

Disability Rights and the Law

l e g a l - e a s e

Edited by Catherine Ryan



An Bord Um
Chúnammh Dlíthiúil
Legal Aid Board

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Chúnammh Dílthiúil
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Editorial

Welcome to this special Edition of Legal Ease which looks at Disability and its interaction with the Law in a number of different contexts. Thank you to all those who have contributed to this edition and helped highlight these important issues. This edition is the brainchild of Susan Fay, Solicitor who in addition to submitting a paper herself also contacted the contributors to produce these useful articles and it is with sincere thanks to Susan for making these efforts. Thanks also to Úna Walsh and Tomás Keane who have helped put this together for publication.

Susan Fay, Solicitor has provided a paper on this important decision from the High Court last year setting out the duties of the State in accordance with the UN Convention on the Rights of Persons with Disabilities and the Court of Justice of the European Union judgements which align a human rights approach to workers with disabilities and confirm that such rights are of real substance. The possible consequences of this decision were teased out in this paper including, the importance of reasonable accommodation for people with a disability in employment.

Carol Ann Burke is the Access Officer in the Legal Aid Board. Her paper highlights the duties of the Legal Aid Board and the importance in adhering to the Disability Act 2005 within the Board. She also sets out the access and disability requirements under this Act, the Code of Practice for the employment of people with a Disability in the Irish Civil Service and the standards regarding the built environment in accordance with disability legislation.

Cathal McGreal BL (with significant contributions by Harriet Burgess, BL) provides us with an article focussing on disability in the context of employment in light of the pandemic. The article sets out the difficulty of the definition of disability, the requirement for the long-term nature of same, and the possible broadening of the definition. It also looks at the interactions between what constitutes an actionable illness in Personal Injuries litigation and the need for a medical diagnosis. Mental Health will almost certainly, now, be considered a disability within the meaning of the Acts. The definition is consistently evolving and changing, and includes such conditions as adjustment disorder, acute stress reaction and PTSD. This submission also promulgates that the definition should be construed as widely and as liberally as possible, but within the ambit of common sense. The article further considers the duty of the employer to provide a safe system of work to those with disabilities, including the safety precautions necessary for the duration of the pandemic and the trials and tribulations of the duty of reasonable accommodation test.

Áine Flynn from the DSS in her instructive paper reminds us of the sections of the Assisted Decision Making Capacity Act 2015, which will have direct applicability for the Legal Aid Board. It is noted that the Act has been enacted, but it has not yet commenced although that is likely to happen in mid 2022. One of the new focuses of the Act will be to abolish adult Wardship and provides for a functional assessment of capacity. It is noted that this new

About the Editor

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functional capacity assessment will operate using a disability neutral approach. Clearly this is an area where lawyers will be central to the implementation of the Act and in particular the supports surrounding any court proceedings emanating therefrom. Furthermore, the issue of advanced planning and changes in respect of Enduring Powers of Attorney and applications to the Circuit Court regarding declarations of capacity / incapacity, are all issues that we need to be cognisant of.

Ciara Johnson's article 'Recent Developments in Practice and Procedure in Wardship Proceedings' explores the developments in practice and procedure in Wardship cases focusing on time saving and costs. Practice Direction HC 95 provides for the information required in the affidavit or medical report of any medical practitioner whose evidence is to be relied upon to support a petition under the Lunacy Regulation Act 1871. Ms. Johnson BL highlights recent case law in respect of Wardship proceedings and costs in the case of TH a Ward of Court where this was a central issue. The article concludes by stressing that practitioners should be familiar with the applicable practice directions as failure to do so gives rise to rejections, delays and the accrual of further costs.

Susan Kennefick of the National Disability Authority has provided us with two submissions. The first article focuses on the use of intermediaries within the Irish Justice System. The paper sets out a very convincing argument as to why intermediaries should be provided in the Criminal Courts and draws on international comparisons. It takes its lead from the UN Convention of The Rights of Persons with Disabilities (UNCRPD) and its application in the Criminal Justice System. Article 13, of UNCRPD which deals with Access to Justice, is particularly relevant and it is clear that some of these arguments could be directly applicable to the entire justice system, not just in the criminal sphere.

The second paper also kindly provided by Susan Kennefick, sets out a summary that is particularly relevant to the Legal Aid Board solicitors and all practitioners. The State's obligations under Art. 13 UNCRPD which was ratified by Ireland in 2018 and the National Disability Inclusion Strategy are alluded to. The duty to ensure access to justice for people with disabilities, including the provision of information in a format which is accessible to all is examined and central to this is training for all staff. This paper also highlights duties under the Decision Making Capacity Act, notably the NDA has been responsible for the development of eleven statutory Codes of Practice in relation to the implementation of this Act. Disability in the context of the employment is highlighted also in this paper. This paper reminds us of how front and central the issue of accessibility for people with disabilities needs to be in all aspects of our work.

The Courts Service has provided us with a submission relating to an exciting new initiative that is has recently launched to improve the experience of people with additional needs participating in the justice system. The Courts and Prison Service have engaged in a

collaborative initiative, launching the Just A Minute (JAM) card. The card enables people with additional needs resulting in communicative or learning difficulties a means to discretely tell public service workers about their needs and to request the requisite extra time necessary to deal with their query. This catchy moniker - JAM certainly gives us food for thought!

Prof. Gautam Gulati MD, Dr Alan Cusack PhD, Prof. Shane Kilcommins PhD, Prof. Colum P Dunne PhD, University of Limerick contribute 'Intellectual Disabilities Awareness and the pre-trial Criminal Justice System in Ireland'. This collaborative article between academics of the School of Law and Medicine examine the onus placed on the Irish State by the UN Convention on the Rights of People with Disabilities to remove barriers to justice for those with intellectual disabilities of all categories. One central component in achieving this aim is the promotion of a culture of disability awareness within the Irish Criminal Justice System. Ensuring equal access to justice is necessary to safeguard the rights of people with disabilities and to ensure adherence with the comprehensive rules of evidence and the avoidance of a miscarriage of justice due to false or changing confessionals. Training programmes in intellectual disability awareness are recommended to ensure that vulnerable persons in all stages of the criminal justice process are identified promptly and that the necessary measures and experts required for information providing, accessibility, and appropriate supports are provided in a timely fashion. There is much to be learned from this article and clearly there are parallels throughout Civil and Family Law that will be instructive for all Legal Aid Board employees.

We have here the opportunity to read the submission of AsIAM to the Joint Oireachtas Justice Committee on Courts and Courthouses. AsIAM is Ireland's national Autism charity, and this submission highlights the often negative experiences of those with autism in accessing the courts and court buildings. Although the paper is critical of existing structures it is important for those of us acting as officers of the court and all working in the Legal Aid Board to use this criticism constructively and to ensure people with autism benefit from meaningful access to justice. Legal language and court forms are often difficult to grapple with, these difficulties are particularly acute for those with disabilities including people with less visible disabilities.

Appended to this Edition is a guidance document based upon the publication of "Autism: a guide for criminal justice professional" as produced by the National Autistic Society Northern Ireland and the Department of Justice in Northern Ireland in 2014. The document sets a definition of autism, the difficulties civil and criminal justice professionals may have in working with those with a disability or those on the autism spectrum. Through real life stories and examples within each section of the document, the guide sets out the issues that may arise when people with autism come into contact with the Justice System, such as social naivety or obsessional interests and setting out an informed approach as to how to deal with such issues. The guidance document further sets out support organisations and

resources of interest to those dealing with people with intellectual disabilities and autism, and is a comprehensive guide on how to engage in an appropriate manner and ensure that the adequate support is provided at each stage of the criminal justice process to both individual and professionals alike.

Catherine Ryan

Editor

October 2021





P A R T O N E

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DISABILITY RIGHTS & EMPLOYMENT

1. Robert Cunningham v Irish Prison Service and The Labour Court [2020] IEHC 282

- Susan Fay, Solicitor

This landmark High Court case rejected the proposition that the prison service has a blanket exemption to reasonably accommodate employees with a disability pursuant to s.37(3) of the Employment Equality Act 1998 (as amended) (the Act) in a further recognition of the provisions of the Employment Equality Acts, the Framework Directive and the UN Convention on the Rights of Persons with Disabilities (UNCRPD) as conferring rights of real substance on people with disabilities.

The Appellant, Robert Cunningham, a prison officer aged 40, suffered a serious back injury following two incidents in which he was assaulted by prisoners in the course of his work. As a result of the injuries sustained in the incidents, the Chief Medical Officer for the Civil Service certified Mr Cunningham as fit to work but unable to carry out any control and restraint duties in the medium or long term.

Mr Cunningham's employer, the Irish Prison Service, advised him that it could not accommodate him with duties that did not involve control and restraint of prisoners and that he could no longer be employed as a prison officer. Mr Cunningham brought a claim to the Workplace Relations Commission under the Act, claiming that he had been discriminated against on disability grounds and, in particular, that the Irish Prison Service had failed to provide reasonable accommodation as required under the Act.

In submissions made on his behalf he provided evidence of prison officers with various disabilities who had been accommodated by re-assigning them to positions with limited duties.¹ The Irish Prison Service argued that in order to maintain the operational capacity of the prison service that all prison officers must be capable of performing control and restraint functions.

Mr Cunningham was successful before the Workplace Relations Commission, the Irish Prison Service successfully appealed the Adjudication Officer's decision to Labour Court who found that the Irish Prison Service was exempt from the obligation to provide reasonable accommodation pursuant to section 37(3) of the Act.

Mr Cunningham appealed the decision of the Labour Court to the High Court on a point of law. The net issue before the High Court was whether the Labour Court had erred in law in dismissing the Appellant's claim because it found that the provisions of s. 37(3) exempted the Respondent as a prison service from providing reasonable accommodation to the Appellant. The Appellant argued that the Respondent indirectly discriminated against him on the ground of disability and that the discrimination was not objectively justified.

1 <https://www.ihrec.ie/app/uploads/2020/06/Outline-Submission-1.pdf> retrieved 10 November 2020

About the Author

Susan Fay is a Solicitor with the Legal Aid Board. Her role involves, the provision of legal services to members of the Traveller community in relation to non family law matters, and improving the Board's overall service provision to Travellers.

In overturning this decision, the High Court found that section 37(3) did not allow the Irish Prison Service to self-certify that the Appellant was incapable of working as a prison officer simply because he is deemed medically unfit to perform control and restraint functions. The Court found that to allow the Irish Prison Service to self-certify in this manner would deprive the Appellant of an effective remedy under the Directive and the Act, contrary to EUCJ jurisprudence in *Egenburger v Evangelisches Werk fur Diaknoie under Entwicklung eV*.²

Mr. Justice Barr in particular relied on two cases; the EUCJ case of HK Danmark, acting on behalf of *Jette Ring (applicant) v. Dansk Almennyttigt Boligselskab (respondent)*³ and the recent Irish Supreme Court decision *Nano Nagle School v. Marie Daly*⁴.

In the case of HK Danmark, acting on behalf of *Jette Ring (applicant) v. Dansk Almennyttigt Boligselskab (respondent)*⁵ the EUCJ recognised that the UNCRPD has legal effect under EU law, accordingly the Framework Directive and the Act must align with UNCRPD.

Mr Cunningham was fortunate in relation to the timing of his High Court case, he was able to rely on the *Nano Nagle*⁶ decision which was delivered while his case was awaiting hearing, this decision was one of the first applications of the *Nano Nagle* precedent⁷. The landmark judgement delivered in *Nano Nagle School v Daly*⁸ delivered by the Supreme Court marked a move away from the medical model of disability which problematised the person with the disability towards the social model which emphasises the need for the workplace to adapt to suit the particular needs of the worker. The Supreme Court confirmed that the Act must be interpreted in line with the State's international human rights obligations to support people with disabilities securing and maintaining employment. The Supreme Court implemented the decision of the CJEU in *Ring*⁹ referred to above which aligned to the human rights approach to workers with a disability in the UNCRPD. The Supreme Court ruled that a person with a disability must be treated with dignity and that the right to work is an essential part of that dignity.

Mr. Justice Barr said, "*The judgments of the CJEU referred to earlier and the judgement of the Supreme Court in the Nano Nagle case*¹⁰, make it clear that the provisions of the Framework Directive and of the Act provide rights of real substance to persons of disability, who wish to enter or remain in work."

2 Case C-414/16 *Egenburger v Evangelisches Werk fur Diaknoie under Entwicklung eV*
3 Joined Cases C-335/11 and C337/11 *HK Danmark, acting on behalf of Jette Ring (applicant) v. Dansk Almennyttigt Boligselskab (respondent)* 2013 IRLR 571
4 [2019] IESC 63
5 Joined Cases C-335/11 and C337/11 *HK Danmark, acting on behalf of Jette Ring (applicant) v. Dansk Almennyttigt Boligselskab (respondent)* 2013 IRLR 571
6 [2019] IESC 63
7 <https://www.ihrec.ie/app/uploads/2020/06/Supplemental-Submissions.pdf> retrieved 10 November 2020
8 [2019] IESC 63
9 Joined Cases C-335/11 and C337/11 *HK Danmark, acting on behalf of Jette Ring (applicant) v. Dansk Almennyttigt Boligselskab (respondent)* 2013 IRLR 571
10 [2019] IESC 63

He went on the state *“If possible, the court must also interpret s. 37.3 in a manner that is consistent with both the working and the objectives sought to be achieved by the Framework Directive, which was implemented in Irish law by the Act.”*

The judgement notes that *“the Court must also interpret s.37.3 in a manner that is consistent with both the wording and the objectives sought to be achieved by the Framework Directive which was implemented into Irish Law by the Employment Equality Act.”*¹¹ The social model of disability recognises that it is not the individual’s physical or intellectual impairment that gives rise to the barrier, rather it is the social and environmental factors¹². The Labour Court’s interpretation of s. 37(3) as providing a blanket exclusion for people with disabilities who may require reasonable accommodation creates a blanket exclusion for people with disabilities who may require reasonable accommodation to work in the prison service.¹³

The Court clarified the scope of s.37(3) of the Act and in so doing it was mindful that there had been an amendment to the Act, when the Act was originally drafted the Irish Prison Service has a complete exemption, this was removed by the insertion of s37(3) in a 2004 amendment.

In terms of whether the decision will be workable in practice, following the *Nano Nagle*¹⁴ precedent, Mr. Justice Barr indicated that employers were not necessarily under an obligation to create a new job for the person with the disability, nor does that employer have to provide measures that are unduly burdensome. Barr J was very careful to say that every case will depend on its own particular facts. It is a test of proportionality or reasonableness which the Respondents in this case did not meet because there was strong evidence put forward by Mr Cunningham that other positions existed within the prison service that would not require contact with prisoners and which had, in fact, been given to employees on a long-term basis due to ill-health or otherwise. Justice Barr concluded that justice requires that the person with a disability be given the chance to make his or her case that they could perform the functions required of them if reasonable accommodation was provided.

As Mr Cunningham was not afforded this opportunity, the High Court remitted the matter to the Labour Court for fresh consideration. The High Court decision was appealed to the Court of Appeal by the Irish Prison Service, however this appeal was subsequently withdrawn.

The case marks a commitment to a departure from the medical model to a rights-based model of disability rights. It has been welcomed by the Irish Human Rights and Equality Commission, *“Today’s judgement again recognises and reaffirms this important shift toward the social model of disability and the need to interpret the Employment Equality Acts in light of EU Law and UNCRPD, which at their core recognise the dignity of persons with disability.”*¹⁵

11 Para 64

12 <https://www.ihrec.ie/app/uploads/2020/06/Outline-Submission-1.pdf> retrieved 10 November 2020

13 <https://www.ihrec.ie/app/uploads/2020/06/Outline-Submission-1.pdf> retrieved 10 November 2020

14 2019] IESC 63

15 <https://www.ihrec.ie/human-rights-and-equality-commission-welcomes-significant-high-court-ruling-in-disability-rights-and-employment-case/> retrieved 10 November 2020

“Today’s judgement again recognises and reaffirms this important shift toward the social model of disability and the need to interpret the Employment Equality Acts in light of EU Law and UNCRPD, which at their core recognise the dignity of persons with disability”.



Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission



2. Legal Aid Board; Our Requirements under the Disability Act 2005

- Carol Ann Burke, Access Officer, Legal Aid Board

Under the Disability Act 2005, all Government Offices are required to appoint one or more Access Officers to help customers with disabilities to access their services, buildings and information. In accordance with section 26(2) of the Disability Act 2005 the Legal Aid Board appointed an Access Officer who is responsible for providing or arranging for, and coordinating assistance and guidance, to persons with disabilities accessing services provided by the Board.

The Access Officer is the Legal Aid Board's nominated point of contact for people with disabilities wishing to access our services. The Legal Aid Board is committed to ensuring that access to our services will not be compromised by reason of a failure to accommodate disability or a failure to accommodate reasonable accessibility.

Disability and Accessibility

The Disability Act 2005 makes a number of requirements of public bodies. In compliance with this Act, the Legal Aid Board commits to the following action points:

- Take all reasonable measures to promote and support the employment of persons with disabilities;
- Comply with any relevant Codes of Practice;
- Monitor compliance with Part 5 of the Disability Act 2005 (concerning public service employment);
- Report to the relevant monitoring body by the 31st March in each year on the achievement of the above obligations during the preceding year;
- Communicate with people with hearing and visual impairments in a form that is accessible to them and compatible with adaptive technology;
- Ensure that published information relevant to persons with intellectual disabilities is in clear language that is easily understood by those persons;
- Ensure that the provision of access to the service by persons with and persons without disabilities is integrated;
- Authorise at least one access officer to co-ordinate assistance and guidance to persons with disabilities in accessing its services; and
- Ensure that public buildings are brought into compliance with Part M of the Building Regulations 1997 insofar as we can achieve this.

About the Author

Carol Ann Burke is a Higher Executive Officer with the Learning & Development Unit in the Legal Aid Board. Carol Ann is the Board's Access Officer.

Under the Disability Act 2005 a person with a disability can make a complaint to an Inquiry Officer appointed by the public body about any failure by a public body to provide

Equal Opportunity

The Civil and Public Service is an equal opportunities employer and all recruitment campaigns are conducted in strict compliance with the Codes of Practice set out by the Commission for Public Service Appointments.

CODE OF PRACTICE

Appointment of Persons with Disabilities to Positions in the Civil Service and Certain Public Bodies

access and may also appeal the Inquiry Officer's decision to the Ombudsman.

The Board will ensure that all of its statutory requirements under the Disability Act 2005 are fully met and will continue to implement the <http://nda.ie/Good-practice/Codes-of-Practice/Code-of-Practice-on-Accessibility-of-Public-Services-and-Information-Provided-by-Public-Bodies> and the Code of Practice for the Employment of People with a Disability in the Irish Civil Service; <http://nda.ie/publications/employment/employment-of-people-with-disabilities-in-the-public-service/>

The Civil and Public Service is an equal opportunities employer and all recruitment campaigns are conducted in strict compliance with the Codes of Practice set out by the Commission for Public Service Appointments including the Codes of Practice governing the External and Internal Appointments of Person with Disabilities to Positions in the Irish Civil Service and Certain Public Bodies. <https://www.cpsa.ie/codes-of-practice/code-of-practice-for-the/>

Access to services delivered via information and communication

The Board is committed to ensuring the accessibility requirements set out in Sections 26, 27 and 28 of the Disability Act 2005 to ensure that its services are, as far as practicable, accessible to persons with disabilities by means of the following action points:

- Ensuring that the provision of access to the service to persons with or without disabilities is integrated, where practicable;

- Reviewing existing procurement policies;
- Revising information provided as part of the induction process for new staff to raise awareness of the Disability Act requirements;
- Ensuring the assigned Access Officer is fully trained to provide or arrange for and coordinate the provision of assistance and guidance to persons with disabilities in accessing the Board's services;
- Ensuring that all written and oral communications are in a form that is accessible to the person concerned;
- Using clear, user-focused language and easy to read formats in all Information leaflets, forms, letters and procedures etc;
- Publicising the alternative formats (Braille, large print etc);
- Ensuring relevant staff know how to get alternative formats when customers request them (guidance note for staff);
- Develop an awareness leaflet regarding translation services/Irish Sign Language Service for all offices.
- Include relevant section on accessibility in the Board's handbooks for staff;
- Updating the Board's website on a regular basis and ensuring contents are accessible to persons with a visual impairment to whom adaptive technology is available;
- Ensuring information published on the Board's website is in clear language that is easily understood;
- Update the Accessibility Statement on Board's website accordingly;
- Carry out an Access Audit of the Board's website every 3 years;
- Ensuring staff who produce accessible content for the Board's website have training on how to write for the web and how to use clear English; and
- Ensuring a named 'Accessibility Technology Officer' in the Board's IT Section continues to develop their expertise in the area of the assistive technology and determine compatibility with Board's ICT infrastructure.

Access to the Built Environment

The Board is committed to ensuring that the accessibility requirements set out in Section 25 of the Disability Act 2005 ensure that its buildings are, as far as practicable, accessible to persons with disabilities by means of the following action points:

- Developing a Built Environment Access Handbook for the use by the Board's managers and maintenance staff for each office and reviewed periodically and updated as required;
- Carrying out an Access audit where any issues are identified;
- Developing an implementation plan for addressing each issue that an audit identifies;
- Embracing new assistive technologies when moving to new offices; and
- Carrying out an audit of evacuation procedures every 3 years.



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3. Equality Implications of Covid-19: Mental Health and Employment and the Role of Disability Discrimination Law

- Cathal McGreal, BL with significant contributions by Harriet Burgess, BL

Introduction

While it must now be a source of considerable concern that workers may be diagnosed with a recognised mental health condition as a result of the Covid-19 crisis, employers and workers across the industrial relations landscape need to consider the implications of the virus in the workplace.

