

# IRELAND

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# Executive summary

## Definitions

- [1]. There are a number of different definitions of mental disorder and intellectual disability set out in the legislation and policies of State and their agencies. Very often definitions of mental disorder and intellectual disability come under definitions of disability. The *Employment Equality Act 1998* and the *Equal Status Act 2000* set out disability as a protected ground and mental disorder and intellectual disability are both covered in these definitions. More restrictive definitions of disability are set out in the *National Disability Authority Act 1999* and the *Disability Act 2005*. Mental disorder and intellectual disability are both covered in the definitions of the *Mental Health Act 2001* and the *Criminal Law (Insanity) Act 2006*. The differences in the definitions are set out below. There is also an outmoded definition of the “mentally impaired” contained in section 5 (5) of the *Criminal Law (Sexual Offences) Act 1993*.
- [2]. The *Mental Capacity Bill* (see also paragraphs 120 to 122) is being drafted by the Department of Justice and Law Reform and is due for publication in the current Dáil session under the Government's legislation programme. It will provide for a presumption that every individual has full mental capacity, with the consequent burden of proof on applicants to court to demonstrate why and to what extent the autonomy of an individual with an alleged mental incapacity ought to be interfered with in the form of substitute decision-making. The Bill will provide for a definition of "capacity" as "the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made." This is a functional definition of capacity in line with international best practice and human rights standards.

## Anti-discrimination

- [3]. Ireland was one of the first countries to sign the Convention on the Rights of Persons with Disabilities, when it opened for signature in 2007. It is accepted that there is a significant amount of legislative reform necessary before Ireland can ratify the United Nations Convention. In particular, there is a need to introduce capacity legislation in order for Irish law to comply with Article 12 of the Convention on the Rights of Persons with Disabilities. The *Employment Equality Act 1998* and the *Equal Status Act 2000* represent the main pieces of anti-discrimination legislation enacted in Ireland. Both Acts include disability as a protected ground. The *Equal Status Act 2000* has already in place many parts of the *Draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*.

## Specific fundamental rights

- [4]. Persons with mental disorder and intellectual disability benefit from protection of the specific fundamental rights listed in section 3 from international, constitutional and domestic laws. However, the full enjoyment of these rights may be restricted in some instances. For example, the current Wards of Court system restricts the right to marry and property rights of persons subject to a wardship order. Similarly, the exercise of the right to vote may be restricted for persons with mental disorder or intellectual disability through the failure to provide reasonable accommodations. The right to freedom from torture cruel and inhuman degrading treatment and punishment could be further improved through the enactment of the necessary legislation to create the National Preventive Mechanisms for the Optional Protocol to the UN Convention Against Torture. Section 5 of the *Criminal Law (Sexual Offences) Act 1993* restricts the privacy and scope for having a family life for persons defined as “mentally impaired” under the Act.
- [5]. The *Mental Capacity Bill* represents a root and branch reform of the current Wards of Court system. For relevant persons, the current restrictions placed on Wards of Court, including the right to own property and the right to marry, will no longer be the norm. Instead, there will be a presumption that every individual has full mental capacity, with decisions only being made on the relevant person's behalf where and to the extent necessary to achieve a benefit for that person. The Bill will repeal the Marriage of Lunatics Act 1811, with the result that capacity to consent, and not legal status as a Ward, will be a key determinant in a person's ability to marry.

## Involuntary placement and involuntary treatment

- [6]. The safeguards protecting persons with mental disorder and intellectual disability in respect of involuntary placement and involuntary treatment have significantly improved in recent years. The *Mental Health Act 2001* has brought Irish law into closer compliance with human rights norms. However, the detention and treatment of incapable compliant patients remains a significant issue. Incapable compliant patients can have significant intellectual disability and/or a severe mental disorder that affect their ability to consent or refuse treatment or detention in a psychiatric setting. Such persons are informally admitted for psychiatric treatment and fall outside the scope of the safeguards available to persons admitted involuntarily under the *Mental Health Act 2001*. Such patients are not voluntary patients as they clearly lack the capacity to consent to admission to psychiatric care and treatment and there is no review mechanism available to safeguard against unlawful detention.

- [7]. Consideration is being given, in the drafting of the *Mental Capacity Bill*, to make specific provision for the protection of persons with a mental incapacity who are detained for the purpose of psychiatric treatment. In particular, safeguards, in the form of compulsory periodic review, similar to those in the Mental Health Act 2001, are being examined.

## Competence, capacity and guardianship

- [8]. The Wards of Court system is the current and exclusive mechanism for managing the affairs of persons lacking decision-making capacity in Ireland. One of the major deficiencies in the wardship system is that an order of wardship is of indefinite duration. There is no requirement for the regular review of a ward or for periodic reviews of the wards welfare. The ward of court system is archaic and complex and clearly not compliant with Article 12 of the United Nations Convention of Rights of Persons with Disabilities. The Irish Government is committed to introducing new capacity legislation to replace the Wards of Court system and have approved the drafting of a Mental Capacity Bill. The detailed “heads” of the Bill are available from the Department of Justice Equality and Law Reform’s website.<sup>1</sup> The Bill aims to reform the Wards of Court system in so far as it applies to adults and replaces it with a modern statutory framework governing decision-making on behalf of persons who lack capacity. The scope of the Bill aims to extend protection for persons with mental illness, persons with intellectual disabilities, and persons who have acquired brain injuries. It aims to provide more clarity in the law for carers who assume responsibility for persons lacking capacity.
- [9]. The *Mental Capacity Bill* follows a recommendation of the Law Reform Commission to legislate for a functional understanding of capacity, based on an issue-specific and time specific approach, which focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates. It allows therefore for the situation where the loss of capacity is temporary or partial. A person may regain capacity or may lack capacity in relation to one matter but not in relation to another. This represents a major departure from current law which is based on an “all or nothing” approach. In addition, the Bill will provide for regular reviews of court ordered declarations of incapacity and the establishment of an Office of Public Guardian who will have a monitoring and supervisory role over court-appointed personal guardians.

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<sup>1</sup> The proposed scheme of the Bill is available at:  
[http://www.justice.ie/en/JELR/Pages/Scheme\\_of\\_Mental\\_Capacity\\_Bill\\_2008](http://www.justice.ie/en/JELR/Pages/Scheme_of_Mental_Capacity_Bill_2008).

## Miscellaneous

- [10]. The underfunding and uneven access to services for independent living for persons with mental disorder and intellectual disabilities means that Ireland is possibly falling short of the standards required by Article 19(b) of the UN Convention on the Rights of Persons with Disabilities. Article 19 requires that persons with disabilities have access to a range of in home, residential and other community support services.
- [11]. The Committee on the Prevention of Torture in its most recent report for Ireland stated that a comparative reading of both the *Mental Health Act 2001* and *Criminal Law (Insanity) Act 2006* indicates that patients placed under the 2006 Act potentially benefit from considerably fewer safeguards than those placed under the *Mental Health Act 2001*.<sup>2</sup>

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<sup>2</sup> “Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 October 2006” Council of Europe, Strasbourg 2007 at paragraph 106.

# 1. Definitions

- [12]. There are a number of different definitions of mental disorder and intellectual disability set out within the legislation and policies of State and their agencies. Very often definitions of mental disorder and intellectual disability come under definitions of disability. The *Employment Equality Act 1998* and the *Equal Status Act 2000* set out disability as a protected ground and mental disorder and intellectual disability are both covered in these definitions. More restrictive definitions of disability are set out in the *National Disability Authority Act 1999* and the *Disability Act 2005*. Mental disorder and intellectual disability are both covered in the definitions of the *Mental Health Act 2001* and the *Criminal Law (Insanity) Act 2006*. The differences in the definitions are set out below.
- [13]. The Scheme of the *Mental Capacity Bill* defines capacity as:
- [14]. "the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made." This is a functional definition of capacity in line with international best practice and human rights standards.
- [15]. The *National Disability Authority Act 1999*<sup>3</sup> provides a definition of disability that covers persons with mental disorder and intellectual disability. The definition of disability is as follows:
- [16]. "“disability”, in relation to a person, means a substantial restriction in the capacity of a person to participate in economic, social or cultural life on account of an enduring physical, sensory, learning, mental health or emotional impairment”<sup>4</sup>
- [17]. The *Disability Act 2005* provides a definition of disability that is similar to the definition contained in the *National Disability Authority Act 1999*. The Act provides the following definition of disability:
- [18]. "... “disability”, in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment”<sup>5</sup>

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<sup>3</sup> The *National Disability Authority Act 1999* established the National Disability Authority, which is the Government's lead agency on disability issues.

<sup>4</sup> See Part 1 Section 2. Available at: <http://www.irishstatutebook.ie/1999/en/act/pub/0014/print.html#partiii-sec35>

<sup>5</sup> See Part 1 of the *Disability Act 2005*. Available at: <http://www.oireachtas.ie/documents/bills28/acts/2005/a1405.pdf>.

[19]. The *Disability Act 2005* makes provision for assessment of need and access to services for people with disabilities. Part 2 of the Act provides a further definition of disability in this context by expanding on the meaning of “substantial restriction”:

[20]. “substantial restriction” shall be construed... as meaning a restriction which— a) is permanent or likely to be permanent, results in a significant difficulty in communication, learning or mobility or in significantly disordered cognitive processes, and (b) gives rise to the need for services to be provided continually to the person whether or not a child or, if the person is a child, to the need for services to be provided early in life to ameliorate the disability.”

[21]. The Department of Social and Family affairs provide a definition of disability as part of it criterion to be eligible for disability welfare.<sup>6</sup> This definition includes persons with an intellectual disability and mental illness, provided that a habitual residence requirement is satisfied and the illness or intellectual disability is expected to continue for longer than a year and that the intellectual disability or mental disorder substantially restricts employment.

[22]. The *Employment Equality Act 1998* and the *Equal Status Act 2000* represent the main pieces of anti-discrimination legislation enacted in Ireland. Both Acts include disability as a protected ground. Section 2 of the *Employment Equality Act 1998* provides that disability means:

- “(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
  - (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
  - (c) the malfunction, malformation or disfigurement of a part of a person's body,
  - (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
  - (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed] behaviour,
- and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person”

[23]. The *Equal Status Act 2000* also provides a definition of disability as meaning:

“(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,

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<sup>6</sup> See the Department of Social and Family Affairs website at: <http://www.welfare.ie/EN/Publications/SW29/Pages/2HowdoIqualify.aspx>.

- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- (c) the malfunction, malformation or disfigurement of a part of a person's body,
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- (e) a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour;”

[24]. Clearly persons with intellectual disability and mental disorder come under the scope of the disability ground in the Irish equality legislation. It is very clear from the broad definition of disability provided for that it is a medical definition rather than a functional definition, in that it focuses on the complaints suffered by the person alleging discrimination rather than on how those complaints present an obstacle to that individual’s full participation in the workplace. The definition of the disability ground in the employment equality legislation and equal status legislation set out above is far broader than the definition of disability contained in the *Disability Act 2005*.

[25]. Section 3 of the *Mental Health Act 2001* gives the following definitions of mental disorder; mental illness, severe dementia and significant intellectual disability:

[26]. “3.—(1) In this Act “**mental disorder**” means mental illness, severe dementia or significant intellectual disability where— (a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or (b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and (ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.

[27]. (2) In subsection (1)—“**mental illness**” means a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons; “**severe dementia**” means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression; “**significant**

**intellectual disability**” means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person.” [Emphasis added]

- [28]. The definitions provided in the *Mental Health Act 2001* are welcome developments providing greater clarity about whether or not an individual is mentally ill for the purposes of involuntary detention. The definitions are also hugely important in providing a relatively unambiguous basis upon which treatment is given voluntarily and involuntarily. Section 8 of the *Mental Health Act 2001* sets out the criteria for involuntary admission.
- [29]. The *Criminal Law (Insanity) Act 2006* deals with the criminal responsibility of persons with mental disorders who may have committed offences. The Act provided for a statutory definition and restatement of the test for criminal insanity based on the rules at common law as developed in Ireland, a new verdict of “not guilty by reason of insanity” to replace the former “guilty but insane” verdict, a new plea of “guilty but with diminished responsibility” in cases of murder, and extensive new provisions in relation to fitness to be tried. The Act also provided for the establishment of the Mental Health (Criminal Law) Review Board to review the detention of persons who are detained by order of a court in a designated centre following a finding of unfitness to be tried or not guilty by reason of insanity.
- [30]. The defence of insanity in criminal law raises complex issues involving the overlapping disciplines of law and medicine. The approach adopted in the *2006 Act* took that overlap into account by providing for two definitions of “mental disorder”: one to be applied by the court for the purposes of the criminal law during the course of the trial, where the issue for the court is fundamentally one of legal responsibility, and the other (the definition in the *Mental Health Act 2001*) to be applied for the purpose of subsequently dealing with a person found to be unfit to be tried under section 4 of the Act or not guilty by reason of insanity under section 5. That subsequent test for the purpose of dealing with such a person is whether the person is suffering from a mental disorder (within the meaning of the 2001 Act) and is in need of in-patient care or treatment in a designated centre.
- [31]. It was decided not to align the definition of mental disorder for the purposes of *the 2006 Act* with that used in the *Mental Health Act 2001* because there should not be any spill-over effects between the two areas of law. Judicial decisions on involuntary admissions to hospitals under the 2001 Act should not affect the criminal law on insanity. Likewise, decisions in the criminal courts as to the meaning of a particular term should not affect the administration of the civil law regarding the detention and treatment of patients with mental disorders in cases that have nothing to do with criminal behaviour.

[32]. Section 5 (5) of the *Criminal Law (Sexual Offences) Act 1993* defines a "mentally impaired" person as meaning someone "... 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."<sup>7</sup> The use of the term "mentally impaired" and the concept as set out in the Act are unsatisfactory and outmoded.<sup>8</sup>

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<sup>7</sup> Available at: <http://www.irishstatutebook.ie/1993/en/act/pub/0020/print.html>.

<sup>8</sup> See "Consultation Paper on Vulnerable Adults and the Law: Capacity" Law Reform Commission (37) 2005 at pages 136-145.

## 2. Anti-discrimination

### 2.1. Incorporation of United Nations standards

- [33]. Ireland was one of the first countries to sign the Convention on the Rights of Persons with Disabilities, when it opened for signature in 2007. However, Ireland has not ratified the Convention and has not signed the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Ireland adheres to the common law tradition of not ratifying treaties until such time that it is considered that Irish domestic law is in general conformity with the treaty. There is an ongoing effort to identify incompatibilities between domestic law and the treaty and to rectify incompatibilities by way of legislative reform before ratification takes place.
- [34]. The Irish Government commenced an internal evaluation on bringing Irish law and practice into line with the Convention on the Rights of Persons with disabilities in order to facilitate ratification. The Government launched the National Disability Strategy in 2004, which adds to existing laws and policies that support the participation of people with disabilities in Irish society.<sup>9</sup> In 2007 a Governmental High-Level and Cross-Departmental Implementation Group was established in 2007. The role of this group is to advise the Government on any amendments necessary to the National Disability Strategy to facilitate the ratification of the Convention. The work of this group is internal to the Government and its reports are not publicly available.
- [35]. It is accepted that there is a significant amount of legislative reform necessary in Ireland before it can ratify the United Nations Convention on the Rights of Persons with Disabilities. In particular, there is a need to introduce capacity legislation in order for Irish law to comply with Article 12 of the Convention.<sup>10</sup> There is recognition that the current law governing the area the *Lunacy Regulation (Ireland) Act 1871* is wholly inappropriate and requires urgent reform.

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<sup>9</sup> See the National Disability Strategy is available at:  
<http://www.justice.ie/en/JELR/NDS.pdf/Files/NDS.pdf>

<sup>10</sup> This is the view of the Irish Human Rights Commission. See “Response of the Irish Human Rights Commission to the Request of the Office of the High Commissioner for Human Rights for Information on: Legal Measures for Ratification of the Convention on the Rights of Persons with Disabilities...” September 2008. Available at:

- [36]. Like other common law jurisdictions Ireland operates a “dualist” system meaning that international agreements that Ireland are party to are not automatically incorporated into Irish domestic law. Therefore, when Ireland ratifies the Convention on the Rights of Persons with Disabilities it will not automatically become part of Irish law unless the Oireachtas (Government) decide to incorporate the Convention. It is noteworthy that Irish Governments have not incorporated ratified UN treaties into domestic Irish law.<sup>11</sup>
- [37]. On numerous occasions the Irish Human Rights Commission has expressed the view that the Government’s position “... does not stand up to legal analysis on a number of levels and has pointed out a number of possible options by which international human rights treaties can be more effectively incorporated into Irish domestic law.”<sup>12</sup> In its Strategic Plan 2007-2011 the Irish Human Rights Commission has committed itself to arguing for the domestic incorporation of human rights treaties and conventions that are not currently reflected in Irish law and administrative practice.

