establishment of a pilot specialist dual diagnosis service to support prisoners with a mental health condition and substance misuse;
- Access to tiered mental health supports that are recovery oriented for every person with mental health difficulties coming into contact with the criminal justice system;
- Maintaining engagement and motivation at the point of release, including through the use of community agreed discharge plans for prisoners (identifying multi-agency supports required);

The implementation plan included in the Final Report assigns ownership for each of the recommendations and expected delivery time frames and recognises that some recommendations can be achieved quickly (within the next 18 months), while others will require a longer lead-in time and are accordingly allocated medium term (within the next three years) or long term (within the

next five years. The implementation of these recommendations will be critically important in changing the landscape for people with severe and enduring mental illness coming in contact with the criminal justice system.

There is a specific reference in the report to tracking the outcomes of the implementation of the Task Force's recommendations, that make particular mention of social inclusion/marginalised groups. This will evidently be critically important and will require the allocation of the resources necessary to implementing the wide-ranging recommendations.

Better access to participation by disabled people in justice administration processes

There is general acceptance that the various branches of the legal profession are more likely to appreciate, accommodate and provide for at-risk adults and other disadvantaged groups if the profession has, within its own ranks, people who are members of those groups.

Barriers exist to the entry into, and retention of people with disabilities in the legal professions. As noted in Chapter Two above, international research has found that more than half of disabled lawyers had experienced "ill treatment" such as bullying or discrimination in the workplace, and most said it was because of their disability. While most respondents indicated positive experiences during their education, many said that university did not adequately prepare them for the level of stress in the profession, especially in the light of their disabilities.

Many disabled lawyers also stated that they were reluctant to disclose their disability or to ask for the adjustments they needed, both during the recruitment process and once in work. Some of those who did speak up said their disclosure made things worse.

The International Principles and Guidelines on Access to Justice for Persons with

Disabilities¹⁹² aimed, inter alia, to provide a framework for –

The inclusion and participation of persons with disabilities in diverse roles within the administration of justice (e.g. judge, juror and witness) as a democratic imperative involving and reflecting all facets of society, in effect, shaping the society in which we live.

Since court hearings may involve disabled witnesses, plaintiffs or defendants, having a disabled person on a jury can contribute to a person's sense that they are being tried by a jury of their peers. However, despite many changes in recent years, including provisions in courts for interpretation, people with disabilities may continue to face barriers to serving on juries.

Obstacles that remain include the eligibility of people with intellectual and learning disabilities for jury service and the need for some people to have a Personal Assistant in attendance. It is noted that Section 96 (a) of the Assisted Decision-Making (Capacity) Amendment Act 2022 amends the Juries Act 1976 by the insertion of the following subsections:

A person who is deaf shall not be ineligible for jury service by reason only of his or her requiring the services of a sign language interpreter for the purpose of enabling him or her to perform the duties of a juror effectively.

While issues have been raised about the ability of people with some sensory disabilities to participate in a jury, e.g., the ability of a visually impaired person to read a map or watch CCTV evidence, it is reasonable to suggest that most of those issues can be addressed by provision of appropriate materials and technical aids. It is also reasonable to suggest that people with a sensory disability know their own limitations and would point them out to the judge before being empanelled.

Section 96(b)n of the Assisted Decision-Making (Capacity) Amendment Act 2022 amends the Juries Act 1976 by providing for a more general condition relating to exclusion from Jury service than that included in the 1976 Act:

"A person who does not, in the opinion of the court, have sufficient mental or intellectual capacity to serve as a juror"

This is an important change in emphasis.

Need for enhanced data collection

The absence of adequate data is particularly evident in matters relating to participation in crime by at-risk adults, including, in particular, the question as to why at-risk adults are disproportionately represented in the prison system.

The absence of reliable and comprehensive data in this regard hinders any attempt to have a balanced discussion about how best to proceed. Without robust evidence, there is a greater chance that unacceptable patterns of practice that have become established and normalised over time will continue. As a society that champions the human and legal rights of every individual, we need to ensure that we avoid the ongoing existence of arrangements and practices that are viewed as discriminatory in their operation and result in an undermining of the integrity of our justice system.