Covid-19 raises a number of issues for employment law generally. They arise in a context of change and uncertainty, of fear and sometimes ignorance. The UK Employment Tribunal in the case of *Reid v The Good Food Store Ltd* (ET 44/2020), deals with a shop worker who was afraid to come to work (she had Type 1 Diabetes and a husband in his seventies) said:

“Back in March 2020, in the confused new and strange world of an emerging pandemic there was rapidly changing and mounting concern, if not panic, among wide swathes of the population, on the Island [Isle of Man] and beyond. Increasingly during March, there was a climate of fear and uncertainty as to the implications of Covid-19. Vulnerable individuals, the wider population and the Isle of Man Government were all grappling to understand or cope with a mounting crisis. This was at a time when medical advice, whether from experts on the Island or from the United Kingdom, or indeed from other countries in Europe, was far from clear or consistent— something that still prevails to an extent even now.”

For most of us, the coronavirus pandemic is a source, at the very least, of stress and considerable inconvenience. For some however, the consequences have been far more profound. It has created pervasive and insidious levels of fear and anxiety which, for some, have manifested in serious mental health issues and cost some workers their very lives. Many of these mental health complaints will fall within the definition of disability under the Employment Equality Acts 1998 to 2015 (“the Acts”). This article will focus on the mental health implications of Covid-19 for workers, and explore how employment equality law will adapt to avoid or cope with these implications. It is aimed at those who are concerned with managing, advising or adjudicating upon the various issues associated with workers with mental health difficulties that are caused by, or aggravated by, the Covid-19 crisis.

Mental illness, where it is a clinical diagnosis of a recognised condition, will almost certainly be a disability within the meaning of the Acts. This is not always fully appreciated and is sometimes obscured by the still relative novelty (in terms of recognition) of certain

psychiatric disorders and the traditional taboos associated with mental illness. The law has had a chequered history in relation to its protection of employees with mental health issues.

Definition of Disability and Mental Health Issues

Mental illness, properly so called, must be distinguished from the variety of complaints which may be symptoms of mental illness, but which would not, in themselves, be considered a disability. It is important also to separate causes of illness from the illness itself. Stress is the most obvious case in point.

The word “disability” was not defined in Directive 2000/78/EC (Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereinafter “the Framework Directive” or “the Directive”). In *Case C- 13/05, Chacon Navas ([2006] E.C.R. 1-6467* at para.43), the court said that the concept of “disability” had to be understood as, “referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”.

Three years after the *Chacon Navas* judgment was delivered, the European Community approved the United Nations Convention on the Rights of Persons with Disabilities. The provisions of that convention are now an integral part of the EU legal order: see Article 216(2) TFEU. In *Case C-325/11, HK Danmark v Dansk almennyttigt Boligselskab* ([2013] I.R.L.R. 571), the Court of Justice at para.32 said that the Framework Directive must, as far as possible, be interpreted in a manner consistent with that convention. This is now a well settled position in Irish employment equality law (see *Nano Nagle School v Daly* ([2019] IESC 63; [2019] E.L.R. 221) *Robert Cunningham v Irish Prison Service and the Labour Court* ([2020] IEHC 282). Accordingly, the concept of disability must be understood, as set out at para.36 of *HK Danmark*, as referring to,

“[A] limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers”.

The court in *HK Danmark* also ruled (at para.40) that it did not appear that the Directive was intended to cover only disabilities that were congenital or that resulted from accidents, to the exclusion of those caused by illness. The origin of the disability was irrelevant. The court went on to say, however, that the physical, mental or psychological impairments must be long-term.

The definition of “disability” in s.2 of the Employment Equality Acts 1998 to 2015 (“the Acts”), is more broadly drawn than that of the Framework Directive (See *Customer Perceptions Ltd v Leyden* [2004] ELR 101). Whereas in *Chacon Navas* the cause of the limitation concerned was limited to health problems or psychological abnormalities which were not short-term in nature, temporary conditions resulting from an accident have been held to fall within the

Irish definition. There is no express limitation on the degree of seriousness or gravity in the definition although it has been held by the Labour Court that symptoms which present to an “*insignificant degree*” can be disregarded (See *A Government Department v A Worker* EDA094). Not only does it include total or partial absence of mental function, it comprehends a condition, illness or disease which affects a person’s thought processes, perception or reality, emotions or judgment or which results in disturbed behaviour (s.2(1)(e) of the Act). The Act covers disabilities, both present and past, as well as disabilities imputed to a person and disabilities which may exist in the future. The Minister, in the course of promoting the Bill, said that s.2 was wide enough to cover a history of any condition, illness or disease which had resulted in a voluntary or involuntary admission to a psychiatric facility (Committee Stage, JUS 1, No. 5, Cols. 83–85).

Specific Illnesses with Which we are Concerned

Non-physical illness traditionally not recognised by our law

It is not long since legal recourse as against an employer for breach of duty with respect to mental health was outside of the field of actionable wrong. Injury of a non-physical nature was simply not recognised by the law. At the time, without an effective contractual remedy and without any recognition that non-physical harm was actionable before the courts, many of the consequences of the circumstances or behaviour we now regard as unlawful were simply accepted as the harsh reality of economic life. Only with the House of Lords decision of *Page v Smith* ([1996] 1 A.C. 155) was the view taken that non-physical illness or suffering could come within the meaning of medical injury. The court held, at p.188, with the dicta of Lord Lloyd that:

“[i]t would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different ‘kinds’ of personal injury, so as to require the application of different tests in law.”

Judicial reluctance to accept as non- physical illness, mere hurt to feelings

Acceptance of whether a complaint constitutes an injury and whether it constitutes a disability is a co- aligned issue in the evolving medico-legal bases for actionable wrongs. It is now well established that claims of work-related injury may manifest in non- physical ways and that physical symptoms may be caused by non-physical illnesses. To be actionable, the complaint can be either a physical injury or a psychiatric disorder but these complaints must be clinically diagnosed (See *Rorrison v West Lothian College and Lothian Regional Council* [2000] S.C.L.R. 245). In *Hinz v Berry* ([1970] 2 Q.B. 40) the difficulty of the concept in our neighbouring jurisdiction was expressed in very clear terms:

“... no damages are awarded for grief or sorrow caused by a person’s death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognisable

psychiatric illness caused by the breach of duty by the defendant.”

Humiliation and disappointment, even in extreme form, do not constitute actionable illnesses in personal injuries litigation (*Larkin v Dublin City Council* [2008] 1 I.R. 391). Similarly, “high levels of stress and anxiety” arising from the plaintiff’s diagnosis as MRSA positive failed to reach the standard necessary to constitute actionable damage (*Hegarty v Mercy University Hospital Cork* [2011] IEHC 435).

Diagnoses and the manifestations of non-physical illness are not as clear-cut as some of the more recognised kinds of physical injury. In *R v Ireland* ([1998] A.C. 147) the area was, even then, still described as “*an imperfectly understood branch of medical science*”. In *Pickering v Microsoft Ireland Operations Ltd* ([2006] E.L.R. 65) it is interesting to note that, instead of comparing the plaintiff’s plight to some other case of psychiatric injury, counsel for the plaintiff is noted as saying (probably for dramatic emphasis) the plaintiff was injured in the same way as if her hand had been cut off. The court was at pains to point out that the medical evidence before it described depression with associated anxiety as a recognised clinical disorder. In *Morgan v Staffordshire University* ([2002] I.R.L.R. 190) stress, anxiety and depression did not amount to mental impairment under the disability discrimination prohibition in the UK, as mere notes referring to these “symptoms” did not amount to well-recognised disabilities. The High Court held in *Larkin v Dublin City Council* ([2008] 1 I.R. 391) that a claim in respect of emotional upset, disappointment and distress, even though it caused what was described by a doctor as an “*acute stress reaction*”, could not succeed for want of clinical diagnosis of a medical condition. The court held that “*upset, humiliation, sensitivity and disappointment*” requiring no treatment or medical intervention did not constitute a recognisable psychiatric condition. It is clear, therefore, that not only is evidence of a clinical mental health disorder or condition an essential pre-requisite for the protections afforded by the Acts, the range of potentially qualifying illness is not settled.

Illnesses which do fall within the definition of disability

One of the international standard systems for classifying all medical diseases, the International Classification of Diseases, is published and kept up to date by the World Health Organisation. This source includes a list of disorders under Chapter V, entitled “*Mental and behavioural disorders*”. The list is surprisingly short but does feature the complaints that commonly feature in employment sickness certificates and medical reports. What might surprise employers and mental illness sceptics is the inclusion of sections such as F43 “*Reaction to severe stress ...*” and such illness as “*adjustment disorder*” and “*acute anxiety*”.

There is little doubt that depression, of a significant level of severity, is a disability for the purposes of the Act. In practice, it will require treatment to include medication or counselling (or referral to a psychologist or psychiatrist) as obvious indicators of diagnosis and severity. The Labour Court was asked in *Government Department v A Worker* (EDA094) whether “*work-related depression*” could amount to a disability. Although finding that the complainant suffered from a depressive illness of a type which was a known psychiatric disability, the Labour Court said that mere unhappiness or ordinary stress or disappointment

would not amount to a disability.

Acute anxiety has been held to be a disability. In *XY v Matrix Shipping* (DEC-E2018-05) the Equality Tribunal said:

"I am persuaded that acute anxiety is a disability within section 2 of the 1998 Act (even if it lasted only two months and only developed because of a dispute between the managing director and the Complainant.) Acute anxiety can amount to 'a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour'. It was for this anxiety that he was certified for sick leave and the evidence of [the] Complainant describing panic attacks and constant sense of anxiety was compelling.

... Acute anxiety may result in symptoms that, however temporary, can be severe and disabling and I accept fully the evidence of the Complainant that unfortunately that this was his experience. I find that due to the broad wording of section 2(3) that acute anxiety comes within the wording of section 2(3) and that it constitutes a disability for the purpose of the Act."

It is worth remembering that it is ultimately a matter of medical evidence, and not self-certification, whether a worker suffers from a disability under the Acts. This point was clearly made by the Labour Court in *A Retail Company v A Worker* (EDA2012) which said it is not sufficient,

"... for the Complainant to rely on 'stress', however caused, as grounds for a claim to have a disability. It is necessary for her to show that she had a disability as defined above in the Acts. In circumstances where the fact of disability is in dispute, the Court can be assisted with evidence from medical practitioners. The failure of the Complainant to call such a practitioner in evidence means that the Court is left to rely entirely on the written evidence provided. The medical certificates provided to the employer are scant on detail, referring only to 'stress/work related stress', which is of no assistance to the Court.

The only evidence of any substance put to the Court in support of a claimed disability is a medical report from the Complainant's GP. However, this report makes no reference to depression and contains no details of any prescribed medication. The report refers to symptoms arising from stress such as sleep difficulties and emotional fragility but in the absence of medical testimony, it is not possible for the Court to get more useful detail. The report refers to the Complainant being 'anxious' but little detail of the sort that the Court would require is provided. In short, this report is of limited value."

Stress, though not a Mental Illness, is a Very Significant Cause of Mental Illness

For anyone involved in industrial relations, human resource management or employment

litigation, the most common non-physical complaint that tends to feature on sick absence certificates at work must be “stress”. Employment lawyers are all too familiar with the implications of this word. However, stress alone is not an illness. It can be a cause of illness. And the cause of the stress is a very different but related issue. Indeed, it may be the most fundamental misconception concerned with mental health issues in the workplace.

A good starting point in discussing the implications of stress is to recognise that, notwithstanding the widely misapplied use of the word to describe an illness, the concept is not so misplaced as we might think. After all, Post-Traumatic Stress Disorder (PTSD) is a very real and sometimes devastating condition that is caused by severe levels of stress. Indeed, it is perhaps the best illustration, for those familiar with the sad history of shell shock victims, of a condition that took far too long to reach the status of recognised psychiatric disorder. Moreover, this is a clinical illness, now fully recognised in medicine, which has been deemed to be a disability under the Employment Equality Acts 1998 to 2015 (see *A Meat Factory Worker v A Meat Processor* ADJ-00001504). There are other illnesses caused by stress that might be called emergent insofar as they are not so well settled in the dictionary of medical disorders. For example, one often sees in practice references to workers suffering from adjustment disorder. This is not to be confused with the far less specific and far more ambiguous “acute stress reaction”. “*Workplace stress*”, which seems to be the label of resort of many GPs, is clearly not sufficiently particular but it is sufficient to place an employer on enquiry. It would be a mistake to dismiss any of these complaints as pseudo-science or to refuse to consider that there may be a very real issue that requires enquiry, accommodation or protective steps.

The International Classification of Diseases (ICD) features the following mental illness under the title “Reaction to severe stress, and adjustment disorders” (s.F43 of the classification). The ICD states that:

“[T]his category differs from others in that it includes disorders identifiable on the basis of not only symptoms and course but also the existence of one or other of two causative influences: an exceptionally stressful life event producing an acute stress reaction, or a significant life change leading to continued unpleasant circumstances that result in an adjustment disorder. Although less severe psychosocial stress (‘life events’) may precipitate the onset or contribute to the presentation of a very wide range of disorders classified elsewhere in this chapter, its etiological importance is not always clear and in each case will be found to depend on individual, often idiosyncratic, vulnerability, i.e. the life events are neither necessary nor sufficient to explain the occurrence and form of the disorder. In contrast, the disorders brought together here are thought to arise always as a direct consequence of acute severe stress or continued trauma. The stressful events or the continuing unpleasant circumstances are the primary and overriding causal factor and the disorder would not have occurred without their impact. The disorders in this section can thus be regarded as maladaptive responses to severe or continued stress, in that they interfere with successful”.

Three specific conditions are listed under this heading:

- Acute stress reaction
- Post-traumatic stress disorder
- Adjustment disorders

It is important to remember that these are not conditions which lend themselves to objectively reasonable assessments of one's work circumstances. It is not so surprising then that in *Sea and Shore Safety Service Ltd v Byrne* (EDA143) the complainant was held to have been harassed on disability grounds where the disability was "excess anxiety and post-traumatic stress due to on-going exposure to rodents in her place of work." Nor is it surprising that in *A Meat Factory Worker v A Meat Processor* (ADJ00001504) the recognised condition was a phobia of knives.

Health and Safety Authority Guidance on Workplace Stress During Covid-19

The Health and Safety Authority (hereafter "HSA") guidance on its website makes absolutely clear that stress, by and of itself, is not an illness. It includes the following categorical statement: "*Stress is not a disease or injury, but it can lead to mental and physical ill health.*" Helpfully, the HSA has also provided relevant guidance on work-related stress (WRS) during Covid-19. The guidance includes the advice that,

"All stress has in common an element of panic, frustration, loss of control and negative physiological changes."

HSA guidance makes a clear distinction between acute versus chronic stress. An acute stress reaction is described as occurring where a sudden event has sudden consequences just after the event. In contrast, chronic stressors are longer-term causes of stress, slowly unfolding and extending over periods of weeks or months. Here the cause persists over time and the worker has no respite from it. This results in more serious psychological consequences and therefore can lead to mental health issues, psychiatric illness and/or disorder.

The HSA advises further, linking the global pandemic and stress, that:

"The Global Pandemic COVID-19 was an acute stressor but as there is no clarity yet as to when restrictions will be lifted and a vaccine developed it is now a chronic stressor. The skillsets and coping mechanisms we have developed for other shorter-term stressors are unlikely to help us as much in the longer term as they did in the short term. However, we can build upon those skillsets developed in the early days to help us going forward."

It is advised that risk assessments, which are a standard feature of the protections and obligations under the Safety Health and Welfare at Work Act 2005, are adapted to take account of the Covid-19 crisis. It is advised that where there is a risk of occupational exposure to Covid-19, (e.g.), healthcare, employers are required to ensure that an appropriate biological

agents' risk assessment is carried out. Suitable control measures should be identified and implemented to mitigate the risk of Covid-19 infection.

Ordinary workplaces (e.g. retail, offices, construction, hospitality, transport etc.) also require risk assessments which take account of Covid-19. Employers are advised that public health advice must be monitored and applied. The HSA provides two sources of specific guidance:

- Health Protection Surveillance Centre (HPSC) guidance for businesses
- National Standards Authority of Ireland (NSAI) guidance for businesses

Ultimately it is recognised that stress and stress related illness (which will inevitably consist of mental illnesses) are a significant feature and aspect of the Covid-19 crisis as it affects the workplace.

Workers With Whom we are Concerned

Covid-19 has affected nearly every worker and workplace in some way. Arguably, frontline workers face the greatest risk of contracting Covid-19, and are more likely to suffer psychiatric symptoms as a result. Calls have been made across jurisdictions to acknowledge the victims of Covid-19, but also the efforts of frontline workers in combatting the virus. Although the term "frontline worker" has not been officially defined, a frontline worker can be loosely described as any employee providing an essential service, or a key public service. The Covid-19 crisis has greatly impacted those working in healthcare: doctors, nurses, midwives. Healthcare staff are reported to be experiencing post-traumatic stress, burn out and fatigue from dealing with the pandemic at work over the last few months. Other healthcare professionals working on the frontline during the pandemic could include speech and language therapists, dentists, and paediatric dentists, who have been redeployed to work in Covid-19 testing centres by the Health Service Executive. Other frontline workers include teachers; a representative of the Association of Secondary Teachers Ireland (ASTI) has said that striking may take place due to Covid-19 safety concerns in schools, due to issues such as physical distancing and the provision of personal protective equipment (hereafter "PPE"). Further, frontline workers could arguably include those working in supermarkets, and food supply chains.

When considering those most likely to be severely affected by the Covid-19 crisis, for the purposes of this paper, it seemed apt to choose as an example, the hard-pressed and sometimes underappreciated profession of nursing.

During a Special Committee on Covid-19 Response debate (Tuesday 21 July 2020) in the Oireachtas, Phil Ní Sheaghdha, General Secretary of the Irish Nurses and Midwives Organisation spoke on behalf of many nurses supported by some startling statistics. At the time, health workers accounted for 34 per cent of those infected and 32 per cent of these were nurses. Ms Ní Sheaghdha stated as follows on the subject matter of this article,

"[Nurses] want practical post-traumatic stress support. They describe what they are

now enduring as post-traumatic stress. They are saying they are fearful of the ability of their employer to keep them safe. They are also quite determined that they will work and are happy to go to work but they must be protected.”

Ms Ní Sheaghda addressed many concerns but made her case perhaps most effectively when she called upon an INMO member, Siobhán Murphy, to speak of her own personal experience of contracting Covid-19 whilst trying to provide care for patients who were suffering from the virus in the early weeks of the crisis. Ms Murphy, in her testimony to the Committee said:

“I worked on a Covid-positive ward since 24 March. We were catapulted into this pandemic but we faced it with strength as a team. We are nurses who work 13-hour shifts. We work days, nights and weekends. My experience was of overexposure and burnout due to the challenge we faced already pre-Covid, with understaffing and being overwhelmed with the ever-expanding role of being a staff nurse. As one cannot put a time limit on providing care to a patient, I suppose the exposure to Covid-19 as a nurse was profound. There have been psychological and physical side effects and symptoms that I still experience today. I am still off work at the moment, as are three of my colleagues, while four colleagues required hospital treatment due to contracting Covid-19. A total of 13 out of 20 of my colleagues contracted Covid-19.”

Later in the debate Ms Murphy said:

“First, I wish to point out that I am 27 years of age with no medical, previous or underlying health conditions. I unjustifiably contracted Covid-19 in the workplace due to, as was previously said, understaffing, being completely overwhelmed with the role of the nurse, extreme burnout and overexposure to the virus. I believe I was competent in my use of PPE; we had extensive training and education on the ward from infection prevention and control in the hospital on a daily basis, as PPE did change depending on supply.

On being prepared for a second surge, as nurses we are professionals. Speaking from the perspective of my own hospital, I cannot say that any of my colleagues presented to the ward with symptoms of Covid-19. There was a very clear pathway whereby a person isolated, he or she got a swab through occupational health in work, got his or her result and subsequently was off work for 14 days if not longer. In my case, it was for 12 weeks due to symptoms. Going forward, the psychological impact of Covid-19 has been detrimental to me and to my colleagues and I am sure I can speak on behalf of the nurses of Ireland when I say that. Being given a telephone number or an app to access from home for psychological trauma, for post-traumatic stress disorder, (PTSD), which was mentioned, is just not sufficient...”

Ms Murphy spoke of her physical ordeal but went on to discuss the psychological implications of the virus,

“For the first time, I experienced acute anxiety and panic attacks. I have ongoing insomnia. I can sleep for eight hours some nights but others I only sleep two to three hours, and I do not know why. I had vivid hallucinations at the start, as did some of my colleagues. That is not spoken about as a side effect. Everybody tends to speak about the physical signs and symptoms but the psychological effects, as I have said, are just as detrimental to recovery...”

It is difficult to follow these words with dry legal analysis, but discussion is needed and these issues must be the subject of analysis and reflection in terms of their legal implications.

Workplace Consequences of Mental Health Disability

This article started with a concern that workers may be diagnosed with a recognised mental health condition as a result of the Covid-19 crisis and that the industrial relations landscape needs to consider the wider implications of the virus in the workplace. What are the workplace consequences and implication of covid-19-related mental health disability?

Employer’s duty to provide a safe system of work

Covid-19 is an ever-present threat whether at work, on the bus, in the local shop, or even at home. The insecurities caused by the crisis have deeply affected everyone. The question of liability of employers, and in particular the question of causation, will be a key focus of employers faced with personal injuries litigation. Diagnosis of recognised illnesses, referred to above, is one thing; causation can be an entirely different question.

This is not an article on personal injuries liability. Its central theme is the legal consequences for employers of a diagnosis of a mental health condition caused by the stress and anxiety of working in a workplace where workers are exposed to the Covid-19 virus.

It should be recalled that employers are legally obliged to provide a safe system of work (See *Christie v Odeon (Ireland) Ltd* (1975) 91 I.L.T.R. 25). This duty has been a feature of the law of torts for centuries and has found statutory expression in s.8(1) of the Safety Health and Welfare at Work Act 2005 (the “2005 Act”) which provides:

“Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.”

The generality of s.8 of the 2005 Act deserves careful consideration but, for anyone who has been concerned to see people ignoring the social distancing guidelines, the provision of greatest current significance in terms of the conduct of others at work seems to be s.8(2) (b) which provides that the duty set out above extends, in particular, to:

“managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk.”