## 2.2. The anti-discrimination national framework

- [38]. Article 13 of the EC Treaty, introduced by the Amsterdam Treaty provided a new competence to the European Union to intervene in the area of discrimination allowing for the EU to take "appropriate action to combat discrimination based on [*inter alia*] disability."<sup>13</sup> It was on this basis that the Framework Employment Directive was adopted. Ireland was one of three member states that had enacted laws prohibiting disability discrimination before the emergence of this directive. The *Employment Equality Act 1998* set out disability as a protected ground and mental disorder and intellectual disability are both covered under the definition of disability.<sup>14</sup> Amending legislation introduced minor amendments to the *Employment Equality Act 1998* to ensure it accorded with the directive.

<sup>11</sup> To see the legal rationale given for this position see Ireland’s Combined First and Second Periodic Reports under the UN Convention for the Elimination of all form of Racial Discrimination, CERD/C/460/Add.1, (2004), paragraphs 97-101. Ireland’s Second Periodic Report under the UN International Covenant on Civil and Political Rights, CCPR/C/IRL/98/2, (1999) at paragraphs 13-17;

<sup>12</sup> See “Response of the Irish Human Rights Commission to the Request of the Office of the High Commissioner for Human Rights for Information on Legal Measures for Ratification of the Convention on the Rights of Persons with Disabilities and Optional Protocol” September 2008. Available at: <http://www2.ohchr.org/english/issues/disability/docs/consultation/NHRIs/IrelandIrishHumanRightsCommission.doc>

<sup>13</sup> For a more detailed examination of Article 13, see Waddington, “*Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive*” (2000) ILJ 176.

<sup>14</sup> See section 1 above.

- [39]. The *Employment Equality Act 1998* established the Equality Tribunal. The Act provides a statutory framework for the mediation and/or investigation of claims of unlawful discrimination. The Equality Tribunal also has responsibility for mediating and investigating complaints of unlawful discrimination under the *Equal Status Act 2000* and the *Pensions Acts 1990-2008*. The Equality Tribunal can and does deal with cases of discrimination against persons with mental disorder and intellectual disability as they come under the disability ground.
- [40]. Section 8 of the *Employment Equality Act 1998* provides that an employer will be deemed to have discriminated against an employee or a prospective employee if he/she discriminates against that person in any arrangement the employer makes for the purpose of deciding who should get a job or by specifying entry requirements for employment on a person or class of persons which are not required of others
- [41]. The definition of disability is usefully broad and has been interpreted as such by the Equality Tribunal and Labour Court. In *Customer Perception Limited v Leydon*<sup>15</sup> the complainant was involved in a road traffic accident that resulted in reduced movement in her shoulder, back and neck. Labour Court held “taking the ordinary and natural meaning of the term malfunction... the condition from which the complainant suffered in consequences of her accident amounted to a malfunction of parts of her body. Therefore, it constituted a disability within the meaning of the Act. Moreover, in providing that the term comprehends a disability which existed but no longer exists, it is clear that a temporary malfunction comes within the statutory definition.” In *Fernandez v Cable & Wireless*<sup>16</sup> the complainant had a severe reaction to an injection that resulted in a weeks hospitalisation. After the complainant returned to work it was necessary for her to attend hospital for a check up. The complainants’ employer informed her that if she attended could be open to disciplinary action. The Equality Officer held that complainant’s condition of kidney infection amounted to a disability within the *Employment Equality Act 1998* and the onus on employer to provide reasonable accommodation.<sup>17</sup>
- [42]. Section 16 of the *Employment Equality Act 1998* provides that an employer is not required to recruit, retain, train or promote a person who will not, or is not available to, carry out the duties of a position or who is not fully competent to carry out the duties concerned. However, an employee with a disability is considered to be competent to undertake the duties if he or she can do if provided with reasonable accommodation (in the form of special treatment or

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<sup>15</sup> [2004] 15 ELR 101.

<sup>16</sup> DEC-E-2002-052.

<sup>17</sup> See also *A Government Department v. An Employee*, Labour Court 2006, EDA062 (The Labour Court held that alcoholism is a disability for the purposes of the Act.) *A Prison Officer v. The Minister for Justice, Equality and Law Reform* DEC-2007-025 where the Equality Officer held that the “acute anxiety reaction”, “work related depression”, “work related stress”, “anxiety and depression” were conditions or illness within the definition of disability in the Employment Equality Act.

facilities known as appropriate measures) by his or her employer, which does not amount to more than a disproportionate burden to the employer.

[43]. In Ireland reasonable accommodation can extend to pre-employment situations, as was the case in *Harrington v East Coast Area Health Board*<sup>18</sup>. The complainant was a wheelchair user who had notified the respondent of her disability and was called for interview. The interview was held in an inaccessible venue and the interview panel had to reconvene the interview at short notice. The Equality Officer held this amounted to a failure to provide reasonable accommodation.

[44]. An exposition of the case law on reasonable accommodation indicates that the following is a non-exhaustive list of examples of reasonable accommodation:<sup>19</sup>

- Allowing a disabled employee to take time off work to attend medical appointments in connection with their condition which amounts to a disability;
- Providing car parking facilities;
- Carrying out a medical assessment on the disabled employee and considering the findings of this medical report in light of the duty to provide reasonable accommodation in the workplace;
- Providing induction training suitable for the disabled employee;
- Providing suitable specialised equipment
- Adapting premises, by providing wider doors, a lift, etc so as to make them accessible for disabled employees;
- Provision of a job coach for a number of months;
- Allowing disabled employees to work flexible hours;
- Allowing an employee to ease his or her way back into the workplace post illness connected with his or her disability;
- Providing accessible premises for job interviews.

[45]. The *Equal Status Act 2000-2004* relates to non-discrimination in the provision of goods and services. This Act has already in place many of components of the *Draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*.<sup>20</sup> The *Equal Status Act 2000-2004* includes all services generally available to the public such as access to and use of any place, facilities for entertainment, recreation or refreshment, credit facilities and transport services, services or facilities provided by a club and a professional or trade service. Section 5 of the Act contains a general non-discrimination section regarding the provision of goods and services. Section 5(1) provides that a person shall not

<sup>18</sup> (DEC-E-2002-001).

<sup>19</sup> From Bruton and O'Mahony "Report on the employment of disabled people in Europe: Republic of Ireland" (Academic Network of European Disability experts, 2008).

<sup>20</sup> Doc. COM (2008) 426 final.

discriminate in disposing of goods, or in the provision of services, whether that disposal or provision “is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.”

- [46]. The Act also prohibits discrimination in the disposal of premises and provision of accommodation. Section 7 covers educational establishments. Sections 8, 9, and 10 relate to discriminating clubs which includes applicants for membership. Section 9 provides an exemption which safeguards the right of freedom of association, by providing an exception from section 8 to clubs which have as their principal purpose catering for one particular class of persons. The *Equal Status Act 2000-2004* prohibits discrimination in relation to goods and services, on all nine grounds contained in the *Employment Equality Act 1998* as discussed above.
- [47]. The *Equal Status Act 2000-2004* specifies that the failure to provide reasonable accommodation is a form of discrimination. It differs from the *Employment Equality Act 1998* in that it does not define the failure to provide reasonable accommodation as discrimination. Under the *Equal Status Act 2000-2004* reasonable accommodation is defined as the provision of a special treatment or facility, where without such special treatment or facility it would be impossible or unduly difficult for the person to avail of the service. A refusal to provide such a treatment or facility under the Act not amount to discrimination where it gives rise to more than a nominal cost. In *Roche v Alabaster Associates Limited t/a Madigans*<sup>21</sup> it was held that refusing access to premises to a person accompanied by a guide dog amounted to discrimination for a failure to provide reasonable accommodation.
- [48]. In *McMahon and five others v McGowan’s Pub*<sup>22</sup> the complainant alleged that he was directly discriminated against and that there had been a failure to reasonably accommodate him. The complainant in this case had an intellectual disability that affected his balance, speech and communication. The complainant and five members of his family sought to access the respondent’s premises to celebrate his mother’s 50th birthday. The doorman refused the complainant access as he decided that he was under the influence of alcohol and refused to admit the rest of his group on that basis. The complainant was upset and distressed by this refusal as he believed he spoiled a family night out. The family were upset at the embarrassment caused to him and the effect this even had on his self-confidence.
- [49]. The Tribunal accepted that he raised a *prima facie* case of direct discrimination and found that the complainant had been discriminated against on the grounds of his disability and the remainder of the family had been discriminated against based on their association with the complainant. The Tribunal also found that the service provider had failed to provide a reasonable accommodation. The accommodation required by the Tribunal was that a licensed premises should be

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<sup>21</sup> DEC-S2002-086.

<sup>22</sup> Circuit Court check full citation.

aware of the possibility for reasons other than drunkenness that may affect a person's demeanour. The Tribunal held that the complainant group were refused admission to the premises without the provision of the normal accommodation afforded to customers, which was for the doorman to engage in conversation with the customers in order to assess whether they were intoxicated. He did not do so in the case of the complainant.

- [50]. This decision was appealed to the Circuit Court, the respondent sought to have this case heard in private but was not successful. Judge Delahunt in the Circuit Court held that the appellant had acted in good faith and was not guilty of discrimination. The Judge held that where a person seeks reasonable accommodation under the *Equal Status Act 2000* it must first be proven that the: "... service provider had actual or implied knowledge of the disability and disregarded such knowledge either intentionally or unintentionally in order to succeed in a claim."
- [51]. In *Forrestal v Hearn's Hotel, Clonmel*<sup>23</sup> it was held to be discrimination not to allow a wheelchair user access to a nightclub. In *Six Complainants v A Public House*<sup>24</sup> only one of the six complainants was disabled, the other five complainants claimed discrimination by association. The six complainants were successful in raising a case of *prima facie* discrimination arguing and that the respondent failed to reasonably accommodate all six complainants.
- [52]. There is no specific constitutional protection in respect of discrimination against persons with mental disorder or intellectual disability. Article 40.1 of the Constitution provides that "[a]ll citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function." It should be noted that the concept of constitutional equality is underdeveloped and there is no significant constitutional case law on equality as it relates to persons with mental disorder or intellectual disability.<sup>25</sup> In terms of anti-discrimination the state has demonstrated a clear preference of dealing with issues of discrimination against persons with mental disorder or intellectual basis on the basis of anti-discrimination legislation. There has been a notable judicial deference to the discretion of the legislature in formulating categories for differential access to the resources of the state. This is particularly the situation in cases relating to social welfare.

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<sup>23</sup> DEC-S2001-018.

<sup>24</sup> DEC-S2004-009-014.

<sup>25</sup> See for example the decisions in *State (Nicolaou) v An Bord Uchtála* [1966] I.R. 567, *Murphy v Attorney General* [1982] I.R. 241, *Norris v Attorney General* [1984] I.R. 36.

## 3. Specific Fundamental Rights

### 3.1. The Right to life

- [53]. The right to life is expressed in Article 40.3.2 of the Irish constitution where it is stated that:
- [54]. “[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”
- [55]. Article 10 of the United Nations Convention on the Rights of Persons with Disabilities provides that the States Parties must reaffirm that every human being has the inherent right to life and shall take the necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others. Therefore, the right to life presupposes that a person with mental disorder or intellectual disability has the right to be born on an equal basis to others. Article 40.3.2 of the Irish Constitution accords with the definition of the right to life under Article 10 of the Convention as the State undertakes to protect the right to life of every citizen.
- [56]. The European Convention on Human Rights was incorporated into Irish law by way of the *European Human Rights Act 2003*. Therefore, the European Court of Human Rights jurisprudence under Article 2 on the right to life of persons with mental disorder is very relevant. There is also Irish constitutional jurisprudence on adults lacking capacity. However, this has been rather limited and unsatisfactory.<sup>26</sup> In *re a Ward of Court No. 2*<sup>27</sup> the Supreme Court considered the withdrawal of life-sustaining treatment from a woman in a near persistent vegetative state. The Supreme Court listed a number of rights that needed to be respected including the right to life. The Supreme Court held that these rights extended to persons lacking capacity on the basis of the constitutional guarantee of equality. As O’Flaherty J. stated the denial of rights to a person lacking capacity “... would operate as an invidious discrimination between the well and the infirm.”<sup>28</sup> On this basis the Supreme Court approved the withdrawal of life-sustaining treatment, given that the withdrawal was in the best interests of the person lacking capacity. The Supreme Court adopted a

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<sup>26</sup> For a discussion on this see Donnelly, Mary “*Legislating for Incapacity: Developing a Rights-Based Framework*” (2008) 15(1) DULJ 395.

<sup>27</sup> [1996] 2 IR 79.

<sup>28</sup> *Ibid*, at 130.

mechanical approach in the decision in relation to interpreting the role of rights. However, the Supreme Court decision *In Re a Ward of Court* does offer a source for the further development of constitutional rights relating to persons lacking capacity.

### 3.2. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

- [57]. Ireland has ratified a number of international and regional human rights treaties that prohibit all forms of torture and inhuman and degrading treatment or punishment. The main international instruments include:
- UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
  - International Covenant on Civil and Political Rights
  - Convention on the Rights of the Child
  - European Convention for Protection of Human Rights and Fundamental Freedoms
  - European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- [58]. The *Criminal Justice (United Nations Convention) Against Torture Act 2000*<sup>29</sup> is one of the main pieces of legislation put in place to meet Ireland's obligations under the UN Convention against Torture. The *Criminal Justice (United Nations Convention) Against Torture Act 2000* makes it a criminal offence for a public official acting on behalf of the government, to carry out torture, regardless of whether the torture takes place inside or outside the State. Under the Act it also an offence for a person to carry out torture at the instigation of, or with the consent or acquiescence of, a public official inside or outside the State. Under Article 10 of the Act the state is placed under an obligation to provide education and information regarding the prohibition against torture in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. This provision is particularly relevant in protecting persons with mental disorder and intellectual disabilities from torture and inhuman and degrading treatment or punishment.
- [59]. The Optional Protocol to the UN Convention Against Torture (OPCAT) provides for a system of regular visits by independent international and national bodies to all places where persons are deprived of their liberty. The focus of the

<sup>29</sup>

Available at: <http://www.irishstatutebook.ie/2000/en/act/pub/0011/index.html>.

Optional Protocol to the UN Convention Against Torture is on prevention of torture, as opposed to a complaints-receiving or investigation role. Ireland signed the optional protocol on 2 October 2007. However, the required legislation necessary for the creation of the National Preventive Mechanisms provided for under the Protocol has yet to be enacted. Once operational the Optional Protocol to the UN Convention Against Torture will provide an added protection against torture and inhuman and degrading treatment or punishment. The Committee for Prevention of Torture carries out regular visits to this jurisdiction (the fifth visit took place from the 25th January to the 5th February, 2010). The Committee has a right to enter any place where persons are being detained. Likewise, the Inspector of Prisons and the Prison Visiting Committees have specific oversight over prisons and places of detention.

- [60]. Article 3 of the *European Convention on Human Rights Act 2003* expressly prohibits torture and inhuman and degrading treatment. The jurisprudence of the European Court of Human Rights clearly shows that Article 3 imposes a positive obligation on States to ensure that individuals are safeguarded against torture or inhuman and degrading treatment including treatment at the hands of private parties. Clearly persons with mental disorder and intellectual disability come under the protection of Article 3.
- [61]. There is also protection at a constitutional level from torture or cruel, inhuman or degrading treatment or punishment by way of the right to bodily integrity under Article 40.3.1. The right was established in *Ryan v Attorney General*<sup>30</sup>. Since the decision in *Ryan v Attorney General* the right to bodily integrity has been expanded to a general right not to have your health endangered by the actions of the state. In *State (C) v Frawley*<sup>31</sup> the applicant made an application for habeas corpus. He was suffering from what was described as a severe sociopathic disorder that resulted in him carrying out acts of violence that mainly caused injuries to his person. As a result the prison authorities put in place a rigorous regime to protect him from himself on the basis of his own safety. This severe regime of constraint was argued to amount to torture, or inhuman or degrading treatment. Finlay J. in this case held that freedom from torture, and from inhuman or degrading treatment and punishment was among the “unspecified personal rights guaranteed by Article 40”.<sup>32</sup> Similarly Costello J. in *obiter dicta* in *Murray v Ireland*<sup>33</sup> stated that the right not to be tortured as one of the personal rights protected but not expressly enumerated in Article 40.3.1 of the constitution. Costello J also stated in *HMW v Ireland (No. 2)*<sup>34</sup> that the right not to be tortured was an absolute right incapable of being abridged.