There is a clear need for more detailed and accessible information and analysis regarding the prevalence and nature of crimes against at-risk adults. Such information is essential if the problem is to be fully recognised, understood and addressed. Data collection could also further highlight the barriers and solutions for at-risk adults being prevented from making complaints due to gaps in monitoring these situations.

The lack of data on the unmet needs of people seeking civil legal aid is also an issue,

¹⁹² International Principles and Guidelines on Access to Justice for Persons with Disabilities. Special Rapporteur on the Rights of Persons with Disabilities. OHCHR 2020. <https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities>

especially in relation to people who do not meet the means test criteria.

Training and education for justice administration personnel

How the assisted decision-making legislation is implemented in practice will obviously depend on the extent to which the cultural and attitudinal change envisaged in the legislation takes place in practice both in the courts system and among health and social care professionals. All personnel involved in the administration of justice will also need to have a good understanding of the provisions of the ADMC Acts – in particular, the various decision making supports available and the role of the courts in determining decision-making capacity. Gardaí and legal practitioners will need to be fully familiar with the legislative provisions.

The nature and quality of education and training of those who are tasked with the administration of the justice system, including gardaí, judges, court officials and lawyers, at all levels, will be of paramount importance. Disability awareness training should be part of every solicitor’s annual continuing professional development (CPD) requirements, including a one-hour minimum in a new category of diversity, equality, and disability awareness training in their Professional Practice Course, with a focus on working with colleagues with disabilities.

It is fundamental in the context of the ADMC acts that the Legal Aid Board has access to skilled legal practitioners in this area. It is essential that such practitioners are fully conversant with the various arrangements provided for supported decision-making in the 2015 and 2022 Acts. It is also important that a person seeking legal aid and legal advice has the benefit of lawyers who are expert in law where the service is required.

Also key is that the provision of legal advice and mediation should be prioritised over

legal aid in some circumstances and that where any or all of these are required that the professionals involved should be sufficiently skilled as to enable them to engage with clients who may need support with decision-making or have difficulty in communicating their concerns and their will and preference. It would be important that there be not just understanding of the key principles of the ADMC Acts but an appreciation with regard to the right of people to make what, to some legal practitioners (and others), may seem unwise decisions.

There is also a need for greater public awareness about where in the Garda Síochána responsibility for the development of policy, practice and training rests in relation to safeguarding and vulnerable adults. It would appear that currently this responsibility rests with the Assistant Commissioner, Organised and Serious Crime, and with the National Protective Services Bureau. (Previously responsibility for ‘elder abuse’ rested under the National Diversity and Integration Unit, which deals with hate crimes).

An enhanced role for independent advocacy

The absence until recently of any legislative provision for independent advocacy¹⁹³, other than under the Mental Health Act 2001, has resulted in an advocacy environment that is unclear, and in a varied understanding of what advocacy is and is not. New regulations for nursing homes, Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022¹⁹⁴, introduced in March 2023, which requires a registered provider to ensure that a resident has access to independent advocacy services, have changed the situation with regard to access to independent advocacy. These Regulations were brought in to facilitate the expansion of the Patient Complaints Advocacy Service into private nursing homes. The extent to which these regulations will be

observed remains to be seen. Of particular importance will be the mechanisms put in place to compel service providers to facilitate access to an independent advocate.

A critically important point that should be noted is that, despite the concept of independent advocacy coming much more to the fore in policy discourse in recent years, the Assisted Decision-Making (Capacity) Acts 2015 and 2022 make no provision in law for independent advocacy. There is provision in the legislation for the Director of the Decision Support Service (DSS) to develop a Code of Practice “*for the guidance of persons acting as advocates on behalf of relevant persons*” (Section 103 (2)). The reference to the Code of Practice is the only reference to advocacy in the Acts. A Code of Practice for Independent Advocates has been developed by the Decision Support Service and has been published recently to coincide with the commencement of ADMC legislation.

Need for a more collaborative approach

Many at-risk adults face problems that are complex and multi-faceted and these often exist simultaneously. At-risk adults face substantial practical barriers to engaging with the legal system, not least financial costs. While many issues or problems that confront people can be resolved without access to the formal justice system, it is crucial that all citizens be able to access the system in a manner that recognises the principle of equality before the law.