Failure to comply with this duty can clearly be directly causative of mental illness arising from the fear and anxiety and over-all stressor of Covid-19.

Stressors – employers ignoring the obligations to test and provide health surveillance

Medical questions, analysis and surveillance may be required to protect against hazards at work and to provide a safe system of work. The absence of such surveillance may be of equal concern. It is odd that the term “*surveillance*”, a deservedly maligned term, is not necessarily a negative word in this particular context. Here, it is the absence of surveillance which may be the source of stress. The protection of health and safety at work is specifically supported with various statutory duties and powers providing for medical questioning, testing and assessments. This duty to monitor employees is confirmed in s.22 of the 2005 Act, which provides that:

“Every employer shall ensure that health surveillance appropriate to the risks to safety health and welfare that may be incurred at the place of work identified by a risk assessment ... is made available to his or her employees.”

“Health surveillance” is defined in s.2 of the 2005 Act as the periodic review for the purpose of protecting health and preventing occupation-related disease, so that any adverse variations in their health that may be related to working conditions are identified as early as possible. Thus, it is clear, at least insofar as the prevention of harm is concerned, that the employer is under a duty to assess the necessity of periodic surveillance of variations in the health of employees in the particular workplace of which it has charge.

Section 23 of the 2005 Act provides for mandatory medical assessments of a worker’s fitness to perform activities that may give rise to serious risk. It provides as follows:

“(1) An employer may require an employee of a class or classes, as may be prescribed, to undergo an assessment by a registered medical practitioner, nominated by the employer, of his or her fitness to perform work activities referred to in subsection (2) and the employee shall co-operate with such a medical assessment.

(2) An employer shall ensure that employees undergo assessment by a registered medical practitioner of their fitness to perform work activities, as may be prescribed, which, when performed, give rise to serious risks to the safety, health and welfare of persons at work.”

It remains to be seen how the courts will interpret, in the current context, the concepts of “*fitness to perform*” and “*co-operate*” in s.23(1) and of “*serious risk*” in s.23(2). The Covid-19 Crisis, in this regard, brings with both a heightened need, obvious justification and perhaps a pretext that might be abused. Psychological screening of applicants to establish sound judgment and emotional stability may not be acceptable (*Soroka v Dayton Hudson Corporation* 1 Cal Rep 2d 77 (1991)). Such tests should be based on accepted and sound methodology and specifically linked to transparent objectives and the requirements of a particular job.

That these duties are not confined to action by the employer is clear from the duty on the part of the employee to report disease to the employer. The requirement placed on employees to notify the employer of disease or mental impairment is specifically referenced in s.23(4) Safety Health and Welfare at Work Act 2005 (5) of the 2005 Act as follows:

“(4) If an employee referred to in subsection (1) becomes aware that he or she is suffering from any disease or physical or mental impairment which, should he or she perform a work activity referred to in subsection (2), would be likely to cause him or her to expose himself or herself or another person to danger or risk of danger, he or she shall immediately notify the employer concerned or a registered medical practitioner nominated by that employer who shall in turn notify the employer.

(5) Where an employer receives a notification under subsection (3) or (4), he or she shall immediately take appropriate action to comply with his or her general duties under section 8.”

No duty to report instance of disease to the HSA

Strangely, employers are not obliged to report an instance of Covid-19 occurring or arising in the workplace. Leaving aside the question of whether the virus was contracted at work and the worker merely showed symptoms at work, the question of the employer’s obligations to report the matter to the HSA as an “*accident*”, as it would with many other recurring hazards to workers, has attracted a significant degree of attention. The General Secretary of the Irish Congress of Trade Unions (ICTU) made a compelling case for an amendment to the legislation to create a reporting obligation, in a letter to the Minister in May of this year.

Stressors – employers failing to provided PPE

Whilst it is inevitably a case of stress to those who are not fully informed on the issues, it is a misconception that every employer must provide PPE to all workers to ensure they do not contract the virus. The Safety Health and Welfare at Work (General Application) Regulations 2007 re-transpose Directive 89/656/EC on the use of PPE aimed at protecting the safety and health of employees (see Chapter 3 of Part 2). As stated in the HSA guidance material (clearly written in a non-Covid-19 era):

“The fundamental principle enshrined in these provisions is that personal protective equipment (PPE) should only be used as a last resort.”

The safety and health of employees must be primarily safeguarded by measures to eliminate workplace risks at source, through technical or organisational means or by providing protection on a collective basis. Collective protective measures covering numbers of employees in a workplace must have priority over protective measures applying to individual employees. If these measures are not sufficient, PPE must be used to protect against the hazards that are unavoidable.

The four principles for eliminating or reducing work-related hazards are:

1. Eliminate the risk.
2. Isolate the risk.
3. Bar access to hazard zones.
4. Use PPE.

Fear and ignorance are doubtless mutually aggravating features of the Covid-19 crisis. Communication, dialogue and consultation on what is and is not required must surely be seen to be amongst the reasonably practicable steps contemplated in s.8(1) of the 2005 Act.

Duty of reasonable accommodation

Where an employer is informed of the illness of a worker and that worker is willing and capable of working with the assistance of appropriate measures, the employer will be required to consider taking appropriate steps under s.16(3) of the Employment Equality Acts to provide reasonable accommodation of the illness. The Supreme Court has recently confirmed in *Nano Nagle School v Daly*, that this provision may require job redesign and accommodation even of those workers who are not able to carry out many of the functions previously thought to be “essential”. To what extent, then, must an employer take appropriate steps to ensure a worker can access the workplace where the worker in question is suffering from mental health illness associated with fear of contracting Covid-19?

It should be recalled that the test for reasonable accommodation—which is now contained in the dicta of McMenamin J. in *Nano Nagle School v Daly* (McMenamin J. paras 89 et seq.)—is really an affirmation of an older test devised in a case about a worker who suffered from anorexia, bulimia and depression. In *Nano Nagle* the Supreme Court did not disagree with the correctness of the test in *Humphries v Westwood* ([2004] 15 E.L.R. 296). Niamh Humphries was a childcare assistant who developed psychiatric issues to the extent that the employer felt she was a danger to herself and the children under her care. She succeeded in her claim, due in no small part to the failure of her employer to obtain a psychiatrist’s opinion, or to conduct a risk assessment before reaching this rather extreme position.

The test we now have is really a refined version of the test enunciated in *Humphries*. The test, in essence, is that an employer must:

1. seek to understand the requirement for special treatment of facilities in the particular case, and
2. assess whether accommodation can be reasonably achieved.

One judge (O’Donnell J., in *Cahill v Minister for Education and Science* ([2017] IESC 29 at para 15) in a different context characterised the approach as asking (1) is it feasible? and (2) is it reasonable? The Supreme Court in *Nano Nagle* said it would be wise also to do as advised in *Westwood* and engage with the worker on these issues. The court said further on the question of how far an employer must go:

“There is no obligation to redefine the employment of an airline pilot as an airline

steward, or vice versa... Even within the scope of compliance, a situation may be reached where the degree of rearrangements necessary, whether by allocation of tasks, or otherwise, might be such as to be disproportionate. It is a matter of degree, capable of being determined objectively.”(per MacMenamin J. at para.106).

In *A Meat Factory Worker v A Meat Processor* (ADJ00001504) the complainant successfully argued that failure to make work available to a general operative, working in a meat factory, where she was suffering from a phobia of knives. She had suffered injury when a knife used for cutting meat was accidentally dropped from a height above where she was working. It sliced through her nose causing a significant injury and some disfigurement. A psychiatric condition was also diagnosed which included an inability to work in the presence of sharp knives. The difficulty was that it was a meat factory where knives were to be found everywhere. The respondent could not even guarantee that the complainant would not come into contact with knives if she was redeployed to cleaning. Due to the manner in which her request for accommodation was dealt with, however, she succeeded before the Workplace Relations Commission (WRC).

The Labour Court considered an appeal of a decision of the Equality Officer in *Sea and Shore Safety Services Ltd v Amanda Byrne* (ADE1322). This case concerned a failure to provide reasonable accommodation for a worker who suffered from a rat phobia. The complainant had written to her employer repeatedly stating that she was stressed and nervous about rodent infestations in her workplace. The director of the respondent company wrote to the complainant informing her that they had installed an ultrasonic rodent repellent in her office. The complainant alleged that this was entirely inadequate, and that “*a large rat walked past her as she stood outside the office*” at work after the respondent had informed the complainant that the problem had been dealt with. In response to this occurrence, the respondent laid ferret droppings as a means by which to deter the rats from entering the yard and buildings within which the company. The complainant drew the director’s attention to her phobia of rodents and stressed the seriousness of the problem for her. She suggested a preventive plan to accommodate her phobia, to enable her to return to work, including a managed pest control plan.

The complainant’s solicitor put the respondent company on notice that the complainant’s rights were being infringed by its failure to provide her with reasonable accommodation to undertake her work. The complainant was later made redundant, which the complainant alleged was a reaction to her decision to vindicate her right to reasonable accommodation under the Acts. The court found that the complainant’s rat phobia constituted a disability and came within the meaning of s.2(e) of the Acts. The court found that the respondent failed to provide the complainant with reasonable accommodation within the meaning of the Act.

In *A Commercial Assistant v A Travel Agency* (ADJ- 00017328) the complainant alleged before the WRC that he had been discriminated against at work because he had asthma and mental health issues, and that his mental health issues had been caused by his employer’s actions. He alleged that the respondent employer would not agree to a

reasonable accommodation for his illness, which involved him sitting in a room separate to his colleagues. While this arrangement was allowed for two weeks, it was not allowed on a permanent basis.

The adjudication officer relied upon the *Labour Court decision of A Government Department and a Worker* (EDA094), wherein it was stated that the definition of a disability “ought to be construed as widely and as liberally as possible consistent with fairness [...]. Nevertheless no statute can be construed so as to produce an absurd result or one that is repugnant to common sense”. The adjudication officer found that “[w]orkplace stress is not a disability and the complainant produced no medical evidence to show that he suffered from a mental illness”. In respect of his asthma, the respondent provided the assistance the complainant requested, in the form of a heater under his desk. The adjudication officer noted that no other assistance was requested by the complainant. She found that the complainant had failed to establish the facts that he was suffering from a disability.

The established principle that each case turns on its own facts comes to mind, and whether or not Covid-19 related mental health issues and reasonable accommodation will be decided in favour of employees will be based on the individual circumstances of the case. *A Commercial Assistant v A Travel Agency* and *Sea and Shore Safety Services Ltd v Amanda Byrne* (discussed above) dealt with whether or not the respondent employer adequately responded to the employee’s requests for reasonable accommodation. In a Covid-19 context, perhaps a failure of an employer to provide PPE or to provide adequate mental health services if requested by the employee, might be a factor the courts will consider in future claims.

Protocol for return to work

Many employees have been absent or largely absent from the workplace since the initial lock-down. For many it is a question of whether they will ever return to the workplace—a stressor in itself. For others, it is the question of whether it is safe to do so. This again is an illness-causing stressor.

The Department of Business, Enterprise and Innovation have published a guidance document on the issue of working safely within a covid-19 environment, entitled “*A Return to Work Safely Protocol*”. The protocol sets out advice to employers on protecting the “*mental health and wellbeing*” of employees suffering from anxiety or stress upon their return to work. This advice includes making staff aware of publically available support and advice, and awareness of any Employee Assistance Programmes or Occupational Health service provided by the employer.

Penalising Complainants and Treating Complaints as the Product of Mental Illness

It is not uncommon for employers to react inappropriately to persons who make complaints at work. Whilst it is unfortunately the case that employees may become serial complainants and be wearisome, taking up valuable time and resources, it is surprisingly common to find employers responding in the extreme by requiring the worker to be assessed for mental health issues (See *Delaney v Central Bank of Ireland* [2012] E.L.R. 117). This can lead

to dramatic prejudice to the worker concerned but it might also illustrate a tendency to negate or explain away complainers and their complaints on the basis that the complainant is mentally ill. This, of course, is a most unwise presentiment given that it is direct discrimination on the ground of disability to presume that complaints are unfounded because the complainant is mentally unwell.

The anxiety associated with conditions at work which expose workers to infection may also include anxieties associated with reporting the matter. The tensions between keeping a business going and protecting workers from infection are clear and obvious. Where it comes to the attention of a worker that an employer is not complying with protocols and is acting in a manner that places workers in danger, the worker may report the matter. The question of protected disclosures or being penalised for making a complaint then arises. Section 13(1)(h)(i) of the 2005 Act provides that:

“An employee shall, while at work ... report to his or her employer or to any other appropriate person, as soon as practicable ... any work being carried on, or likely to be carried on, in a manner which may endanger the safety, health or welfare at work of the employee or that of any other person ... of which he or she is aware.”

Section 27(3)(a) of the same Act provides that,

“An employer shall not penalise or threaten penalisation against an employee for ... acting in compliance with the relevant statutory provisions.”

A report or complaint by a worker of an employer’s failure to comply with a legal obligation (other than obligations specifically arising under a contract of and for service) or endangering the health or safety of any individual is a “relevant wrongdoing” under s.5(3)(b) or s.5(3)(d) of the Protected Disclosures Act 2014.

It is not difficult to see the relevance of these provisions to a workplace in which employees, perhaps desperate to remain at work and not at all anxious to make a complaint that may lead to closure, are exposed to hazards by reason of the manner in which work continues to be carried on in spite of the Covid-19 risk.

Conclusion

The Covid-19 virus poses significant challenges across the employment landscape. This article has addressed how employment law and, in particular employment equality law, may play a key role in addressing mental health issues that will inevitably arise for frontline workers faced with the Covid-19 coronavirus in their workplace. Employers not only have significant duties and responsibilities towards their employees arising directly from the various stressors of the Covid-19 crisis, they must not be dismissive of the cumulative corrosive and dangerous implications of stress itself. Employers must now consider whether conditions caused by high levels of workplace stress arising from Covid-19 can amount to a disability; whether or not employers have reasonably accommodated workers with such disabilities

and how employers should be wary of ignoring or even penalising associated complainants.

Ultimately, the mental health implications of the Covid-19 virus and the corresponding protections against discrimination and victimisation, are now very real factors for consideration in human resource management, industrial relations and adjudication of claims. While the law may have a chequered history in relation to protecting employees with mental illnesses, the current circumstances of the Covid-19 crisis may force a realisation, through the duties imposed by law, that it is time to more fully accept mental illness as an unfortunate workplace reality and to accept it as a disability.



P A R T T W O

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DECISION MAKING CAPACITY



4. The Assisted Decision-Making (Capacity) Act 2015: Considerations for Lawyers and the Legal Aid Board

- Áine Flynn, Director of the Decision Making Service

Background

On 30 December 2015, the President signed into law the Assisted Decision-Making (Capacity) Act ('the 2015 Act').

This Act fundamentally changes how we interact with and support adults who have difficulties with their decision-making capacity.

It was passed followed extensive consultation and has been broadly welcomed as reforming legislation which marks a shift away from paternalism to a rights-based approach to decision-making. Although fully enacted, the 2015 Act is largely not yet operational. Preparatory work is ongoing, and the Department of Children, Equality, Disability, Integration and Youth has committed to full commencement of the Act in mid-2022.

It has been estimated that at present over 200,000 adults could potentially benefit from the new statutory framework. This baseline figure includes adults with decision-making capacity difficulties due to intellectual disability, acquired brain injury, enduring mental illness and neurodegenerative disorders. It would be wrong, however, to presume that any one of this number will necessarily come within the ambit of the Act. That will depend on their individual circumstances. Equally, it would be a mistake to think that this legislation belongs to a particular cohort of people. Any of us could experience difficulties with our decision-making capacity in the future, due to illness or injury and the Act provides important tools for advance planning. Therefore, this really is an Act for everyone.

It is expected that the 2015 Act will have impacts across many sectors, including the legal profession. Lawyers may expect to be consulted in respect of the new provisions and to interact with 'decision supporters' appointed under decision support arrangements. In some cases a lawyer may be a party to a decision support arrangement, for example, as a decision -making representative appointed by the court from a panel to be established by the Decision Support Service (DSS).

Key reforming features of the 2015 Act

Abolition of wardship for adults

The Act abolishes the wards of court system under the Lunacy Regulation (Ireland) Act 1871.

Following commencement of the 2015 Act, there will be no further applications for

About the Author

Áine Flynn is Director of the Decision Support Service (DSS). The DSService is a new service established under the Assisted Decision-Making (Capacity) Act 2015. The DSS is part of the Mental Health Commission but will have a new and separate role.

Decision Support Service

The Decision Support Service will provide an essential service for people who face difficulties exercising their decision-making capacity. This may include people with an intellectual disability, acquired brain injury, mental health difficulty or dementia. This also includes all people who want to plan ahead for a time when they might lose their capacity.

www.decisionsupportservice.ie



wardship, and Part 6 of the Act provides that all current adult wards will have their cases reviewed by the wardship court and will exit wardship within three years. This review process will be managed by the Office of Wards of Court. Where appropriate, former wards may transition to a support arrangement under the 2015 Act. Any adult ward or a person on their behalf may apply to the wardship court immediately on commencement, rather than waiting for their review to be reached during the three-year period. It is understood that there are approximately 2150 adult wards at present.

Functional assessment of capacity

Under the 2015 Act, capacity is defined in a time-specific and issue-specific way.

Incapacity is not a fixed 'person of unsound mind' status as in wardship and is not linked to a medical diagnosis. The intention of the 2015 Act was to adopt a disability-neutral approach, so that, a person lacks capacity in respect of particular decision if he or she is unable to:

- understand the information relevant to the decision
- retain that information long enough to make a voluntary choice
- use or weigh up the information and
- communicate his or her decision, with whatever assistance is necessary.

This functional assessment of capacity is already the standard at common law, having been articulated by the *High Court in Fitzpatrick v. K* in 2008. The de-medicalised approach means that, with limited exceptions, the Act is not exhaustive or prescriptive about who

may assess capacity. A lawyer may be the person best placed to assess whether a client has capacity in respect of a particular legal matter, as it is the lawyer who is in possession of the relevant information that needs to be understood.

Guiding principles

Section 8 of the Act sets out a number of important guiding principles to protect the rights of the 'relevant person', who is defined as 'a person whose capacity is in question or may shortly be in question in respect of one or more than matter'.

These guiding principles are broadly aligned to the United Nations Convention on the Rights of Persons with Disabilities and include the following:

- a relevant person is presumed to have capacity unless the contrary is shown;
- a relevant person shall not be considered to lack capacity to make a decision, unless all practicable steps have been taken to help him or her to do so;
- a relevant person is not considered to lack capacity on the basis of having made or being likely to make an unwise decision;
- minimal restriction of rights and freedom of action;
- respect for dignity, bodily integrity, privacy, autonomy and control over one's financial affairs and property;
- give effect as far as practicable to the relevant person's past and present will and preferences;
- act in good faith and for the benefit of the relevant person.

There is no mention of acting in the relevant person's 'best interests' which is the familiar standard in other legislation and policy.

Three-tier framework of supports

'Decisions' under the Act are broadly defined and divided into two categories: personal welfare, and property and affairs, which includes the conduct of court proceedings. All such decisions are capable of being supported within the new graduated framework.

At the lowest, least formal, level on the framework, the relevant person may appoint a decision-making assistant to help obtain and interpret information and communicate the relevant person's decision. The relevant person is still the decision-maker.

At the middle level, a relevant person may register a co-decision-making agreement, under which specified decisions are made jointly with an appointed, trusted person. Co-decision-making agreements are subject to the supervision of the Decision Support Service.

At the upper level, under Part 5 of the Act, any person who has a bona fide interest in the welfare of the relevant person may apply to the Circuit Court for a declaration in relation to the person's capacity to decide about a particular matter or matters. The applicant will often be a family member or carer. If the court finds that the person does not have capacity,

the court may either make the decision or may appoint a decision-making-representative to make the specified decision(s) on behalf of the person, under the supervision of the Decision Support Service. A declaration of incapacity by the Circuit Court is subject to periodic review and may be re-entered at any time by the relevant person.

At present the Courts Service is making practical preparations for the Circuit Court to manage applications and Court Rules are also awaited.

Advance Planning

The 2015 Act provides two tools for advance planning to allow a person to plan ahead in case he or she loses capacity in the future. These are the statutory advance healthcare directive and a new form of enduring power of attorney (EPA).

An existing EPA under the Powers of Attorney Act 1996 will remain valid. After commencement, any new EPAs will be executed and registered under the 2015 Act. Attorneys under the 2015 Act will be subject to a new form of supervision by the DSS.

Establishment of the Decision Support Service

The 2015 Act establishes the office of the Decision Support Service (DSS).

The following are included among the functions of the Director:

- to promote public awareness of the 2015 Act
- to provide information and guidance
- to establish and maintain registers of decision support arrangements, which will be searchable by appropriately authorised person
- to supervise decision support arrangements
- to investigate complaints about these arrangements
- to appoint panels; this will include a panel of DMRs who may be appointed by the court in the absence of a suitable family member or friend, and a panel of 'court friends' who may be appointed to a relevant person who has no legal representation
- to furnish reports to the Ministers and make recommendations for change

The Director may also publish codes of practice. These will include a general code to provide guidance on supporting decision -making and assessing capacity, and a specific code for legal practitioners. The National Disability Authority was commissioned by the Department of Justice to draft these codes and was assisted by the Law Society and Bar Council who contributed to an expert writing group. All codes of practice will be subject to a consultation process in the coming months before final publication.

Provision for Legal Aid

Section 52 of the 2015 Act amends the Civil Legal Aid Act 1995. A party to a Part 5 application shall now qualify for legal advice. In relation to legal aid and Part 5 applications, criteria concerning the likelihood of success, and the cost to the Legal Aid Board/ benefit to

the applicant shall not apply. Where the applicant for legal aid is the relevant person, financial eligibility criteria shall not apply but costs may subsequently be recouped where appropriate.

A Bill to amend the 2015 Act is being progressed. Amendments will include significant revision of Part 6 to improve the position of the current wards whose cases are to be reviewed, These wards will have access to the court, to Legal Aid and to ongoing review.

