



**Submission on the Draft General Scheme and Heads
of Bill on the Assisted Decision-Making (Capacity)
(Amendment) Bill 2021.**

January 2022

Introduction

Sage Advocacy welcomes the opportunity to make a submission to the Joint Oireachtas Committee on Children, Equality, Disability, Integration and Youth on the Draft General Scheme and Heads of Bill Assisted Decision-Making (Capacity) (Amendment) Bill 2021 – hereafter the Amendment Bill.

Sage Advocacy is a support and advocacy service for older people, vulnerable adults and healthcare patients. Sage Advocacy delivers its service through the provision of information and support, and individual case-based representative advocacy. Our most recent annual report, which can be read [HERE](#), shows the breadth of Sage Advocacy’s work, in providing advocacy support to almost 1,300 people as well as information and support to more than 1,600 people. The report also outlines, Sage Advocacy’s important research and systemic advocacy work.

The Amendment Bill represents some essential legislative amendments necessary to enable the full commencement of the Assisted Decision-Making (Capacity) Act 2015 (2015 Act), which is in turn crucial legislation to respect the rights of adults whose decision-making capacity may be in doubt or who may lack decision-making capacity.

In general, many of the amendments relating to Enduring Powers of Attorney, personal welfare decisions, the dispensing of the requirement of wards of court to seek leave before applying for a review and the inclusion of a new subsection to give the Director of the Decision Support Service (DSS) a specific statutory function to enable the sharing of information to promote the safeguarding and welfare of relevant persons, are broadly welcomed by Sage Advocacy.

There is however one glaring omission from the Bill and that is the statutory recognition of the right of access to independent advocacy. This is already provided for in regulations and has been at the centre of significant public policy recommendations during the Covid-19 crisis.

The Right to Independent Advocacy

As stated in the introduction above, it is imperative for the protection of all relevant persons that there is statutory recognition of independent advocacy, that is that the right is given to persons to have an independent person who will voice and represent the relevant person’s personal views (will and preferences) on matters concerning them independently of family or system’s interests.

Not only is independent advocacy already provided for in Regulations published by Health Information and Quality Authority (HIQA) for both older persons’ services and persons with disabilities, and in HSE policies, but the Covid-19 crisis has made clearer than ever the importance of independent advocacy, as evidenced by the Nursing Home Expert panel’s recommendation that “HIQA and each nursing home provider should continue to highlight and promote independent advocacy services available to residents”.¹ It is time to give statutory recognition to what is already a requirement in practice.

¹ Recommendation 15.4 of the COVID-19 Nursing Homes Expert Panel Examination of Measures

The right to an advocate has also been recognised by the Courts.

In a judgement in 2018² the Supreme Court clarified the right of a “vulnerable adult” to have an independent person represent their voice in situations where third parties are in conflict about the care, or other matters which directly affect or impact the life of the vulnerable adult. This has been interpreted as meaning that a person, whose capacity to make a decision about their care, personal well-being or other decision, should have access to independent advocacy. The role of that independent advocate is to represent the will and preference of that person, free from systems or family’s interests.

Additionally, the reports prepared by Sage Advocacy were mentioned and quoted in a recent judgement of the President of the High Court, Ms Justice Mary Irvine.³

Noting that the Adult Safeguarding Bill 2017⁴, includes a section providing for the provision of an independent advocate where there is a safeguarding concern, the Amending Bill should amend the 2015 Act to make specific provision that a relevant person has a right to an independent advocate.

Presently the 2015 Act⁵ provides that the Director of the DSS may prepare and publish a code of practice for “the guidance of persons acting as advocates on behalf of relevant persons” despite there being no mention of a relevant person’s right to an independent advocate within the Act itself. That must be remedied by the inclusion of a right to independent advocacy, otherwise this provision in the Act does not make sense.