The barriers to ever reaching the legal environment can include societal and personal perceptions and recognition of what constitutes crime and injustice; the hidden nature of many aspects of the indignities, coercion and abuse to which at-risk adults can be subjected; the power that other people – often family, carers and institutions – exert over at-risk adults; and limitations on access that result from poverty, communication deficits, and poor access to information. As already stated, there is only limited availability of civil

legal aid to help people to address some of these issues, which means, in effect, that there is unmet need for legal supports to enable people to have equality of access to justice.

In addition, it is noted that commitments to improving access to justice are frequently outlined in government strategies, as evidenced in the National Disability Inclusion Strategy 2017-2022¹⁹⁵ commitments regarding matters such as the support of vulnerable witnesses, protection against hate crime, appropriate Garda and Court supports, provision for prisoners with mental health issues, etc. It is noteworthy that reviews of progress toward implementation of the strategy and proposals for a future strategy – while recording progress – also point to the need for ongoing action on many issues.

There are circumstances where access to legal advice and legal representation is necessary to ensure a fair balance between the individual citizen and the other party who may have, as a matter of course, engaged legal representation. Such circumstances can frequently extend to proceedings that are presently excluded from the Civil Legal Aid Scheme such as quasi-judicial settings dealing with tenancy, social welfare and employment issues. Also, excluded in practice are broader family-related matters, which have been discussed above.

It is important that the Legal Aid Board continues to build, strengthen, and develop effective relationships with Citizens Information Centres (CISs) and Community Law Centres in order that people can be efficiently and confidently assisted along their pathways to justice. There may be a case in this regard for an examination of how best these relationships can be progressed, and for the identification of measures that need to be taken across and within these various domains to deliver best results.

There is potential for greater integration between free legal advice provided by FLAC and Community Law Centres, the Citizens Information Board (CIB) and CISs in the

¹⁹³ The Citizens Information Act 2007 provided for the establishment by the Citizens Information Board of a Personal Advocacy Service (PAS), but the service was not established as the relevant section of the Act was not commenced.

¹⁹⁴ S.I. No. 628/2022 – Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) (Amendment) Regulations 2022, <https://www.irishstatutebook.ie/eli/2022/si/628/made/en/print>

¹⁹⁵ <https://assets.gov.ie/162923/96990962-f41f-4844-b784-e9ccf8cbfa42.pdf>

provision of legal advice under the Civil Legal Aid Scheme.¹⁹⁶ CISs¹⁹⁷ provide first stop assistance, basic legal information and advice, such as outlining the next steps a person needs to take and making a referral to another appropriate service. There is also potential for greater collaboration between the Legal Aid Board and independent advocacy organisations such as Sage Advocacy and the National Advocacy Service for People with Disabilities.

The Citizens Information Board currently operates a wide network of walk-in facilities around the country. Larger CISs could be used as a basis for developing and providing more widespread access to legal advice, mediation and legal aid. A small number of local authorities, such as Sligo and Donegal County Councils have tried to develop 'one-stop-shop' projects to co-locate a range of public service providers in the same building. Dublin City Council developed a useful model at the Northside Civic Centre, where Coolock Community Law & Mediation is based.

There is a need to establish dedicated and purpose-built modes of delivery aimed at meeting the needs of groups of potential clients. These would include persons living in institutional settings (including prisons), the Traveller and Roma¹⁹⁸ communities, persons seeking international protection, and homeless people. These client groups could be directly served through dedicated and specialised channels that could involve existing specialist advocacy and support organisations as well as expanding community law centre provision.

Panels of specialist legal experts will be required for some particularly complex and challenging issues:

- Improve 'first point of contact' Information & Support Service;
- Provide legal advice and mediation to pre-empt the need for legal aid;
- Develop outreach services to hard-to-

reach areas and groups.

The channels of access to information are particularly important for those who are isolated in institutions, homes or other living arrangements where they may find themselves dependent on others.

It is noted that currently LAB has a staff member with a dedicated brief in regard to Travellers, with three strands – namely outreach; cases; and training required for LAB staff in dealing with Travellers as clients. There would be much merit in having a similar approach to people being provided with support under the ADMC Acts. This would be facilitated by the development of collaborative mechanisms with independent advocacy organisations, e.g., Sage Advocacy and the National Advocacy Service for People with Disabilities.