In our engagement with stakeholders, the DSS is frequently asked about ease of access to the court and likely costs. This is of particular concern to family carers. We understand that detail around the mode of delivery of legal advice and legal aid is being decided by the Legal Aid Board and look forward to further information.

The DSS acknowledges the challenges presented by Assisted Decision-Making (Capacity) Act 2015 and the amenable attitude and interest shown by the Legal Aid Board. We look forward to continuing dialogue as we seek to ensure that this important legislation which promises much can deliver effectively in practice.





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5. Recent Developments in Practice and Procedure in Wardship proceedings

- Ciara Johnson, BL

The President of the High Court has jurisdiction in respect of wardship proceedings. Accordingly, the manner in which the wardship list operates will be guided by the rules and procedures put in place by the current President. Since appointment to the role in June 2020, President Irvine, has put in place number of practice directions which must be complied with in wardship proceedings. These directions set strict timelines for the filing of various documents and also prescribe the matters which must be addressed in any supporting medical reports/affidavits.

An additional development in the area of wardship is in respect of the issue of costs. Recent case law provides guidance on the factors the court will consider in any such applications.

Practice Direction HC 95

Practice Direction HC95 provides for the information which must be included in the affidavit and/or medical report of any registered medical practitioner whose evidence is to be relied upon to support a petition presented under the Lunacy Regulation (Ireland) Act 1871.

Of particular note, HC95 provides that the examination of any respondent to a petition should be carried out within *three months* of the presentation of the petition. Additionally, any medical affidavit, must be sworn within *one month* of the date on which the medical examination was carried out. This provides a strict timeframe within which the papers must be completed and filed. If these timelines are not met, the Office of the Wards of Court will return the papers and it may be necessary to obtain updated medical reports and affidavits, which can cause not only delays having matters go before the Court, but also can incur additional costs.

Medical reports in support of a petition must specifically include the following information:

1. The date, place, duration and circumstances in which the medical examination was carried out.
2. The nature and duration of any prior relationship between the medical practitioner and the respondent.
3. The nature of the examination carried out and details of the test and/or capacity tools deployed for the purpose of concluding whether the respondent is or is not of unsound mind and incapable of managing their affairs.
4. Whether in the opinion of the registered medical practitioner, the respondent is or is not of unsound mind and incapable of managing their affairs.
5. Where the medical practitioner is of the opinion that the respondent is of unsound mind and incapable of managing their affairs i.e. lacks capacity, he/she should state:

- i. The nature of the respondent's illness/condition;
- ii. The likely date of onset of that illness/condition;
- iii. The symptoms pertaining to that illness/condition;
- iv. The evidence relied upon in making their diagnosis; and
- v. Whether the illness/condition is permanent or likely to improve.

Where a medical report contains all of the relevant information outlined and required by HC95, the verifying affidavit sworn by the medical practitioner need only affirm the content of the medical report. This means there is no need for the affidavit to go through in detail the matters contained within the report.

Practice Direction HC 102

As of January 2021, Practice Direction HC102 requires that Form WOC1 accompany all High Court Wardship petitions and application. Form WOC1 is available to download on the Courts.ie website. The form essentially requires the applicant to outline the nature of the application which they are bringing, give a brief synopsis of the key points arising in the application and an outline of the relevant dates, parties and documents which are being relied upon. The form is to be completed electronically in Microsoft Word and filed in advance of the hearing.

Each subsequent time a matter comes back before the court, Form WOC1 must be updated and clearly marked with the date of the update.

HC102 also provides specific directions in respect of the filing of papers in wardship applications. A booklet for hearing must be lodged with the Court *two clear days* prior to date allocated for hearing. The booklet must be lodged electronically **and** in paper form.

HC102 also specifies in detail the order in which the booklet for hearing should be presented:

1. Completed Form WOC1
2. The document detailing the application i.e. the ex parte docket/Notice of Motion/Petition, as appropriate
3. The grounding affidavit and exhibits behind.
4. Any proposed draft Order.
5. Other relevant affidavits.
6. Affidavit of service where the matter is listed for inquiry.
7. The most recent Order made in the proceedings and any other relevant orders as required by Form WOC1.

Recent Case Law in respect of the issue of costs

The Courts have provided a number of recent written decisions in respect of the issue of costs in Wardship proceedings, of particular note, is the case of *In the matter of T.H., a Ward of Court*.

In the matter of T.H., a Ward of Court [2020] IEHC 487

This case concerned Mr H, who was 83 years of age at the time the judgment was given. Mr H had been admitted to hospital in October 2018 and had a diagnosis of dementia. When Mr H was medically fit for discharge, the staff at the hospital were concerned that he would not be able to look after himself, as a result of his dementia and they had further concerns that his support system within the community was no longer sufficient to meet his needs.

Solicitors for the HSE wrote to the Office of the Wards of Court outlining these concerns and asked that the President of the High Court consider requesting a Medical Visitor to attend on Mr H to commence 12th section proceedings on foot of the information which had been furnished. The President directed for Dr Justin Brophy to act as Medical Visitor. Dr Brophy's assessment of Mr H concluded that he was of unsound mind and incapable of managing his affairs.

Subsequently, the President directed that the matter proceed by way of Petition for an inquiry as to the soundness or unsoundness of mind of Mr H and that the HSE would have carriage of same and would serve the petition on Mr H. After the Originating Notice document had been served on Mr H, he signed an objection in the presence of Ms Mary Ward, solicitor. Ms Ward requested that two doctors to assess Mr H's capacity. Both reports agreed that Mr H did not have capacity to make decisions, lacked insight into his care needs and was a person of unsound mind, unable to manage his person or affairs due to vascular dementia. These reports were filed in court and it was confirmed at the hearing that there was no evidence to contest the proceedings. The President admitted Mr H to wardship and the General Solicitor was appointed as Committee.

Mr H's legal team sought costs against the HSE on the basis that the Constitution and the ECHR require that the intended ward's voice be heard and that therefore the HSE should pay the costs of his representation. The HSE resisted this application.

Judge Hyland held that "*[t]he question of the entitlement to be represented and the question as to who pays for that representation are two quite different issues*".¹ She agreed fully that it was appropriate that Mr H be represented and that his solicitors be entitled to an order for costs when measured, however, she noted that the fact that the HSE present the petition under s. 12 of the Lunacy Regulation (Ireland) Act 1871, does not mean that it should inevitably pay Mr H's legal costs.

Judge Hyland held that the costs in this instances should be borne by the estate of the ward and she placed particular emphasis on the following factors:

- a. the court has explicit jurisdiction to make orders directing that costs be paid out of the estate of a ward of court;
- b. the costs in question were incurred representing Mr H's interests and on his instruction;

¹ *In the matter of T.H., a Ward of Court [2020] IEHC 487, para 2*

- c. the HSE cannot be viewed as an “*unsuccessful*” party within the meaning of s. 169 of the Legal Services Regulation Act 2015 (the “LSRA 2015”) for the purposes of costs;
- d. the solicitors for Mr H did not seek to agree with the HSE in advance that the costs of his representation would be borne by the HSE;
- e. the estate of Mr H in this case has sufficient means to discharge the legal costs when measured;
- f. the right of a ward to have his or her voice heard can be vindicated just as effectively by an intended ward bearing the costs of legal representation from their own funds, where appropriate, as by a third party bearing those costs.²

There are a number of matters addressed in this judgment which are worth drawing particular attention to:

Failure to agree costs in advance with the HSE

Judge Hyland made specific reference to an argument put forward by Counsel for the ward in their application, where it had been contended that if respondents to wardship were required to fund their own legal costs, it would have a ‘chilling effect’ on the provision of legal representation to respondents to wardship inquiries as solicitors would not be able to ascertain in advance whether a respondent had sufficient means to fund representation. She noted that often, it would be possible to identify a respondent’s assets from the Petition. Judge Hyland stated:

“[m]oreover, it could not be the case that even if the HSE were, in a given case, the appropriate party against whom a costs order would be made, that a solicitor could assume that a costs order for all and any legal advice provided would inevitably be borne by the HSE, irrespective of the circumstance in which that advice was provided.”³

In this case, the solicitors for the Ward has not contacted the HSE to inform them that a notice of objection was being submitted or to identify the steps they intended to make on the ward’s behalf and seek any form of agreement in respect of costs being incurred. Judge Hyland commented that *“[h]ad the HSE been deemed to be the appropriate party in principle to pay Mr H’s costs, that lack of consultation might have mitigated against some or all of the costs being recovered from the HSE”⁴*. This is of importance, as it clearly indicates that in any circumstances where costs may ultimately be sought from the HSE, efforts should be made to discuss and agree same prior to initiating any action. The Judge has clearly indicated that a failure to do so could result in costs not being recovered in circumstances where the otherwise may have been.

Sections 168 and 169 of Legal Services Regulation Act 2015 (“LSRA”)/Order 99

Judge Hyland explores in detail the legal framework applicable to a decision on costs in the context of wardship. All parties to the application expressed reservations about the

² *In the matter of T.H., a Ward of Court* [2020] IEHC 487, para 3

³ *ibid* para 47

⁴ *ibid*

application of s. 168/169 of the LSRA and Order 99 in this case. Judge Hyland noted that the provisions should be read having “*regard to the nature*” of the special and unusual jurisdiction of the President of the High Court in respect of wardship. She noted that there was a wide discretion provided in the costs rules and that the context of a case can be taken into account. Judge Hyland commented that a court can always make costs orders on a basis other than the success of a party, but found that in her opinion, “*the concept of an entirely or partially successful party may still be helpful as part of an overall analysis of where the costs burden should lie*”⁵ in some petitions for inquiry.

In In The Matter of The Appropriate Care Of A Ward of Court [2020] IEHC 20, a dispute arose between the Committee and the HSE in respect of the care of ward. In circumstances where the Committee were partially successful in its application, Judge McDonald, applied Order 99 and awarded the committee a percentage of their costs as against the HSE.

This is of note, as it differentiates the approach in the manner in which the costs rules are applied in an inquiry versus in other applications relating to a ward’s care. While the costs rules may form part of the overall analysis of any costs argument in an inquiry, it is more likely that the default rule will be applied in other applications.

In the author’s experience, the Court has noted the necessity of applying the default rule, as a matter of justice, that costs should “*follow the event*”, in applications surrounding a ward’s care, placement, access etc. This is unless the Court is satisfied that there were specific reasons on the facts of the case which required the rule to be departed from in the interests of justice.

Conclusion

The above provides a brief synopsis of some recent developments in practice and procedure in wardship cases. It is particularly important that practitioners are familiar with the applicable practice directions as failures to adhere to same may result in papers being rejected by the Office, delays and accrual of further costs. Similarly, it is important to be familiar with the factors outlined in *In the matter of T.H., a Ward of Court*, in particular the need to seek to agree costs with the HSE in advance in any circumstances where a costs application may be pursued.

5 *In the matter of T.H., a Ward of Court* [2020] IEHC 487, para 42



P A R T T H R E E



DISABILITY AND ACCESS TO JUSTICE



An Bord Um
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6. NDA Independent Advice Paper on the use of intermediaries in the Irish justice system - June 2020

- Susan Kennefick, National Disability Authority

Executive Summary

This paper sets out the National Disability Authority's advice towards implementing a model of supports for persons with disabilities who have communication difficulties, building on research and practice in other jurisdictions, and also further to discussion with a wide range of stakeholders in the Irish justice system.

The proposed approach would enable the provision of accommodation to people who may have communication difficulties affecting their ability to give evidence and to communicate with officials at different stages of the Irish justice system. Such barriers need to be addressed to enable Ireland to comply with duties in the UN Convention on the Rights of Persons with Disabilities (UNCRPD) to ensure persons with disabilities can access the justice system. The NDA advises that this accommodation could be best delivered through the use of intermediaries, where the scope and application of same would be set out in an agreed programme and procedures.

The primary goal of the proposed approach is to enable the justice system to secure the best evidence possible from people who may have communication difficulties through the use of registered intermediaries, while also affording them the right to do so, and to be treated as equal citizens. If victims of crime are not able to be interviewed, or give a full and accurate account of events, it can make it more difficult to investigate crimes and manage cases in court. If an individual accused of a crime is not supported to give their version of events, a miscarriage of justice may take place. In some instances, criminal behaviour may go unchallenged or the rights of the accused may not be fully upheld – neither scenario is appropriate in a modern justice system.

The proposed policy approach has regard to existing legislation, policy and practice, and the gaps that exist in those for all people with communication difficulties, be they victims of crime, witnesses or accused persons. It also has regard to evidence of intermediary practice, benefits of same and the further duties on the State arising from the UNCRPD which it has signed and ratified. The Convention reinforces the provisions of the International Covenant on Civil & Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).

The NDA advises that, based on feedback at a round-table hosted by the NDA in 2019, the proposed policy approach is likely to be widely supported by the various stakeholders in the justice system who would encounter such a service. At that event, representatives from An Garda Síochána, the Law Society, the Bar Council, the Courts Service, the judiciary, the Office of the Director of Public Prosecutions and the University of Limerick agreed that

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NDA

The National Disability Authority (NDA) is an independent statutory body with a duty to provide information and evidence-informed advice to Government and officials in the public sector on disability matters, and to promote Universal Design.



the use of intermediaries is critical to ensuring equal access to justice for persons with disabilities and/or communication difficulties.

A registered intermediary is a professional with specialist skills in communication, coming from backgrounds such as speech and language therapy and social work. In other jurisdictions, their role is to facilitate communication during the police investigation and at trial between a person with significant communication deficits (which may be on account of a disability, age or other factor) and others in the justice system, and that is the role the NDA advises they could hold in this jurisdiction. The intermediaries would be recruited through a public campaign, and placed on a central register for ease of access.

In order to promote and regulate the use of intermediaries, and based on evidence from Northern Ireland and other jurisdictions, the NDA advises that a Registered Intermediary Scheme be piloted in the Irish criminal justice system in the first instance, before being implemented on a national scale. This method would allow for the identification of difficulties and solutions, and also refinements and improvements to be identified to support a wider rollout. The pilot project could be implemented, monitored and evaluated by a steering group, on which representatives of key stakeholders could sit.

The NDA advises that, based on evidence from other jurisdictions, the Department of Justice and Equality would be the most appropriate body to have ownership and oversight of both the pilot project and the Registered Intermediaries scheme. The Department of Justice and Equality is the department with responsibility for the implementation of the relevant pieces of legislation, as well as responsibility for the civil and criminal justice systems. It is also tasked with ensuring the effective implementation of provisions in the UNCRPD which fall within its remit, including Article 13. Finally, it is the department with the strongest

connections to many of the stakeholders who will be tasked with implementing the policy, such as An Garda Síochána, the Courts Service and the Office of the Director of Public Prosecutors, and is therefore in a position to bring all stakeholders together to achieve a coordinated approach to putting such a scheme in place.

To ensure effectiveness and parity in respect of accessing justice, three minor legislative amendments would be required to the Criminal Evidence Act 1992 to cover the various elements of the national scheme. However, the NDA advises that the pilot be established and rolled out as an administrative scheme while the legislative amendments are being progressed.

It is also advised to amend S.I. No. 199/1987- Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, Section 22(1) in order to delete inappropriate and outdated language. However, it is important to note that the language used does not preclude the use of an intermediary.

To summarise, the NDA advises that:

- A regulated approach to providing accommodation to persons with communication difficulties when giving evidence, that is in line with both Ireland's international obligations and examples of good practice in other jurisdictions, is needed.
- This accommodation should come in the form of a Registered Intermediaries Scheme
- This Scheme should be available to witnesses, victims and accused persons who may be in need of support, due to their communication difficulties, to give better evidence, at all stages of the criminal justice system, including in Garda stations and in court settings.
- A pilot scheme would enable the development and testing of an approach appropriate to the Irish justice system and we advise that the design and implementation of the pilot would be led by the Department of Justice and Equality. The pilot will include the delivery of training for intermediaries recruited to take part.
- A steering group should be established to oversee the pilot project and consider the learning of same for a national scheme.
- Minor legislative amendments are necessary to allow a national scheme to effectively operate and to come into line with appropriate language and Ireland's obligations. However, a pilot may be progressed on an administrative scheme basis prior to those amendments.

This paper sets out the relevant considerations for both a pilot project and a national Registered Intermediaries Scheme. While a pilot should be carried out in the first instance, in order to tease out issues that may arise, the NDA advises that it should be seen as just one part of the longer journey towards a national scheme.

Introduction

The National Disability Authority (NDA) is an independent statutory body with a duty to provide information and evidence-informed advice to Government and officials in the public sector on disability matters, and to promote Universal Design. The NDA has a specific duty to advise the Minister for Justice and Equality and this paper is particularly relevant to criminal justice matters and supports for citizen engagement with same.

This paper aims to provide advice on means of establishing necessary supports to address the barriers faced by persons with disabilities who have communications difficulties where they are engaging with the justice system, beyond the reasonable accommodations that may already be deployed. These supports should be available at all stages of the justice system, from providing a statement to An Garda Síochána to meeting with solicitors to giving evidence in court.

While certain special measures are provided for in legislation, and exist in practice, there is no standardised approach for such a support in the Irish justice system, and as a result of this, persons with disabilities (who are already likely to be overrepresented in the population taken into custody each year¹) will continue to encounter barriers in respect of communicating statements, evidence and responses to questions.

In particular, the NDA advises the need for a specific accommodation programme where communication is supported by qualified persons i.e. Registered Intermediaries. A registered intermediary is a professional with specialist skills in communication, typically coming from backgrounds such as speech and language therapy and social work. Where operated in other jurisdictions, they are required to pass accredited training, are bound by a Code of Practice and Code of Ethics and are subject to a complaints procedure². Their function is to facilitate communication during the police investigation and at trial between a person with significant communication deficits (which can be on account of a disability, age or other factor) and others in the justice system. A registered intermediary is different to an advocate, whose role is to work closely with an individual to support them to voice their will and preferences, and to intervene where an individual is not able to. The role of a registered intermediary is not to advocate or intervene on behalf of the individual, but to ensure communication methods being used are appropriate to the person's needs.

The NDA advises that the programme should allow for an intermediary's involvement from as early as the Garda Station stage of an investigation in order to fully test and demonstrate the value and potential of the scheme, and in order to ensure that appropriate access to justice is made available from the very first stage. If a person with communication difficulties is accused of a crime and is not accommodated at the Garda Station stage, he/she may commit to a position or give an inaccurate account of events, without fully understanding the consequences of doing so, and this will affect the subsequent justice process.

1 National Disability Authority (2019) Submission to the Garda Inspectorate on Custody Arrangements.

2 Working definition taken from the Northern Ireland Registered Intermediaries Schemes Pilot Project Post-Project Review (January 2015), page 5, paragraph 2.

The NDA advises that, under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and other international obligations in respect of equality, the use of intermediaries should be accessible to victims, witnesses and persons accused of a crime. In other jurisdictions, this support is only offered to the two former cohorts. However, the NDA does not believe that this satisfies a State Party's obligations under the Convention, which itself does not distinguish between victims and witnesses with disabilities, and accused persons with disabilities.

Evidence from other jurisdictions highlight many positives achieved through the standardisation of similar schemes. In Northern Ireland, there was clear evidence that the Registered Intermediaries Scheme gave vulnerable people a voice, protection and the access to justice to which they are entitled. In England and Wales, six 'pathfinder projects' implementing the special measure of an intermediary were carried out in 2004/05. Key findings from these projects stated that "almost all those who encountered the work of intermediaries in pathfinder cases expressed a positive opinion of their experience and provided specific examples of their contributions. There were a number of reported emerging benefits, including the potential to: assist in bringing offenders to justice; increase access to justice; contribute to cost savings; assist in identifying witness needs; and inform appropriate interviewing and questioning techniques."³

In Ireland, while a small number of cases have seen the ad hoc use of an intermediary there is a need to explore how a standardised support programme could operate on a national basis. A national programme of Registered Intermediaries would provide a means for a person with communication difficulties to receive accommodation to allow him or her to interact effectively with the justice system at every stage relevant, in turn affording that person an equal footing before the law. Such a programme would be in line with national legislation already enacted, as well as Ireland's obligations under the UNCRPD. In this regard it is noted that Ireland is due to deliver its first report to the UN Committee in relation to its progress in implementing the Convention in 2020. Article 13 is particularly relevant, as set out below, and as civil and political right requires more immediate implementation.

Article 13 (Access to Justice) of the UNCRPD requires the provisions of procedural accommodations and states that,

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities,

3 Plotnikoff, Joyce and Woolfson, Richard (2007) The 'Go-Between': evaluation of intermediary pathfinder projects <http://embed.policyreview.tv/media/documents/11.%20gillian%20harrison%20summary.pdf>

States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

The Committee on the Rights of Persons with Disabilities frequently comments on the “lack of procedural and age-appropriate accommodations” in judicial proceedings for persons with disabilities when examining States Parties in its Concluding Observations⁴. While the Committee has not explicitly mentioned the use of intermediaries, it has recommended interpretation and different forms of communication repeatedly.

A Registered Intermediaries scheme would be a key enabler in meeting such duties, noting that Article 13 is considered an article that warrants immediate focus. This is because equality before the law is also a civil and political right under the International Covenant on Civil & Political Rights (ICCPR). Article 14 of this Covenant (which Ireland ratified in 1989) and which also extends to persons with disabilities states that

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

Article 14.3 of ICCPR goes on to say that

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him [...] and (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

Article 14 of the ICCPR echoes Article 6 of the European Convention on Human Rights, which Ireland ratified in 1953 and which states that everyone has the right to “have the free assistance of an interpreter if he cannot understand or speak the language used in court”. The NDA advises that a person with communication difficulties may not have the capacity to understand the language used in court, and should therefore be accommodated by way of ‘interpretation’ in order to have access to justice. This accommodation can be delivered through an intermediary.