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<sup>30</sup> [1965] IR 345.

<sup>31</sup> [1976] IR 365.

<sup>32</sup> *State (C) v Frawley* [1976] IR 365 at 374.

<sup>33</sup> [1985] IRLM 542 at 548.

<sup>34</sup> [1997] 2 IR 141.

### 3.3. The right to freedom from exploitation

- [62]. There are a number of provisions in Irish law aimed at protecting vulnerable persons from exploitation. For example, section 5 of the *Criminal Law (Sexual Offences) Act 1993* introduced an offence that applies where a person has or attempts to have sex with a person who is “mentally impaired” unless they are married to each other.<sup>35</sup> It is also an offence under this Act for a male person to commit or attempt to commit an act of gross indecency with another male. However, there is a significant issue with section 5 of the 1993 Act in that it is paternalistic in the extreme, and is an obstacle to reciprocally consensual sexual relationships between persons with limited decision-making. The Act while seeking to protect vulnerable persons from sexual exploitation disproportionately interferes with a person’s right to respect for a private life, under Article 8 of the European Convention on Human Rights.
- [63]. The *Criminal Law (Sexual Offences) Act 2006* seeks to protect younger persons from sexual exploitation including persons with mental disorder and intellectual disability. Sections 2 and 3 of the Act make it an offence to engage in a sexual act with a person under the age of 15 and 17. The age of consent to penetrative sexual activity for both males and females in Irish law is now 17. Under the Act any person who engages or attempts to engage in a sexual act with a child who is under the age of 15 years is liable on conviction to imprisonment for life or a lesser sentence. A person who engages or attempts to engage in a sexual act with a child who is under the age of 17 can be sentenced to a term of imprisonment not exceeding five years or two years. Under the Act if the accused is a “person in authority” the sanction increases to a term not exceeding ten years or four years respectively. A person in authority is defined as a parent, stepparent, guardian, grandparent, uncle or aunt of the victim, any person who is in *loco parentis* to the victim. The definition also covers any person who is responsible for the education, supervision or welfare of the victim of the sexual offence.
- [64]. The Garda Central Vetting Unit (GCVU) commenced operations in 2002. It was created to cater for the growing demand for Garda vetting. Vetting of persons working with vulnerable persons is an important component of policy in Ireland in protecting against the exploitation of persons with mental disorder and intellectual disability. The Working Group on Garda Vetting recommended in its Report that all organisations that recruit and select persons who would have “substantial unsupervised access” to children and vulnerable adults should be entitled and avail of the vetting services of the Garda Central Vetting Unit.<sup>36</sup> According to the Report prospective full-time employees, all prospective part-time employees, all prospective volunteers and all prospective students on placement who would have “substantial unsupervised access” to children and/or

<sup>35</sup> For a fuller discussion on this see Part 3.7 below.

<sup>36</sup> “Working Group on Garda Vetting Report” 2004, at page 4, 13-15. Available at: [http://www.justice.ie/en/JELR/Pages/Garda\\_vetting\\_report](http://www.justice.ie/en/JELR/Pages/Garda_vetting_report).

vulnerable adults should be vetted prior to taking up their posts.<sup>37</sup> However, this is not a mandatory requirement. Clearly a mandatory requirement for vetting would be best practice in ensuring that persons with a record of abusing or exploiting vulnerable adults would not have any substantial unsupervised access.

[65]. There is a range of bodies' and policies across the public sector that seeks to protect vulnerable adults from exploitation and abuse. For example, the Health Information and Quality Authority established in May 2007 forms part of the government's health reform programme.

It is an independent Authority

has broad ranging functions and powers to drive quality, safety, accountability and the best use of resources in health and social care services. HIQA clearly has a role to play in ensuring that persons with mental disorder and intellectual disability are free from exploitation. Its mandate extends to public, voluntary and private bodies. One of its key roles is setting standards for the delivery of health and social care services and inspection to ensure that the standards are met and

taking action in circumstances w

any person using health services. Similarly, section 33(3)(e) of the *Mental Health Act 2001* required the Mental Health Commission to publish a code of practice for persons working in mental health services with people with intellectual disabilities. This code of practice adopts a human rights approach to the delivery of mental health services. In this regard the code sets out key principles, such as the best interests of the person, adopting a person centred approach, employing the least restrictive intervention and the presumption of capacity. The code of practice will be effective from 1 January 2010 and inspections undertaken by the Inspectorate of Mental Health Services are due to commence in 2010.

[66]. The issue of supported, sheltered or protected work settings raises concerns in terms of the exploitation. Supported, sheltered or protected work settings are a prevalent feature of the employment of people with mental disorder, and particularly persons with intellectual disabilities in Ireland.<sup>38</sup> The employment rate of persons in this group is very low. According to the National Intellectual Disability Database in 2007 there were a total of 4315 attending a sheltered work centre.<sup>39</sup> The National Intellectual Disability Database shows that only a

<sup>37</sup> *Ibid.*

<sup>38</sup> "How far towards equality? Measuring how equally people with disabilities are included in Irish Society" National Disability Authority (2005). Available at: <http://www.nda.ie/cntmgtnew.nsf/0/5419C80ECE72C05D802570C8003E1D36?OpenDocument> chapter 5, at

<sup>39</sup> Kelly, Kelly and Craig "Annual Report of the National Intellectual Disability Database Committee 2007" (2007) (Dublin: Health Research Board). Available at: [http://www.hrb.ie/display\\_content.php?page\\_id=72&stream=1&div\\_id=3](http://www.hrb.ie/display_content.php?page_id=72&stream=1&div_id=3). The Intellectual Disability Database includes people with a mild intellectual disability where they use or are considered to require an intellectual disability services. A higher proportion of persons with mild disabilities who are registered on the database are in open employment. It is noteworthy that it is likely that adults with a mild intellectual disability who are not registered on the database are less likely to hold a job than the population at large.

small minority of persons in receipt of sheltered employment services are considered to be in employment. The majority of persons are in what is classified as sheltered work. The concern with this is that the normal employment relationship does not apply to persons in sheltered employment. Persons falling into this category are not entitled to avail of the national minimum wage in the Republic of Ireland. As the National Disability Authority noted the earnings of these persons are nominal.

- [67]. David Begg the General Secretary of the Irish Congress of Trade Unions (ICTU) called for the issue to be investigated by the Equality Tribunal.<sup>40</sup> He was very critical of the failure of action on this issue, which was on the agenda of the Partnership Agreement talks in 2002. A document entitled the *Code of Practice for Sheltered Occupational Services* was produced in 2004. However, there has been no progress on implementation of this issue. This code sets out standards for the operation of sheltered occupational services. The code covers the rights and entitlements of persons in sheltered occupational services, the provision of allowances, personal development activities, and complaints procedures. The National Disability Authority recommended that the Department of Enterprise, Trade and Employment should develop and implement a policy that supports enterprises that have been established specifically to employ people with disabilities. The National Disability Authority formed the opinion that the *Code of Practice for Sheltered Occupational Services* could not be implemented without a comprehensive policy that supports these enterprises.<sup>41</sup>

### 3.4. The right to liberty and security

- [68]. There are a number of sources of law protecting against the deprivation of liberty in this jurisdiction at the international, domestic and at constitutional levels. Article 40.4.1 of the constitution provides “No citizen shall be deprived of his personal liberty save in accordance with law.”
- [69]. However, Irish law has been slow to meet the standards of international norms in respect of persons with mental disorder. However, as discussed in greater detail below the *Mental Health Act 2001* has been fully commenced. This Act

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<sup>40</sup> “ICTU alleges bias against disabled in workshops” Irish Times 14 April 2008. Available at: <http://www.irishtimes.com/newspaper/ireland/2008/0414/1208115797535.html>. Inclusion Ireland supported David Begg in his criticism see: <http://www.inclusionireland.ie/InclusionIrelandwelcomesICTUcallforInvestigationintoShelteredWorkshops.asp>.

<sup>41</sup> “Towards Best Practice in the Provision of Further Education, Employment and Training Services for People with Disabilities in Ireland” National Disability Authority of Ireland. Recommendation 6, at page 84. Available at: [http://www.nda.ie/cntmgmtnew.nsf/0/D1D9E829E33A5FE980256E630034E03B/\\$File/education.pdf](http://www.nda.ie/cntmgmtnew.nsf/0/D1D9E829E33A5FE980256E630034E03B/$File/education.pdf).

for the first time in Irish law has introduced an automatic review of involuntary detention of persons with mental disorder and intellectual disability detained in psychiatric facilities.

- [70]. However, there is an issue in respect of the detention of what can be referred to as incapable compliant patients with a mental disorder in Ireland. Incapable compliant patients are persons lacking decision-making capacity in relation to their admission to a psychiatric institution. Incapable compliant patients can have significant intellectual disability and severe mental disorders that affect their ability to consent or refuse treatment or detention in a psychiatric setting. Such persons are informally admitted for psychiatric treatment and fall outside the scope of the safeguards available to persons admitted involuntarily under the *Mental Health Act 2001*. Such patients are not voluntary patients as they clearly lack the capacity to consent to admission to psychiatric care and treatment and there is no review mechanism available to safeguard against unlawful detention.
- [71]. Until the introduction of the *Criminal Law (Insanity) Act 2006* when a person was found guilty but insane under the provisions of the *Trial of Lunatics Act 1883* the court was obliged to commit the defendant to the Central Mental Hospital. The *Criminal Law (Insanity) Act 2006* provides for a Mental Health (Criminal Law) Review Board to review the cases of persons committed to “designated centres” following findings of unfitness to be tried or verdicts of not guilty by reason of insanity. It also reviews the cases of prisoners serving sentence and awaiting trial transferred from prison and military prisoners. The new procedure is a vast improvement on the old review system. Under the Act, these reviews must take place at intervals of not greater than 6 months. Reviews can take place earlier following an application by the detained person or on the basis of the Mental Health (Criminal Law) Review Board's own initiative. New patients at the Central Mental Hospital have the first review of their detention at an early date.

### 3.5. The right to fair trial

- [72]. There is constitutional protection for the right to a fair trial under the constitution. The right is an important right in the hierarchy of rights as evidenced by constitutional case law in the area.<sup>42</sup> There is protection of the right to a fair trial by way of Article 6 of the *European Human Rights Act 2003*.
- [73]. District court judges normally deal with the issue of the fitness of an accused for trial in criminal proceedings. In Ireland, there are a limited number of options available to the courts in this regard. Judges “... must attempt to choose

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<sup>42</sup> See *D v Director of Public Prosecutions* [1994] 2 IR 465 and *The People (Director of Public Prosecutions) v MC* (16 June) CCC and *Director of Public Prosecutions (Murphy) v PT* [1998] 1ILRM 344.

between the alternative courses of action available, bearing in mind such principles as the right to liberty, the right to a fair trial and the duty to protect the accused person and/or the public in appropriate cases.”<sup>43</sup> The *Criminal Law (Insanity) Act 2006* sets out in section 4 (2) that an accused person will be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as the plead to the charge, instruct a legal representative, make a proper defence etc.

- [74]. The *Criminal Law (Insanity) Bill 2010* provides for the amendment of section 4 of the *Criminal Law (Insanity) Act 2006*, which deals with fitness to be tried, in order to improve the operation of that section and to provide for better compliance with the European Convention on Human Rights of the procedure specified in the Act for dealing with persons who may be unfit to be tried. The primary purpose of the amendment of section 4 is accordingly to provide that evidence of an approved medical officer (consultant psychiatrist) is required before a person can be committed to a designated centre for examination. The amendment also provides that the examination can be on an in-patient or out-patient basis.
- [75]. Among the matters addressed in the amendments to section 4 is a provision for the courts to take account of the evidence of an approved medical officer to assist in determining the issue of fitness to be tried and also to facilitate an adjournment to allow the accused person to receive appropriate medical treatment. The latter should help to prevent unnecessary referrals to the Central Mental Hospital and give statutory recognition to informal diversion arrangements currently operating.
- [76]. Under section 1 of the Act “mental disorder” includes mental illness, mental disability, dementia or any disease of the mind, but excludes intoxication.

### 3.6. Ireland The right to privacy, including the access to one’s own confidential medical records

- [77]. A statutory right of privacy have not featured generally in common law jurisdictions. However, the Irish Courts have recognised a very limited right of privacy for the protection of certain personal rights based on the Irish Constitution. There is also protection by way of the *European Convention on Human Rights Act 2003*, which is enhanced by the case law of the European Court of Human Rights on Article 8.

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<sup>43</sup> Whelan, Darius “Fitness for Trial in the District Court: The Legal Perspective” *Judicial Studies Institute Journal* [2007] Vol. 2 124.

- [78]. The law on the ownership of medical records in this jurisdiction is reasonably certain in that medical records belong to the health professional or the employer of the health professional and not the patient. However, the patient retains the right to control access to his or her own medical records. When a health care professional refuses a patient access to his or her medical records, the burden of proof is placed on the health care professional to justify his or her decision.
- [79]. In *Toal v Duignan*<sup>44</sup> the court considered the duty of a hospital to maintain proper medical records. However, the court did not elaborate on the extent of this duty. The court did not establish any minimum time periods for the maintenance of medical records and the court did not outline any sanctions for losing medical files and did not consider the right of access of patients. Therefore, the existing Irish case law on this area is unhelpful. The *Data Protection Acts* protect the right to privacy against risk from computerised information in relation to data held about a particular individual. Medical records are included in the term ‘data’. However only medical records stored on computer are protected by the Act. The *Data Protection Act 1988* provides safeguards for individuals regarding information held about them on computers and includes a right of access to information held about oneself and the right to rectify incorrect information. Section 4 of the *Data Protection Act 1988* provides that a patient has the right to request information and it must be intelligible to the average person otherwise it must be accompanied by an explanation.
- [80]. There is a pre-supposition in the *Data Protection Act 1988* that giving the data is in the patient’s best interests and access is not unqualified in that data cannot be supplied where it would be likely to cause serious harm to the physical or mental health of the data subject. Health professionals make the decisions as to whether it is suitable to give the data to a patient and the restrictions should be narrowly interpreted.<sup>45</sup> The *Data Protection Act 2003* made a number of improvements to the 1988 Act by requiring the data controllers who obtain personal information to inform the ‘data subject’ (patients) of their identity, the reason they are keeping their data and if they intend pass on their data. The *Freedom of Information Act 1997* also applies to the Health Service Executive and covers access to medical records. However, there is a restriction on access to records of medical or psychiatric under section 26 (3) of the Act, which provides:
- [81]. “( a ) a record of a medical or psychiatric nature relating to the requester concerned, or ( b ) a record kept for the purposes of, or obtained in the course of the carrying out of, social work in relation to the requester, and, in the opinion of the head concerned, disclosure of the

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<sup>44</sup> [1991] ILRM 140.

<sup>45</sup> Restrictions on disclosure do not apply if the disclosure is required for security of the State, the prevention, investigation, detection of offences, protecting international relations, preventing injury to health, damage to property, required by court, required for legal proceedings.

information concerned to the requester might be prejudicial to his or her physical or mental health, well-being or emotional condition, the head may decide to refuse to grant the request.”<sup>46</sup>

- [82]. The final decision on the release of the record rests with the Information Commissioner whose decision is binding with appeal to the High Court on a point of law.

### 3.7. The right to marry, to found a family and to respect of family life

- [83]. There is a body of law regulating the right to marry dating back as far as 1844 in Ireland. The constitutional right to marry was considered in *Donovan v Minister for Justice*<sup>47</sup> and the case law in this area focuses on rights arising out of marriage as opposed to a consideration of the right itself. However, Laffoy J. in *O’Shea v Ireland*<sup>48</sup> affirmed the existence of the right to marry in the context of the *Deceased Wife’s Sister’s Marriage Act 1907*. Laffoy J. held that where a legislative provision restricts the right to marry, the restriction required justification as being necessary in support of the constitutional protection of the family and the constitutional institution of marriage, or as having regard to the requirements of the common good. Article 12 of the *European Convention on Human Rights Act 2003* also contains a provision on the right to marry.
- [84]. Free and informed consent is a key principle of existing marriage law in Ireland. Contravention of this requirement renders a marriage void.<sup>49</sup> This requirement was further enhanced by section 32 of the *Family Law Act 1995* that requires that all couples intending to marry must give a minimum of three months notification to a registrar of their intention to marry.

There is a statutory restriction on the right to marry for persons the subject of a wardship order<sup>50</sup> under the *Marriage of Lunatics Act 1811*. The *Marriage of Lunatics Act 1811* Act renders void a marriage contract that is entered into by a person found to be a “lunatic” by inquisition. Section 58(11) of the *Civil Registration Act 2004* provides that an objection on the ground that a marriage would be void by under the *Marriage of Lunatics Act 1811* must be accompanied by a certificate of a certified medical practitioner in support of the objection. However, this provision does not address the difficulty that the

<sup>46</sup> The Act is available at: <http://www.irishstatutebook.ie/1997/en/act/pub/0013/print.html>.  
<sup>47</sup> (1951) 85 ILTR 134.