Need for new legislative provisions

There are four areas where additional legislative provision is required – adult safeguarding, protection of liberty, independent advocacy and coercive control.

Adult safeguarding

Currently there is no clear obligation on the State, state agencies or organisations to safeguard at-risk adults. In developing a regulatory framework, it is necessary to impose a statutory obligation on state bodies and organisations providing care and support services on behalf of the State to prevent or reduce abuse in all its forms, as distinct from the current approach where the focus is primarily on the management of crises and responding to concerns reported. High levels of dependency and/or a lack of decision-making capacity almost certainly results in extremely vulnerable adults having their human rights infringed (e.g., right to bodily integrity) with inadequate protection from the law.¹⁹⁹ Access to justice for this group requires not only safeguarding legislation but

also more public scrutiny and an embedded role for independent advocacy, in particular non-instructed advocacy.

The need for safeguarding legislation has been identified repeatedly in recent years by various agencies (statutory and NGO). For example, HIQA, the National Safeguarding Office, Safeguarding Ireland, the Irish Association of Social Workers, Sage Advocacy, Inclusion Ireland and others have all called for safeguarding legislation.

The need for such legislation arises because of a number of factors, including, in particular,

- The need for an independent oversight body;
- The need to broaden the issue of safeguarding vulnerable adults beyond the domain of health and social care;
- The need for HSE Safeguarding and Protection Teams to have stronger rights of entry and inspection;
- The need for better intra- and inter-agency liaison and collaboration;
- The need to ensure that people who experience abuse in any form have easy access to safeguarding and to redress (where the latter is relevant);
- The need to ensure that at-risk adults in nursing homes and in other residential care facilities are fully safeguarded and their human and legal rights protected.

The Law Reform Commission has noted that the provision of adult safeguarding legislation is underpinned by international human rights obligations as well as in the context of defending the personal rights of those whose capacity is in question as set out in Article 40.3.1 of Bunreacht na hÉireann. HIQA, in its submission to the Oireachtas Select Committee on the Future of Healthcare in 2017²⁰⁰, noted as follows:

“We believe that now is the time to introduce safeguarding legislation to protect at risk adults from abuse and neglect. While national safeguarding protocols are in place following recent high-profile revelations of abuse, these do not go far enough to ensure the safety and rights of vulnerable people.”

The Joint Oireachtas Committee on Health in its Report on Adult Safeguarding²⁰¹ recommended that there should be no unnecessary delay in implementing adult safeguarding legislation.

Adult safeguarding legislation is also clearly necessary to ensure compliance with Article 16 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which provides that state parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects. Article 16.5 of the UNCRPD requires that effective legislation and policies are put in place “to ensure that instances of exploitation, violence and abuse are identified, investigated and, where appropriate, prosecuted.”

Protection of liberty

The right to personal liberty is one of the most fundamental human rights as it affects the vital elements of an individual's personal and physical freedom. The right of liberty is critically important in a democratic society and a basic component of access to justice, particularly when a person lacks decision-making capacity to consent to, or disagree with, a proposed action.

The UN Convention on the Rights of Persons with Disabilities (Article 14) provides that there is an obligation on the State to ensure that a person is not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in accordance with the law.

¹⁹⁶ The Citizens Information Board funds FLAC to provide legal clinics and helpline services through Citizens Information Centres.

¹⁹⁷ <https://centres.citizensinformation.ie>

¹⁹⁸ In 2020, FLAC with support from the Community Foundation for Ireland established a dedicated Traveller Legal Service.

¹⁹⁹ See Sage Advocacy Homepage, <https://www.sageadvocacy.ie/> Postcards with an edge – ‘Not everyone is happy in a nappy’ and ‘To you it is care ...to him it is custody’ and ‘A gilded cage is still a cage’, etc.

²⁰⁰ <https://www.hiqa.ie/sites/default/files/2017-02/Submission-Committee-on-the-Future-of-Healthcare.pdf>

²⁰¹ https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_health/reports/2017/2017-12-13_report-adult-safeguarding_en.pdf p.7.