Ireland’s legislation and current practice

The NDA advises that legislation that could be used to deliver this aspect of Article 13 of the UNCRPD is currently in place. Relevant provisions can be found in Section 14 of the Criminal Evidence Act 1992, which allows for evidence to be given via an intermediary in a court context, and in Section 22 of S.I. No. 199/1987- Criminal Justice Act, 1984 (Treatment of

⁴ Concluding Observations on the initial report of Norway, 7 May 2019; Concluding Observations on the combined second and third periodic reports of Spain, 13 May 2019; Concluding Observations on the initial report of Luxembourg, 10 October 2017; Concluding Observations on the initial report of Canada, 8 May 2017.

Persons in Custody in Garda Síochána Stations) Regulations, 1987, Section 22(1), which allows for the presence of a ‘responsible adult’ during questioning in a Garda Station. At time of writing, however, there is no national standardised approach to invoking these provisions.

The EU Victims of Crime Directive, transposed into Irish law by the Criminal Justice (Victims of Crime) Act 2017, recognises the right of victims of crime to understand and to be understood in the context of criminal proceedings. The 2017 Act contains provision for special measures, including intermediaries, to achieve recognition of this right for victims of crime in Ireland. However, there has been no significant progress to date in implementing this provision. There is perception among stakeholders that this legislation lacks details regarding how, when and for what purpose intermediaries should be used.⁵

Criminal Evidence Act 1992

The Criminal Evidence Act 1992 provides for the following important support measures for witnesses for certain offences under Part III of the Act, including:

- Use of live video link for vulnerable witnesses
- Use of intermediaries
- Recorded testimony

In addition, victims have available to them the optional use of court accompaniment through victim support services, a Garda liaison officer, and use of the witness suite within the Criminal Courts of Justice. None of these supports are aimed specifically at individuals with communication difficulties.

Victim Supports

A Garda Liaison Officer, as outlined in the Victim’s Charter, informs a victim about significant developments in the relevant investigation and gives them information on appropriate support services.⁶

Victim Support at Court (V-Sac), a volunteer service which meets the needs of victims of crime and/or their families or witnesses by ensuring that they are assisted and supported when attending for pre-trial visits and court proceedings.⁷ The service currently operates in the Criminal Courts of Justice, Tallaght and Blanchardstown District Courts and the Eastern and South Eastern Circuit Courts, with plans to expand into the Western and Midland Circuit Courts in the next few years. In 2019, V-Sac provided free support to 1,482 victims of crime, prosecution witnesses and their family/friends. Countrywide support was provided for 629 trials/hearings, including pre-trial visits, sentencing hearings, retrials and appeals. V-Sac volunteers may give a tour of the court, inform victims and witnesses about how jury selection works and explain to them what they are likely to face once when called to give evidence.

5 COSC, Discussion Paper on Intermediaries, 2017 (not circulated).

6 Victims of Crime Office, Department of Justice and Equality (2010) Victims Charter and Guide to the Criminal Justice System, page 17. <https://www.garda.ie/en/victim-services/garda-victim-service/victim-charter-2020.pdf>

7 <https://www.vsac.ie/>

V-Sac receives referrals from An Garda Síochána, the Director of Public Prosecutions and other support services. It is funded by an annual grant received from the Commission for the Support of Victims of Crime within the Department of Justice and Equality, donations and ad-hoc Dormant Account funding. In 2019, it operated on a budget of €159,261. It has four paid employees (two full-time and two part-time) and the directors, secretary and 45 volunteers serve in a voluntary capacity.

Victim waiting rooms are available in almost all refurbished courthouses and also in a number of other courthouses. A dedicated victim suite of four rooms and a reception area is available within the Criminal Courts of Justice in Dublin, and in courthouses in several other counties. Arrangements are in place to reserve consultation rooms for victims in other venues, if required. Rooms will be specially set aside for victims and vulnerable witnesses in all future projects to refurbish buildings.⁸

While the NDA welcomes the progression of such measures for victims and witnesses, we advise that there is still barriers for individuals with disabilities and/or communication difficulties in the absence of dedicated supports to support them to communicate evidence and to respond to questions. Any measure that is extended to these individuals appears to be done so on an ad-hoc basis, in very few cases, and with no standardised approach. In the Courts Service Annual Report 2018, it was announced that the Service had commenced the collection of statistical information in compliance with section 30 of the Criminal Justice (Victims of Crime) Act 2017. In 2018, of the special measures available to victims and witnesses, evidence was given via video link on 20 occasions, however on no occasion were intermediaries used or evidence given behind a screen, despite the theoretical availability of these measures.⁹

The NDA is also concerned that none of these measures are made available to accused persons with extra support needs, which does not satisfy the principle of equality discussed earlier in this paper.

Intermediaries

In respect of intermediaries, the Criminal Evidence Act 1992 states that

1. “Where-
 - a) A person is accused of an offence to which this Part applies, and
 - (b) A person under 17 years of age is giving, or is to give, evidence through a live television link,

8 Victims of Crime Office, Department of Justice and Equality (2010) Victims Charter and Guide to the Criminal Justice System, page 31. <https://www.garda.ie/en/victim-services/garda-victim-service/victim-charter-2020.pdf>

9 Courts Service (2018) Annual Report 2018, page 92 [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/C2B4BFC1AFEC7B098025842D00473F25/\\$FILE/Courts%20Service%20Annual%20Report%202018.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/C2B4BFC1AFEC7B098025842D00473F25/$FILE/Courts%20Service%20Annual%20Report%202018.pdf)

The court may, on the application of the prosecution of the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

2. Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.
3. An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.”

As outlined above, the legislative provision does not make clear who an intermediary could be, and support of this kind currently operates in an ad hoc manner, depending on the support networks (including voluntary organisations) available to the individual. No Rules of Court have been written to address these issues. A trial judge can grant an application for an intermediary if he or she believes that the interests of justice require that any questions to be put to the witness be put through an intermediary. Questions put to a witness in this manner shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his or her age and mental condition the meaning of the questions being asked.

The Criminal Justice (Victims of Crime) Act 2017 was enacted on 5 November 2017. The Act transposes Directive 2012/29/EU into Irish law, which establishes minimum standards on the rights, support and protection of victims of crime and ensures that persons who have fallen victim to crime are recognised and treated with respect. The 2017 Act reiterates the availability of special measures, including the use of an intermediary. The 2017 Act does not supplant the 1992 Act.

As of 2018, intermediaries had been used in two Irish court cases, both rape cases. In one case, the complainant had Downs Syndrome¹⁰, and in the other case, it was decided that the child complainant would be unable to give evidence without the help of an intermediary¹¹. In the former case, a Registered Intermediary from Northern Ireland was used, and in the latter an intermediary from England was used (as the child gave evidence via video link from the Old Bailey in London). One participant at the NDA’s Roundtable in April 2019 commented that a significant difference could be seen between the latter case, and cases where a Guardian ad Litem had been used on an ad hoc basis. He noted that the case involving the Registered Intermediary ran more smoothly and a better process for involving the individuals in question in giving evidence was achieved. In both cases, there was a

10 DPP vs FE [2015] unreported, (Hunt J) (Bill No.84/2013 Central Criminal Court) trial in Nov-Dec 2015 Downs Syndrome, adult female complainant.

11 DPP vs NR & RN [2016] IECCC 2 (Central Criminal Court) trial in April-May 2016, 12 year child allegations against parents; intermediary nominated and used throughout trial on basis of psychological trauma to child of giving evidence against both parents of depraved abuse.

form of Ground Rules Hearing beforehand¹². In the absence of dedicated Rules of Court, the Court relied on its inherent jurisdiction to conduct these preliminary hearings in each case.¹³

The NDA notes that the legislation described above provides for the introduction and use of intermediaries solely for victims of crime. We advise, however, that consideration needs to be given to how intermediaries can also ensure that persons accused of a crime have equal access to justice, in spite of any communication difficulties or disabilities that might apply, as this is in keeping with the principles underpinning the UN Convention on the Rights of Persons with Disabilities, and other international contained in the ICCPR and ECHR, that all persons have the right to a fair hearing. The remainder of this paper is framed in the context of considerations for accessing the justice system at any stage, and from either an accused or victim standpoint.

Statutory Instrument No. 119/1987- Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987

The NDA notes that experience in other jurisdictions, as well as input at our roundtable event, suggests that maximum benefit could be derived from having intermediaries involved from the very earliest stages of a criminal justice matter, and therefore consideration to how intermediaries could be used in Garda Stations is warranted.

In respect of the use of intermediaries in Garda Síochána stations, the language of S.I. No. 119/1987, while outdated and certainly not in line with the language nor spirit of the UNCPRD, does not preclude the introduction of intermediaries at the Garda questioning stage.

The S.I. states that, in a section entitled ‘Section 22: Mentally handicapped persons’:

“The provisions of these Regulations relating to persons under the age of seventeen years shall apply, in addition to any other applicable provisions, in relation to a person in custody now below that age whom the member in charge suspects or knows to be mentally handicapped.”¹⁴

It is important to note that this provision conflicts with Article 13 of the UNCPRD, which states that States Parties must provide “age-appropriate accommodations” to persons with disabilities. Under the UNCPRD, it is not acceptable to simply apply measures that are in place for children to persons with disabilities.

Section 22 goes on to state that

12 A Ground Rules Hearing is a pre-trial process that involves all parties (including an intermediary) and the judge, who discuss and agree an approach for ensuring the fair treatment and effective participation of vulnerable defendants and vulnerable witnesses.

13 Rape Crisis Network Ireland (2018) Hearing Every Voice- Towards a New Strategy for Vulnerable Witnesses in Legal Proceedings, page 10-11 <https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf>

14 S.I. No. 199/1987- Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, Section 22(1).

“In the application of Regulation 13(2)(c) to such a person [with a ‘mental handicap’], the responsible adult referred to in that provision shall, where practicable, be a person who has experience in dealing with the mentally handicapped.”¹⁵

Simply put, a person with a ‘mental handicap’ is to be treated in the same manner as a person under the age of 17. Under Section 13(2), the latter is afforded access to a ‘responsible person’ who can be present for questioning. A person with a ‘mental handicap’ is also entitled to have a ‘responsible person’ present, and the Statutory Instrument recommends that this be a person experienced in dealing with persons with such a disability. It could be argued that a Registered Intermediary is such a person.

Currently, the National Advocacy Service is often contacted by Gardai, when a person with a disability or communication difficulties is taken into custody. However, this usually occurs where a solicitor has not yet been appointed, and the advocate’s involvement often ceases when a solicitor appears.

In one case study featured in NAS’s Annual Report 2018, an individual with both a physical and intellectual disability sought advocacy support after being charged with a serious crime. NAS supported the individual “to prepare for meetings, to attend meetings and assessments and to reflect and summarise the outcomes of discussions with [his] legal team.”¹⁶ NAS also supported the individual through the trial, and linked in with probation services as part of the pre-sentencing process. Together, they came up with a plan to connect the individual with appropriate disability services in the community, and the individual avoided a custodial sentence.

However, through consultation with advocacy organisations in respect of other areas of work, the NDA is aware that advocates are rarely allowed in the courtroom and are not allowed to advocate on behalf of an individual in a court setting. The NDA has also been informed that access to advocates is dependent on the extent of a Guard’s or solicitor’s disability awareness and can be quite arbitrary.

Research

In 2012, the NDA funded a work of research entitled Access to Justice for People with Disabilities as Victims of Crime in Ireland.¹⁷ This report explores how the criminal justice system in Ireland recognises and responds to the needs of people with disabilities who report having experienced a crime or abuse. The report notes that, while the Criminal Evidence Act 1992 makes provision for the use of an intermediary, it remains unclear who that intermediary should be. As a result, such support currently operates in an ad hoc manner, depending on the networks available to the individual.

15 S.I. No. 199/1987- Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, Section 13(2)(c).

16 National Advocacy Service for People with Disabilities (2018) Annual Report 2018, page 29 <https://advocacy.ie/app/uploads/2019/09/NAS-Annual-Report-2018-published-September-2019.pdf>

17 Edwards, Claire; Harold, Gillian; Kilcommins Shane (2012) Access to Justice for People with Disabilities as Victims of Crime in Ireland <http://nda.ie/nda-files/Access-to-Justice-for-People-with-Disabilities-as-Victims-of-Crime-in-Ireland1.pdf>

The report lists several barriers to the different stages of the justice system: reporting and recording of crimes, the trial, the post-trial period. Barriers include the lack of trust by people with disabilities of the criminal justice system and authority figures in it; lack of disability awareness on the part of justice personnel; and the lack of accessible environments, information and methods of communication. It also proposes several facilitators in the same contexts. The use of intermediaries is repeatedly highlighted, for example in supporting the individual through the interviewing process, to provide technical linguistic support, and to ensure that a victim achieves appropriate levels of support during the often traumatic process of compiling an impact statement.

On this latter point, the report draws attention to the importance of victim impact statements. Such statements, in their current form, demand a particular level of literacy. Support is not provided to individuals who may not have the literacy capacity to draft a victim impact statement. The Victims Charter provides an interpretation service in the court room, that is available by order of the court, to witnesses who do not speak English so that they can make a victim impact statement where the law or the court permits a statement to be made.¹⁸ It does not clarify whether this interpretation service extends to victims who use ISL, and it does not clarify what type of support is provided to individuals with communication difficulties or ‘limited powers of expression’.¹⁹

The report continuously emphasises how prominent the ‘principle of orality’ is throughout the justice system. From reporting a crime to An Garda Síochána, to speaking with a solicitor, to giving evidence in court, the capacity of an individual to communicate effectively is often taken for granted. With so much depending on good oral evidence, it is crucial that people with communication difficulties are adequately supported to access the same levels of justice to those achieved by people who can effectively verbalise their evidence.

The report also highlights stakeholder views that indicate the value of a pilot project for intermediaries to allow demonstration of operations and benefits. In qualitative evidence included in the report, a member of the judiciary noted that he had never seen an intermediary used in a court setting, and expressed wariness about the method, stating that there was a danger that such a person may be at liberty to pressurise the person giving evidence to respond in a particular way.²⁰ Another piece of qualitative evidence relevant to this advice paper is the point in the report made by a member of the judiciary that “they were unaware of any disability awareness training available”.²¹ The NDA advises that through a collaborative approach with all stakeholders, and a careful, comprehensive pilot approach, all stakeholders can understand the need for different supports to be in place for individuals with communication difficulties, they can see how such an accommodation might work and

18 Victims of Crime Office, Department of Justice and Equality (2010) Victims Charter and Guide to the Criminal Justice System, page 25.

19 Edwards, Claire; Harold, Gillian; Kilcommins Shane (2012) Access to Justice for People with Disabilities as Victims of Crime in Ireland, page 90.

20 Edwards, Claire; Harold, Gillian; Kilcommins Shane (2012) Access to Justice for People with Disabilities as Victims of Crime in Ireland, pages 113-114.

21 Edwards, Claire; Harold, Gillian; Kilcommins Shane (2012) Access to Justice for People with Disabilities as Victims of Crime in Ireland, page 105.

they can input from the beginning on how such a scheme could be enhanced and improved in an Irish context.

Finally, the report calls for a comprehensive collection of data of the extent of the use of intermediaries, who the intermediaries are and how effective their involvement is. The NDA advises this will be crucial to understand the current landscape in order to build on what already exists.

Good practice in other jurisdictions

In April 2019, the NDA held a roundtable to explore the role and the use and value of intermediaries for victims of crime, witnesses and accused in the criminal justice system in Ireland. The aim of the roundtable was to understand the learning from the use of intermediaries in a different jurisdiction and to consider the opportunities for how a similar system could be implemented in this jurisdiction.

The roundtable included officials from An Garda Síochána, the Law Society, the Bar Council, the judiciary, the Office of the Director of Public Prosecutions, Cosc, the Courts Service, the Decision Support Service and academics. The NDA invited officials from the Northern Ireland Department of Justice to address the roundtable in order to share learning and experiences on the introduction and implementation of the Registered Intermediaries Scheme that has been in place in Northern Ireland since April 2017, and which is managed and overseen by the NI Department of Justice.

The NDA is also aware of other jurisdictions that have a type of intermediary support in place, and key information is summarised below.

Northern Ireland

The Criminal Evidence (Northern Ireland) Order 1999 provides special measures in relation to vulnerable witnesses. This Order also sets out the criteria for eligibility for special measures for vulnerable witnesses and vulnerable defendants. Essentially, the special measures are in place for persons who have communication issues, which impact on them giving evidence. The relevant provisions relating to the examination of a vulnerable person through an intermediary are:

- Article 17 of the 1999 Order, which states that an application for an intermediary may be made where it is considered that their use is likely to improve the quality (completeness, coherence and accuracy) of the evidence given by the witness.²²
- Article 21BA “Examination of accused through an Intermediary”, which states that an application for an intermediary may be made where their use will enable the defendant to participate effectively in the proceedings as a witness giving oral evidence in court and ensure a fair trial

22 <https://www.justice-ni.gov.uk/ri>

- 21BB “Further provisions as to directions under Article 21BA(3)”, which states that a court may discharge or vary a direction made under 21BA to invoke the use of an intermediary in respect of a defendant.

The two latter provisions were inserted into the Order by the Justice Act (Northern Ireland) 2011.

Following a commitment given in its Victim and Witness Strategic Action Plan 2010-11 to develop a model for the provision of intermediaries for particularly vulnerable victims and witnesses, the Northern Ireland Department of Justice launched the Registered Intermediary Scheme in 2013, which was initially piloted in a three-phase approach. By focussing on a smaller geographical area in the first instance, and involving fewer judges at the beginning, the phased pilot approach helped to ensure consistency and address glitches and teething problems. A campaign to recruit and train 12 Registered Intermediaries (RIs) was launched in August 2012. Recruitment included newspaper advertising. Twelve persons were selected to undertake the accreditation training and eleven passed. The key criteria for an RI related to their communication skills and the ability to assist with the giving of evidence where an individual has communication difficulties. While there is no requirement as to particular qualifications to be an RI, the outcomes of the recruitment exercise have been almost exclusively that these are through social workers, and speech and language therapists.

During the first phase of the pilot, between May 2013 and March 2015, there were 383 requests for a Registered Intermediary. 331 requests were made by the PSNI, 35 by the PPS and 17 by solicitors. 294 requests were for victims, 20 for prosecution witnesses, 52 for suspects and 17 for defendants. 218 requests were for males and 165 for females. 149 requests were in respect of adults and 234 in respect of children under the age of 18. The nature of the ‘vulnerabilities’ of the individuals included learning disability; young age; Autism Spectrum Disorder; Alzheimer’s or dementia; Attention Deficit Disorder; brain injury; Down’s Syndrome; cerebral palsy; and schizophrenia among others. The nature of offences included sexual offences; assault; cruelty or neglect’, burglary, robbery or theft; murder or attempted murder; attempted abduction; harassment; and human trafficking offences among others.

The feedback to the NI Department of Justice from the pilot was very positive, with good working relations established between the RIs and criminal justice practitioners. There were, in particular, many examples of full disclosure being obtained from a victim where this previously might not have been possible due, for example, to their young age or intellectual disability, which led to more straightforward and more efficient access to justice for all parties involved.²³

One notable aspect of the Northern Irish pilot was that RIs were made available to facilitate communication with suspects as well as victims at the police investigative stage.

23 Department of Justice Northern Ireland (2015) Northern Ireland Registered Intermediaries Schemes Pilot Project, Post-Project Review, page 3 <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/registered-intermediaries-post-project-review-feb15.pdf>

The Registered Intermediaries Scheme has enabled suspects to participate effectively when being interviewed and thereby enhanced their access to justice from the outset.

While 37 requests were made for an RI at court stage, there were only four cases in which an RI facilitated communication at the trial during the pilot. The review of the first phase of the pilot concluded that it had limited experience at the court stage, and therefore the full potential of the Scheme had not yet been demonstrated. Therefore, a second phase of the pilot was launched in April 2015. Results were similar to those seen during the first pilot, however, awareness of the availability of RIs had increased.

Following two pilots and two evaluations, the Registered Intermediaries Scheme was rolled out to cover all Magistrates' and Youth Courts in Northern Ireland in April 2017. The Scheme was originally rolled out for witnesses, but it now also applies to defendants - the provision contained in Section 12 of the Justice Act (Northern Ireland) 2011, amending Section 21B of the Criminal Evidence (Northern Ireland) Order 1999 made this expansion possible. The Scheme only applies to criminal cases, and not civil/family cases.

Costings for both the pilot project and the national Scheme are outlined below in the section entitled 'Costings'.

How it works in Northern Ireland

A Registered Intermediary does not usually have a legal background. They are specialists in communication skills, and the panel is currently made up of speech and language therapists and social workers, who undergo an intensive week-long course on the criminal justice system at Masters level. They remain accredited to their original organisation/body, where applicable.

Once called upon, the RI will meet with the individual to assess whether or not they are needed. They will assess how best to facilitate the person in question, and produce a report, which may include a list of "do's and don'ts", and recommendations in respect of how best to communicate with the individual based on their particular needs and circumstances. This report will be discussed at a Ground Rules Hearing. Northern Ireland officials indicated that in many cases a Registered Intermediary should not have to intervene in the trial if all parties take on board the recommendations made in their report, as the legal professionals involved in the trial will have been made aware of how to facilitate communication by the individual in question from the outset. A Registered Intermediary is only present when the individual is giving evidence. They are not a supporter nor an advocate of the individual. If the individual is an accused and is found guilty, the RI is not involved in the probation hearing, only the trial.

The NI Department of Justice provided funds for the first two years of the pilot. The cost was subsequently divided up between the Public Prosecution Service (PPS), the PSNI and the Department of Justice. Of the three, the PSNI avails of Registered Intermediaries the most. The NI Department of Justice retains oversight for the Registered Intermediaries Scheme.

England and Wales

The Youth Justice and Criminal Evidence Act 1999 provides for a Registered Intermediary to be made available to witnesses who are vulnerable due to their age or 'incapacity'. Section 16 of the 1999 Act stipulates that the witness must be under the age of 17 or suffers from a mental or physical impairment to the extent that the court considers that the quality of evidence given by the witness may be diminished without the use of an intermediary.

