



THE BAR
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An Leabharlann Dlí

Department of Health public consultation on policy proposals for adult safeguarding in the health and social care sector.

Submission of The Bar of Ireland

April 2024

DEPARTMENT OF HEALTH

**Public consultation on policy proposals for adult safeguarding in the health and social care
sector**

SUBMISSION OF THE BAR OF IRELAND

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Question 1

We are providing feedback on behalf of The Bar of Ireland, a professional body which represents barristers in Ireland.

Question 2

Overall, do you agree with the following in the policy proposals: Vision, aims and objectives, principles?

The Bar of Ireland welcomes the State's efforts to implement legislative safeguards for vulnerable adults in the health and social care sector as mandated by the European Convention on Human Rights and the United Nations Convention on the Rights of Persons with Disabilities ("UNCRC"). The Bar further endorses the proposed regulatory framework which places, at its core, the will and preferences of the individual, mirroring the provisions of the Assisted Decision Making (Capacity) Act 2015 ("ADMCA") and ensuring greater implementation of that Act.

The Bar reiterates its previous submissions regarding the need for a regulatory framework in respect of deprivation of liberty¹ for adults whose decision-making capacity is impaired. The Constitution and the European Convention on Human Rights Act 2003 protect people with disabilities against unlawful detention. The Bar notes with concern that there continues to be no mechanism in Ireland to protect incapacitated adults against de facto detention in nursing homes, designated centres and other similar facilities. Further, even where a question of detention does not necessarily arise, the Bar submits that a regime of care should be in place to safeguard individuals where the risks to them in terms of their own capacity may vary over their period of engagement with state health and social care sectors.

Legislation for adult safeguarding is crucial to ensure the State's compliance with Article

¹ Bar of Ireland, *Submission to the Committee on Children, Equality, Disability, Integration and Youth on the General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill 2021*, (<https://www.lawlibrary.ie/app/uploads/securepdfs/2022/06/Submission-on-the-General-Scheme-of-the-Assisted-Decision-Making-Capacity-Amendment-Bill-2021.pdf>)

16 of the UNCRPD, which mandates that State Parties must enact appropriate laws and take various measures to safeguard individuals with disabilities from all forms of exploitation, violence, and abuse, including those related to gender. Article 16(5) UNCRPD necessitates the enactment of laws and implementation of policies to ensure the detection, investigation, and prosecution of incidents involving exploitation, violence, and abuse.

Finally, as the Department of Health itself has identified, there will be a need for protective legislative measures for persons who either need to be moved from their place of care or who need to be shielded from particular persons who are inhibiting their care. The Bar supports the provision of a legislative and/or regulatory framework that protects the individual, in recognition of the individual's right to autonomy. However, it is important that any further frameworks should also recognise the interdependence between the individual the family, and other social supports. Like the ADMCA, any new system should adhere to the ethical framework of relational autonomy, recognising and supporting relationships of between patients and those who love and support them. The Bar therefore suggests that the principles underpinning the policy proposals be adjusted to recognise the important role that families and other carers play in the lives of those who use HSE health and social services. It is important that such relationships be recognised and protected, so that service users can be properly supported.

Question 3

Should the scope of the proposals cover public, private and voluntary services?

The Bar endorses the continuity of service provision across all sectors and by all service providers. Problems can arise from the distinction between the public and private sector, e.g. social workers do not have automatic access to private nursing homes. A more universal system would allow a smoother implementation of safeguards. However, existing powers of entry can prove prohibitive. The complexities therein are highlighted in the Law Reform Commission's 2019 report regarding issues arising in Adult Safeguarding

under Issue 6: Powers of Entry and Inspection² which concludes with some suggestions around multi-agency approaches to overcoming restrictions on entry to certain premises. These approaches would need to be built into safeguarding training or formalised in safeguarding legislation.

Question 4

Comment on whether the proposal will be achieved.

The likelihood of the policy proposals achieving their aims will largely be determined by the following :

- i. The extent to which the structures, training and service are resourced: the relevance of the appropriate level of resources was highlighted by Collins J in AB v. HSE, where he considered lack of resources in the HSE for assessments of need under the Disability Act 2005 and held at [17]

[I]t is often easier to legislate on paper than it is to ensure that legislation functions as intended and actually achieves its policy objectives. In his stimulating book *Making Laws that Work: How Law Fails and How We Can Do Better* (2022), David Goddard, a Judge of the New Zealand Court of Appeal, observes that it is impossible to design effective laws without paying close attention to the institution(s) that will administer them (page 82). Where that is an existing institution, consideration must be given to whether it has the capacity and the resources needed to play its intended role. If the institution lacks the capacity to administer the law, then it is likely that the law will fail to achieve its policy goals (page 83).

- ii. The extent to which the appropriate legal structures are in place (dealt with further below).

² Law Reform Commission, *Issues Paper – A Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019) para. 6.59 and 6.60.

Question 6

Do you have any concerns about the policy proposals?

The Bar reiterates its submissions in respect of the need for Deprivation of Liberty Safeguards as a key aspect of the implementation of adult safeguarding.³ In response to a call for submissions regarding the General Scheme of the ADCMA amendment Bill 2021, the Bar of Ireland outlined the vital significance of such safeguards for people who do not meet the criteria for ‘mental disorder’ saying, “While the nature of the relevant underlying condition may fall outside the narrow confines of s9 of the MHA, those persons may still lack decision-making capacity (as understood under the 867 Act) and the risks that they face in the community may be every bit as acute – and in some cases more acute – than those faced by persons with a s9 mental disorder.”