<sup>48</sup> High Court, unreported, 17 October 2006.

<sup>49</sup> See “United Nations Convention No. 7525 (Consent to Marriage, Minimum Age for Marriage and Registration of Marriages)” Position Paper No.7, Inter-Departmental Committee on Reform of Marriage Law.  
 Available at: <http://www.groireland.ie/docs/position7.pdf>.

<sup>50</sup> The Wards of Court System is discussed in detail below.

*Marriage of Lunatics Act 1811* could be interpreted to void the marriage of a ward, in circumstances where he or she has capacity at the time of marriage. It is arguable that the *Marriage of Lunatics Act 1811* would not survive constitutional challenge as it automatically denies the ward's right to marry without reference to his or her actual capacity to enter into marriage.<sup>51</sup> The Mental Capacity Bill will repeal the *Marriage of Lunatics Act 1811* and provide for a presumption of mental capacity for all adults.

- [85]. Section 5 of the *Criminal Law (Sexual Offences) Act 1993* repealed section 4 of the *Criminal Law Amendment Act 1935* Act. Section 5 of the 1993 Act introduced an offence that applies where a person has or attempts to have sex with a person who is "mentally impaired" unless they are married to each other. It is also an offence for a male person to commit or attempt to commit an act of gross indecency with another male. A defence is available to a person who did not know and had no reason to suspect that the person was "mentally impaired". "Mentally impaired" is defined in the Act as a person "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."
- [86]. Prosecutions taken under section 5 of the *Criminal Law (Sexual Offences) Act 1993* are at the discretion of the Director of Public Prosecutions. The Law Reform Commission is of the opinion that the test of ability to guard against serious exploitation "... constitutes a better yardstick of capacity to consent than ability to lead an independent life ... because some degree of dependence would not necessarily preclude an ability to consent."<sup>52</sup> Another shortcoming with section 5 of the 1993 Act is that outside of marriage a sexual relationship between two "mentally impaired" persons can constitute a criminal offence, as there is no provision for consent as a defence. This is completely unsatisfactory as both adults qualifying as "mentally impaired" under the Act may be able to give valid consent to sexual intercourse.
- [87]. There is a significant issue with section 5 of the 1993 Act in that it is a hurdle to reciprocally consensual sexual relationship between persons with limited decision-making. Section 5 may also impact on carers as they may consider facilitating such relationships might leave the vulnerable to criminal liability. Section 5 of the 1993 Act may be considered to breach Article 8 of the European Convention on human rights as it disproportionately interferes with a person's right to respect for a private life.

<sup>51</sup> Donnelly, Mary "Assessing Legal Capacity: Process and the Operation of the Functional Test" (2007) 2 *JSIJ* 141, at 150). Available at: [http://www.jsijournal.ie/html/Volume%207%20No.%202/2007%5B2%5D\\_Donnelly\\_Assessing%20Legal%20Capacity.pdf](http://www.jsijournal.ie/html/Volume%207%20No.%202/2007%5B2%5D_Donnelly_Assessing%20Legal%20Capacity.pdf).

<sup>52</sup> "Consultation Paper on Vulnerable Adults and the Law: Capacity" Law Reform Commission (37) 2005 at page 141.

### 3.8. The right to have children and maintain parental rights

- [88]. There is no statistical information available in relation to the incidence of sterilisation of people with limited decision-making ability in Ireland. The Commission on the Status of People with Disabilities stated that:
- [89]. “It is assumed that the sterilisations which do take place are authorised on the basis of medical and psychological opinion and with parental agreement. It is not known to what extent people with disabilities are consulted about such decisions. This is a profoundly complex question with ethical, social, economic and legal implications. It is a question to be faced in the future, given the developing emphasis on people’s rights and changing attitudes.”<sup>53</sup>
- [90]. It is arguable that sterilisation in the best interests of an individual would not be sufficient given the existence of the mentally disabled person’s underlying constitutional rights.<sup>54</sup> In *Murray v Ireland*<sup>55</sup> the right to have children was considered in the context of marriage as one of the unenumerated rights guaranteed by Article 40.3.1 of the constitution.<sup>56</sup> It is important to note that there is no judicial adjudication on the broader right of reproduction under Irish constitutional law. However, the constitutional right to bodily integrity under the constitution and Article 8 of the *European Convention on Human Rights Act 2003* do provide protections. Non-consensual sterilisation may constitute a trespass against the person under Irish civil law<sup>57</sup> and a criminal assault offence under sections 2, 3 and 4 of the *Non-Fatal Offences Against the Persons Act 1997*.
- [91]. The Scheme of the *Mental Capacity Bill* follows a recommendation of the Law Reform Commission that jurisdiction in certain matters, including non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment and organ donation should be confined to the exclusive jurisdiction of the High Court. Given the presumption of capacity provided for in the Scheme, substitute decision-making on behalf of a person lacking mental capacity may only be made where necessary and to the benefit of that person.

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<sup>53</sup> Commission on the Status of People with Disabilities *A Strategy for Equality: Report of the Commission on the Status People with Disabilities* (1996) at paragraph 18.27.

<sup>54</sup> Donnelly, Mary “Non-Consensual Sterilisation of Mentally Disabled People: The Law in Ireland” (1997) 32 *Irish Jurist* 297, 310.

<sup>55</sup> [1991] *ILRM* 465.

<sup>56</sup> Reproduction was seen as being essential to the human condition and personal dignity.

<sup>57</sup> *Walsh v Family Planning Services Ltd* [1992] 1 *IR* 496.

### 3.9. The right to property

- [92]. Article 43 of the Irish constitution sets out rights in respect of private property. The courts have jurisdiction to enquire into whether a restriction on property rights is justified on the exigencies of the common good and whether the restrictions accords with the principle of the common good.<sup>58</sup> The Wards of Court system is the current and exclusive mechanism for managing the affairs of persons lacking decision-making capacity in Ireland. As discussed below the Wards of Court system normally operates where a person with a mental disorder or an intellectual disability receives or inherits property and where it is contended that they are unable to manage it. One of the major deficiencies in the wardship system is that an order of wardship is of indefinite duration and there is no requirement for the regular review of a ward. The Wards of Court system is archaic and complex and is ineffective in guaranteeing the property rights of persons with mental disorder and intellectual disability.

The Scheme of the *Mental Capacity Bill* follows a recommendation of the Law Reform Commission in legislating for a functional understanding of capacity, based on an issue-specific and time specific approach, which focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates. It allows therefore for the situation where the loss of capacity is temporary or partial. A person may regain capacity or may lack capacity in relation to one matter but not in relation to another. This represents a major departure from current law which is based on an "all or nothing" approach. In addition, the Scheme provides for regular reviews of court ordered declarations of incapacity and the establishment of an Office of Public Guardian who will have a monitoring and supervisory role over court-appointed personal guardians.

- [93]. In *Re Dolan*<sup>59</sup> the applicant had cerebral palsy and his parents, who had been responsible for his care since birth, strongly objected to the concept of the person and the property of their son being under the control of the President of the High Court rather than primarily under their own control. The respondent's parents objected to the respondent being made a ward of court and refused to present a petition for wardship. The President of the High Court ordered that one of the court's medical visitors visit the respondent and file a report in accordance with sections 11 and 12 of the *Lunacy Regulation (Ireland) Act 1871* in order to determine whether the applicant was of "unsound mind". As an alternative to having their son made a ward of court, the applicant's parents sought for the establishment of a trust to manage the monies received by him as a result of the settlement of a medical negligence action. The applicant sought a determination by the High Court, in advance of any consideration of the

<sup>58</sup> For a discussion on the right to property see Hogan and Whyte JM *Kelly: The Irish Constitution* 4<sup>th</sup> edition Tottel (2003) at chapter 7.7 page 1969.

<sup>59</sup> (37/2005), Supreme Court, July 4, 2007.

wardship, as to whether an appropriate trust or some other arrangement could be arrived at which would allow the applicant's parents reasonable control of their child and that they be trusted within reason to decide how to apply the monies for the benefit of their son. The Supreme Court allowed the appeal and remitted the matter back to the High Court for a preliminary hearing prior to the wardship application. It was held that there should be a preliminary hearing to determine whether or not some form of arrangement might be possible for the care of the applicant and his property other than the wardship procedure. It was also held that the expression “person of unsound mind” had a special meaning and not the perceived offensive meaning that was attributed to it by the parents of the applicant. It was held that a “person of unsound mind” meant whether the appellant was incapable of managing his affairs. The Supreme Court reaffirmed that the High Court had a discretionary jurisdiction to take persons of unsound mind into wardship. In circumstances where a person had property, it was open to a judge exercising wardship jurisdiction to conclude that wardship was not necessary in any given circumstances either for the protection of that property or of the person of the respondent.

- [94]. The Irish Government is committed to introducing new capacity legislation to replace the Wards of Court system and have approved the drafting of a Mental Capacity Bill. The scope of the Bill aims to extend protection for persons with mental illness, persons with intellectual disabilities, and persons who have acquired brain injuries. It aims to provide more clarity in the law for carers who assume responsibility for persons lacking capacity and will provide a better system for protecting property rights.

### 3.10. The right to vote

- [95]. Article 16.1.2 of the Constitution provides that every citizen who has reached the age of 18 years who is not disqualified by law “and complies with the provisions of the law relating to the election of members of Dáil Éireann shall have the right to vote at an election for members of Dáil Éireann”. Article 8 of the *Electoral Act 1992* provides that “[a] person shall be entitled to be registered as a Dáil elector in a constituency if he has reached the age of eighteen years and he was, on the qualifying date— ( a ) a citizen of Ireland, and ( b ) ordinarily resident in that constituency.”<sup>60</sup>
- [96]. In *Draper v The Attorney General The Minister for the Environment and the Returning Officer for the Dáil Constituency of Dún Laoghaire*<sup>61</sup> the applicant was unable to leave her home without suffering severe physical discomfort and as such was not able to exercise her right to vote. She argued that she and persons similarly situated should be able to exercise her right to vote through the provision of postal voting. Both the High Court and the Supreme Court

<sup>60</sup> Available at: <http://www.irishstatutebook.ie/1992/en/act/pub/0023/print.html>.

<sup>61</sup> [1984] I.L.R.M. 643.

dismissed her application. The Electoral (Amendment) Act 1996 provides for persons with physical illness or physical disability to be entered on the postal voters list.

[97]. The *Electoral Act 1992* has been amended to assist electors with certain disabilities to exercise their voting rights. A person who satisfies the returning officer that he or she is unable by reason of physical illness or physical disability to vote at their local polling station may be allowed to vote at a more accessible polling station. The legislation also provides for:

- assistance in voting at the polling station by a companion or by the presiding officer for people with a visual impairment, physical disability or literacy difficulty;
- the use of photographs and party political emblems on ballot papers to assist visually impaired people and people with literacy difficulties;
- the display of a large print copy of the ballot paper in polling stations to further assist visually impaired people and people with literacy difficulties.

[98]. Accessibility to polling buildings: Electoral law provides that in making polling schemes, local authorities shall endeavour to appoint polling places where at least one polling station is accessible to wheelchair users. Public notice must be given of all the polling stations in the constituency which are not accessible to wheelchair users.

[99]. Accessible polling booths: The legislation also provides that returning officers shall make arrangements at polling stations to facilitate the marking and placing in the ballot box of ballot papers by voters who are wheelchair users, persons with a physical disability or the elderly.

[100]. Guidance: Guidance is issued to returning officers on accessible voting providing them with practical assistance to enable voters with disabilities to vote at their local polling station insofar as is practicable. The guidance highlights that election staff be made aware of the needs of voters with disabilities and sets out practical steps that staff can take to provide a safe and supportive environment on polling day.

[101]. The situation is compounded by the non-provision of postal voting for persons with mental disorder and intellectual disability. It was recommended in 1983 that a list of eligible postal voters including persons with disabilities should be compiled each year alongside the electoral register.<sup>62</sup> However, this recommendation was not implemented on the grounds that postal voting was open to abuse. However, no evidence was produced supporting the identified

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<sup>62</sup> *Ibid.*

risk of abuse.<sup>63</sup> In practice, persons whose names are on the register of electors are generally entitled to vote at elections and referenda, according to their citizenship. Detailed requirements in relation to registration, the right to vote and the procedure for voting are set out in electoral law – the implementation of these is a matter for local registration authorities and returning officers, as appropriate.

- [102]. A person residing in a hospital, nursing home or similar institution who has a physical disability or illness which prevents them from going to the polling station, can vote at the hospital/nursing home if they apply to be included in the special voters list which is drawn up every as part of the register of electors.<sup>64</sup> A presiding officer together with a Garda calls to people on the 'special' list with the ballot paper, which must be completed on the spot. In addition, postal voting is available to electors living at home who cannot go to the polling station due to a physical disability or physical illness. In order to be entered on the postal voters list, an application must be made to the relevant county or city council .The application form includes provision for a medical certificate which is generally required in the case of a first application only."

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<sup>63</sup> *Ibid.*

<sup>64</sup> See section 17 of the *Electoral Act 1992*.

## 4. Involuntary placement and Involuntary Treatment

### 4.1. Legal Framework

- [103]. The *Mental Health Act 2001* repeals most of *Mental Treatment Act 1945*. This legislation is rights based law-regulating involuntary detention in hospital. It came into force in its entirety as of 1 November 2006. The *Mental Health Act 2001* provided for the creation of the Mental Health Commission. The Mental Health Commission is the body that has overall responsibility for ensuring good practice in the delivery of mental health services and for protecting the interests of persons detained under the Act. The Mental Health Commission also plays an important role in publishing codes of practice to guide staff in the mental health services in carrying out their jobs. The Mental Health Commission is also responsible for appointing members of Tribunals and a panel of Consultant Psychiatrists to carry out independent examinations on persons detained under the *Mental Health Act 2001*.
- [104]. The Irish legislation deals with involuntary placement and involuntary treatment in different parts of the Act. Consent to treatment is dealt with under Part 4 of the *Mental Health Act 2001*, while involuntary admission is dealt with under Part 2 of the Act. There are a range of provisions contained in Part 2 of the Act that set out the criteria for involuntary admission, the making of an application for involuntary admission, the power of the police and so on. Under Part 4 Section 56 of the Act provides that “consent”, in relation to a patient, means consent obtained freely without threats or inducements, where the consultant psychiatrist responsible for the care of the patient is satisfied he/she is capable of understanding the nature, purpose and likely effects of the proposed treatment.<sup>65</sup> And where the consultant psychiatrist has given the patient adequate information, in a form and language that the patient can understand, on the nature, purpose and likely effects of the treatment.<sup>66</sup> Section 57(1) of the Act provides that the consent to treatment of a patient is not required where, in the opinion of the consultant psychiatrist responsible for the care and treatment of the patient, the treatment is necessary to safeguard the life of the patient, to restore his or her health, to alleviate his or her condition, or to relieve his or her suffering, in circumstances where the patient with mental disorder is incapable of giving such consent.
- [105]. The *Mental Health Act 2001* provides for the voluntary and compulsory admission of children. Under section 2 of the Act a child is defined as a person

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<sup>65</sup> Section 56(a).

<sup>66</sup> Section 56(b).

under the age of 18 (other than a person who has been married). The definition of child under the *Mental Health Act 2001* conflicts with section 23 of the *Non-Fatal Offences Against the Person Act 1997* which sets the age of consent of minors to surgical, medical and dental treatment at 16. Most children in need of mental health services receive outpatient treatment. However, where in-patient care is required the consent of parents will normally apply. The Mental Health Commission Code of Practice Relating to the Admission of Children under the *Mental Health Act 2001* provides important practice and operational details regarding children in in-patient care.<sup>67</sup> The *Mental Health Act 2001* provides for compulsory admission of children on the basis of mental disorder.<sup>68</sup> The Principles in the Act of best interests, notification and respect apply also to children in decisions about admission and treatment. The courts must be involved in all compulsory admissions of children with mental disorders.<sup>69</sup> The Health Service Executive can apply to the District Court for a detention order where it seems a child is suffering from a mental disorder and needs treatment that he or she is unlikely to receive otherwise. When the court is satisfied with evidence that the child has a mental disorder, a detention order can be made for 21 days. Further extensions of three months and six months can be sought. The Code of Practice Relating to the Admission of Children refers to the undesirability of inappropriate placement in adult centres and should only be used where necessary. Arrangements must be made for the protection and safety of such children by having appropriate policies and protocols in place. Section 61 of the *Mental Health Act 2001* provides that children admitted by a court order pursuant to the *Mental Health Act 2001* medicine for mental disorder can be administered without consent for three months. After the initial three-months the continuation of medicine must be approved both by the child's consultant psychiatrist and a second opinion from another consultant psychiatrist is also required. The treatment then remains valid for a further period of three months. Electro Convulsive Therapy and psychosurgery cannot be administered to children without the approval of the court.<sup>70</sup>

## 4.2. Criteria and Definitions

- [106]. Section 3 of the *Mental Health Act 2001* gives the following definitions of mental disorder, mental illness, severe dementia and significant intellectual disability.