It is generally acknowledged that Ireland does not have adequate legislation and procedures to ensure that vulnerable adults' liberty is fully protected at all times and in all situations. For a person whose decision-making capacity is in question or who lacks capacity, there are no adequate legal safeguards and procedures to prevent the person being *de facto* detained in a residential care setting/nursing home/designated centre for people with disabilities/hospital other than a High Court *Habeas Corpus* application. This is in marked contrast to the Mental Health Tribunals that operate under the Mental Health Act 2001. Currently, everyone who is involuntarily admitted to an approved centre under the Mental Health Acts 2001-2018²⁰² has their case reviewed by a Mental Health Tribunal within 21 days of the making of the admission or renewal order detaining the person. Tribunals are independent and the reviews are there to protect the person's rights. The situation is very different for people with high care needs who are forced to remain in a residential setting against their will because there are no realistic alternatives available in the community. This issue is compounded by the current lack of legislative safeguards and the absence of a process of automatic review to determine if a person admitted to a residential care centre has consented to be there. This can result in people being effectively detained against their will, which constitutes a deprivation of liberty.

An acknowledged gap in the Assisted Decision-making (Capacity) Act 2015 is the absence of Deprivation of Liberty Safeguards to provide for people who lack capacity to consent and who reside in a situation where they are subject to continuous supervision and are not free to leave. Objectively, they are held against their will. Under Article 5 of the European Convention on Human Rights, this can only happen in accordance with a

procedure prescribed by law and must be amenable to review and challenge.

There have been repeated calls for the State to enact legislation on Deprivation of Liberty in accordance with international human rights standards and norms regarding use of detention and restraint including the UN Convention Against Torture (UNCAT), the UNCRPD and the European Convention on Human Rights. Concerns have been expressed in submissions to the UN Committee Against Torture²⁰³ regarding possible deprivation of liberty of vulnerable adults in congregated care settings such as nursing homes, hospitals and other institutions. For example, the Irish Human Rights and Equality Commission (IHREC)²⁰⁴ has identified significant concerns regarding the lack of systematic safeguards, vulnerability assessment, and independent regulation across a range of institutional and quasi-institutional settings where people may be at risk – such as health and social care services, accommodation services for homeless people, drug treatment facilities, direct provision centres for applicants for international protection, and residential settings for older people and disabled people.

The Government approved the relevant draft Deprivation of Liberty Heads of Bill for public consultation in December 2017.²⁰⁵ The draft Heads of Bill set out procedural safeguards to ensure that people in relevant facilities who lack capacity are not unlawfully deprived of their liberty. The approach taken in the draft Heads of Bill makes use of the decision-making procedures, supports and safeguards that are provided for in the Assisted Decision-Making (Capacity) Acts and also includes some additional safeguards specific to deprivation of liberty. The proposals build on the infrastructure of the Decision Support Service, which is provided for under the ADMC Act 2015. The Department of Health held a

related consultation in 2018, and received in excess of 50 submissions.²⁰⁶ An Advisory Group comprised of key stakeholders was formed to consider the findings of the public consultation, advise on appropriate amendments to the draft Heads of Bill and ensure that the approach taken integrates effectively with existing legislation. The Bill was due to be published by the end of 2018 but this did not happen.

It is very important that legislation is formulated in Ireland in order to comply with the Constitution and the State's international human rights obligations, for example, the European Convention on Human Rights and the UNCRPD and the Supreme Court's judgement in the AC case.

The National Disability Inclusion Strategy 2017-2022²⁰⁷ committed to introduce statutory safeguards to protect residents of nursing homes and residential centres, and ensure that they are not deprived of liberty, save in accordance with the law as a last-resort measure in exceptional circumstances.

It is noted that the Department of Health had commenced work on Protection of Liberty safeguards and that a draft Heads of Bill was developed and published for public consultation in 2018/2019. Progress on this process was interrupted by the Covid-19 pandemic and has been dormant since then. The failure by the Department of Health to progress protection of liberty legislation since to 2018 is a matter of some concern. However, it is noted that the Department of Health has now (March 2023) set up a Protection of Liberty Safeguards Experts Advisory Group to support the Department in establishing a policy direction and a preliminary policy proposal.