As recently as 12 October 2023, the Minister for Health once again reiterated the need for these safeguards in the response to Dáil questions: “Protection of Liberty Safeguards legislation will provide procedural safeguards to ensure that people who cannot consent to their care arrangements in relevant health and social care facilities such as long term residential centres for older people and people with disabilities and hospitals are not unlawfully deprived of their liberty.”

The safeguarding proposals outlined in this public consultation policy document are detailed and ambitious. Effective implementation in a practical manner, is to be hugely welcomed. However, where there are gaps in the systems in place, such as this very significant gap arising without DoLS, it will be very difficult for any other policy proposals on safeguarding to be effective. Those who are most at risk and affected by this lacuna will suffer.

³ Bar of Ireland, *Submission to the Committee on Children, Equality, Disability, Integration and Youth on the General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill 2021*, (<https://www.lawlibrary.ie/app/uploads/securepdfs/2022/06/Submission-on-the-General-Scheme-of-the-Assisted-Decision-Making-Capacity-Amendment-Bill-2021.pdf>)

Question 8

Do you agree with the policy proposals on the legal framework for adult safeguarding duties?

The Bar endorses the clear assignment of duties to all health and social care services to safeguard service users abuse⁴. The Bar agrees that duties should be imposed on all providers of health and social care services and all relevant health and social care agencies, including the requirement to cooperate for safeguarding purposes and to share information where necessary to protect an adult at risk who uses a service from being abused.⁵ Explicit functions and duties should be assigned to the HSE to allow it to perform a central role in relation to safeguarding adults at risk who use our services across the health and social care sector.

Question 9

Do you agree with the policy proposals that new laws should be introduced to provide legal powers for specified safeguarding bodies or personnel?

We are concerned that such measures would duplicate protective measures which are already available.

To remove an adult with disabilities (“AWD”) from a place of risk to a place of safety does not require a removal order. AWDs are assumed to have capacity until the contrary is found by a court. If there are concerns that an AWD is at risk of harm, he or she can be invited to remove themselves from the risk in question. No other person has a right to prevent such removal, unless they have been given custody of the person by a court. In this context, the first line of protection is provided by An Garda Síochána exercising their existing statutory powers.

If the AWD has been placed by a court in a placement in which he/she is now apprehended to be at risk, the appropriate course is to apply to the court for discharge or

⁴ See Chapter 2 and Chapter 4 of the proposal

⁵ See Chapter 7 of the proposal

variation of the relevant order. For example, if an AWD is placed in a designated centre by order of the High Court in wardship or in the exercise of the inherent jurisdiction, and it is apprehended that he or she is at risk of harm there, it would be appropriate to apply to the court for permission to move him or her to a place of safety.

If an AWD is not subject to any orders but does not have capacity to decide to remove himself or herself from a place of risk, the ADMCA provides a framework, depending on his or her level of capacity, whereby such a decision can be made: whether with the assistance of a decision-making assistant, a co-decision-maker or the appointment of a decision-making representative. If the AWD does not have such an arrangement in place and does not have capacity to make the necessary decision, an urgent application can be made to the Circuit Court for the appointment of a decision-making representative. The ADMCA even provides for interim orders under section 49. If the AWD has a decision-making arrangement in place but it is insufficient, for whatever reason, to secure his or her protection, a complaint can be made to the Decision Support Service or, where a decision-making representative has been appointed, an application can be made to the Circuit Court to discharge the decision-maker and appoint a new one who will make the decision necessary to allow the person's removal to a place of safety.

Question 10 – Chapter 6

Do you broadly agree with the policy proposals set out in the following sub-chapter: Interventions and Sanctions: 6.3?

We also note that under section 11 of the Domestic Violence Act 2018, the Child and Family Agency (“CFA”) is empowered to apply for a safety order, a barring order or an emergency barring order on behalf of any person, including an AWD, where that person's safety or welfare is in doubt and where it has reasonable cause to believe that the person has been subjected to molestation, violence or threatened violence or otherwise put in fear of his or her safety or welfare. We understand that by agreement with the CFA under the Child and Family Agency Act 2013, the HSE may exercise this power on its behalf with respect to adults with disabilities.

The Bar of Ireland considers that the 2018 Act adequately addresses the harm which it is proposed to address by way of a 'no contact order.' Preventing contact between adults, especially members of families, involves significant interference with constitutionally protected rights. We are not aware of any evidence demonstrating a need for the HSE to be conferred with any additional powers going further than those that already exist under the 2018 Act.

If the Department believes that the mechanisms of the ADMCA and the 2018 Act are deficient in providing for removal of AWDs from situations of risk, it would be more appropriate to make the necessary amendments to those Acts than to create a new mechanism which could be used to frustrate or bypass the existing procedures.

Question 11

Any additional comments?

The Bar recognises and supports the legitimate aim of the proposals in the consultation paper but reiterates the necessity for adequate resourcing of any and all implemented proposals to avoid frequent litigation and the indirect consumption of finite resources: See *AB v HSE* (referred to at question 4 above).

Furthermore, there is a urgent need to implement Deprivation of Liberty safeguards in order to underpin the effectiveness of a new regime of adult safeguarding. Finally, any legislative changes will need to be clear, necessary and effective.

Adult safeguarding proposals, if implemented and resourced appropriately, can and should play a vital role in protecting vulnerable adults, upholding their rights, promoting accountability, preventing harm and empowering individuals to have control over their own lives.



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