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<sup>67</sup> Available at:  
<http://www.stateclaims.ie/ClinicalIndemnityScheme/publications/2008/MHCCCodeOfPracticeAdmittingChildren.pdf>.

<sup>68</sup> See section 25 (1) *Mental Health Act 2001*.

<sup>69</sup> See section 25 (1)(b) *Mental Health Act 2001*.

<sup>70</sup> See section 25 (12) and (13) *Mental Health Act 2001*.

- [107]. “3. —(1) In this Act “**mental disorder**” means mental illness, severe dementia or significant intellectual disability where— (a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or(b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and (ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.
- [108]. (2) In subsection (1)—“**mental illness**” means a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons; “**severe dementia**” means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression; “**significant intellectual disability**” means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person.” [Emphasis added]
- [109]. The definitions provided in the *Mental Health Act 2001* are welcome developments providing greater clarity about whether or not an individual is mentally ill. The definitions are also hugely important in providing a relatively unambiguous basis upon which treatment is given voluntarily and involuntarily. Section 8 of the *Mental Health Act 2001* sets out the criteria for involuntary admission. Section 8 provides that persons cannot be involuntarily admitted solely on the grounds that they are suffering from a personality disorder or are a social deviant, or are addicted to drugs or intoxicants’. It is noteworthy that there is no definition of a social deviant in the Act. As the *Mental Health Act 2001* was only fully commenced in 2006 the “...effects of these definitional changes have yet to be fully determined in the courts”.<sup>71</sup> However, it is clear that the courts see the definitions of mental disorder and intellectual disability as of critical importance in establishing the benchmark against which all forms

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<sup>71</sup> Kelly, Brendan “The legal definition of mental disorders in recent legislation” 2009 *Irish Medical Times*. Available at: <http://www.imt.ie/clinical/mental-health-cns/the-legal-definition-of-mental.html>.

of mental illness must be assessed before an admission order or a renewal order can be issued.<sup>72</sup>

- [110]. O’Neill J. in *M.R. v. Byrne*<sup>73</sup> held that the definitions under Section 3 (1) (a) and (b) can be expressed as alternatives. The High Court took this approach on the basis that in many cases there would be a significant overlap between the different definitions and persons could be categorised as falling under both definitions at the same time.

### 4.3. Assessment, Decision Procedures and Duration

- [111]. One of the most important aspects of the *Mental Health Act 2001* was the provision of Mental Health Tribunals that review detention orders. The Mental Health Tribunals have a role in scrutinising proposals for psychosurgery and transferring patients to the Central Mental Hospital.<sup>74</sup> These reviews happen in all cases where the decision to detain a person involuntarily occurs or where there is a renewal of an order of involuntary detention. The Mental Health Commission appoints the members of the Tribunals. These Tribunals sit in panels of three and include a consultant psychiatrist a barrister or solicitor with at least 7 years experience in practice and a layperson (who cannot be a doctor or a nurse).
- [112]. In order for a person to be involuntarily detained they must have a “mental disorder”. According to the *Mental Health Act’s* definition of mental disorder a person must have mental illness, severe dementia or a significant intellectual disability. In addition, there has to be a serious likelihood that the person concerned will cause immediate and serious harm to themselves or others and their judgment is impaired to the extent that failure to admit would result in a serious deterioration in their condition and would preclude the administration of appropriate treatment following admission. However, there is a requirement that the detention and treatment will benefit the person.
- [113]. To be entitled to make an application for involuntary detention a person must be a family member or must have cohabited for a period of at least three years. Under section 2 of the *Mental Health Act 2001* a “spouse” “... means a husband

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<sup>72</sup> See for example, Charleton J. in *T. O’D. v Harry Kennedy, Clinical Director of the Central Mental Hospital, the Health Service Executive, the Mental Health Commission* (High Court, Unreported, 25 April 2007) and O’Neill J. in *M.R. v. Byrne* (High Court, Unreported, 2 March 2007).

<sup>73</sup> (High Court, Unreported, 2 March 2007).

<sup>74</sup> The Central Mental Hospital was built in 1850 and is considered to be the longest established forensic mental health institution in Europe. The Central Mental Hospital provides long, medium and short-term care in conditions of high, medium and low security.

or wife or a man or a woman who is cohabiting with a person of the opposite sex for a continuous period of not less than 3 years but is not married to that person”. Therefore, same-sex couples are not permitted under the *Mental Health Act 2001* to make an application for the involuntary detention of their partner. However, under section 9(1)(d) of the Act “any other person” is entitled to make an application for involuntary detention, however, there is no explanation of who qualifies as “any other person” as there is no definition of the term in section 2 on interpretation. An authorised officer can apply and “any other person” with an explanation as to why this category is applying.

- [114]. Examination for recommendation for detention must happen within 24 hours of the application and a doctor must inform the person of the purpose and have a personal examination by doctor or Consultant Psychiatrist of the “process and content of thought, the mood, and the behaviour of the person.” If satisfied that the person is suffering from a mental disorder they must make a recommendation for admission in the form. Under section 10(5) where a recommendation for the involuntary detention of a patient is made the recommendation will only remain valid for a maximum period of 7 days from the date of its making and shall then expire.
- [115]. Section 18 of the *Mental Health Act 2001* provides that where an admission order or a renewal order has been referred to a Tribunal under the Act the Tribunal should review the detention of the patient concerned. Section 18(a) provides that if the Tribunal is satisfied that the patient is suffering from a mental disorder they can affirm the order. If the Tribunal under section 18(b) is not satisfied that the patient is suffering from a mental disorder it can revoke the order and direct that the patient be discharged. Under section 28 (1) of the *Mental Health Act 2001* when the consultant psychiatrist responsible for the care and treatment of a patient forms the opinion that the patient no longer suffers from a mental disorder, he or she can revoke the relevant admission order or renewal order, and discharge the patient. Section 28(2) provides that in deciding on the discharge of a patient the consultant psychiatrist responsible should have regard to not inappropriately discharging the patient and that the patient is detained for only as long as is reasonably necessary for his or her proper care and treatment. Under section 19(1) of the *Mental Health Act 2001* a patient can appeal to the Circuit Court against a decision of a Mental Health Tribunal to affirm an order made in respect of him or her on the grounds that he or she is not suffering from a mental disorder. Section 19(16) provides that once the Circuit Court makes its decision then a further appeal is not permitted to the High Court. Unless the appeal relates to a point of law.
- [116]. There is a requirement of patient consent and that appropriate information is provided to patients. Additionally, a right to have a second opinion regarding treatment decisions involving Electro Convulsive Therapy<sup>75</sup> or ongoing

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<sup>75</sup> See section 59 of the *Mental Health Act 2001* provides that a programme of electroconvulsive therapy shall not be administered to a patient unless either they consent to

medication<sup>76</sup> are significant as these procedures provide some level of review of treatment and some level of protection for patients against inappropriate treatment decisions. However, there is concern that the review procedure of medication from a human rights perspective is not sufficiently independent as the patient's consultant psychiatrist is entitled to select the psychiatrist that will provide the second opinion.<sup>77</sup>

[117]. Section 23(1) of the *Mental Health Act 2001* deals with circumstances where a person who is being treated as a voluntary patient wants to leave an "approved centre". It provides that where a consultant psychiatrist, registered medical practitioner or registered nurse on the staff is of opinion that the person is suffering from a mental disorder, they can detain the person for a period not exceeding 24 hours. When a person is detained under section 23 their consultant psychiatrist is required to discharge the person or arrange for him or her to be examined by another consultant psychiatrist. If this consultant psychiatrist is satisfied that the person is suffering from a mental disorder, he/she can issue a certificate in writing stating that they are of the opinion that because of the mental disorder the person should be detained.<sup>78</sup> The consultant psychiatrist can then make an admission order.<sup>79</sup> In circumstances where the consultant psychiatrist is not satisfied the patient is suffering from a mental disorder they issue a certificate in writing stating that he or she is of opinion that the person should not be detained and the person is then discharged.<sup>80</sup> Section 24(4) of the *Mental Health Act 2001* also provides that the provisions contained in sections 15 to 22 (as they apply to a person detained involuntarily) then apply to once voluntary patients "with any necessary modifications".

[118]. Section 69 of the *Mental Health Act 2001* provides that a "... person shall not place a patient in seclusion or apply mechanical means of bodily restraint to the patient unless such seclusion or restraint is determined, in accordance with the rules made under subsection (2), to be necessary for the purposes of treatment or to prevent the patient from injuring himself or herself or others and unless the seclusion or restraint complies with such rules." Section 69(2) of the Act required the Mental Health Commission to draft rules providing for the use of seclusion and mechanical means of bodily restraint on a patient.<sup>81</sup> Under

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the treatment in writing or where they are unable to give their consent there is a review by a second consultant psychiatrist.

<sup>76</sup> Section 60 of the *Mental Health Act 2001* provides that where "... medicine has been administered to a patient for the purposes of ameliorating his or her mental disorder for a continuous period of 3 months, the administration of that medicine shall not be continued unless" they consent to the continued administration in writing or where they are unable to give their consent there is a review by a second consultant psychiatrist.

<sup>77</sup> See Mary Donnelly, "Treatment for a Mental Disorder: The Mental Health Act, Consent and the Role of Rights" (2005) 40 *Irish Jurist* 220, at 234-238.

<sup>78</sup> Section 24(2)(a) *Mental Health Act 2001*.

<sup>79</sup> Section 24(3) *Mental Health Act 2001*.

<sup>80</sup> Section 24(2)(b) *Mental Health Act 2001*.

<sup>81</sup> "Rules Governing the Use of Seclusion and Mechanical Means of Bodily Restraint" Mental Health Commission, October 2009. Available at: [http://www.mhcirl.ie/Mental\\_Health\\_Act\\_2001/Mental\\_Health\\_Commission\\_Rules/Se](http://www.mhcirl.ie/Mental_Health_Act_2001/Mental_Health_Commission_Rules/Se)

section 69(3) of the *Mental Health Act 2001* a person who contravenes this section or a rule made under the section is guilty of an offence and is liable on summary conviction to a fine. This protection extends to children detained under section 25 of the Act and voluntary patients.<sup>82</sup>

- [119]. Persons involuntarily detained are entitled to legal representation under the *Mental Health Act 2001*. Section 16 of the *Mental Health Act 2001* provides for the dissemination of information to persons the subject of an admission order or a renewal order. This information under section 16(2) has to be in a written statement and must include reference to entitlement to legal representation. For the purposes of the Act a “legal representative” refers to solicitors and barristers. Section 17(1) of the *Mental Health Act 2001* provides that the Mental Health Commission following the receipt of a copy of an admission order or a renewal order, must as soon as possible refer the matter to a Tribunal and assign a legal representative to represent the patient concerned unless he or she proposes to engage a lawyer.
- [120]. There does not appear to be any specific requirement for the provision of aftercare provisions for persons involuntarily detained under the *Mental Health Act 2001*, apart from the requirement under section 28(2)(a) that persons are not “inappropriately discharged”. However, the Mental Health Commission recently published a code of practice on admission, transfer and discharge to and from an approved centre pursuant to Section 33(3)(e) of the *Mental Health Act 2001*.<sup>83</sup> One of the primary aims of the code is the creation of a more positive journey to recovery for service users through inpatient mental health services and by improving the continuity and co-ordination of the care and treatment provided. This code of practice will be effective from 1 January 2010 and inspections by the Inspectorate of Mental Health Services in 2010 will include inspection of compliance with this code.
- [121]. There is an issue in respect of the detention of what can be referred to as incapable compliant patients with a mental disorder in Ireland. Incapable compliant patients are persons lacking decision-making capacity in relation to their admission to a psychiatric institution. Incapable compliant patients can have significant intellectual disability and severe mental disorders that affect their ability to consent or refuse treatment or detention in a psychiatric setting. Such persons are informally admitted for psychiatric treatment and fall outside the scope of the safeguards available to persons admitted involuntarily. Such patients are not voluntary patients as they clearly lack the capacity to consent to admission to psychiatric care and treatment and there is no review mechanism

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clusion and Mechanical Restraint/. The Rules have been recently revised and will be effective from 1 January 2010.

<sup>82</sup> Section 69(4).

<sup>83</sup> “Code of Practice on Admission, Transfer and Discharge to and from an Approved Centre” Mental Health Commission, September 2009. Available at: [http://www.mhcirl.ie/Mental\\_Health\\_Act\\_2001/Mental\\_Health\\_Commission\\_Codes\\_of\\_Practice/Admission.Transfer\\_Discharge/](http://www.mhcirl.ie/Mental_Health_Act_2001/Mental_Health_Commission_Codes_of_Practice/Admission.Transfer_Discharge/).

available to safeguard against unlawful detention as the scope of the *Mental Health Act 2001* does not extend to this category of persons. Worryingly there is no data available on the number of incapable compliant patients in Ireland. The lack of safeguards in respect of incapable compliant patients could mean that their detention could be in breach of the guarantee of liberty in Article 40.4 of the constitution.<sup>84</sup> Similarly, the lack of safeguards is insufficient in protecting against arbitrary deprivation of liberty under Article 5 of the European Convention on Human Rights.

- [122]. The *habeas corpus* provisions contained in the Irish Constitution guaranteeing liberty have proven an insufficient safeguard.<sup>85</sup> The Supreme Court in *Croke v Smith (No 2)*<sup>86</sup> held that indefinite detention without automatic review could be regarded as lawful detention. The *habeas corpus* procedure is also an inadequate source of protection for incapable compliant patients as the protection afforded by the procedure can only be availed of when the applicant applies for its protection. Clearly this category of person is not in a position to make such an application. Article 5 of the European Convention on Human Rights and the corresponding case law of the European Court of Human Rights provide an effective protection against deprivation of liberty in respect of incapable compliant patients with a mental disorder. Article 5 has proven to be effective because the European Court of Human Rights applies a broad meaning to what constitutes a deprivation of liberty. Its effectiveness can also be attributed to ensuring that an equivalent level of protection is available to incapable and capable patients.
- [123]. The Committee on the Prevention of Torture Report in its most recent Report indicated that measures should be taken to improve patients' living conditions at the Central Mental Hospital without waiting for the complete renovation of the hospital's main building.<sup>87</sup> It also recommended that the Irish authorities pursue their efforts to resolve staff-related problems at the Central Mental Hospital and to fill all vacant posts.<sup>88</sup> The Committee noted that on an occasion during its visit a patient was housed in a padded cell, as a staffing shortage meant that the patient could not be provided with a safe environment. The Committee recommended that steps be taken to ensure that seclusion at the Central Mental Hospital is always properly recorded and only has to be resorted

<sup>84</sup> For a discussion on the detention of incapable compliant patients see Murray, Claire "Safeguarding the Right to Liberty of Incapable Compliant Patients With A Mental Disorder In Ireland" (2007) 14(1) DULJ 279.

<sup>85</sup> For a discussion of the *Habeas Corpus* procedure in respect of persons with mental disorders see Keys, Mary "Challenging the legality of psychiatric detention under habeas corpus in Ireland" (2002) 24 *Dublin University Law Journal*, pages 26 – 57. [1998] 1 IR 101 (SC).

<sup>87</sup> "Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 October 2006" Council of Europe, Strasbourg 2007 at paragraph 85. Available at: <http://www.cpt.coe.int/en/visits.htm>.