Legislative provision for independent advocacy

It is widely accepted that the provision of independent advocacy is an essential part of effective access to justice. The absence until recently of a legislative remit for independent advocacy other than under the Mental Health Act 2001 resulted in an unclear independent advocacy environment. Evidence from Sage Advocacy casework indicates that sometimes nursing home staff have sided with relatives to exclude an independent advocate and that an at-risk adult's General Practitioner or solicitor will sometimes side with family members or not speak out, for a variety of reasons.²⁰⁸ It is noted that many respondents to The Deprivation of Liberty Safeguard Proposals Public Consultation²⁰⁹ recommended that the legislation should make provision for the appointment of an independent advocate and that a panel of independent advocates should be established by the Director of the DSS, and that the legislation should encompass a definition of an 'independent advocate'.

While much of the consideration given to the concept of independent advocacy has, rightly, focused on aspects of assisted decision-making and capacity, it is equally clear that advocacy can have an important role in ensuring that at-risk adults, whether victims or perpetrators of crime, have equal access to justice. Independent advocacy can also play a critical role in enabling a person's voice to be heard in decisions about their long-term care.

Coercive control and the Domestic Violence Act 2018

The Domestic Violence Act 2018 performs a very important task in criminalising coercive control, which is now, in certain contexts, a criminal offence under the Act. However, there are significant shortcomings, limitations and difficulties attached to the application of the

202 <https://revisedacts.lawreform.ie/eli/2001/act/25/revised/en/html>

203 See, for example, <https://www.sageadvocacy.ie/news/2017/june/sage-makes-submission-to-un-committee-against-torture>

204 Submission to the UN Committee against Torture on the List of Issues for the Third Examination of Ireland <https://www.ihrec.ie/app/uploads/2020/01/Submission-to-the-UN-Committee-against-Torture-on-the-List-of-Issues-for-the-Third-Examination-of-Ireland.pdf>

205 While Protection of Liberty legislation was originally planned as a new section to be included in the Assisted Decision Making (Capacity) Act, stand-alone legislation is now planned.

206 The: Report on the Public Consultation on the Deprivation of Liberty Safeguard Proposals was published in July 2019, <https://www.gov.ie/en/publication/3f88c4-the-deprivation-of-liberty-safeguard-proposals-report-on-the-public-/#>

207 <https://assets.gov.ie/162923/96990962-f41f-4844-b784-e9ccf8cbfa42.pdf> P.13

208 Browne, M. (2018) Independent Advocacy in Ireland - Current Context and Future Challenge, Safeguarding Ireland, <https://www.safeguardingireland.org/wp-content/uploads/2018/10/Advocacy-Scoping-Documents-Final-310818.pdf>

209 The Deprivation of Liberty Safeguard Proposals: Key Findings of the Public Consultation, <https://www.gov.ie/en/publication/3f88c4-the-deprivation-of-liberty-safeguard-proposals-report-on-the-public-/>

law in respect of providing protection against coercive control for many adults at risk. Protection under the 2018 Act is not available unless the perpetrator is or was an intimate partner. Neither does the Non-Fatal Offences Against the Person Act 1997 address this regulatory gap relating to coercive control.

The narrow scope of the offence of coercive control under the 2018 Act does not adequately capture the nuanced coercive control often exercised over persons who are dependent on the perpetrator for their care.

The definition of 'relevant person', in the Domestic Violence Act 2018, i.e., the perpetrator of coercive control, needs to be expanded to include all persons who inflict this form of abuse, irrespective of the relationship involved. Such an expansion of the definition would ensure that the general public can be made aware of this form of abuse of adults generally and of its unacceptability; and that all people experiencing coercive control have effective legal redress, irrespective of their relationship with the perpetrator.

Better protection for people in residential care facilities where staff and other residents perpetrate abuse in the form of coercive control is required. There is a similar need to provide legislative safeguards where coercive control is perpetrated by a home care provider.

The Domestic Violence Act 2018 needs to be amended to address the above matters.

Concluding Observations

There is an obvious need to acknowledge, as highlighted throughout this report, that access to justice is broader than equality of access to the courts. Mediation and arbitration services, as well as services that provide information, advice, and advocacy also play an important role. While civil legal aid and advice in court proceedings is often a critical factor, information, advice, and advocacy is an essential part of ensuring due process both in the formal judicial system and in quasi-judicial and administrative tribunals.