The Registered Intermediary Procedural Guidance Manual (2019) outlines good practice and procedure.²⁴ When a police officer believes that a witness might benefit from the assistance of a Registered Intermediary, the officer contacts the Crown Prosecution Service. They then submit a 'request-for-service' form, which will be used to match the witness's communication abilities and needs to an available Registered Intermediary with suitable expertise operating in the geographical area. The appointed Registered Intermediary undertakes an assessment, before providing a preliminary report for the interviewing police officer. The Registered Intermediary also produces a report for the court, consisting of advice and recommendations for those who will be questioning the witness. The Registered Intermediary attends the witness's familiarisation visit to the court, the Ground Rules Hearing and the live link room or the court during the trial.

The Witness Intermediary Scheme was established by the Ministry of Justice's Better Trials Unit, and operates a national database of intermediaries who are recruited, selected, trained and accredited by the Ministry of Justice. Since its national roll-out in September 2008 (following a pilot which began in 2004), the Witness Intermediary Scheme has been available in all 43 police forces and Crown Prosecution Service areas in England and Wales. The Ministry of Justice retains overall governance, strategy and policy management while the National Crime Agency's Specialist Operations Centre operates and manages the Witness Intermediary Scheme's matching service and Registered Intermediary Register on behalf of the Ministry.

There were approximately 200 Registered Intermediaries on the Ministry of Justice's register covering England and Wales in 2016.²⁵ In 2018, there were 6,391 requests for Registered Intermediary services.²⁶

The relevant sections of the 1999 Act do not apply to an accused person. However, the court may allow the use of a non-registered intermediaries to assist a defendant. This is based on the court's inherent jurisdiction to ensure that the defendant has a fair trial, pursuant to Article 6 of the European Convention on Human Rights. The non-registered intermediary is not sourced from the Witness Intermediary Scheme.

24 Ministry of Justice (2019) Registered Intermediary Procedural Guidance https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831537/moj-registered-intermediary-procedural-guidance.pdf

25 Cooper, Penny and Mattison, Michelle (2017) Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model, *The International Journal of Evidence & Proof* 2017, Vol. 21(4) page 355.

26 Ministry of Justice (2019) Registered Intermediary Procedural Guidance, page 5.

New Zealand

A similar scheme has been in place in New Zealand since 2012. A Communication Assistant is a court-appointed specialist who advises and assists lawyers, police and judges with defendants, witnesses and civil litigants who have communication difficulties, so that they can give 'best evidence' and participate effectively in the justice system.²⁷ The scheme began in the adult criminal court and has since been used in the Youth Court and, less frequently, the Family and civil courts.

Communication Assistants are appointed under Section 80 of the Evidence Act 2006, which entitles defendants in criminal proceedings and witnesses in civil or criminal proceedings to "communication assistance", broadly defined in Section 4 of the same Act as "oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication" with a person with a communication impairment.²⁸ Communication Assistants can provide assistance during pre-trial client and witness/suspect interviews, during trial and afterwards. Their assistance includes direct assistance with monitoring of questioning, the provision of visual aids and stress-management techniques during questioning, and formal recommendations as to directions for adapting courtroom processes. Most Communication Assistants are speech and language therapists, but others such as psychologists, social workers and specialist teachers may also qualify.

If a lawyer believes that a defendant or witness may need to avail of a Communication Assistant, they will request that an assessment be carried out by a psychologist or psychiatrist, or a specialist teacher or social worker with expertise in this area. A Communication Assistant may then be appointed, and will undertake a Communication Assistance Assessment before delivering a court report with recommendations.

There is no accredited list or register of Communication Assistants. Communications Assistants are found through a social enterprise organisation of speech and language therapists.²⁹ An individual may make an application for the support of a Communications Assistants to the relevant authority (the police, if support is needed at that stage or the court, if needed at that stage). The relevant authority then contacts the social enterprise organisation, which refers them to an available and appropriate Communications Assistant.

New Zealand has seen examples of more than one Communication Assistant working together on the same case in a multi-disciplinary team, for example a Communication Assistant working alongside a sign-language interpreter.

Funding for Communication Assistants comes mainly from the Ministry of Justice and occasionally from Crown Law or Legal Aid or the police. In Youth Justice matters, Oranga Tamariki (the Ministry for Children) also funds communication assistance at Family Group

27 Benchmark (2020) Communications Assistance Guidelines, Section 2 <https://www.benchmark.org.nz/guidelines/communication-assistants/>

28 Benchmark (2020) Communications Assistance Guidelines, Section 2 <https://www.benchmark.org.nz/guidelines/communication-assistants/>

29 <https://talkingtroublenz.org/about-ttanz/>

Conferences.

Costing

It is difficult to compare the costs of establishing and managing a scheme of Registered Intermediaries across the other jurisdictions examined. In England and Wales, Registered Intermediaries (RIs) also work on a self-employed basis, and earn £38 per hour. They may also claim for travel and subsistence, and receive a rate of £55 per hour for work carried out during 'unsociable hours'.

RIs in Northern Ireland carry out their work on a self-employed basis and are able to claim for travel and subsistence costs from that Department of Justice, as well as a professional fee for the time spent carrying out their role. The professional fee is £37 per hour. The pilots showed that, in relation to costs for defendants, the average cost per case was approximately £470.

The most relevant comparison in this jurisdiction is with Guardians ad litem (GALs). GALs are appointed by judges in child care proceedings under Section 26 of the Child Care Act 1991. The legislation intends for GALs to enhance the decision-making capacity of the court in child care proceedings. One of a GAL's functions is to engage with the child in order to independently establish the wishes, feelings and interests of the child and present them to the court. Previously, GALs could charge different hourly rates, and add travel and subsistence claims to that amount. Following consultations with GALs by Tusla in 2015, a flat hourly rate of €125 was set, which includes both the work carried out by GALs and all expenses incurred. While Túsła is not involved in either the management nor the monitoring of the GALs service, any costs incurred by GALs shall be paid by Tusla, from a budget provided by the Department of Children and Youth Affairs.

It is envisaged that some costs will be incurred in the establishment of a pilot scheme and the training and monitoring of RIs. The costs borne by Northern Ireland Department of Justice for both the pilot project and the continued maintenance of the national Scheme are broken down below:

Pilot schemes for both witnesses and defendants in the Crown Court in Belfast

A campaign to recruit and train 12 RIs was launched in August 2012. Twelve persons were selected to undertake the accreditation training and eleven passed. The actual costs were as follows:

- Advertising the recruitment campaign: £3,235.14
- Fees for an RI for assisting with selecting those who went forward for interviews: £962.90
- Costs associated with interviewing potential RIs: £3,717.15
- Accreditation training costs were £28,974.49.

The total cost for the recruitment and training of 11 RIs to participate in the pilot project

was £36,889.68.

Costs for the recruitment campaign in 2018

The additional costs for the recruitment campaign were minimal (£1,250). It was managed by the Intermediaries Scheme Secretariat within the Department and advertised on the DoJ website and Speech and Language Therapy and Social Workers recruitment websites at no cost. The Department did not advertise in newspapers; this was based on learning from the recruitment for the pilot project, where there were hundreds of applications from people who believed they were good at communicating but did not fit the profile of an RI. There was one payment to a Registered Intermediary for assessing case studies and sitting on the recruitment panel of £1,250. The other two panel members were from Department of Justice and PSNI and incurred no charge.

Costs for training in 2018

In 2018, £29,275 was spent on training for 24 RIs. This can be broken down as follows:

- Travel and accommodation, which included travel for applicants who were successful and overnight accommodation for trainers and 2 candidates who had significant travel: £3,650
- Main facilitator's fees: £22,200
- Hire of training facilities: £2,175
- Payments to existing RIs for role play during training: £950
- Catering for 6 days: £300

Ongoing Costs - Training for RIs

In 2019, the NI Department of Justice facilitated a day's CPD training. The total cost was just over £7,000. However, the majority of this cost was paying RIs for their time and travel. The Department has since decided that, for any future training, it will not pay the RIs for their time as they receive non-monetary benefits in relation to their continuous professional development. Future training may be provided based on the profile of the vulnerable people that RIs are assisting, for example, there is an increase in the number of cases where the person suffers from a mental illness as well as other vulnerabilities and therefore there may be a need in the future to provide specialist training to those RIs who do not include mental illness within their skillset.

Next steps

In order to provide individuals with a voice, protections and the access to justice to which they are entitled, the NDA advises that an introduction of a national scheme of Registered Intermediaries be progressed through the Department of Justice and Equality. We believe responsibility and oversight for the pilot in the first instance, and later a national scheme, should rest with the Department of Justice and Equality, as the Department with ownership of the relevant pieces of legislation and the civil and criminal justice systems, as well as responsibility for monitoring and implementing the UNCRPD. Based on our research and exploration of this topic, the NDA advises that costs be divided between the Department of

Justice and Equality, An Garda Síochána and the Courts Service.

Based on evidence from other jurisdictions, we advise that small, phased pilot project be progressed in the first instance. This approach will provide an opportunity for the Department of Justice and Equality to identify challenges early on in the pilot and to resolve them on in a timely manner before scaling up, as happened in the Northern Ireland example. It will also allow the Department to obtain input from key stakeholders, who can become champions of the Registered Intermediaries Scheme and therefore support and facilitate its rollout on a national basis.

The pilot in Northern Ireland ran for almost four years, in three separate phases, each of which built on the results of the previous pilot. The NDA advises that a first phase be launched in Ireland, which would involve a small number of intermediaries (4-5) working in one geographical region, which would capture individuals with a variety of support needs. Subsequent phases could increase the number of intermediaries, and could involve a wider spread across the country.

The NDA advises that a steering group be set up, with participants similar to those who attended the NDA's Roundtable in April 2019 and which is led by the Department of Justice and Equality.³⁰ This steering group would be responsible for the establishment, monitoring and evaluation of the pilot project. The steering group would consider and agree the criteria and skills needed by intermediaries and agree on methods of training for those selected, similar to the training received by Registered Intermediaries in Northern Ireland. It is advised that the selected Registered Intermediaries sit on one panel, receive the same training to the same standards and be overseen by a central body, for example the Department of Justice and Equality. The NDA believes the Department of Justice and Equality is best placed to oversee the pilot project, and later a national scheme, rather than An Garda Síochána, the Courts Services, or the Office of the Director of Public Prosecutions, none of which has the far-reaching and encompassing remit of the Department of Justice and Equality in respect of the justice system. The NDA also advises that a person(s) with disabilities and communication difficulties, and with relevant lived experience, is invited to sit on the steering group in order to assess the gaps in support that exists and how they should be addressed. Consultation with persons with disabilities in respect of policies that relate to their lives is a key obligation of the State under the UNCRPD.

The NDA advises that the pilot be available to victims of crime, witnesses and accused persons alike. This will satisfy the principle of equality, and it will allow the criminal justice system to achieve better evidence, as all parties involved will be accommodated to give the best evidence they can, including persons accused of a crime. Support for the pilot is more likely if all persons are accommodated to give their best evidence.

30 This roundtable included representatives from An Garda Síochána, the Courts Service, the judiciary, the DPP, the Law Society, the Bar Council, the Decision Support Service and the University of Limerick.

The NDA advises that the pilot should allow for an intermediary's involvement from as early as the Garda Station stage of an investigation in order to fully test and demonstrate the value and potential of the scheme, and in order to ensure that appropriate access to justice is made available from the very first stage. If a person with communication difficulties is accused of a crime and is not accommodated at the Garda Station stage, he/she may commit to a position or give an inaccurate account of events, without fully understanding the consequences of doing so, and this will affect the subsequent justice process.

The NDA advises that representatives from across the whole sector be involved from the beginning of the pilot, including police, legal representatives, courts and the judiciary. By raising awareness and providing training to the people who will be key to the success of the pilot project, it will help to ensure that there is consistency in the implementation of the pilot across the sector. It will also allow for the creation of champions across the sector, who will support the implementation of any subsequent national scheme following the pilot project. The NDA's roundtable included participants from across the justice sector and this holistic approach to involvement was welcomed and beneficial to advancing discussions.

Early interaction between all stakeholders, including the intermediaries recruited to participate in the pilot project, will enable the cultivation of good relationships across the justice system, and an understanding of the role the intermediaries are envisioned to play.

Finally, learning from the experience of other people and other jurisdictions should continue to be a priority. Ireland should continue to look to other jurisdictions for examples of best practice and for guidance in respect of the inevitable challenges that will arise in the rolling out of a pilot project and a national scheme. For example, an evaluation of the roll-out of the Registered Intermediaries Scheme to the Northern Irish Magistrates Courts (available in this court since April 2017) is currently underway and the NDA advises it would be helpful to speak to the NI Department of Justice following completion of that evaluation in order to capture any additional learning.

Amendments to legislation

Three amendments to the Criminal Evidence Act 1992 would be required in order to provide a clear statutory footing for the national scheme:

- Currently, Section 14 of the Criminal Evidence Act 1992 only provides for the use of intermediaries for witnesses. The National Disability Authority advises that this section be amended to include provision of an intermediary to the accused. To achieve better evidence- and to realise Article 13 of the UNCRPD- all parties involved must be accommodated, including persons accused of a crime;
- Section 14 clearly states that intermediaries may only be used in court to convey questions to the witness, but not to convey the answers of the witness back to the court. This is of limited use; it may mean that the witness understands the questions clearly, because it has been put to them in a way they understand, thanks

to the involvement of the intermediary. However, they may not be able to answer adequately if they are denied the use of the intermediary to respond;

- Finally, it would be necessary to amend or delete the phrase ‘mental handicap’ in Section 19. The reason for this is twofold: the phrase ‘mental handicap is not in keeping with UNCRPD, and this linguistic amendment is in line with several amendments that were proposed in the Department of Justice and Equality’s Roadmap to Ratification of the UNCRPD’. Many of these proposed amendments are contained in the Disability (Miscellaneous Provisions) Bill, including the deletion of phrase such as ‘unsound mind’ and ‘mental impairment’. Secondly, not all individuals with communication difficulties would be accommodated if intermediaries were provided only to those typically understood to fall under the definition of ‘mental handicap’. Autism, for example, is defined as a ‘development disorder’.

As mentioned above, Statutory Instrument No. 119/1987- Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 does not preclude the introduction of intermediaries at the Garda questioning stage. However, the language used in the Statutory Instrument is outdated and it also provides the same protections for persons with disability as it does for children. This is not in line with other Irish legislation nor international obligations, which insist that States Parties provide ‘age-appropriate’ accommodations for persons with disabilities. The NDA advises updating the language in this S.I., to clearly set out appropriate measures that are in place for the treatment of persons with disabilities in custody in Garda stations.

While the amendments outlined above would be necessary for a permanent national scheme, the NDA advises that the pilot be rolled out on an administrative scheme basis while the legislative amendments are being progressed.

Conclusion

Effective access to justice, which is on an equal basis with the access afforded to the general population, is essential for the realisation of Article 13 of the UN Convention on the Rights of Persons with Disabilities, as well as Article 6 of the European Convention of Human Rights, Article 14 of the International Covenant on Civil and Political Rights. These two latter international treaties both speak of the right of the individual to an interpreter where an individual cannot understand or speak the language used in court.

Where an individual has communication difficulties and is not afforded the support to effectively engage with the different stages of the Irish justice system, that individual may be experiencing a breach of their rights to accessing justice on an equal basis as a person without communication difficulties could. By providing an intermediary, who can put questions to the individual in a way they understand, and interpret the answers they receive, that individual is supported and accommodated to give the best evidence they can. This evidence will be more accurate and more detailed than that individual could provide had they not access to an intermediary.

Not only is such a scheme important in terms of providing procedural accommodations for victims, witnesses and accused persons with disabilities and communication difficulties, it will also provide for appropriate safeguards to be put in place so that there is less likelihood of cases collapsing due to issues surrounding the credibility of statements gathered at investigative stages or of evidence given in court.

By putting a Registered Intermediaries Scheme in place, an individual with communication difficulties will receive the support they need in a justice system that is inclusive and accommodating in line with Ireland's obligations. Only when such an objective is achieved can Ireland state that it is realising this one important aspect of Article 13 of the UNCRPD.

The NDA is happy to continue to input and advise the Department of Justice and Equality as relevant and appropriate to assist in devising a pilot and considering the emerging issues.



An Bord Um
Chúnamh Dílthiúil
Legal Aid Board

7. A summary of legislation and policy relevant to the work of the Legal Aid Board

- Susan Kennefick, National Disability Authority

UN Convention on the Rights of Persons with Disabilities

Ireland ratified the UN Convention on the Rights of Persons with Disabilities (UNCRPD) in March 2018. The overarching vision of the UNCRPD, which entered into force on 19 April 2008, is to ensure that persons with disabilities can participate in, and contribute to, society on an equal basis with others.

Many of the Convention's Articles are relevant to legal professionals, in particular Article 13. This Article obliges States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others. This includes providing procedural and age-appropriate accommodations, in order to facilitate their effective participation in all legal proceedings, including at investigative and other preliminary stages. It also obliges States Parties to promote appropriate training for those working in the field of administration of justice.

Other relevant Articles include Article 5 on equality and non-discrimination, Article 9 on accessibility, Article 12 on equal recognition before the law and Article 14 on liberty and security.

Article 4(3) obliges States Parties to closely consult with and actively involve persons with disabilities in the development and implementation of legislation and policies to implement the Convention, and in other decision-making processes concerning issues relating to persons with disabilities. Public bodies are encouraged to consider how to engage with and capture the voice and lived experience of persons with disabilities, including through their representative organisations or Disabled Persons Organisations, in the development of any training or work processes related to engaging with persons with disabilities.

National Disability Inclusion Strategy

The National Disability Inclusion Strategy 2017 – 2022 (NDIS) seeks to ensure that a whole-of-government approach is taken to disability issues. Made up of 125 actions, the NDIS was prepared on foot of a comprehensive consultation process in 2016, and was updated following a mid-term review in 2019. The NDIS names specific Departments and agencies as 'Responsible Bodies' against each action, and all Departments are represented on the NDIS Steering Group, which also comprises the Disability Stakeholders Group and the NDA. This Steering Group meets quarterly and is chaired by the Minister of State with responsibility for Disability, Anne Rabbitte T.D.

Several actions within the NDIS are intended to improve access to justice for persons with disabilities:

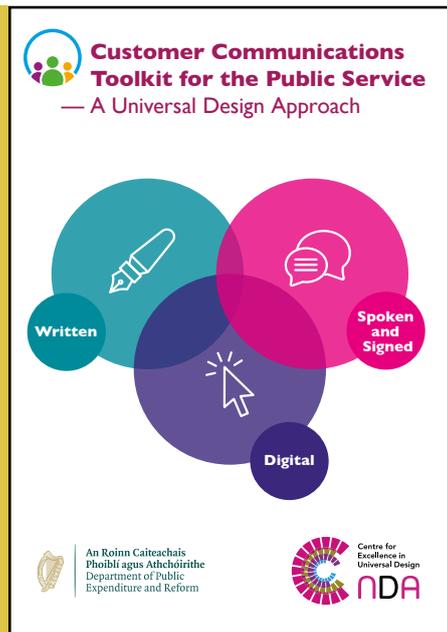
About the Author

Susan Kennefick is the Senior Policy & Public Affairs Advisor at National Disability Authority.

CUSTOMER COMMUNICATIONS

Public bodies must communicate in a form that is accessible to the person concerned.

The NDA published a Customer Communications Toolkit for the Public Service, which contains guidance to inform the design and procurement of customer communications across the public service.



Action 17: Compliance with Disability Act requirements around accessible information

The Disability Act 2005 states that public bodies must communicate with a person in a form that is accessible to the person concerned. It also states that electronic communications should be accessible to persons with visual impairments and that communications which include information relevant to persons with intellectual disabilities should be communicated in clear language.

The NDA has published guidance in this area, including its Customer Communications Toolkit for the Public

Service, which contains guidance, based on a Universal Design Approach, to inform the design and procurement of customer communications across the public service. A supplement to the Toolkit was published in 2020, containing guidance on accessible virtual meetings.

The EU Web Accessibility Directive was transposed into Irish law on 25 September 2020. European Union (Accessibility of Websites and Mobile Applications of Public Sector Bodies) Regulations 2020 require public sector bodies to take necessary measures to make their websites and mobile applications more accessible by making them perceivable, operable, understandable and robust. The NDA is the official monitoring body for this Directive. The Department of Communications, Climate Change and Environment is due to submit Ireland's first report to the European Commission by 23 December 2021. The Legal Aid Board, along with all departments and other public sector bodies, will be obliged to ensure its websites and mobile applications meet the accessibility requirements outlined in the Directive.

Action 18B: Integrate a focus on the needs of people with disabilities in initiatives to enhance access to justice

This action was added to the NDIS following a mid-term review, which took place in late 2019. The responsible bodies named against this action are the Department of Justice and all relevant agencies. The NDA is aware of much work ongoing in various bodies that help to achieve this action, for example An Garda Síochána ran a pilot in two Garda stations, offering services through Irish Sign Language, and the Courts Service developed a 360-degree audio-visual tour of Áras Uí Dhálaigh in the Four Courts complex, aimed at providing practical information to users. However, a more collaborative approach between the Department and relevant bodies is advised, so that such work can be properly tracked and reported on. In this respect, the NDA welcomed the joint launch of the Just A Minute (JAM) cards by the Courts Service, Dublin Coroners Court and the Irish Prison Services in September.

Action 20: Disability Awareness training

The National Disability Inclusion Strategy contains a commitment on the part of all public bodies to “provide disability awareness training for all staff”. Disability awareness training frequently comes up in the UN Committee’s Concluding Observations on a State Party’s implementation of the UN Convention. The NDA has a disability awareness training e-learning module, which is available to all public sector bodies (<http://nda.ie/resources/elearning/>). There is currently no monitoring of disability awareness training but this may change in the future. It is good practice for public bodies to monitor the continued training and development of staff. The NDA would support the inclusion of disability awareness training in the curricula of the Law Society and the Bar of Ireland.