<sup>88</sup> *Ibid*, at paragraph 86.

to on the basis of medical considerations.<sup>89</sup> It can be noted that the most recent Committee on the Prevention of Torture Report on Ireland [2006] states, “... the new legislation generally meets the CPT’s concerns” in relation to involuntary detention.<sup>90</sup>

- [124]. The Committee on the Prevention of Torture delegation also visited three establishments for mentally disabled persons during its most recent visit.<sup>91</sup> The Committee recommended that the legal situation of persons placed in mental disability facilities should be reviewed as a matter of urgency and that action be taken with a view to providing a comprehensive legal framework for institutions, offering an adequate range of safeguards to persons placed in them.<sup>92</sup> The Committee also recommended that the Irish authorities review staffing levels in the three institutions visited.<sup>93</sup> In addition, it recommended an individualised assessment of residents in establishments for mentally disabled persons, with a view to ensuring that residents received the treatment they require or that they were transferred to a more appropriate establishment.<sup>94</sup> The information gathered by the delegation from its visit to the three establishments did not give rise to concern as regards the use of seclusion and means of physical restraint of persons with intellectual disability.<sup>95</sup>
- [125]. In the drafting of the *Mental Capacity Bill*, consideration is being given to make specific provision for the protection of persons with a mental incapacity who are detained for the purpose of psychiatric treatment. In particular, safeguards, in the form of compulsory periodic review, similar to those in the Mental Health Act 2001, are being examined.
- [126]. Article 25 of the “Recommendation of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder” provides guidance in relation to the reviews and appeals concerning the lawfulness of involuntary placement and/or involuntary treatment.<sup>96</sup> The *Mental Health Act 2001* complies generally with this recommendation, in that the Act provides for appeals against a decision. The Act also provides for the ongoing review of the lawfulness of detention at reasonable and regular intervals. In addition, the Act provides legal representation for persons detained involuntarily. Section 16 of the Act on the provision of information and materials also seems to accord with the standards

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<sup>89</sup> *Ibid.*, at paragraph 90.

<sup>90</sup> *Ibid.*, at paragraph 103.

<sup>91</sup> Grove House Intellectual Disability Service in Cork, St Joseph’s Intellectual Disability Service in Portrane and St Raphael’s Centre in Youghal.

<sup>92</sup> “Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 October 2006” Council of Europe, Strasbourg 2007 at paragraph 94. Available at: <http://www.cpt.coe.int/en/visits.htm>.

<sup>93</sup> *Ibid.*, paragraph 104.

<sup>94</sup> *Ibid.*, paragraph 104.

<sup>95</sup> *Ibid.*, paragraph 105.

<sup>96</sup> Rec(2004)10.

of the Committee of Ministers Recommendation. The provisions on appeal of the decision of the Mental Health Tribunal to the Circuit Court under section 19 of the Act also meets the requirements in the Recommendations.

## 5. Competence, Capacity and Guardianship

[127]. The Wards of Court system is the current and exclusive mechanism for managing the affairs of persons lacking decision-making capacity in Ireland. The President of the High Court has responsibility for the Wards of Court system and the Registrar and staff of the Office of Wards of Court administer the system. The criteria for wardship and the procedure for bringing a person into wardship are set out in the *Lunacy Regulation (Ireland) Act 1871* and Order 67 of the *Rules of the Superior Courts 1986*<sup>97</sup>. Wardship proceedings are most commonly brought in respect of an adult where that person has substantially lost capacity through illness or injury and the person has a certain amount of money or property that requires protection and use for their maintenance.<sup>98</sup> However, other common circumstances where wardship operates is where a person with a mental disorder or an intellectual disability receives or inherits property and where it is contended that they are unable to manage it. There are a number of procedures for making an application for wardship under the 1871 Act. Section 15 provides for the standard procedure, section 12 provides for emergency procedures and section 68 provides for people with little or no property and section 103 provides for temporary procedures. The section 15 procedure is the most important and commonly used procedure. Anyone can present the petition for wardship. However, a family member normally presents the petition and the procedure requires that a solicitor be used. In circumstances where no person is willing to be the petitioner the Registrar of Wards of Court can initiate the wardship procedure. The *Lunacy Regulation (Ireland) Act 1871* unsurprisingly does not contain a definition of capacity.

The Supreme Court has acknowledged that being made a ward has a monumental impact, in the *Re A Ward of Court (No.2)* the Supreme Court stated “[w]hen a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward...”<sup>99</sup> A person who is made a ward loses the right to make any decisions about their person and property. The current Wards of Court system does not provide for a functional approach to capacity. A functional approach to capacity acknowledges that a

<sup>97</sup> S.I. No. 15 of 1986.

<sup>98</sup> For a comprehensive discussion of the Wards of Court system see “Consultation Paper on Vulnerable Adults and the Law: Capacity” Law Reform Commission (37) 2005 at page 78 and “Consultation Paper on Law and the Elderly” Law Reform Commission (23) 2003 at page 87.

<sup>99</sup> [1996] 2 IR 79.

person may have the capacity to decide upon their living arrangements, however, they might not have the capacity to enter into a financial arrangement. Under the Wards of Court system a decision of incapacity is applied to every decision and legal transaction taken by the ward. The Scheme of the Mental Capacity Bill provides for the repeal and replacement of the Lunacy Regulation (Ireland) Act 1871 with a modern statutory framework in line with international best practice, which will include a functional definition of capacity.

[128]. While the Court will have regard to the views of the ward's committee and family members, it is the Court who will make decisions on the basis of the "best interests" of the ward. However, as the Law Reform Commission noted there is generally no effort to consult the ward in relation to those decisions.<sup>100</sup> The Law Reform Commission also noted that the "... criteria for wardship and the procedure for bringing a person into wardship are archaic and complex".<sup>101</sup> One of the big issues with the wardship procedure is that it does not contain sufficient procedural safeguards in terms of protecting the human rights of the ward. In addition, to the archaic and complex procedure for wardship there are paternalistic concepts at the heart of the wardship system and these do not accord with human rights law and the functional approach to capacity. The focus of the Wards of Court system is on the property and estate of a ward. It is only when the issue of protecting the property of the ward becomes an issue that the person is made a ward of court and the focus from there on in is on the protection of property. Under the Scheme of the Mental Capacity Bill internationally-recognised human rights standards will be applied so that the rights and personal autonomy of the relevant person will remain of paramount consideration in any decision-making regarding their welfare. The views of the relevant person will be a key factor in any decisions made on their behalf and a variety of interested parties, including family members, friends and experts will be in a position to give a view as to what course of action constitutes the closest representation of the person's "best interests".

[129]. One of the major deficiencies in the wardship system is that an order of wardship is of indefinite duration. There is no requirement for the regular review of a ward or for periodic review of the wards welfare. Section 56 of the *Lunacy Regulation (Ireland) Act 1871* merely provides that the President of the High Court can instruct a "Medical Visitor" to visit a person after they have been made a ward. The Registrar does have a power to require the Committee of the Person to provide details of the ward's residence and physical and mental condition on a periodic basis.<sup>102</sup> In practice, review of a wards situation is only

<sup>100</sup> "Report Vulnerable Adults and the Law" Law Reform Commission (83) 2006 at page 29.

<sup>101</sup> *Ibid.*

<sup>102</sup> When a Judge decides to make a person a ward it is normal practice to make an order appointing a Committee of the Ward. The Committee is the person to whom the supervision of the Ward's person and affairs is committed is typically a family member of the ward. A Committee of the Estate can also be appointed, however, the same person is normally appointed to both roles.

likely to be examined when the Office of Wards of Court receives a specific complaint.<sup>103</sup> The current regime does not make provision for the periodic review of the capacity or welfare of a person who has been made wards.<sup>104</sup>

A person admitted to wardship will be often resident in a long term care facility or psychiatric unit and the court often makes an order that the ward be detained there until further order. Section 57 of the *Lunacy Regulation (Ireland) Act 1871* states that where a person who has been made a ward is a private patient in a psychiatric hospital they must be visited at least four times a year by a Medical Visitor who will report on their mental and physical condition to the President of the High Court. However, there is a distinction drawn between private and public patients resident in psychiatric hospitals. The statutory requirement is limited to at least one visit a year by a Medical Visitor for a person resident on a public patient basis. This distinction between public and private patients cannot be justified and there is no comparable review requirement in respect of persons resident in a long stay care facility as opposed to a psychiatric hospital. The Scheme of the Mental Capacity Bill provides for transitional provisions, which will effectively transfer Wards of Court to the new system, and the distinction outlined above between public and private patients will no longer apply.

The High Court can discharge a person from wardship where satisfactory medical evidence is provided in relation to the wards mental capacity. If the court grants a discharge then a wards legal capacity and control of the person and property can be restored. However, this does not constitute an adequate review mechanism to address continuing detention in a long stay care facility or psychiatric residence. Particularly, in respect of the European Court of Human Rights case law on Article 5 of the ECHR.<sup>105</sup> The Scheme of the Mental Capacity Bill provides for regular reviews of court declarations of incapacity. Consideration is being given in drafting the Bill to provide for more frequent reviews.

The Wards of Court system is clearly not compliant with Article 12 of the United Nations Convention of Rights of Persons with Disabilities. Article 12 of the Convention recognises that persons with disabilities have legal capacity on an equal basis with others. Article 12 (4) of the Convention requires the provision of effective safeguards relating to the exercise of legal capacity in accordance with international human rights law. These safeguards are required to respect the rights, will and preferences of the person and need to be free of

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<sup>103</sup> “Consultation Paper on Vulnerable Adults and the Law: Capacity” Law Reform Commission (37) 2005 at page 91.

<sup>104</sup> Similar concerns expressed in respect of the involuntary psychiatric patients gave rise to the introduction of the *Mental Health Act 2001*, which as discussed above provides for the systematic review of involuntary psychiatric detention by Mental Health Tribunals.

<sup>105</sup> See for example, *Winterwerp v The Netherlands* (1979-1980) 2 EHRR 387.

conflict of interest and undue influence. There is also a requirement under Article 12 (4) that measures relating to the exercise of legal capacity are proportional and tailored to a persons circumstances and apply for the shortest time possible and are subject to regular review by a competent, independent impartial authority or judicial body. The Scheme of the Mental Capacity Bill provides for a functional understanding of capacity, based on an issue-specific and time specific approach, which focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates. It allows therefore for the situation where the loss of capacity is temporary or partial. A person may regain capacity or may lack capacity in relation to one matter but not in relation to another. This represents a major departure from current law which is based on an "all or nothing" approach. In addition, the Bill will provide for regular reviews of court ordered declarations of incapacity and the establishment of an Office of Public Guardian who will have a monitoring and supervisory role over court-appointed personal guardians.

It is clear from the examination of the Wards of Court system as discussed above that the safeguards fall well short of the standards set out in Article 12 (4) of the Convention. The Wards of Court system leaves no space to reflect the rights wills and preferences of persons subject to a wardship application. The normal court practice of not meeting with the person subject of a wardship application is not sufficient in safeguarding against conflicts of interests and the exertion of undue influence. In addition, the archaic and complex nature of the wardship system means that restrictions on capacity are not proportional or tailored to personal circumstance. The Wards of Court System also fails to comply with the requirement under Article 12 (4) in applying restrictions on capacity for the shortest time possible and subject to regular review. The proposals in the Scheme of the Mental Capacity Bill resolve these concerns. The will and preferences of the person allegedly having a mental incapacity will be reflected as fully as possible in any proceedings. Potential conflicts of interest are expressly provided for including that a person may not be appointed personal guardian where the court considers there may be a conflict of interest. In addition, all declarations of incapacity and resultant orders will be time bound, subject to regular review and tailored to the specific issues and circumstances at hand.

- [130]. The Principles formulated by the Committee of Ministers of the Council of Europe, regarding the legal protection of incapable adults, support the concept of fair procedures.<sup>106</sup> Principle 13 provides that persons "... should have the right to be heard in person in any proceedings which could affect his or her legal capacity." Principle 15 recognises that provisional measures might be necessary in the case of an emergency. Under these circumstances the

<sup>106</sup> *Council of Europe Recommendation R(99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults.* Available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=536854&SecMode=1&DocId=396848&Usage=2>

application of certain procedural safeguards, including the right to be heard in person, may be restricted but should be applicable as far as possible. The reality with the Wards of Court system is that persons subject to an application for wardship are rarely heard, as such the ward of court system is not consistent with the principles set out by the Committee of Ministers of the Council of Europe. The Scheme of the Mental Capacity Bill provides for the right of the relevant person to be heard, subject to a court discretion that the person who is the subject of the proceedings shall not be required to attend the proceedings when in the opinion of the court such attendance might be prejudicial to his or her mental health, wellbeing or emotional condition, or the person is unable, whether due to old-age or infirmity or otherwise, to attend.

- [131]. The Irish Government have accepted that there are deficiencies with the current legislative regime on capacity and has committed to introduce new legislation in this area.<sup>107</sup> The Department of Justice, Equality and Law Reform published detailed “heads” of a proposed Bill and these “heads” are largely based on the Law Reform Commission of Ireland’s recommendations in its body of work in this area.<sup>108</sup>

## 5.1. Subsection level 1

- [132]. In September 2008 the Irish Government approved the drafting of a Mental Capacity Bill. The detailed “heads” of the Bill are available from the Department of Justice Equality and Law Reform’s website.<sup>109</sup> The Bill aims to reform the Wards of Court system in so far as it applies to adults and replaces it with a modern statutory framework governing decision-making on behalf of persons who lack capacity. The scope of the Bill aims to extend protection for persons with mental illness, persons with intellectual disabilities, and persons who have acquired brain injuries. It aims to provide more clarity in the law for carers who assume responsibility for persons lacking capacity.
- [133]. The Irish Government stated in the Report of the Disability High Level Group on the UN Convention state that this legislation “... will give effect to the Convention in so far as it applies to the legal capacity issues in Article 12d of the Convention. The Mental Capacity Bill is now at an advanced stage of drafting and is due for publication within the current Dáil session (ends September 2010).

<sup>107</sup> See for example, “*Second Disability High Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities*” (June 2009) at page 96.

Available at: <http://ec.europa.eu/social/main.jsp?catId=431&langId=en>.

<sup>108</sup> See “Report Vulnerable Adults and the Law” Law Reform Commission (83) 2006. “Consultation Paper on Vulnerable Adults and the Law: Capacity” Law Reform Commission (37) 2005, “Consultation Paper on Law and the Elderly” Law Reform Commission (23) 2003. Available at: [www.lawreform.ie](http://www.lawreform.ie).

<sup>109</sup> The proposed scheme of the Bill is available at: [http://www.justice.ie/en/JELR/Pages/Scheme\\_of\\_Mental\\_Capacity\\_Bill\\_2008](http://www.justice.ie/en/JELR/Pages/Scheme_of_Mental_Capacity_Bill_2008).

- [134]. The Department of Justice, Equality and Law Reform have engaged in consultation on the Scheme of the Mental Capacity Bill. The Department invited written submissions on the Scheme of the Bill and co-organised a Conference with the National Disability Authority in February 2008. The National Disability Authority (the lead state agency on disability issues) in also preparing a submission on the Bill is also consulting with the Disability Sector.
- [135]. One of the major shortcomings of the proposed legislation under the Scheme for the *Mental Capacity Bill 2008* is that it does not make provision for a specialist court. The Bill simply states that the relevant courts when exercising jurisdiction under the Act shall be known as the ‘Court of Care and Protection.’ The Scheme of the Bill does not make any provision for specialist judges to be appointed to the court. The Law Reform Commission in its Report on Vulnerable Adults and the Law recommended the establishment of a Guardianship Board.<sup>110</sup> While the Department of Justice, Equality and Law Reform endorse the recommendations of the Law Reform Commission and contend that the Scheme of the Bill reflects the Commission’s recommendations the absence of provision for a Guardian Board is a notable omission. A Guardianship Board/Tribunal would provide better safeguards in reviewing decisions regarding persons lacking capacity. Renaming the Circuit Court and High Court when they hear cases dealing with capacity issues is not a sufficient reform.
- [136]. Many common law jurisdictions that have enacted modern capacity legislation that provides for a Guardianship Tribunal system. These systems are amenable to assessments of capacity to be undertaken based on the functional approach to capacity. These Tribunals are composed of panels of persons with the experience and expertise necessary to assess the functional capacity of persons the subject of proceedings. For example, in England and Wales under the *Mental Capacity Act 2005* the Court of Protection deals with cases on legal capacity. This court is composed of specialist judges who can hear cases at any place in England and Wales at any time. Additionally, *the Court of Protection Rules 2007*<sup>111</sup> and the specialist President of the Court are empowered to give directions as to the practice and procedure of the specialist Court.
- [137]. The Scheme for the Bill does not clarify where the Court of Care and Protection will run. Head 4 of the Bill provides that the President of the High Court will make the decision as to where in the State such cases should be heard. It is unclear whether the High Court will travel to different parts of the country in cases where the property value of the person subject of the application goes above the Circuit Court jurisdiction. It is also uncertain if the Court will hear applications where the person is physically residing such as a group care home for persons with mental disorder or persons with intellectual disability. It is noteworthy that here is no similar provision on the venue of applications in

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<sup>110</sup> See Report “Vulnerable Adults and the Law” Law Reform Commission (83) 2006 at page 134.

<sup>111</sup> 2007 No 1744 (L.12).

respect of the Circuit Court. All that is sated in the Scheme is a provision that the Circuit Court's jurisdiction will be exercised by the judge of the Circuit in which the person resides, or carries on any business, profession or occupation.

