

# **Capacity & Guardianship**

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## **Introduction**

**In 2006 Ireland signed the UN Convention and has yet to ratify it. In order to ratify it Ireland will have to amend the current Ward of Court System to satisfy the obligation that "*States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life*" (Article 12.2)**

**It is clear that the current Ward of Court system, discussed further below does not satisfy this obligation and in September '08 the government introduced the scheme of the Mental Capacity Bill 2008.**

## **Current Law**

**The only adult guardianship system in place in Ireland is the Ward of Court system. Until the Capacity Bill 2008 is enacted the Ward of Court system will remain in place.**

**The Ward of Court System is a status based approach to capacity and this means that if a person is judged to lack capacity on a particular issue then they lose the right to make all decisions and this right is vested either in the court or in a person appointed by the court.**

**A person is usually made a Ward of Court when they have inherited or been awarded a sum of money and there are doubts about their capacity. It is not always appropriate for a person with intellectual disability to be made a Ward of Court as it can last indefinitely and have far reaching effects such as preventing the person making a will, getting married or making medical decisions.**

## **Proposed New Law: Overview**

**Under the new legislation proposed by the government the Ward of Court system would be replaced, although it is not yet clear what would happen to people who are currently Ward of Court.**

**The new system would be issue based, meaning that a person's capacity will be assessed in relation to a particular decision and not in an over-arching way like Ward of Court.**

**Like the Ward of Court system the decision would be made by a judge and based on evidence such as doctor's reports or consultation with the family depending on an individual case. A personal guardian can be appointed to make certain decisions as laid out by the court and for a limited time period.**

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## **Presumption of Capacity**

The legislation sets out clearly that there is a presumption of capacity. This means that every person is to be presumed able to make a decision unless the contrary has been shown. Capacity is defined as the ability to understand relevant information, to retain that information and to use that information in making a decision and to communicate the decision.

The information being used to make a decision must be presented in a manner appropriate to his/her needs i.e. using simple language or visual aids.

## **Informal Decisions**

There is scope within the bill for informal decision making such as often happens at present in medical situations. Under the new legislation an act related to the personal care, health care or treatment may be legal if it is in the person's best interests and there is a real doubt over their capacity.

## **Exclusions**

Certain areas are excluded from the scope of this Bill and they include consent to marriage or civil partnership, separation, divorce or dissolution of a civil partnership, consent to a child being placed for adoption, consent to sexual relations, voting at an election or at a referendum and acting as a member of a jury.

## **Public Guardian**

Under the new legislation a Public Guardian will be set up. The Public Guardian will carry out several functions including supervision of personal guardians and enduring powers of attorney, dealing with complaints and nominating personal guardians where there is no one willing or able to do so.

## **Further Reading**

### **The UN Convention on the Rights of Persons with Disabilities**

<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>

### **Law Society Submission to the Department of Justice on the Scheme of the Bill**

[http://www.lawsociety.ie/documents/committees/lawreform/Submission\\_Mental\\_Capacity\\_Bill\\_260109.pdf](http://www.lawsociety.ie/documents/committees/lawreform/Submission_Mental_Capacity_Bill_260109.pdf)

### **Who Decides & How?: Legal Capacity & Decision Making**

### **Who Decides & How?: Making Medical Decisions**

Both available from Inclusion Ireland