Such training should include the comprehensive understanding by legal professionals of new and emerging legislation that will impact the lives of persons with disabilities. This will be very relevant in the coming year, with the commencement and operationalisation of the Assisted Decision-Making (Capacity) Act 2015. This legislation represents a shift in society from a medical model of disability, where ‘best interest’ decisions are made on behalf of individuals and towards a social model of disability, whereby people are empowered and supported to make their own decisions. It includes abolishing the wardship system that has been in place for 150 years, and it obliges courts to review every wardship case, in order to return estates to the individuals in question (2,285 individuals, as of November 2020). Under the legislation, courts will have 36 months to review all wardship cases.

The legislation also names new stakeholders with whom legal professionals will interact, for example Court Friends, General Visitors, Special Visitors and a range of new decision-making supporters.

“The NDA suggests that the Legal Aid Board could work with the Courts Service, the Judicial Studies Committee, the Law Society and the Bar of Ireland in order to form a comprehensive understanding of their roles and functions under the 2015 Act, and to develop helpful training to all legal professionals .”

The NDA has developed Guidance for Justice Professionals in communicating with people with autism. This guidance provides background information about autism spectrum disorders and aims to assist those working in the civil and criminal justice system who may come into contact with someone who has autism in order to best communicate with and support them. This includes public service officials such as An Garda Síochána, the Courts Service, the judiciary and the Prison Service and the Probation Service, and members of the legal profession such as solicitors and barristers. This guidance has been welcomed by relevant stakeholders.

Action 105: Code of Practice on Accessible Public Buildings

Public bodies are obliged to be in compliance with Part M of the Building Regulations, which require all public buildings to be accessible to people with disabilities, by 2022. Action 105 of the NDIS states that the National Disability Authority will develop a code of practice for accessible public areas of public sector buildings. The Code will give guidance to public bodies relating to the accessibility of public buildings, including design, management and maintenance and how to approach their obligation to bring public buildings into compliance with Part M.

Discussions will soon commence around a successor national strategy - led by the Department of Children, Equality, Disability, Integration and Youth, as the coordinating Department - and public consultations will be held, in order to hear from organisations, bodies and individuals on suggested priorities to be included in the next Strategy.

The Department of Children, Equality, Disability, Integration and Youth has also recently announced a review of the equality legislation (including, but not limited to the Equal Status Act 2000 and the Employment Equality Act 1998). A public consultation for submissions to this review is currently underway. It is likely that this public consultation will result in a review of the definition of ‘disability’ contained in the various pieces of legislation, especially given Ireland’s efforts to move towards a social model of disability (in line with the UNCRPD) over the last number of years. Legal professionals may be interested in potential changes to the legal interpretation of ‘disability’ and other such terms, following the review.

Irish Sign Language Act 2017

The Irish Sign Language Act 2017 (the Act) was enacted on 24 December 2017 and commenced on 23 December 2020. The Act recognises the right of Irish Sign Language (ISL) users to use ISL as their native language, and to develop and preserve it. The Act places a statutory duty on all public bodies to provide ISL users with free interpretation when availing of or seeking to access statutory entitlements and services. In addition, the Act provides for specific duties and obligations in the areas of legal proceedings, educational provision and broadcasting

ISL is the first or preferred language of an estimated 5,000 deaf people in Ireland, and an estimated 40,000 people communicate in ISL.

Legal professionals may be interested in potential changes to the legal interpretation of ‘disability’ and other such terms, following a review of the equality legislation (including, but not limited to the Equal Status Act 2000 and the Employment Equality Act 1998.

Section 4 of the Act is explicit in stating that a person may use ISL in, or in any pleading in, any court. There is a duty on the court service to make sure that the person will not be placed at any disadvantage in being heard by arranging ISL interpretation for any individual appearing or giving evidence in legal proceedings at court.

The NDA has been given responsibility to report to Government on the operation of the Irish Sign Language Act, and an initial report has recently been submitted to the Minister prior to it being laid before the Houses of the Oireachtas. The report found that for the most part, criminal courts provide ISL interpretation as needed, however improvements to the knowledge of the judiciary in directing the appointment of accredited interpreters would support more robust provision.

Outside of criminal courts, civil courts showed a lack of preparation for commencement of the ISL Act, with improvements needed in relation to published processes for ISL users to raise the need for ISL interpretation, and the establishment of an ISL complaints mechanism.

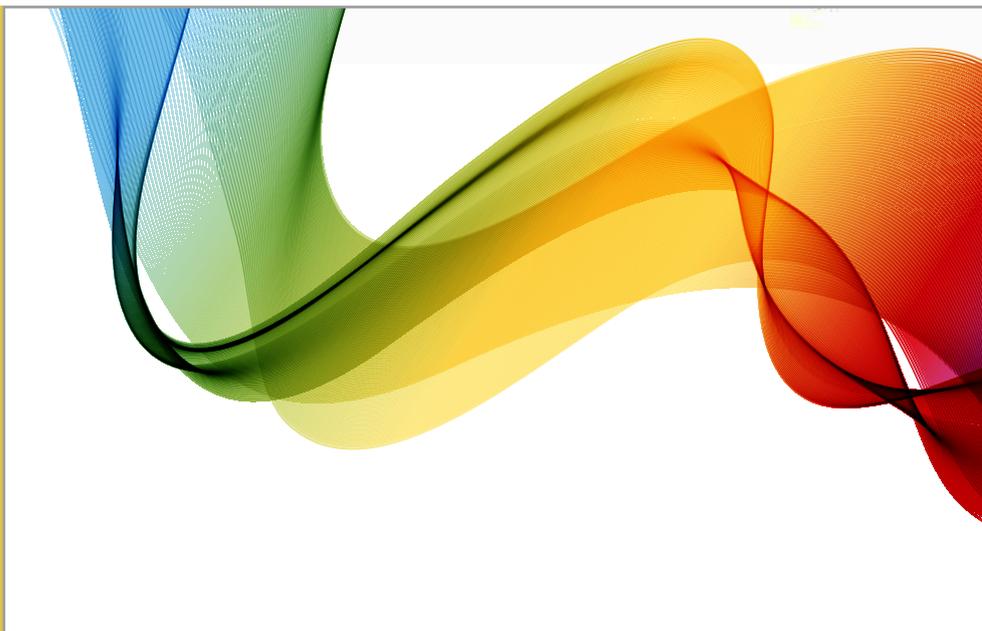
Assisted Decision-Making (Capacity) Act 2015

The Assisted Decision-Making (Capacity) Act 2015 is due to be commenced in mid-2022. This legislation represents a shift in society from a medical model of disability, where ‘best interest’ decisions are made on behalf of individuals and towards a social model of

125 ACTIONS

National Disability Inclusion Strategy

The NDIS seeks to ensure that a whole-of-government approach is taken to disability issues. Made up of 125 actions, the NDIS was prepared on foot of a comprehensive consultation process in 2016, and was updated following a mid-term review in 2019.



disability, whereby people are empowered and supported to make their own decisions. Its provisions include abolishing the wardship system that has been in place for 150 years, and it obliges courts to review every wardship case, in order to return estates to the individuals in question (2,285 individuals, as of November 2020). Under the legislation, courts (the High Court in most instances, but the Circuit Court may also have a role, depending on which court dealt with the wardship application) will have 36 months to review all wardship cases.

The legislation also names new stakeholders the judiciary, Courts Service and legal professionals will have to interact with, for example Court Friends, General Visitors, Special Visitors and a range of new decision-making supporters. Advocates will also have new functions under the Act.

Section 26 (Criteria for obtaining legal advice) of the Civil Legal Aid Act 1995 will be amended by the 2015 Act (Section 52), to allow for a party to an application under Part 5 of the 2015 Act to qualify for legal advice. Part 5 of the Assisted Decision-Making (Capacity) Act 2015 pertains to applications made to the court in respect of declarations of capacity.

The NDA was responsible for developing 11 draft statutory Code of Practice, which offer practical guidance on the effective implementation of the Assisted Decision-Making (Capacity) Act. Several of these Codes will be of interest to the Legal Aid Board staff, including the general Code of Practice for Supporting Decision-Making and Assessing Capacity, and the Code of Practice for Legal Professionals. These draft Codes have been transferred to the Decision Support Service, where they will undergo a review and public consultation, before being published next year.

As mentioned above, the Assisted Decision-Making (Capacity) Act is a transformative piece of legislation, and the NDA emphasises the need for particular training and awareness-raising for legal professionals.

Reasonable Accommodation

Persons with a disability can face a range of individual and structural barriers at different stages of employment including recruitment, retention and re-entering the workforce. The integration of reasonable accommodations into routine recruitment and employment processes is an important element in addressing the barriers and challenges that adversely affect the employment of persons with disabilities.

Reasonable accommodations are effective and practical changes that an employer is required to put in place to enable a person with a disability to carry out their work on an equal footing with others. Reasonable accommodations take a variety of forms and can include flexible working arrangements, assistive technology or an adaptation of the physical workplace.

The Employment Equality Acts 1998-2015 oblige employers to provide reasonable accommodations to both employment candidates and employees with disabilities, unless these measures would impose a disproportionate burden on them. The factors to be taken into account in assessing whether a reasonable accommodation request would impose a disproportionate burden on the employer include, in particular:

- The financial and other costs entailed in providing the accommodation
- The resources available to the employer's business
- The possibility of obtaining public funding or other assistance

Employers also have a duty to make reasonable accommodations under European Union law and the United Nations Convention on the Rights of Persons with Disabilities.

The NDA published a report in 2019 entitled **Reasonable Accommodations: Obstacles and Opportunities to the Employment of Persons with a Disability**. The report found that accommodations often cost little or nothing to the employer. The report also found that, in many of the instances in which the WRC found against an employer, it was due to a lack of process around the reasonable accommodation request rather than the denial of that accommodation. Irish Human Rights and Equality Commission has committed to producing a Code of Practice on Reasonable Accommodation.



8. Just A Minute (JAM) card - The Courts Service

We are delighted to update you on a recent customer service initiative that the Courts Service launched across all of our public offices. As part of a joint project with the Coroner’s Court and the Irish Prison Services earlier this year the Courts Service secured funding from the Public Service Innovation Fund to support our organisation becoming JAM Card friendly.

A JAM Card allows people with a learning difficulty, autism or a communication barrier to tell others that they need ‘Just A Minute’ discreetly and easily. Those with a communication barrier are often reluctant or unable to tell others about their condition. JAM Card allows this to happen in a simple, effective non-verbal manner. As of Thursday 23rd September, anyone with a communication barrier can present a physical JAM Card or electronic JAM Card via an app in our public service offices to request an additional amount of time to deal with their query.

Our commitment to become a JAM Card friendly organisation sends out a clear message of inclusion, access and quality customer service to all our users. This initiative is another example of how the Courts Service continues to develop a customer centric approach which is a key pillar under the Modernisation Programme. Over 70% of our staff are JAM card trained and we are very proud that the Courts service will be the first Civil Service organisation to become JAM Card friendly in the Republic of Ireland.



Launch of the Just A Minute (JAM) card

L-R - Angela Denning, CEO (Courts Service), Dr Emily Jordon (DCC), Maeve Monaghan, CEO (NOW Group), Seamus Beirne, Equality, Diversity & Inclusion Lead (IPS)

9. Intellectual Disabilities Awareness and the pre-trial Criminal Justice System in Ireland

- Prof. Gautam Gulati MD^{1 2}
 - Dr Alan Cusack PhD²
 - Prof. Shane Kilcommins PhD²
 - Prof. Colum P Dunne PhD¹
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Introduction

The United Nations Convention on the Rights of People with Disabilities, ratified by Ireland in 2018 places an onus, inter alia, on State parties to remove barriers for people with disabilities in accessing justice equally and this is a particular concern for people with intellectual disabilities, who may be vulnerable to miscarriages of justice. A central component in achieving this aim of the Convention, is the promotion of a culture of disability awareness amongst individuals and agencies working in the Irish criminal justice system. Securing equal access to justice is not only necessary to safeguard the rights of people with intellectual disabilities by adhering to a human rights-based approach to law enforcement, but it is also equally important in ensuring the forensic accuracy of the criminal justice process. Empirical Irish research has recommended that training programmes in intellectual disabilities awareness may usefully focus on recognition of disability, communication skills, provision of accessible information and appropriate supports.

What is an Intellectual Disability?

The term “Intellectual Disability” refers to a significantly reduced ability to understand new or complex information and to learn and apply new skills. Diagnostically, this disability is understood as a psychosocial condition which is diagnosed by sub-average intellectual functioning (IQ score <70), accompanied by significant limitations in an individual’s adaptive social functioning prior to reaching the age of 18 years. This results in a reduced ability to function independently, and begins before adulthood, with a lasting effect on development. Disability depends not only on health conditions or impairments but, crucially, on the extent to which environmental factors support full participation and inclusion in society (World Health Organisation).

Why is this relevant to the Criminal Justice System?

It is internationally established that people with intellectual disabilities are over-represented in police custody. For example, 9% of people in police custody in the UK and 28% of people in police custody in a Dutch setting screened positive for intellectual disabilities. Moreover, one in three people in Irish prisons screen positive for an intellectual disability and multiple international studies have reported over-representation of people with intellectual disabilities in incarcerated populations. Further, a concern exists in respect of miscarriages

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of justice: in one recent US dataset, a quarter of exonerations arising from false confessions were from people with intellectual disabilities.

In view of this, there is a need for people within the criminal justice system to respond appropriately to the cognitive and social dimensions of intellectual disability. This is particularly important for people (Gardaí, Solicitors, District Court Judiciary) interfacing with suspects in the early stages of the criminal justice pathway – this stage of the trajectory has unparalleled influence over subsequent proceedings.

Studies reveal, for instance, that people with intellectual disabilities can have cognitive profiles that can make them more likely to acquiesce or confabulate on questioning. They may also possibly demonstrate a final option bias when faced with closed questioning. These psychological vulnerabilities can be exacerbated due to the formality of an interrogation setting and the senior authority of investigating officials and, equally, the formality of a court setting. Moreover, individuals with intellectual disabilities are more likely to have mental health comorbidities, autism spectrum disorder and physical health problems such as hearing difficulties as well as epilepsy than people without intellectual disabilities. Accused persons with an intellectual disability therefore may have additional specific needs in policing interactions, police custody as well as at their initial presentation at Court. Some people who have autism may, for example, be very sensitive to sound and/or light and may become agitated with sirens and flashing lights. Their distress can sometimes be misperceived as defiant behaviour or non-cooperation. Some people with epilepsy may be vulnerable to seizures with stress.

A failure to adapt forensic techniques, and mitigate the hostility of the interrogative environment, to address the needs of vulnerable suspects, can potentially pose a material risk of narrative distortion and – as demonstrated in Ireland by the case of Dean Lyons, an 24 year old man with an intellectual disability, who falsely confessed to Grangegorman murders in 1997.

Recognising someone as a person with an intellectual disability

As noted above, formal diagnoses of intellectual disabilities, usually made by specialists, include criteria based on standardised tests of intellectual functioning (IQ score <70), significant limitations in an individual's adaptive social functioning in a given environment, and a criterion that the impairment commenced prior to reaching the age of 18 years.

National and international research suggests that Identifying intellectual impairment in frontline policing interactions, by solicitors, by court officials or by the judiciary can be challenging, particularly given that in many cases an individual's disability is hidden. Relying on presence of physical characteristics alone is therefore only helpful in the case of obvious syndromes (e.g., Downs Syndrome, Turner's Syndrome). There may be behavioural clues such as incongruent behaviour (e.g., laughing when this would not be socially appropriate), poor coping skills in the face of stress (e.g., inability to sit down or "meltdowns"), a failure to understand the seriousness of the situation and unusual personal interaction (e.g., overly friendly behaviour, overly anxious behaviour, inappropriate physical contact, or unusual eye

contact).

On occasion, asking of the usual place of residence can provide information (e.g., if an individual is living in a supported setting for people with intellectual disabilities) as can “medical alert bracelets” (some people may have a bracelet indicating that they have a particular condition such as autism or epilepsy both of which are more common in people with intellectual disabilities).

There may be reason to suspect a disability where the suspect is acquiescing to procedures that would usually require special permissions, not asking for support including legal support, has difficulty repeating back what has been said to them, has difficulties understanding what is being asked of them, responding with irrelevant information or with highly improbable answers, or changing version of events on questioning. In the US, for example, it has been argued that suspects with intellectual disabilities are more likely to acquiesce to a “Miranda Waiver” due to a desire to please authority figures, following from the necessary reliance on authority figures for solutions to what an individual with typical abilities would consider everyday problems.

There is no definitive checklist and whilst diagnoses can only be made by a specialist, the above may be circumstances where a police officer, a solicitor or court official may suspect someone may have an intellectual disability.

The disability may be suspected or identified at the point of arrest or at the stage the Garda C84 Custody Risk Assessment is completed. Identification at the point of arrest, particularly with minor offences, has advantages in respect of early diversion and/or the application of the Adult Caution Scheme. Identification at custody may allow the provision of safeguards, and identification at the point of Court appearance, confer a benefit of asking for a formal evaluation by a specialist. The European Commission Recommendation C (2013) 8178/289 on procedural safeguards for vulnerable people suspected or accused in criminal proceedings aims to encourage Member States to strengthen the procedural rights of all suspects or accused persons who are not able to understand, and effectively participate, in criminal proceedings due to their age, mental or physical condition or disabilities (“vulnerable persons”). In particular, it aims to ensure that vulnerable persons are identified promptly and recognised as such. A review of the Garda C.84 Custody Record has recently been undertaken by an Garda Síochána, in collaboration with experts at the University of Limerick, with a view to updating the form to ensure that it meets best international practice in securing the timely identification of vulnerabilities amongst arrested individuals.

Communicating with a person who has an intellectual disability

Some people with severe intellectual disabilities may not have spoken speech and some may communicate using special languages such as Irish Sign Language (ISL) if they are hard of hearing or Makaton (a universal language programme that uses symbols to support spoken language). In many cases, however, simple skills may be very helpful to facilitate communication. These include an awareness of the law enforcement officer’s own verbal and

non-verbal cues and the need to remain calm, allowing sufficient time for comprehension of what is said, frequent repetition, frequently checking comprehension and asking for what has been said to be repeated, avoiding legal jargon and metaphors, and allowing frequent breaks.

The presence of a “*responsible adult*” as mandated in the Garda Custody Regulations 1987 can be invaluable. The Garda Síochána Interview Module allows for enhanced cognitive interviews for people with significant intellectual disabilities. The cognitive interview is also permitted for use in interviews with vulnerable witnesses that are conducted pursuant to s.16(1)(b) of the Criminal Evidence Act 1992.

Providing information to someone with an intellectual disability

When providing information, such as during the arrest process or in custody in respect of the C72(s) Notice of Rights, the use of simple, plain language may enhance understanding. Information may need to be repeated with checks of comprehension. The same principles are true in the District Court, where it is not unusual to have several parties present and rapid exchanges of communication that may be confusing to someone with an intellectual disability.

A registered intermediary, as proposed by the National Disability Authority and in the recent O’Malley Report, may be important in facilitation of communication in the Court setting. Physical disabilities may coexist, and some people may require information in Braille or ISL, in addition. Work is currently ongoing at the University of Limerick to produce an easy-to read version of the C72(s) for people with intellectual disabilities, and this should be completed by the end of 2021.

Directive 2012/13/EU86 on the right to information in criminal proceedings lays down rules concerning suspects’ or accused persons’ access to information relating to their rights in criminal proceedings and to the accusation against them. Under Article 3, suspects or accused persons should be provided promptly with information concerning certain procedural rights, such as the right of access to a lawyer, any entitlement to free legal advice, the right to remain silent and the right to interpretation and translation, which may include sign language interpretation or alternative communication mechanisms. Member States are also to ensure that the information provided is in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons. It is important to ensure that legal practice in Ireland corresponds not just with the inclusionary exigencies of the UNCRPD and the EU Directive but also accessibility standards mandated by section 28(3) of the Disability Act 2005 and Article 6(3)(a) of the European Convention on Human Rights.

Supporting a person with an intellectual disability

The 1987 Garda Custody Regulations allow for a person with an intellectual disability to have a responsible adult present. This is a very helpful source of support around communication and practical needs. Ensuring access to a solicitor and a lower threshold for involvement of a medical practitioner for any physical health needs and prescriptions, as identified by the Garda C84 Risk Assessment, are additional resources for the person with an intellectual disability in custody. Medical practitioners may also be a source of support to police officers

in the application of safeguards where there is a suspicion of a disability requiring further assessment, in the assessment of fitness to be interviewed, and/or to facilitate diversion. In Court, the presence of a registered intermediary may help facilitate communication. Court can be a very challenging place for someone with intellectual disabilities and consideration should be given to ensuring that any approach minimises environmental stressors so as not to exacerbate any psychological vulnerabilities.

The Court, on recognition of a disability, may also wish to appoint experts to assist with recommendations regarding issues such as fitness to stand trial and other defences that relate to the Criminal Law (Insanity) Act 2006 and, in acute circumstances, considerations pertinent to bail and diversion that may or may not relate to the Mental Health Act 2001.

Conclusions

There are several safeguards in current legislation, conventions, and policy relevant to people with intellectual disabilities interfacing with the pre-trial criminal justice system. Consideration of these safeguards will likely contribute to equal access to justice. Ireland is due to submit its first periodic report under Article 35 of the UNCRPD. Any demonstrable advances in access to justice for people with disabilities may prove an important component of this report and, more importantly, in addressing the State's constitutional obligations under Article 38.1 and Article 40.3.2 of Bunreacht na hEireann.