- [138]. It seems that applications will be held at the Circuit Court courtrooms around the State. It is clearly the case that courtrooms are inappropriate venues to assess the functional capacity of persons with mental disorder and persons with intellectual disability. It is regrettable that there is no provision in the scheme for the hearing of an application at any time as it may result in applications under the new legislation being listed in the ordinary court list and require being set down for hearing in the ordinary course of the courts business. This again would be unsuitable and not meet the requirements of being time and issue specific which are central to a functional approach to capacity assessment. Many decisions with regard to people who lack capacity must be made as soon as an issue arises in the interest of their physical care and protection.
- [139]. As the Law Society noted in their submission on the Scheme for the Capacity Bill there is a "... need to deal with applications in relation to issues of capacity as soon as they arise, if such cases were to receive priority in the normal court listing this would have a detrimental effect on other cases such as family law cases that at present are already at an unacceptable level of delay for hearing in many Circuit Court areas."<sup>112</sup>
- [140]. It has been suggested that the majority of orders under the proposed legislation will be made under Head 12 in relation to interim orders, as such there will be a limit in relation to time and will be subject to review. This does not accord with the guiding principles of the least restrictive functional approach to capacity under Head 1. If the proposed system goes ahead then applications will be expensive and there is a likelihood that there will be a similar avoidance of the use of the procedure as occurs under the current Wards of Court system.
- [141]. The Schedule of Mental Capacity Bill provides that jurisdiction of the High Court and the Circuit Court to deal with applications under the Act will be based on the valuation of property. This approach does not sit well with the principles contained in Head 1 of the Bill in giving due regard to the dignity and autonomy of the persons lacking capacity. Applications concerning persons with a mental disorder or intellectual disability with little or no property will be dealt in the Circuit Court under the Bill. While applications concerning a wealthier older person will be dealt with by the High Court. These provisions should be amended as they place an incorrect emphasis on property, as the Law

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<sup>112</sup> "Submission by Law Society to The Department of Justice, Equality and Law Reform on Scheme of Mental Capacity Bill 2008" Incorporated Law Society of Ireland, August 2009, at page 3. Available at: <http://www.lawsociety.ie/en/pages/News/Submission-Scheme-of-Mental-Capacity-Bill-2008-/>.

Society stated in its submission the “...dominant emphasis should be the protection of the person and welfare of the person who lacks capacity.”<sup>113</sup>

- [142]. Providing for Circuit Court jurisdiction over matters concerning mental capacity will ensure that potential applicants to court will enjoy relative ease of access as the Circuit Court is a court of local and limited jurisdiction. The Circuit Court has Circuit Court offices spread throughout the country with each court sitting in a number of venues in each Circuit. The Bill is being drafted to ensure maximum accessibility on the Circuit in which the person resides. The cost of applications to the Circuit Court will be relatively low. The judiciary are well experienced in deciding on complex matters and will have the benefit not only of a new, rights-focused legislative framework, but may also draw on the views of the person the focus of the application, as well as experts, friends and family members when making a decision or order. The Bill provides that where a decision is required to be made urgently, the Court may do so. The Court may also make urgent interim orders, pending the determination of an application to it. The proposal to relate court jurisdiction to property valuation is under review.
- [143]. Under Head 9(6)(c) there is provision for the court to dispose of applications without holding a hearing. Head 9(6)(d) also permits the court to proceed with any part of a hearing in the absence of the person subject of the hearing. It is very important that the use of these provisions are limited and only used in very exceptional circumstances. To that end the legislation should specify the limited and exceptional circumstances where these provisions can be used. As discussed above one of the main difficulties with the current Wards of Courts system is that the majority of cases are heard without the presence of the person subject to the proceedings. Clearly a person subject to these proceedings needs to be present at the hearing in order for an assessment of their capacity. It is envisaged that the Mental Capacity Bill will provide that non-attendance of the relevant person will only occur in limited and exceptional circumstances and where the person's attendance would have a detrimental impact on their health or wellbeing.
- [144]. There is provision for the regular review of decisions on capacity under Head 14. The court is required to review decisions at regular intervals but not periods longer than 36 months. This clearly does not comply with the principles set out in the Schedule. In particular, it does not comply with the functional approach to capacity, which is time and issue specific. The shortening of the maximum period of review is under consideration.

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<sup>113</sup> “Submission by Law Society to The Department of Justice, Equality and Law Reform on Scheme of Mental Capacity Bill 2008” Incorporated Law Society of Ireland, August 2009, at pages 1-2. Available at: <http://www.lawsociety.ie/en/pages/News/Submission-Scheme-of-Mental-Capacity-Bill-2008-/>.

- [145]. Under Head 41 on transitional provisions an existing wards can make an application for a review of a declaration that a person lacks capacity to make decisions. Head 41 (1) states:
- [146]. “... it shall be open to a person to whom this Act applies who has been taken into wardship under the jurisdiction of the High Court or Circuit Court existing at the time immediately before this Act comes into force, to make an application to the court for a review of his or her position, and such application shall be treated as if it were an application under Head 14 for a review of a declaration that the person lacks capacity to make a decision or decisions.”
- [147]. Persons with mental disorder and intellectual disability who are existing wards of courts will not be able to automatically benefit from the legislation when it eventually comes into force. Therefore, the Act should make the review mandatory and should specify a time period in which the review has to take place. If the proposed system under the Schedule remains unchanged then wards of court will not be benefiting from legislation that aims to comply with human rights standards.
- [148]. The shortcomings of the proposed legislation in this regard calls into question whether Ireland is satisfying its international obligation in respect of its capacity legislation. As the Bill has not yet been published there is still the opportunity for additional consultation and space for the Government to provide for a Guardianship Board or Tribunal in the new legislation. There is no doubt that the Guardianship Board system would be a more a more appropriate body for dealing with assessing the capacity of vulnerable persons.
- [149]. Consideration is being given in drafting transition provisions in the Bill to apply the principles and safeguards in the new scheme to existing wards of court within a short time-frame. The power to determine capacity and to appoint personal guardians will remain in the courts with the Circuit Court becoming more widely available resulting in greater accessibility and lower cost.

## 6. Miscellaneous

- [150]. The issue of independent living is an important issue for persons with mental disorder and intellectual disability.<sup>114</sup> There has been no definitive policy

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<sup>114</sup> For a more comprehensive consideration of the independent living in Ireland see “ANED country report on the implementation of policies supporting independent living for disabled people” Academic Network of European Disability Experts (ANED), May 2009. Available at: <http://www.disability-europe.net/content/pdf/ANED%20Independent%20Living%20report%20->

statement to move away from the provision of support in segregated residential institutions to independent living in the community. There is no legal right to independent living in Ireland at the constitutional, statute or administrative levels. Support for people with intellectual disability is delivered primarily in the residential institutional setting. There are significant barriers for people with intellectual disabilities who want to live independently in their own residences in Ireland.<sup>115</sup> In theory they have the same entitlements to social housing as other members of the community. However, in practice the limited supply of accessible and adaptable local authority or voluntary sector social housing is a substantial barrier to people with disabilities living independently in their own homes. The underfunding and uneven access to services means that Ireland is possibly falling short of the standards required by Article 19(b) of the UN Convention on the Rights of Persons with Disabilities. Article 19 requires that persons with disabilities have access to a range of in home, residential and other community support services.<sup>116</sup>

## 6.1. Subsection level 1

- [151]. Until the introduction of the *Criminal Law (Insanity) Act 2006* a person was found guilty but insane under the provisions of the *Trial of Lunatics Act 1883* the court was obliged to commit the defendant to the Central Mental Hospital. In *re Gallagher's Application*<sup>117</sup> the applicant argued that the release of a person in such circumstances was part of the administration of justice and as such could only be carried out by a court. The Supreme Court rejected this argument. In 1991 an ad hoc Advisory Committee was established to consider whether a person still suffering from a mental disorder might be a danger to themselves or others. This Committee reported to the Minister for Justice, however, its findings were not binding on the Minister.
- [152]. This procedure was replaced by the *Criminal Law (Insanity) Act 2006*. The *Criminal Law (Insanity) Act 2006* provides for a Mental Health (Criminal Law) Review Board to review the cases of persons committed to “designated centres” following findings of unfitness to be tried or verdicts of not guilty by reason of insanity. Under the Act these reviews are undertaken every 6 months or following an application by the detained person or on the basis of the Mental Health (Criminal Law) Review Board’s own initiative.
- [153]. The Mental Health (Criminal Law) Review Board is empowered to make orders as it thinks proper in relation to the patient. They can order further detention,

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[%20Ireland.pdf](#).

<sup>115</sup> *Ibid.*

<sup>116</sup> This includes personal assistance necessary to support living and inclusion in the community, which is essential in preventing isolation and segregation from the community.

<sup>117</sup> [1991] 1 IR 31.

care or treatment, or for the discharge of the patient unconditionally or subject to conditions for outpatient treatment or supervision or orders for both. The Board consists of a number of persons and is chaired by a practicing barrister or solicitor of not less than 10 years experience or a serving or former judge of the Supreme Court, High Court or Circuit Court. The Review Board also has at least one consultant psychiatrist as an ordinary member. The *Criminal Law (Insanity) Act 2006* allows the Review Board to settle to a large extent on its own procedure, and is obliged to assign a legal representative and to establish a legal aid scheme for the purpose of providing legal representation. Under the Act the Review Board is entitled to summon witnesses and take evidence on oath and sittings are held in private. Interestingly, under 12(6)(e) of the Act the Minister for Justice, Equality and Law Reform, the Director of Public Prosecutions and the Minister for Defence can be heard or represented at the sittings of the Review Board.

- [154]. The Committee on the Prevention of Torture in its most recent report for Ireland stated that a comparative reading of both the *Mental Health Act 2001* and *Criminal Law (Insanity) Act 2006* indicates that patients placed under the 2006 Act potentially benefit from considerably fewer safeguards than those placed under the *Mental Health Act 2001*.<sup>118</sup> It noted that the *Criminal Law (Insanity) Act 2006* lacks provisions on the use of physical restraint, seclusion and inspection. Similarly, the mandate of the Mental Health (Criminal Law) Review Board is limited when compared with that of the Mental Health Board.
- [155]. While the *Criminal Law (Insanity) Act 2006* does not make specific provision regarding physical restraint, seclusion and inspection in relation to persons detained in designated centres under the 2006 Act, the Central Mental Hospital, which currently is the only designated centre under the 2006 Act, is an approved centre under the *Mental Health Act 2001*. It is understood that, in practice, the safeguards provided by the *Mental Health Act 2001* regarding physical restraint, seclusion and inspection are applied to patients detained there under the 2006 Act. The question of the provision of a specific legislative underpinning for these matters in relation to persons detained in designated centres under the 2006 Act is being considered by the Department of Justice, Equality and Law Reform and the Department of Health and Children.
- [156]. The Mental Health Tribunals established under the *Mental Health Act 2001* have specific functions and responsibilities to review the involuntary admission of persons to hospital under the civil law governing the provision of mental health services. However, the Mental Health (Criminal Law) Review Board has qualitatively different functions, which are the regular review of the detention of persons found not guilty by reason of insanity or unfit to be tried and who

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<sup>118</sup> “Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 October 2006” Council of Europe, Strasbourg 2007 at paragraph 106.

have been detained in a designated centre by order of a court, and deciding on the discharge of such persons back into the community.

- [157]. Section 11 of the *2006 Act* provides that the Review Board is independent in the discharge of its functions. The Review Board is required to have regard to the welfare and safety of the person whose detention it reviews and to the public interest. Under Schedule 1 to the *2006 Act*, the Chairperson of the Review Board must be a practising barrister or practising solicitor with at least 10 years' experience or must be a judge of or former judge of the Circuit Court, High Court or Supreme Court. The Review Board must also have, as an ordinary member, at least one consultant psychiatrist. The members of the Review Board at present are the Honourable Mr Justice Brian McCracken, Dr Michael Mulcahy, Consultant Psychiatrist and Mr Tim Dalton, former Secretary General of the Department of Justice, Equality and Law Reform.
- [158]. The Irish Human Rights Commission in October 2009 was granted leave to appear before the Supreme Court as *amicus curiae* in a case that raises important issues about the extent to which aspects of the *Criminal Law (Insanity) Act 2006* respects human rights principles.<sup>119</sup> The case concerns the detention status of a person deemed to be “not guilty by virtue of insanity” by virtue of the enactment of the *Criminal Law (Insanity) Act 2006*.<sup>120</sup> The Human Rights Commission's submission addresses circumstances where a person originally found “guilty but insane” (under the law as it then stood (section 2 of the Trial of Lunatics Act 1883) but now deemed to be ‘not guilty by virtue of insanity’ can continue to be detained by the State. The other main issue relates to the degree to which a statutory body, in assuming the State's functions in taking decisions on the detention of citizens, is bound by provisions of the Irish Constitution and European Convention on Human Rights.
- [159]. The *Criminal Law (Insanity) Bill 2010* addresses the issues raised in the case of *B v Mental Health (Criminal Law) Review Board* regarding the discharge of patients from designated centres. The Bill will make better provision for the Mental Health (Criminal Law) Review Board to make orders for the conditional or unconditional discharge of patients who are detained by order of a court in a designated centre, having been found unfit to be tried or not guilty by reason of insanity. Currently, under the *Act of 2006*, the Review Board may order the discharge of a patient, subject to conditions for out-patient treatment or supervision or both. However, these conditions are not enforceable and the Review Board, since its establishment, has been reluctant to order the discharge of patients who might be considered suitable for discharge subject to conditions because it has no statutory power effectively to enforce such conditions. To remove this difficulty, the Bill provides for the enforceability of conditions

<sup>119</sup> See the Irish Human Rights Commission website at: <http://www.ihrc.ie/home/wnarticle.asp?NID=238&T=N>.

<sup>120</sup> The proceedings are entitled *J.B. v The Mental Health (Criminal Law) Review Board, the Minister for Justice, Equality and Law Reform, Ireland and The Attorney General*.

specified by the Review Board where it orders the conditional discharge of a patient.

## Annexes-Case Law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

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| <b>Case title</b>  | <i>Draper v The Attorney General The Minister for the Environment and the Returning Officer for the Dáil Constituency of Dún Laoghaire</i>   |
| <b>Decision date</b>   | 10 February 1984   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Supreme Court<br>[1984] I.L.R.M. 643   |
| <b>Key facts of the case</b> (max. 500 chars)  | The plaintiff was an Irish citizen suffering from multiple sclerosis. Up to 1973 she cast her vote at Dáil, local and Presidential elections. Since then she was unable to leave her home without suffering severe physical discomfort and had not exercised her franchise but remained on the electoral register. <i>Article 16.1.2°</i> of the Constitution provides that every citizen who has reached the age of 18 years who is not disqualified by law ‘ <i>and complies with the provisions of the law relating to the election of members of Dáil Éireann shall have the right to vote at an election for members of Dáil Éireann</i> ’. <i>Article 16.7</i> provides that subject to the provisions of <i>Article 16</i> elections to Dáil Éireann ‘ <i>shall be regulated in accordance with law</i> ’. Pursuant to recommendations of the Joint Committee on the Electoral Law, the <i>Electoral Act, 1963</i> provided that members of the Garda Síochána were accorded the right, previously enjoyed only by members of the Defence Forces, to vote by post. The Joint Committee declined to recommend the extension of this facility to other voters in view of ‘ <i>the resulting greatly increased risk of abuse</i> ’. <i>S. 22 (5)</i> of the 1963 Act provided that polling places shall be such as to give electors ‘ <i>reasonable facilities for voting</i> ’. Under the <i>Electoral Act, 1923</i> , votes must be cast at polling stations ‘ <i>screened from observation</i> ’, except in the case of postal voting. The plaintiff claimed declarations that facilities be made available for the exercise by her and others similarly situated of the franchise and that insofar as postal voting was provided for certain classes of persons and not others, and that these classes differed for Dáil and local elections, it amounted to arbitrary discrimination. |

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| <p><b>Main reasoning/argumentation</b><br/>(max. 500 chars)</p>   | <p>Postal voting is not a privilege. However, it entails some risk of abuse and since responsibility for regulating the exercise of the franchise was given to the Oireachtas the courts would not interfere with the balance of risks and advantages, which members of the legislature were particularly, qualified to make.</p> |
| <p><b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)</p>             | <p>Persons with disabilities are not entitled to be reasonably accommodated in terms of exercising their right to vote. It is up to the legislature to strike a balance between reasonably accommodating voters and the potential abuses/</p>   |
| <p><b>Results (sanctions) and key consequences or implications of the case</b><br/>(max. 500 chars)</p> | <p>Persons requiring reasonable accommodation in order to exercise their right to vote have only recourse to the reasonable accommodations provided for in statute.</p>   |
| <p><b>Proposal of key words for data base</b></p>   | <p>Right to vote, reasonable accommodation</p>  |

