

Submission by the National Institute for Intellectual Disability (NIID) at the University of Dublin, Trinity College to the Oireachtas Committee on Justice, Defence and Equality regarding proposed changes to mental capacity law in Ireland.

August 2011

NIID's mission is to promote inclusion for people with intellectual disabilities through education, research and advocacy. Our stakeholders are numerous including people with intellectual disabilities, their families, service providers, advocates and the research community. NIID welcomes the progress made by the Law Reform Commission in the drafting of the Mental Capacity Bill (2008). NIID understands that the Bill aims to redress the lack of rights afforded to people who are deemed to lack capacity under the Lunacy Regulations Act (Ireland) of 1871, and that it aims to align with the aspirations of the United Nations Convention on the Rights of Persons with Disabilities (2006).

NIID is currently looking at the proposed legislation to determine whether it truly supports the rights of people with intellectual disabilities who need support in making decisions or who have been determined to lack the capacity to make decisions.

Bearing this in mind, NIID has three key concerns with this Bill:

- (1) Lack of detail on statutory supports, training and information for those persons tasked with acting as personal guardians to people with intellectual disabilities who are deemed to lack capacity to make decisions
- (2) Lack of information on the development of accessible information and training in decision making in order to:
  - (a) Support the capacity of people with intellectual disabilities to make decisions.
  - (b) Ensure that 'all practicable steps' have been taken to ensure that a person with intellectual disabilities lacks capacity to make certain decisions
  - (c) Recognise that decision making skills can change over time.
- (3) Lack of reference to the repeal of the Sexual Offences Act (Government of Ireland, 1993)

(1) NIID proposes that provisions for support and training of persons tasked with acting as personal guardians be included in the Bill.

(2) Capacity to make decisions is not static. It does not apply to all possible decisions to be made and it can be enhanced through: 1) support (e.g., accessible information, key trained people) and 2) training and 3) experience.

People with intellectual disabilities typically experience challenges in these three areas: accessible information, training on how to make decisions, and experience making them.

The Bill should consider including accessible information training on how to make decisions, and experience in making them as factors that determine capacity in decision making.

A judgement about lack of capacity to make decisions by a person with intellectual disabilities and subsequent actions based on that judgement may need to be revised if the person undertakes training on making decisions, gains experience making them or has the adequate support to make them. In relation to accessible information, NIID proposes that the extent and nature of accessible information on public services and citizens' information be considered, with reference to the NDA's Code of Practice on Accessibility of Public Services and Information Provided by Public Bodies (NDA, 2006) and the NDA's Monitoring Report on the enactment of this code. NIID proposes that accessible information, free of charge, on the implications of the Bill, if enacted, be made available on a statutory basis.

(3) NIID is concerned that the exclusion of legislation regarding capacity to consent to sexual relations may render the Bill incompliant with the United Nations Convention on the Rights of People with Disabilities (UNCRPD). The UNCRPD specifies that 'states parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in *all aspects of life*' (article 12(2)). Irish domestic law, namely, section 5 of the Sexual Offenses Act (Government of Ireland, 1993) states that it is an offense for a person to have sexual relations with a 'mentally impaired person'. Mentally impaired is defined as 'a person suffering from a disorder

of the mind, whether through mental disability or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or guarding themselves against serious exploitation.’

As the law currently stands consenting sexual relations between people with intellectual disabilities can be considered a criminal offense. Because of this, people with intellectual disabilities, their families, care givers and other stakeholders in this area may be afraid to give support, information and guidance in the area of romantic relationships. NIID is informed by stakeholders of the adoption of highly restrictive practices, not just in terms of sexual relationships, but also in the promotion of friendships that may potentially develop into sexual relationships. These restrictive practices are in contravention of the views of people with intellectual disabilities who perceive their engagement in relationships as a right (Inclusive Research Network, 2010; National Institute for Intellectual Disability, 2009). Clearly this level of intrusion in the lives of individual citizens’ private lives is unacceptable. While NIID is not in a position to comment as to whether the current Bill is the appropriate forum for repeal of the Sexual Offenses Act (1993), NIID will be taking advice from our colleagues in the sectors of law, services and advocacy as to the legalities of this particular issue. NIID looks forward to making a submission in due course.