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Requires immediate attention

Mary Condell outlines the current situation of mental capacity law in Ireland.

Currently, the approach to capacity in Ireland, reflected in an archaic wards of court system based on legislation dating from 1871, is an all-or-nothing approach based on a medical assessment of the individual. This, however, does not reflect the research and discussion that has taken place since 2003 about updating the law relating to capacity, not least so that Ireland can ratify the *UN Convention on the Rights of Persons with Disabilities* (UNCRPD).

Discussion began with the publication of two Law Reform Commission (LRC) consultation papers: *Law and the Elderly* (2003) and *Vulnerable Adults and the Law: Capacity* (2005). Following a consultation process with interested parties, the LRC published its 2006 report *Vulnerable Adults and the Law*. It combined the matters dealt with in both consultation papers.

The 2006 report was prepared with the benefit of the sight of the then draft UNCRPD. Following the international trend away from a medical model towards a social and rights-based model of disability, which placed the emphasis on ability rather than disability, the LRC recommended the introduction into Irish law of the time- and issue-specific functional approach to capacity. The report included a draft *Mental Capacity Bill* containing this approach.

When the UNCRPD was opened for signature in 2007, Ireland was one of the first countries to sign it, but it will not ratify it until its domestic law is in general conformity with it. Despite the publication, in 2008, of the scheme of the *Mental Capacity Bill* (as it was then entitled), which was based on the Bill suggested by the LRC, the Bill has not yet been introduced. It is currently on the government's A-list, with a promise that it will be published and introduced into the Dáil for debate around Easter of this year.

Meanwhile, the Bill has been renamed. It is now the *Assisted Decision-Making (Capacity) Bill*. The renaming is presumed to be the result of the Joint Oireachtas (parliament) Committee hearings from interested parties on the Bill, which took place in early 2012. At those hearings there was considerable lobbying by parties involved in disability law and policy, in reliance on article 12 of the UNCRPD – that persons with disabilities enjoy legal capacity equally with all others before the law – that it be called the *Legal Capacity Bill* to reflect the absolute right for all to make legal decisions, albeit in some instances with assistance.

The Law Society advanced the view that while article 12 does, quite rightly, state that all persons are equal before the law, those who were arguing for a form of assisted decision-making were looking at this only from the point of view of disability legislation generally, and that having equal rights before the law is a different concept to having capacity to make legal decisions.

The Law Society supported what had been recommended by the LRC, namely that where a legal decision has to be made the competency of the individual to make it has to be assessed in every instance, and that the approach to be used is the functional approach, with a default substituted decision-making structure, based on what is in the best interests of the individual, and that this fully meets the requirements of article 12.

Another lacuna presently in Irish law is the ability of an individual to make end-of- life decisions in advance for themselves. This is despite the *Powers of Attorney Act 1996*, which allows an individual to appoint an attorney to make personal care and property decisions if they become incapable of making those decisions for themselves. The Act does not make provision for end-of-life decisions.

In 2009, the LRC published *Report on Bioethics; Advance Care Directives*, which recommended passing legislation allowing and regulating the way an individual may sign an advance care directive appointing another person to make end-of-life decisions on their behalf. The report included draft legislation that it is understood will form part of the *Assisted Decision-Making (Capacity) Bill*.

The Bill is urgently and eagerly awaited.

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