

Submission into reform of mental capacity laws

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Introduction

Barnardos welcomes the opportunity to feed into the reform of the mental capacity laws. Reform of the 1871 Lunacy Ireland Regulation Act has been mooted for a long time, most recently in 2008 when the then Minister for Justice proposed a Mental Capacity Bill. However, this was never progressed and Barnardos hopes that the current opportunity for reform is not wasted but rather creates modern legislation that protects and supports those covered within the Act. This includes people with intellectual disabilities, persons suffering from dementia or mental illness and persons who have acquired brain injuries through trauma or accident. While the legislation largely applies to adults, it does have implications for children and Barnardos would like to highlight these in order to inform the proposed reform of the 1871 legislation.

Issues that can arise

From a child and young people's perspective, the application of the 1871 Act can have numerous repercussions contrary to the best interests of the child, which are outlined here.

Wards of Court

Children who have been made a ward of court are deemed to be incapable of making decisions and this can affect everyday aspects of their lives e.g. where they live, who they live with and affects their ability apply for a passport. Therefore, if a family member or friend wants to take the person abroad for a holiday, permission has to be sought from the High Court which can cause undue complications for children. For example, one family whose father took his son to football matches in Britain had to apply to the court every time he wanted to travel after his son was made a ward of court on foot of a payout of damages following a brain injury. Being made a ward of court means that it can be difficult for children to be released from it even when they pass the age of 18.

For adults who have been made wards of court, there can be strict restrictions their behaviour and ability to enter into legal contracts. For instance they cannot have their child adopted as they are deemed to lack capacity. For those who are unable to parent adequately, this can result in a child remaining in the care of the state long term instead of offering them the chance to be legally adopted into a family which offers greater security for them.

Additional Powers to Carers

Barnardos believes that the proposal outlined in the 2008 Mental Capacity Bill regarding extending additional powers to carers should be included in any reform of the 1871 Act. This proposal allows for carers who have responsibility for the person who lacks capacity to make normal everyday decisions on their behalf without reference to the court. However, certain decisions, such as a decision to withdraw artificial life-saving treatment, will be reserved to the High Court. It is crucial that the proposal to establish an independent Office of Public Guardian is pursued in tandem with legislative change. This Office would ensure supervision of persons appointed by the courts to perform guardianship or decision-making functions on behalf of incapacitated persons. In situations where there is no person willing or able to act as personal guardian for an incapacitated person, the Office would also act as a guardian of last resort.

Determining Capacity

Another key issue requiring reform within the legislation surrounds the issue of determining a person's capacity. Presently, once the courts determine incapacity this applies to every decision a person may make and every legal transaction they may wish to enter into. This has significant implications for adults and children in all aspects for their lives. Any new law should establish core guidelines and definitions for 'testing' capacity for making decisions, including who decides capacity. The Mental Capacity Bill (2008) proposed determining capacity with regard to the particular time when a decision has to be made and on the particular matter to which a decision relates, not on any general review of capacity to make decisions generally. This is in line with international best practice, as well as a recommendation of the Law Reform Commission, whereby capacity will be understood 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.

Children in Care Proceedings

Parents with intellectual disabilities whose children are involved in care proceedings sometimes experience specific consequences from this legislation that are not necessarily in the child's best interests and contrary to principles underpinning the 1991 Child Care Act. These include:

- Failure to appoint a Guardian ad Litem to children of such parents to ensure the child's wishes and voices are heard in any court proceedings making any decisions regarding their future.
- Courts are asked to make judgements on the current parenting capacity of parents. Courts are not required to assess the level and quality of support and capacity development that has taken place prior to the HSE's application for a care order. Such support if properly given could develop the parent's capacity and foster positive care for children within their own families in their best interests. If such support is not given, by the time that an application for a care order is made, it may be 'too late' developmentally for the child for lengthy programmes to take place.
- Parents with intellectual disability rarely have access to independent information when placing their children into Voluntary Care, so that they sometimes don't fully understand the implications of their decision and the possible legal consequences that can arise should they later decide to withdraw consent.
- Failure to appoint a 'Person to Assist' under the Legal Aid Board scheme to ensure that the parent is fully advised and supported in defending care proceedings.
- Parents experiencing difficulties in gaining meaningful access to their children when they are taken into care, and in receiving support to ensure that access is of the best quality possible for both child and parent.

Intellectual Disability Placements

For children with intellectual disabilities who are placed in residential centres there is no inspection system in operation to assess the quality of service being offered to them. The Health Information and Quality Authority (HIQA) currently inspects premises, both foster homes and residential centres, for children who are in care but do not inspect residential centres for children with disabilities. Under the Ryan Implementation Plan (2009) it is planned to extend the remit of HIQA to cover these premises but this has not happened as of yet, despite HIQA having compiled standards of care to be applicable to all forms of care settings. This absence of inspection means children are living in premises which may not meet the necessary standards, where staff are potentially not vetted or are insufficiently trained. Barnardos is aware of at least one case of a child being reared in a unit for adults. In the interests of providing child centred and appropriate care for children with intellectual disabilities it is imperative that HIQA's remit be extended to include inspection of these residential premises as a matter of urgency to ensure adherence to standards.

Medical Treatment

The Law Reform Commission 'Children and the Law: Medical Treatment' recommended children aged 16 and 17 should be allowed to consent to or decline healthcare and treatment, and be entitled to medical confidentiality on the same basis as those over 18. Children under 16 should

have their views taken into account when obtaining medical treatment but, in general, they would not be considered capable of giving or withholding consent. Any changes to consent capacity affecting children aged 16 and 17 must also include provision for those children of the same age with reduced capacity as defined in the new legislation.

Conclusions and Recommendations:

Barnardos welcomes reform of this outdated legislation and recommends that any subsequent Bill be compatible to the key principles enshrined in the UN Convention on the Rights of the Child and the 1991 Child Care Act. Furthermore, the new legislation must:

- Be actively supportive of persons covered by the Act in their capacity to make decisions;
- Ensure that the determination of capacity focuses on the decision at hand at that specific point in time;
- Guarantee that the bests interests of the child be a determining factor for those children involved in care proceedings;
- Ensure that parents affected by the Act are actively supported to parent their child where it is in the child's best interests to remain within the family home.

The legislative reform should be followed by the ratification of the UN Convention on the Rights of Persons with Disabilities, which Ireland signed in 2007. This legislation provides an opportunity for Ireland to ratify this Convention. All adults and children with intellectual disabilities, persons suffering from dementia or mental illness and persons who have acquired brain injuries through trauma or accident deserve to be comprehensively supported and protected by a modern legal framework and support services which reflect their rights as members of Irish society.

Should you require any additional information, please do not hesitate to contact June Tinsley, Policy Officer, at 01-7080440 or june.tinsley@barnardos.ie