



INCLUSION IRELAND

National Association for People with an Intellectual Disability

Briefing Note: Disability (Miscellaneous Provisions) Bill 2016

January 2017

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About Inclusion Ireland

Inclusion Ireland is a national, rights-based advocacy organisation that works to promote the rights of people with an intellectual disability.

The vision of Inclusion Ireland is that of people with an intellectual disability living and participating in the community with equal rights as citizens, to live the life of their choice to their fullest potential.

Introduction

While Inclusion Ireland welcomes many aspects of this Bill, it is regrettable that there was not public consultation on any aspect of the legislation.

In particular it is not appropriate that the Deprivation of Liberty issues (Head 3) would be introduced at committee stage. This is a crucial aspect of Ireland's compliance with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and introducing it at committee stage denies an opportunity to many people affected by it to have an input into the legislative process.

Overall, Inclusion Ireland welcomes the amendments in relation to jury services, electoral acts and the expansion of reasonable accommodation; although this does not go far enough.

Inclusion Ireland remains concerned about the makeup of the advisory committee to the Irish Human Rights and Equality Commission (IHREC) in its role as independent mechanism. It would be preferable if the proposal that half of this committee be persons with lived experience of disability was amended to ensure all members had lived experience of disability rather than half as is currently proposed.

1. Jury Service

The bill states that "A person who does not, in the opinion of the court, have sufficient mental or intellectual capacity to serve as a juror" will not be eligible for Jury service.

In the Assisted Decision-Making (Capacity) Act 2015¹, a person's capacity is assessed functionally and on the basis of his or her ability to understand, at

¹ Number 64 of 2015

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. A person will also enjoy a presumption of capacity to make decisions.

A person lacks capacity if they cannot understand information, retain information, use information and communicate a choice.

1.1 Inclusion Ireland is concerned that the Bill is not consistent with the 'functional approach' of the Assisted Decision-Making legislation and recommends the replacing of Section 1.1.b with

"A person who does not, in the opinion of the court, possess the decision-making capacity to exercise the functions of a member of a juror."

2. Electoral Acts

The Bill removes reference to 'unsound mind' regarding persons standing for election to Dáil or Seanad Eireann and this is to be welcomed.

The Committee on the Rights of Persons with Disabilities has commented that 'all stages of an election are made fully accessible'² and so Inclusion Ireland recommends that amendments to other aspects of the electoral process are looked at in tandem with the electoral acts.

2.1 Inclusion Ireland welcomes the amendment regarding the electoral acts as a move away from a 'status' approach.

2.2 Inclusion Ireland recommends the substitution of subsection (1) of section 3 of the 1998 referendum Act with

"The Commission shall have, in addition to any functions conferred on it by any other provision of this Act, the following

² Committee on the Rights of Persons with Disabilities
Concluding observations on the initial report of Gabon CRPD/C/GAB/CO/1

principal functions in relation to the referendum in respect of which it is established:

- (a) to prepare statements containing a general explanation of the subject matter of the proposal and of the text thereof in the relevant Bill and any other information relating to those matters that the Commission considers appropriate;***
- (b) to prepare statements that are as far as practicable accessible to persons with a disability;***
- (b) to publish and distribute those statements in such manner and by such means including the use of television, radio and other electronic media as the Commission considers most likely to bring them to the attention of the electorate and to ensure as far as practicable that the means employed enable those with a sight or hearing disability to read or hear the statements concerned;***
- (c) to promote public awareness of the referendum and encourage the electorate to vote at the poll”***

3. Monitoring the UN Convention on the Rights of Persons with Disabilities

The Bill provides for a focal point in the Department of Justice & Equality for implementing the Convention. The UNCRPD committee has recommended that States Parties ‘establish strong and efficient focal points within each ministry and State institution responsible for implementing the Convention’³.

Many states have opted for Social Protection ministries. In Northern Ireland, the Office of the First Minister and Deputy First Minister in Northern Ireland are the focal point. Inclusion Ireland believe that a similar approach should be adopted in the Republic of Ireland.

³ Committee on the Rights of Persons with Disabilities
Concluding observations on the initial report of Lithuania CRPD/C/LTU/CO/1

3.1 Inclusion Ireland believes that there should be a single focal point to be based within the Department of An Taoiseach. This would represent a commitment to persons with disabilities and ensure that the UNCRPD is given a cross-departmental focus.

Inclusion Ireland welcomes the IHREC as the monitoring body. As the body responsible for monitoring Ireland's performance with other UN instruments, it is important that the UNCRPD is monitored in a similar fashion. However the proposals relating to "an advisory committee" are concerning. The Bill states that "at least half of the number of persons appointed ...shall have, or have had, a disability". IHREC reported that an approach similar to that of Malta, where 10/12 members had a lived experience and 2/12 were family members was the preferred approach in their view.⁴

3.2 Inclusion Ireland believes that any advisory body should comprise wholly of persons with personal, lived experience of disability that this committee should be representative of all forms of disability and should be adequately resourced, facilitated and its members accommodated and supported.

4. Reasonable Accommodation

It is deeply regrettable that Ireland will enter a reservation in relation to reasonable accommodation and that different 'levels' for reasonable accommodation – i.e. "nominal cost" for private services and "disproportionate burden" for public services in employment law will operate in tandem.

⁴ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities Dublin: NUI Galway and the Irish Human Rights and Equality Commission, pp. 73-74. Available at: <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>

The UNCRPD standard is disproportionate or undue burden under Article 5.

The Irish Human Rights & Equality Commission recommend that the Bill would incorporate a “relatively increased burden for larger providers of goods and services, which might, for example, be based on a turnover threshold⁵” and Inclusion Ireland endorse this view.

- 4.1 Advice relating to the Constitutional barriers to reasonable accommodation should be published.**
- 4.2 An increased burden for larger providers of goods and services could be considered.**
- 4.3 If there is a Constitutional barrier to a higher standard being imposed on private services, the State should commit to a funding scheme to allow them to meet the higher standard while respecting their property rights**

5. Deprivation of Liberty

Legislative clarity is required on the issue of deprivation of liberty. Persons can only be detained in accordance with law e.g. prisoners, involuntary mental patients but in Ireland, persons may be de facto detained not in accordance with law.

In the UK a deprivation of liberty is defined as when:

“The person is under **continuous supervision and control** and is **not free to leave**, and the person **lacks capacity to consent** to these arrangements and that “any care that restricts a person’s liberty is both appropriate and in their best interests”

If a UK facility wants to ‘detain’ someone they must get permission first and the care facility processes the ‘safeguards’

⁵ IHREC; Observations on the General Scheme of the Equality / Disability (Miscellaneous Provisions) Bill 02/12/2016

The explanatory memorandum for this Bill states "Legislative clarity is needed, in relation to residential care facilities, on who has statutory responsibility for a decision that a patient should not leave for health and safety reasons, and what appeals process should be in place"

The exact wording of our safeguards has not been provided and is being developed by the Department of Health.

5.1 Inclusion Ireland is deeply concerned that this crucial part of the Bill will only be introduced at committee stage. There has been no public consultation on any part of this Bill and introducing this element at committee stage further reduces the opportunity for persons affected by the legislation to have an input

5.2 Inclusion Ireland believes that Irish disability residential facilities 'detain' people according to the UK definition

5.3 Careful consideration must be given to the Assisted Decision-Making Act and how 'will and preference' of the person will interface with deprivation of liberty provisions.

5.4 Clarity is required as to who will oversee the safeguarding process be it the Decision Support Service , HSE, HIQA, court of law.

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