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| <b>Case title</b>  | <i>Fernandez v Cable &amp; Wireless</i>  |
| <b>Decision date</b>   | 11 December 2002   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | The Equality Tribunal<br>DEC-E-2002-052  |
| <b>Key facts of the case</b> (max. 500 chars)  | The complainant had a severe reaction to an injection that resulted in a week's hospitalisation. After the complainant returned to work it was necessary for her to attend hospital for a check up. The complainants' employer informed her that if she attended she could be open to disciplinary action.   |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | The Equality Officer held that complainant's condition of a kidney infection amounted to a disability within the <i>Employment Equality Act 1998</i> and the onus on employer to provide reasonable accommodation.   |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)   | The definition of disability under the <i>Employment Equality Act 1998</i> has been interpreted broadly.<br><br>A similar approach has been taken in the following cases <i>A Government Department v. An Employee</i> , Labour Court 2006, EDA062 (The Labour Court held that alcoholism is a disability for the purposes of the Act.) <i>A Prison Officer v. The Minister for Justice, Equality and Law Reform</i> DEC-2007-025 where the Equality Officer held that the "acute anxiety reaction", "work related depression", "work related stress", "anxiety and depression" were conditions or illness within the definition of disability in the Employment Equality Act. |

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| <p><b>Results (sanctions) and key consequences or implications of the case</b><br/>(max. 500 chars)</p> | <p>This approach is of benefit to persons with mental disorder or intellectual disabilities in challenging discrimination, as complainants do not have to satisfy strict conditions in order to come under the protection of the legislation.</p> |
| <p><b>Proposal of key words for data base</b></p>   | <p>Broad definition of disability, anti-discrimination, employment equality</p>   |

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| <b>Case title</b>  | <i>Forrestal v Hearn's Hotel Clonmel</i>   |
| <b>Decision date</b>   | 12 December 2001   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Equality Tribunal<br>DEC-S2001-018   |
| <b>Key facts of the case</b> (max. 500 chars)  | The complainant maintains that, on 20 December 2000, he and two of his friends were refused access to the Vault Nightclub by a doorman because he was in a wheelchair. The respondents deny that they discriminated against the complainant and say that he was refused access because of his family's conduct previously in other establishments. |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | It was held to be discrimination not to allow a wheelchair user access to a nightclub.   |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)   | Persons with disabilities cannot be discriminated against in accessing services.   |

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| <p><b>Results (sanctions) and key consequences or implications of the case</b><br/>(max. 500 chars)</p> | <p>The Equality Officer held that the complainant was discriminated against, contrary to Sections 3(1) and 3(2)(g) of the <i>Equal Status Act 2000</i> on the grounds of his disability. The respondent hotel was order to pay sum of €635 for the humiliation, upset and distress suffered by the complainant.</p> |
| <p><b>Proposal of key words for data base</b></p>   | <p>Equal Status Act, non-discrimination in the sale and supply of goods and services, non-admission of a person with a disability to a public premises</p>  |

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| <b>Case title</b>  | <i>Six Complainants v A Public House</i>   |
| <b>Decision date</b>   | 27 January 2004  |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Equality Tribunal<br>DEC-S2004-009-014   |
| <b>Key facts of the case</b> (max. 500 chars)  | The complainant had an intellectual disability. He was refused entry to a public house and he was told that it was because he was unknown to the doorman that entry was being refused the entire group. Other members of the complainants group had never been to the premises and could not therefore be known to the doorman. In written submissions the respondent called into question the complainants attire and "suitability" for the premises. Other members of the group were not referred to in these terms. The complainant had not been drinking and was well dressed. |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | The complainant had not caused any problems at the respondents business and the respondent has failed to show how there were any indications that he might do so. In the circumstances, the Equality Officer was satisfied that the burden of proof has shifted to the respondents to show that the complainants were not discriminated against on the grounds disability on the night of 27 January 2002.   |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)   | The six complainants were successful in raising a case of <i>prima facie</i> discrimination arguing and that the respondent who discriminated against the complainant with an intellectual disability  |

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| <p><b>Results (sanctions) and key consequences or implications of the case</b><br/>(max. 500 chars)</p> | <p>Under section 27 of the <i>Equal Status Act 20</i> the respondent was ordered to pay the complainant <del>€600</del>, to another complainant <del>€100</del> to each of the four remaining complainants for the effects of the discrimination.</p> |
| <p><b>Proposal of key words for data base</b></p>   | <p>Discrimination by association, intellectual disability, non-discrimination in the sale or supply of goods and services</p>   |

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| <b>Case title</b>  | <i>McMahon and five others v McGowan's Pub</i>   |
| <b>Decision date</b>   | 23 June 2005   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Equality Tribunal<br>DEC-2004-009/014<br><br>Circuit Court (On Appeal) Unreported<br>23 June 2005  |
| <b>Key facts of the case</b> (max. 500 chars)  | In the complainant alleged that he was directly discriminated against and that there had been a failure to reasonably accommodate him. The complainant has an intellectual disability which affected his balance, speech and communication. He went with five members of his family to the respondent's premises to celebrate his mother's 50th birthday. The doorman refused the complainant having decided that he was under the influence of alcohol and refused the entire group access because of this. The complainant was upset and distressed as he believed he spoiled a family night out, equally the family were upset at the embarrassment caused to him and the effect this even had on his self-confidence.  |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | The Equality Tribunal accepted that he raised a <i>prima facie</i> case of direct discrimination and found that the complainant had been discriminated against on the grounds of his disability and the remainder of the family had been discriminated against based on their association with the complainant. The Tribunal also found that the service provider had failed to provide a reasonable accommodation. The accommodation required by the Tribunal was that a licensed premises should be aware of the possibility for reasons other than drunkenness that may affect a person's demeanour. The Tribunal held that the complainant group were refused admission to the premises without the provision of the normal accommodation afforded to customers, which was for the doorman to engage in conversation with the customers in order to assess whether they were intoxicated, he did not do so with the complainant.<br><br>This decision was appealed to the Circuit Court, the respondent sought to have this case heard in private but was not successful. Judge Delahunt in the Circuit Court held that the appellant had acted in good faith and was not guilty of discrimination. The Judge held that where a person seeks reasonable accommodation under the <i>Equal Status Act 2000</i> he must first prove that the: "service provider had actual or implied knowledge of the disability and disregarded such knowledge either intentionally or unintentionally in order to succeed in a claim." |

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| <p><b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)</p>         | <p>A person with an intellectual disability should be reasonably accommodated under the <i>Equal Status Act 2000</i>. However, a complainant must first prove that the service provider had actual or implied knowledge of the disability and disregarded that knowledge either intentionally or unintentionally in order to succeed in a claim.</p>   |
| <p><b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)</p> | <p>The applicants had been initially successful in the Equality Tribunal. Where they were awarded €1,500 compensation for the effects of the discrimination and the respondent was ordered to admit the complainants in future to their premises. However, on appeal in the Circuit Court they were unsuccessful and these remedies were reversed.</p> |
| <p><b>Proposal of key words for data base</b></p>   | <p>Discrimination by association, intellectual disability, non-discrimination in the sale or supply of goods and services</p>  |

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| <b>Case title</b>  | <i>Harrington v East Coast Area Health Board</i>  |
| <b>Decision date</b>   | 23 January 2002   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Equality Tribunal<br>DEC-E-2002-001   |
| <b>Key facts of the case</b> (max. 500 chars)  | The complainant was a wheelchair user who had notified the respondent of her disability and was called for interview. The interview was held in an inaccessible venue and the interview panel had to reconvene the interview at short notice. The complainant contended that the East Coast Area Health Board directly discriminated against her <i>inter alia</i> the disability ground in relation to the interview facilities.   |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | The Equality Officer held that the respondent discriminated against the complainant in terms of the <i>Employment Equality Act 1998</i> and contrary to the provisions of section 16 of the Act by its failure to do all that was reasonable to accommodate the needs of a person with a disability by providing special facilities at the interview stage.   |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)   | Reasonable accommodation under Irish law can extend to pre-employment situations.   |
| <b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)   | The respondent was ordered to pay to the complainant €1,270 as compensation for the distress suffered as a result of the discrimination occurring in relation to the finding of discrimination. The respondent was also ordered to immediately provide and maintain an effective means of access to the Administrative Building by way of a functioning stair lift or otherwise to circulate to every member of staff a summary of the main provisions of the <i>Employment Equality Act 1998</i> . The respondent was also ordered to draft its own Equality Policy and take account of the provisions of the <i>Employment Equality Act 1998</i> and make a copy of the revised policy available to every member of staff within a three-month period from the date of the decision. The respondent was also ordered to draft its own Code of Practice on the |

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|   | <p>Employment of People with Disabilities within three months of the date of the decision and specifically bring its contents to the attention of all interview boards in the future. It was also ordered to draft its own recruitment and selection policy, taking account of the provisions of the <i>Employment Equality Act</i>.</p> |
| <p><b>Proposal of key words for data base</b></p> | <p>Reasonable accommodation, employment equality, pre-employment situations</p>  |

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| <b>Case title</b>  | <i>Roche v Alabaster Associates Limited t/a Madigans</i>  |
| <b>Decision date</b>   | 1 August 2002   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Equality Tribunal<br>DEC-S2002-086  |
| <b>Key facts of the case</b> (max. 500 chars)  | The complainant a visually impaired person used a guide dog, was refused access to a service in the respondent's premises. The complainant submitted that he was discriminated against on the grounds of his disability as the respondent failed to provide special treatment to accommodate the needs of a person with a disability. The respondent claimed is that it would have been contrary to the Food Hygiene Regulations to allow the complainant's dog into the pub as it provided food. The respondent submitted that he tried to accommodate the complainant's needs and he offered to leave the dog at the door in the company of the doorman while the complainant had refreshments. |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | It was held that refusing access to premises to a person accompanied by a guide dog amounted to discrimination for a failure to provide reasonable accommodation.   |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)   | The Equality Officer found that the respondent unlawfully discriminated against the complainant in terms of the <i>Equal Status Act 2000</i> .  |

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| <p><b>Results (sanctions) and key consequences or implications of the case</b><br/>(max. 500 chars)</p> | <p>The Equality Officer ordered the respondent to pay to the complainant the sum of €3,000 to compensate him for the distress, embarrassment and inconvenience suffered as well as the loss of the amenity to him. She also ordered the respondent to place a notice at the entrance to his premises stating that people with disabilities including people with guide dogs are welcome to the premises. It was also ordered that staff should be trained in relation to the provisions of the <i>Equal Status Act 2000</i> and be made aware of the relevant Regulations and circulars in relation to food hygiene and guide dogs.</p> |
| <p><b>Proposal of key words for data base</b></p>   | <p>Reasonable accommodation, access to building</p>   |

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| <b>Case title</b>  | <i>O'Shea v Ireland</i>  |
| <b>Decision date</b>   | 17 October 2006  |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | High Court<br>[2007] 1 I.L.R.M. 460  |
| <b>Key facts of the case</b> (max. 500 chars)  | The plaintiff married in 1980 and divorced in 2000. A number of months after the plaintiff and her former husband separated, a relationship developed between her and the younger brother of the former husband. After the first named plaintiff was granted the decree of divorce the plaintiffs decided to get married and they discovered that law from doing so prohibited them. The plaintiffs' instituted proceedings on December 1 2003 seeking a declaration that s.3(2) of the <i>Deceased Wife's Sister's Marriage Act 1907</i> (as amended) was inconsistent with the provisions of the Constitution, and related declaratory reliefs. The plaintiffs also sought damages on the basis that they had suffered anxiety, loss, damage and upset and had been financially prejudiced having been unable to avail of tax allowances available to married persons. |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | Laffoy J. in this case affirmed the existence of the right to marry in the context of the <i>Deceased Wife's Sister's Marriage Act 1907</i> . Laffoy J. held that where a legislative provision restricts the right to marry, the restriction required justification as being necessary in support of the constitutional protection of the family and the constitutional institution of marriage, or as having regard to the requirements of the common good.  |

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| <p><b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)</p>         | <p>[171]. The statutory restriction on the right to marry for persons the subject of a wardship order under the <i>Marriage of Lunatics Act 1811</i> is legally questionable given the decision of Laffoy J. in this case as the Act automatically denies the ward's right to marry without reference to his or her actual capacity to enter into marriage.</p> |
| <p><b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)</p> | <p>In this case it was held that the restriction on marriage in this case was not justified as being necessary in support of the constitutional protection of the family and the institution of marriage or more generally having regard to the common good.</p>  |
| <p><b>Proposal of key words for data base</b></p>   | <p>Restrictions on the right to marry, wardship</p>   |

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| <b>Case title</b>  | <i>M.R. v. Byrne</i>   |
| <b>Decision date</b>   | 2 March 2007   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | High Court<br>Unreported, 2 March 2007<br>[2007] IEHC 73 (unreported)  |
| <b>Key facts of the case</b> (max. 500 chars)  | The applicant in this case was detained under the <i>Mental Health Act 2001</i> .  |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | O’Neill J. held that the definitions under Section 3 (1) (a) and (b) of the <i>Mental Health Act 2001</i> can be expressed as alternatives. The High Court took this approach on the basis that in many cases there would be a significant overlap between the different definitions and persons could be categorised as falling under both definitions at the same time.  |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)   | <p>The court in this case acknowledged that there are clearly two separate bases upon which “mental disorder” can be established under section 3 of the Act. The first of these is as set out in section 3(1)(a) and it is where the Mental Illness, severe dementia or significant intellectual disability is such that there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons. The second basis is where the severity of the mental illness, dementia or disability is such that the judgment of the person concerned is so impaired that a failure to admit the person would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission and that the reception, detention and treatment of the person concerned in an approved centre would likely to benefit or alleviate the condition to a material extent.</p> <p>The court was satisfied that these two bases are not alternative to each other. It was the view of the court that it would be probable that in a great many cases of severe mental illness there would be a substantial overlap between the two. Thus, it would be very likely in a great many cases in which a person could be considered to fall within the categorisation in section 3(1)(a) that they would also be likely to fall within section 3(1)(b). Insofar as s. 3(1)(a) is concerned the threshold for detention in an approved centre by way of either an Admission</p> |

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|   | <p>Order or as in this case a Renewal Order is set high. There must be a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons. It was also noted in the judgment that the standard of “serious likelihood” was said to be higher than the ordinary standard of proof in civil actions namely balance of probability but somewhat short of certainty.</p> <p>It is also clear from this judgment that the courts see the definitions of mental disorder and intellectual disability as of critical importance in establishing the benchmark against which all forms of mental illness must be assessed before an admission order or a renewal order can be issued under the <i>Mental Health Act 2001</i>.</p> |
| <p><b>Results (sanctions) and key consequences or implications of the case</b><br/>(max. 500 chars)</p> | <p>The detention of the applicant under the <i>Mental Health Act 2001</i> was held to be lawful.</p>   |
| <p><b>Proposal of key words for data base</b></p>   | <p>Involuntary detention, interpretation of “mental disorder” under the <i>Mental Health Act 2001</i></p>  |

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| <b>Case title</b>  | <i>Re A Ward of Court (No.2)</i>   |
| <b>Decision date</b>   | 1995   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Supreme Court<br>[1996] 2 IR 79  |
| <b>Key facts of the case</b> (max. 500 chars)  | This case concerned the withdrawal of artificial feeding and nutrition from a woman who had been in what was termed ‘a near persistent vegetative state’ (PVS) for more than 20 years arising from complications following a gynaecological operation.   |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | The Supreme Court listed a number of rights that needed to be respected including the right to life. The Supreme Court held that these rights extended to persons lacking capacity on the basis of the constitutional guarantee of equality. As O’Flaherty J. stated the denial of rights to a person lacking capacity “... would operate as an invidious discrimination between the well and the infirm.” On this basis the Supreme Court approved the withdrawal of life-sustaining treatment, given that the withdrawal was in the best interests of the person lacking capacity. |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)   | The Supreme Court has acknowledged that being made a ward has a monumental impact and has far-reaching consequences. The Supreme Court decision in <i>Re a Ward of Court</i> does offer a source of law for the further development of constitutional rights relating to persons lacking capacity.   |
| <b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)   | The Supreme Court held that it is for the court to make a decision on behalf of the Ward, with the prime and paramount consideration being the best interests of the Ward. The court in doing this takes into account the view of the Committee and family. In this case the decision to withdraw artificial nourishment was upheld by the majority of the Supreme Court on the basis that it was in the best interests of the ward.   |

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| <b>Proposal of key words for data base</b> | Wards of court system, withdrawal of artificial feeding and nutrition |
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