At-risk adults who are experiencing legal problems are frequently caught up in a cascade of inter-related issues, involving

problems that are multiple and interconnected. At-risk adults can have complex and wide-ranging legal support needs and may need assistance in multiple legal areas including family law, housing issues, domestic violence, and debt.

There is little doubt that the living circumstances of many at-risk adults who are resident in nursing homes, hospitals and other institutional settings place them in a situation where their access to information, advice and support with regard to legal matters is seriously curtailed. People's knowledge regarding their rights, their motivation to demand and pursue those rights, and their ability to use legal means in order to achieve their rights is very restricted. At-risk adults are frequently highly dependent on others for the essentials of daily life. In some instances, the people charged with the care and support of at-risk adults are seen to exploit and abuse their positions of trust. The fact that abusers are often also the 'gatekeepers' for information and for access to justice makes for a particularly challenging and difficult state of affairs. The channels of access to information about human and legal rights are particularly important for at-risk people who are isolated in institutions (residential care facilities and prisons) or in their own homes where they find themselves dependent on others.

Complaints mechanisms must be available, accessible and confidential, particularly for those in institutional settings. The literature indicates that formal or informal supports, such as peer advocacy and more formal independent advocacy can improve access to complaints systems.

It is particularly important that all efforts should be made to ensure that people with an intellectual disability are facilitated in giving evidence in court and acting as jurors.

As a society that champions the human and legal rights of every individual, we need to ensure that we avoid the ongoing existence of arrangements and practices that may be discriminatory in their operation and result in an undermining of the integrity of our justice system.

Appendix One

Other relevant legislation

In addition to the *Criminal Justice (Victims of Crime) Act 2017*, there are a number of other pieces of legislation that deal with the rights of victims of crime in Ireland –

Criminal Evidence Act 1992

This Act makes it easier for witnesses to give evidence in physical or sexual abuse cases by allowing for a live television link with the court. In some cases, this Act forces the spouse of the accused to give evidence for the prosecution. The Act makes it easier for children to give evidence by getting rid of –

- The need to give evidence on oath;
- The need for corroboration (previously, additional evidence confirming the evidence given by the child was needed);
- The wearing of wigs and gowns by barristers when evidence is being given by video link.

Criminal Justice Act 1993

This Act requires the court to consider the effect of a violent or sexual offence on the victim when it is deciding a sentence. The Act allows the Director of Public Prosecutions to appeal lenient sentences. It also gives the court the power to force the offender to pay compensation to the victim for any personal injury or loss suffered.

Civil Legal Aid Act 1995

Under this Act, the Legal Aid Board provides legal aid or advice to a **complainant** in certain criminal cases involving prosecution for a range of sexual offences, including rape, aggravated sexual assault and incest. A **complainant** is the person making the complaint. The Board also provides legal advice in relation to criminal matters to alleged victims of human trafficking.

Criminal Justice Act 1999

The *Criminal Justice Act 1999* deals with the protection of witnesses, including victims, who may have to give evidence in court.

It allows witnesses who are in fear or subject to intimidation to give evidence via a live video link. It creates some new offences, including intimidation of a witness, a jury member or any person helping gardaí with a criminal investigation. The penalty is up to 10 years' imprisonment.

*Criminal Law (Human Trafficking) Act 2008*²¹⁰

The *Criminal Law (Human Trafficking) Act 2008* makes it an offence to **traffic in adults or children** for the purpose of their sexual or labour exploitation or the removal of their organs. In addition, it makes it an offence to sell or purchase (or offer to sell or purchase) any person for any purpose. It is also an offence to solicit a trafficked person for the purpose of prostitution.

Criminal Law (Defence and the Dwelling) Act 2011

The Criminal Law (Defence and the Dwelling) Act 2011 provides that people are entitled to use reasonable force in defence of people and property if they believe that an intruder has entered their dwelling to commit a criminal act.