Furthermore, the DSS has now also published a number of draft codes of practice describing how decision supporters and relevant professionals should act in certain situations to meet their responsibilities under the 2015 Act and to comply with obligations under the UN Convention on the Rights of Persons with Disabilities (UNCRPD). A Code for Independent Advocates is included amongst them. Again, it is imperative that this Code is underpinned by a statutory right to an independent advocate within the Act itself. Again, without this, what the Code states, namely that, once published, all those for whom the Code is intended must have regard to its contents while performing any function under the Act, makes no sense.

Additionally, an independent advocate is recognised as being essential for providing fair and equal access to justice under Article 13 of UNCRPD where States are required to make appropriate (and unqualified) procedural accommodations to facilitate this.

to 2021 Report to the Minister for Health’s vital

² AC V Cork University Hospital [2020] 2IR 38

³ A v Hickey [2021] IEHC_318

⁴ Listed as at 3rd Stage, Seanad Éireann in March 2021

⁵ Section 103 (2)(x)

Recommendations:

- 1. It is recommended that a general right to an independent advocate is included in the 2015 Act.**

Advocacy Organisations

Sage Advocacy's support and advocacy work has for some years been carried out in accordance with Quality Standards for Support and Advocacy, which were launched in 2015 and which can be read at this link [HERE](#).

This document equates to the requirement within the Codes of Practice developed by the DSS that the work of independent advocates should be guided by quality standards, robust policies and guidelines.

As can be seen from this document Sage Advocacy works with clients either on an instructed basis or a non-instructed basis. The latter is crucial for protecting the basic essential rights of an individual who cannot voice their wishes and who has not planned ahead to appoint others to do so.

Recommendations:

- 1. The requirement in the DSS draft in Code for Independent Advocates, that the work of independent advocates should be guided by quality standards, robust policies and guidelines, should be included in the 2015 Act.**
- 2. The legislation should be clarified to provide that a relevant person has a right to independent advocacy regardless of whether or not the relevant person has capacity to instruct the advocate.**

Legal Aid

It is noted, that despite the fact that it had been acknowledged by the Department of Justice that applicants under Part 6 should have the same rights as those under Part 5, the Amending Bill gives no right to the provision of legal aid for relevant persons coming within Part 6 of the Act. This is a major omission and should be remedied.

The 2015 Act and the Amendment Bill collectively provide the right for individuals to plan ahead for themselves by appointing those persons whom they wish to make decisions for them and their affairs in the future if they become unable to make those decisions for themselves.

The Act also requires the Director of the DSS to promote public awareness of the Act and its rights.

However public awareness of this legislation and the rights it confers on citizens is of no use to those members of our society who do not have sufficient funds to exercise those rights by engaging a solicitor or other adviser.

It is also generally accepted by the various State services providing assistance to vulnerable adults that it would greatly improve efficiency and would be less wasteful of the State's scarce resources (human and financial) if those vulnerable adults who may be relevant persons had planned ahead through an Enduring Power of Attorney or Advanced Healthcare Directive.

It is also the experience of Sage Advocacy that the legal costs of putting planning ahead documents in place is a major barrier for our clients.

Legal Aid is therefore a necessity for citizens wishing to exercise their right to plan ahead as envisaged by this legislation.

Recommendation:

It is recommended that the provision of civil legal aid for exercising all planning ahead rights under the 2015 Act should be included in the 2015 Act.

Summary of Recommendations:

- 1. It is recommended that a general right to an independent advocate is included in the 2015 Act.**
- 2. The requirement in the DSS draft in Code for Independent Advocates, that the work of independent advocates should be guided by quality standards, robust policies and guidelines, should be included in the 2015 Act.**
- 3. It is recommended that the legislation should be clarified to provide that a relevant person has a right to independent advocacy regardless of whether or not the relevant person has capacity to instruct the advocate.**
- 4. It is recommended that the provision of civil legal aid for exercising all planning ahead rights under the 2015 Act should be included in the 2015 Act.**