S.I. No. 119/1987 – Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations

Section 22 of this Statutory Instrument provides that –

The provisions of these Regulations relating to persons under the age of

210 <https://www.irishstatutebook.ie/eli/2008/act/8/enacted/en/html>

seventeen years shall apply, in addition to any other applicable provisions, in relation to a person in custody not below that age whom the member in charge suspects or knows to be mentally handicapped.

In the application of Regulation 13(2) (c) to such a person, the responsible adult referred to in that provision shall, where practicable, be a person who has experience in dealing with the mentally handicapped.

This regulation states that a responsible person be called if a person with intellectual disability is brought into custody. However, this is not 'age appropriate' under the UNCRPD, as the same provision pertains to both a child and to a disabled person.

The Criminal Procedure Act 2021 provides for preliminary hearings, which will be very important in the functioning of an intermediaries' scheme.

A [Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) has been published. The proposed legislation will criminalise any intentional or reckless communication or behaviour that is likely to incite violence or hatred against a person or persons because they are associated with a protected characteristic, including disability.

Appendix Two

Financial Criteria for Accessing Legal Aid and Legal Advice

Means test

The Legal Aid Board also has an online Financial Eligibility Indicator²¹¹ on its website, which aims to assist people in finding out if they are likely to qualify for support.

The Legal Aid Board means test is different to the social welfare or Health Service Executive (HSE) means tests. The time period of relevance – for the purposes of the means test – is the year following the application. The Board will seek to estimate what the person's disposable income for that year will be. It may be necessary to consider their income for the last year in order to do so.

As well as having disposable income of less than €18,000, the applicant must also have disposable capital of less than €100,000. The family home is not considered when assessing disposable capital.

Disposable income

Disposable income is total income less deductible expenses including income tax, mortgage repayments, rent, social insurance contributions, interest on loans, child-minding expenses and other items.

Most sources of income are considered by the Legal Aid Board and taken into account including income from a job, self-employment, pensions (both occupational and social welfare) investments, rental income, etc.

The value of benefits, privileges and perks that an applicant enjoys are also taken into account. This includes free accommodation and/or board, and the value of a non-contributory pension scheme.

No housing support measure, provided by any public body, is treated as income. This includes the Housing Assistance Payment and any rent supplement or allowance.

In the case of spouses or cohabitants with a joint interest in proceedings, the income of both may be taken into account.

Allowances and expenditure

Once the Board has estimated an applicant's annual income, it will then seek to calculate their disposable income by deducting the following allowances and expenditure from the annual income;

- Spouse/partner – there is a deduction of €3,500 if the applicant has a spouse/partner;
- Dependants – there is a deduction of €1,600 for each dependant. A dependant may be a child or step-child under 18 or over 18 and in full-time education or a dependant relative or other person who lives with the applicant and is supported by them;
- Childcare expenses up to a maximum of €6,000 per child;
- Accommodation costs up to a maximum of €8,000 per year;
- PRSI and USC contributions are deducted in full;
- Income tax payments are deducted in full;
- Ex gratia payments received up to €1,040 in total.

²¹¹ Available at <https://www.legalaidboard.ie/en/our-services/legal-aid-services/on-line-financial-eligibility-indicator/on-line-financial-eligibility-indicator.html>

Rates

There are minimum contributions that must be paid except in cases of extreme hardship. However, the contribution that the applicant must make depends on their disposable income in the case of **legal advice**, and on their disposable income and disposable capital, in considering a case for **legal aid**, while there is no contribution required in child-care and domestic violence cases, the applicant still needs to come within the disposable income and capital thresholds.

The Minimum contributions are –

Legal advice: a minimum contribution of €30 must be paid where disposable income is less than €11,500. If it is more, the contribution is one-tenth of the difference between €11,500 and the applicant's disposable income, up to a maximum of €150.

Legal aid: a minimum contribution of €130 must be paid where disposable income is less than €11,500. If it is more, the contribution is €130 plus one-quarter of the difference between €11,500 and the applicant's disposable income. The applicant must pay an additional contribution if their disposable capital is more than €4,000 as follows:

- Disposable capital between €4,000 and €54,000 – the contribution is 2.5% of the difference between €4,000 and the person's disposable capital
- Disposable income over €54,000 – the contribution is €1,250 plus 5% of the difference between €54,000 and the person's disposable capital



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