Further Reading

Gulati, G., Cusack, A., Bogue, J., O'Connor, A., Murphy, V., Whelan, D., Cullen, W., McGovern, C., Kelly, B. D., Fistein, E., Kilcommins, S., & Dunne, C. P. (2021). Challenges for people with intellectual disabilities in law enforcement interactions in Ireland; thematic analysis informed by 1537 person-years' experience. *International journal of law and psychiatry*, 75, 101683. <https://doi.org/10.1016/j.ijlp.2021.101683>

Pre-trial safeguards for people with intellectual disabilities in Ireland

Pre-Arrest

- Alternatives to arrest
- Responding to challenging behaviour
- Adult Caution Scheme

Arrest

- Accessible Communication
- Caution

Custody

- Recognising a disability
- C84 Risk Assessment
- C72 Notice of Rights
- Access to a Solicitor
- Access to a Medical Professional
- Provision of Healthcare

Interview

- Enhanced Cognitive Interview
- Responsible Adult
- Solicitor

Court

- Accessible Court Environment
- Registered Intermediary
- Bail considerations
- Specialist Reports on defences and diversion



10. Submission to the Joint Oireachtas Justice Committee on Courts and Courthouses - August 2021 - AsIAM

Introduction

AsIAM welcomes the opportunity to make a submission to the Oireachtas Joint Committee on Justice on the subject of “Courts and Courthouses”. As Ireland’s National Autism Charity, we see the impact that access to justice has on the autistic community, which comprises at least one in 65 people, along with their families and supporters. The courts’ system/structure can often be a complex and oftentimes arduous and intimidating process for anyone, but it can be particularly daunting and overwhelming for autistic people. It has a real and substantial impact on our community’s ability to access justice in accordance with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), and to fully exercise and vindicate their rights as Irish citizens.

Professor Theresia Degener notes that “*access to justice in most countries is usually available to those who have financial, political or cultural power, whereas minorities or other groups experiencing discrimination and subordination are excluded from it*”¹. This is no different in Ireland, where autistic people and disabled people comprise some of the most marginalised and excluded groups in society. Many individuals on the spectrum and their families often find themselves engaging with the legal system in a myriad of ways. For instance, some may find themselves having to sue the State just to ensure that their children can fully access their education or essential services. Others may find themselves coming into contact with the criminal justice system, either as victims or survivors, as witnesses, as jurors or as perpetrators themselves. This can be complicated further if it intersects with gender identity, ethnicity, sexual orientation, socio-economic background, other disabilities or forms of neurodiversity or if they are a member of the Roma/Traveller Community.

Autistic parents may have cases in the Family Courts if there are disputes relating to custody/child maintenance, inter alia. Our Ward of Court system also disproportionately impacts many members of the autistic community, and many autistic people find themselves in the care of the State, often through no fault of their own. Other autistic people may seek to sue businesses or entities as injured parties for tortious wrongdoing, including defamation, personal injury, unfair dismissal or negligence etc.

In short, Autistic people are part of the fabric of Irish society. They can, and often do, access the legal system in much the same ways as their neurotypical peers. This means that all autistic people, regardless of their status, need to have full and equal access to the same facets of the legal system. This includes having full access to court buildings in accordance

About AsIAM

AsIAM is Ireland’s National Autism Charity and are working to create a society in which every autistic person is empowered to reach their own personal potential and fully participate in society. AsIAM believe that by developing the capacity of the autism community and addressing the societal barriers to inclusion we can make Ireland the world’s most autism-friendly country.

¹ E. Flynn, ‘Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities’ (1st edn, Routledge, 2016), p.ix.

with Universal Design principles, including access to quiet spaces or sensory rooms if needed. In terms of wider accessibility, this will also include ensuring that legal professionals, Gardaí, prison staff and court staff are fully trained on autism acceptance and inclusion, and that autistic people can readily access Reasonable Accommodations at any point of proceedings where they need support without undue delay.

Anecdotal evidence suggests that many autistic individuals and their families have had negative experiences in engaging with the legal system. This can have a real and tangible impact on their faith in the rule of law and the administration of justice. This is particularly prevalent as autistic people are more likely to engage with the legal system as victims of crime or as injured parties². Autistic people are also more likely to experience trauma and develop conditions such as Post Traumatic Stress Disorder; this often happens due to negative or adverse experiences that go along with growing up as autistic³. Autistic people, alongside people with intellectual disabilities, are also particularly vulnerable to experiencing disablist hate crime⁴, to incidences of ‘mate crime’⁵ and to ableist attitudes held by society more generally.

There are two Articles within the UNCRPD in particular that relate to how autistic people access the Courts in Ireland. Article 12, on Equal Recognition Before the Law, obliges States to ensure that people with disabilities are treated equally before the law. This includes the right to enjoy the legal capacity to make decisions about their lives, including being supported to making these decisions.⁶ Article 13, on Access to Justice, obliges States to ensure that disabled people have equal and effective access to justice. This includes providing accommodations that support their participation in investigations and court cases, and for police, courts, probation and prison staff to receive awareness training appropriate to supporting people with disabilities to participate in legal proceedings.⁷

For this submission, AsIAM will set out to answer the questions posed by the Committee to the best of our knowledge step-by-step, and then provide further information, including recommendations, on how the Courts can improve accessibility for autistic people.

About AsIAM

AsIAM is the national charity and advocacy organisation for Ireland’s autism community.

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- 2 Equality and Human Rights Commission (Great Britain), ‘Crime and disabled people’, <https://www.equalityhumanrights.com/sites/default/files/research-report-103-crime-and-disabled-people.pdf> (accessed 20 Aug 2021), 33.
 - 3 N. Haruvi-Lamdan et al, ‘Autism Spectrum Disorder and Post-Traumatic Stress Disorder: An unexplored co-occurrence of conditions.’ (2020) 24 (4) *Autism* 884-898, 884.
 - 4 E. Chaplin, S. Mukhopadhyay, ‘Autism Spectrum Disorders and Hate Crime’, (2018) 4 (1) *Advances in Autism*, <https://openresearch.lsbu.ac.uk/item/86w4v> (accessed 20 Aug 2021), 4.
 - 5 S. Forster, A. Pearson, “‘Bullies tend to be obvious’”: autistic adults perceptions of friendship and the concept of ‘mate crime’, (2020) 35 (7) *Disability and Society* 1103-1123, 1103.
 - 6 Article 12, United Nations Convention on the Rights of Persons with Disabilities. Online. Available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html> (accessed 20 Aug 2021).
 - 7 Article 13, United Nations Convention on the Rights of Persons with Disabilities. Online. Available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html> (accessed 20 Aug 2021).

We are working to create a society in which every autistic person is empowered to reach their own personal potential and fully participate in society. We believe that by developing the capacity of the autism community and addressing the societal barriers to inclusion, we can make Ireland the world's most autism-friendly country.

Our organisation has made its mark on the national landscape since our founding in 2014, from our award-winning campaigns to lobbying lawmakers to prioritise autism on the Oireachtas' agenda. AsIAM has developed a range of innovative supports for Ireland's autism community; as well as providing vital information and advocacy supports, we have also delivered several nationally and internationally renowned training and accreditation programmes for businesses and services to become autism-friendly.

Executive Summary

- Mainstream autism and neurodiversity into the Courts Service's future plans on physical and virtual accessibility, including the use of virtual courtrooms.
- Increase resources to ensure that autistic people have full access to court buildings in accordance with Universal Design principles, to meet the autism community's diversity of needs. Such measures should include access to quiet spaces, providing separate waiting areas for witnesses and defendants, accessible signage, flexible court schedules, reducing sensory stimuli and other measures. Mainstream these access considerations into all future builds and renovations.
- Ensure that all information related to the court's activities and proceedings is fully accessible to the autistic community, including the development of Easy-to-Read materials and Social Stories.
- Ensure that all courts put pre-trial preparation/support in place for autistic people, including courtroom visits in advance of the hearing, and information on what to expect at court.
- Provide measures for courts to facilitate family members, advocates, 'appropriate adults', to support autistic people throughout the court process if they need it.
- Ensure that the courts have the option to facilitate ways of making court hearings less formal and intimidating for autistic people, including the removal of gowns/wigs, the use of pre-recorded evidence or the use of Plain English.
- Coordinate with relevant stakeholders to ensure that court staff receive timely information about an autistic person's access needs, including other disabilities or mental health conditions, before their case reaches court.
- All Court Service staff, legal professionals, Gardaí and prison staff should receive the appropriate information, including Autism Acceptance and Understanding Training and Disability Equality training on how to engage with autistic people and disabled people, based on best practices and delivered by autistic-led and disability-led organisations.

Are there sufficient numbers of courthouses/courtrooms throughout the State and are they sufficiently resourced?

AsIAM cannot directly speak to whether or not there are sufficient numbers of courthouses and courtrooms throughout the State. We would not be privy to the kind of data around courthouses and the number of cases that each court building would have to go through in a given year. What we can say, however, is that the COVID-19 has no doubt had a significant impact on the workload of the courts. It is important, therefore, to note there have been significant delays to some of the cases in which members of the autism community have been involved.

It is also important to be mindful of the opportunities COVID-19 has presented, not just in making courts physically accessible to people with disabilities, but also the potential to promote Digital Justice⁸ as a means of ensuring that more autistic people can access the courts and vindicate their rights. The pandemic has created an opportunity for those who feel that the Court system is not accessible. Virtual courtrooms have given many disabled people a more accessible route to the courtrooms/courthouses in Ireland, which removes some of the concerns above (i.e., the intimidating atmosphere of the court building, the formality of legal proceedings, etc.).

AsIAM, given the information we are privy to, does not believe that at this point in time that courthouses/courtrooms are sufficiently resourced to fully meet the access needs of Ireland's autistic community. Many autistic people and their families in correspondence with us have relayed their stressful experiences in accessing courts in terms of accessing facilities adjacent to the court, which can be attributed to gaps in training or understanding among Court Service staff and legal professionals. The sensory impact of being at court itself, particularly during busy periods, can also be overwhelming for many on the spectrum who might be sensitive to lights, crowds or noise, and the need to hear evidence from autistic people at court, given the often adversarial nature of proceedings, can pose significant barriers to accessing courtrooms and by extension accessing justice for the autism community.

In summary, AsIAM believes that additional resources need to be in place so that not just courtrooms/courthouses are fully accessible, based on Universal Design principles. court staff and legal professionals must receive sufficient training and support to ensure that autistic people can fully access the legal system and have their rights vindicated.

Recognising the need to maintain and modernise courthouses while acknowledging the importance of such buildings from historical and heritage and economic perspectives.

AsIAM understands the importance of maintaining and modernising courthouses whilst also recognising the need to preserve their character and integrity. However, from an accessibility perspective, many of Ireland's court facilities are lacking not just in terms of disability access, but also in integrating autism and neurodiversity into wider disability considerations within the Courts Service.

⁸ Courts Service of Ireland 'Supporting Access to Justice in a Modern, Digital Ireland - Long Term Strategic Vision 2030' <https://iwla.ie/wp-content/uploads/2020/11/Long-Term-Strategic-Vision.pdf> (accessed 20 Aug 2021), p. 4, 10.

Autistic people, and disabled people more widely, face a wide range of accessibility issues. The lack of a separate waiting venue for witnesses and defendants is seen as a key issue, as well as the formality and authority of court buildings, signage, and the language and tones used by Court Service staff, which can be intimidating and confusing to many within the autistic community. Architectural barriers, rigid scheduling, the lack of use of stimming/comfort breaks, lack of access to quiet spaces, and lack of training can compound lack of access to courts, even though legislation such as the Disability Act enshrines that all public buildings, including courts, must be fully accessible to people with disabilities⁹. These are all issues that should be addressed to make the courts more accessible to Ireland's autism community.

Are courthouses currently equipped to provide separate entrances and waiting areas for victims and the accused?

AsIAM does not believe that any meaningful number of operational courthouses are presently equipped to provide separate entrances and waiting areas for particular parties (e.g., witnesses, victims, the accused, etc). Given the potential vulnerability of one or both parties involved, this should be addressed as a major accessibility issue for autistic people, and should be mainstreamed into all future builds and renovations planned for courthouses.

Are courthouses appropriately equipped with facilities and interview suites, particularly for those who may be considered vulnerable or those with visible and invisible disabilities?

AsIAM does not believe that many courthouses are presently equipped with facilities that meet the autism community's diverse profile of needs, particularly in regards to the sensory environment, and physical accessibility more generally. For instance, many of the interview suites and meeting rooms used would use harsh fluorescent lighting, bright colours, that may be located near courtrooms or busy corridors, and may be subject to background noise from proceedings, and there may be a lack of accommodations that meet an autistic person's sensory needs. This is because an autistic person may find these environments to be overwhelming, and being asked to be interviewed by a barrister or solicitor may serve to add to the worry or distress without having additional support or accommodations in place. Some autistic people may also require access to things that might address their sensory needs, such as dimmers (e.g, sunglasses or earplugs if needed). Moreover, members of our community may need access to additional supports, such as information about their rights, or access to an "appropriate adult" if they are vulnerable, or separate entrances.

A persistent lack of clear guidelines for Court Service personnel on how to provide supports for people with disabilities in court is a major barrier to accessibility. Chief among these supports include providing interpreters or advocates in court, and allowing different modes of giving evidence that meet their communication needs, and for all in the legal community to presume that all autistic people have the right to decide on how they wish to engage in the legal process. It is also crucial to stress that agencies involved in the legal process have the capacity to identify when a person identifies as autistic, and communicate this to Court

9 Section 25, Disability Act 2005.

Service staff so that Reasonable Accommodations can be put in place in a timely manner.

At present, few of these recommendations, if any, are formally in place and all need to be addressed as a matter of urgency.

AsIAM¹⁰ recommends that:

- Pre-trial preparation/support be put in place for autistic people. This may include a visit to the courtroom and the court building in advance of the proceedings, or others that provide assistance on what to expect in the courtroom.
- The Court Service provide an option for facilitating informal support, through family members, advocates, ‘appropriate adults’, throughout and during the time of the court hearing.
- The Courts Service have measures in place to make the process of going to Court less formal and intimidating for autistic people. This may include the removal of gowns/wigs as in Family Court proceedings, the use of videolink or pre-recorded video evidence, and any accommodations which address an autistic person’s sensory needs, such as the relaxation of dress codes, regular comfort/stim breaks or access to a quiet space.
- That an autistic person’s disability and their support/access needs should be formally recognised and communicated to Court Service staff and the judiciary should happen before their case reaches court.
- Judges and barristers should receive appropriate information and best practices training regarding how to communicate and engage with autistic people, as either witnesses, defendants and plaintiffs, as well as people with all forms of disabilities more generally.
- More accessible court environments, whether in terms of the provision of information (such as Social Stories or Easy-to-Read), making court buildings physically accessible to disabled people more generally, or the greater use of more flexible court schedules to adapt to an autistic person’s access needs.

In view of the COVID-19 pandemic, are courthouses structurally suitable to ensure social distancing and have the facilities to conduct remote participation?

As our organisation lacks sufficiently direct experience in this regard, we cannot immediately answer that question with specific reference to COVID-19 and the suitability of courts to ensure social distancing.

In the issue of remote participation, however, depending on the context and nature, AsIAM believes that this would be particularly useful to include the option to provide evidence or attend court over video link or to submit pre-recorded evidence as an accommodation for the autism community. We note that this is already used by children and vulnerable

¹⁰ Many of these recommendations are based on the work of Claire Edwards and Shane Kilcommins on Access to Justice for People with Disabilities. See C. Edwards, G. Harold, and S. Kilcommins, ‘Access to Justice for People with Disabilities as Victims of Crime in Ireland’ <http://nda.ie/nda-files/access-to-justice-for-people-with-disabilities-as-victims-of-crime-in-ireland1.pdf> (accessed 20 Aug 2021).

adults, particularly where the case may involve abuse or sexual offences, and propose that this would be particularly helpful for making the legal system more accessible to those on the autism spectrum. We also believe that having court sittings involving autistic witnesses and defendants during quieter parts of the day, as well as greater use of 'appropriate adults', advocates/supporters or family members, might help make the experience of attending court less intimidating and pressurising for many autistic people, particularly those who might be experiencing trauma.

Are there sufficient facilities/accommodations in courthouses to allow for engagement between legal advisors and their clients?

AsIAM does not believe that those jury rooms are equipped with facilities that meet the diversity of needs of the autism community, particularly with regards to the sensory environment, access to accessible information, quieter rooms where both parties can engage without any unnecessary sensory distractions.

Legal jargon and the way that certain legal practitioners speak, used both during and outside of court settings, can also pose a significant access barrier to autistic people and their families, as this can be confusing and difficult to follow, particularly for those unfamiliar with the legal process. The adversarial nature of the court system, the legal system's emphasis on 'orality,' and the need to communicate verbally to participate in court proceedings can pose significant barriers to many autistic people, particularly those of are non-speaking (non-verbal) or partially speaking (pre-verbal), and who need additional supports, such as the use of assistive technology or augmentative and alternative communication to fully participate in the proceedings. How barristers cross-examine witnesses can also be significantly intimidating to autistic people, including the types of questions that may be asked, as well the speed and tone in which they may ask these, and that this should also be addressed to make the legal process more accessible to autistic people who need these supports.

Challenging stereotypes around autism within the legal community is another issue to be addressed to make the court process more accessible. Some of these biases can be attributed to the uncertainty from barristers and the judiciary on how to best engage with autistic people and their families, and on misconceptions surrounding what it is like to be autistic on an individual basis. Some legal professionals may harbour doubts about an autistic person's competence or capacity to be a reliable witness, or to fully participate in the broader legal process. Indeed, our organisation has also received anecdotal evidence from correspondence with our community members about several incidents whereby an autistic person's diagnosis might even be used against them during legal proceedings.

The UNCRPD has enshrined that all people with disabilities, including autistic people, have the legal capacity to participate in court proceedings with the right supports put in place. This highlights the clear need for the judiciary and the legal community to receive full training on best practices in [Autism Acceptance and Inclusion](#), neurodiversity and Disability Equality Training (DET) from autistic-led and disability-led organisations and disability rights advocates.

AsIAM recommends that:

- Formalising clear, concise information, step-by-step instructions and the acceptance of the legal community of other forms of communication, and not just verbal communication, will go some way to addressing some of the gaps in communication between the legal community and autistic people and their families.
- Providing regular, and accessible information to participants around the different stages of hearings, how their case is going and what will happen next.
- Legal professionals should receive training on best practices on both Autism Acceptance and Inclusion, as well as Disability Equality Training.
- Legal professionals to receive timely information on an autistic person's access needs.

Are jury rooms adequate to accommodate juries who are providing a valuable service to the State?

AsIAM does not believe that jury rooms are equipped with facilities that meet the diversity of needs of the autism community, particularly with regards to the sensory environment. For instance, many of the interview suites and meeting rooms use harsh fluorescent lighting, bright colours, may be subject to background noise from proceedings, noises from within the room itself, and there may be a lack of accommodations that meet an autistic person's sensory needs.

An autistic person may find it to be overwhelming, and being asked to be interviewed by a barrister or solicitor may serve to add to the worry or distress without having additional support or accommodations in place, particularly if jury rooms are full. Some autistic people may also require access to things that might address their sensory needs, such as dimmers (such as sunglasses or earplugs if needed), stim breaks, or having access to quiet spaces or quiet parts of the building to regulate themselves, particularly when deliberations are made. At present, few of these recommendations, if any, are in place and all need to be addressed as a matter of urgency.

Noting that justice must be done and must be seen to be done, are there adequate facilities for media coverage, where appropriate?

As this is not within our area of expertise, AsIAM would not be in a position to answer this question. AsIAM notes that media coverage around court cases involving autistic witnesses and defendants can often be sensationalised or based on outdated preconceptions about autism, and fuel misconceptions and stereotypes that the general public may have around autism. Whilst there may be autistic people who engage in wrongdoing or criminal activity, being diagnosed with autism does not in itself cause a person to commit crimes or harmful behaviour.

Our Language Guide may be helpful in terms of providing clarity on misconceptions surrounding autism. It provides guidance around how to best cover legal proceedings which involve autistic people, and other members of the autistic community.

Is there sufficient IT support in courts to provide for the use of technology in courtrooms for children and minors attending court?

As this is not within our area of expertise, AsIAM would not be in a position to answer this question. However, all technology used should comply with best practices in digital accessibility, including the Web Content Accessibility Guidelines, the EU Accessibility Act, and the National Disability Authority's Customer Communications Toolkit for the Public Service.

Are courthouses geographically located in places that are easily accessible for those that need to attend them?

As this is not within our area of expertise, AsIAM would not be in a position to directly answer this question. However, we appreciate that geographic access looks very different to people living in different parts of the country, which does have a tangible impact on some autistic people's ability to attend court proceedings. For this reason, AsIAM believes that autism should also be mainstreamed into wider geographical considerations when locating courthouses.

Is security adequate in courthouses - is there a case for the presence of a "Court Garda"?

As this is not within our area of expertise, AsIAM would not be in a position to fully answer this question. AsIAM believes that all Court Service staff, including Court Gardaí, should be fully trained on Autism Understanding and Acceptance based on best practices on autism inclusion.



11. Assisting People with Autism - Guidance for Justice Professionals in communicating with people with autism **- National Autistic Society Northern Ireland and the Department of Justice in Northern Ireland**

Appended to this Edition with the kind permission of the authors, is a guidance document based on the publication 'Autism: a guide for criminal justice professionals', produced by the National Autistic Society Northern Ireland and the Department of Justice in Northern Ireland in 2014. The guidance document has been produced for the Republic of Ireland. Thank you to the National Disability Authority.



**An Bord Um
Chúnamh Dlíthiúil**
Legal Aid Board

Assisting People with Autism

Guidance for Justice Professionals in
communicating with people with autism



NDA

National Disability Authority
Údarás Náisiúnta Míchumais

This guidance document is based on the publication 'Autism: a guide for criminal justice professionals', produced by the National Autistic Society Northern Ireland and the Department of Justice in Northern Ireland in 2014. The NDA wishes to thank Shirelle Stewart, Director of the National Autistic Society Northern Ireland, for her support and input into developing the guidance document for the Republic of Ireland, and for permission to use text from the Northern Ireland guide for producing this.



The National
Autistic Society

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How this guide can help you

- This guide provides background information about autism spectrum disorders and aims to assist those working in the civil and criminal justice system who may come into contact with someone who has autism in order to best communicate with and support them. This includes public service officials such as anGarda Síochána, the Courts Service, the judiciary and the Prison Service and the Probation Service, and members of the legal profession such as solicitors and barristers. The term justice professional is used in the guide to refer to the two groups.
- People with autism are individuals with their own particular ways of relating to others, and no two people with autism are likely to display all the characteristics outlined in this guide. Nevertheless, it can be helpful if you are aware of the points in this guide for communicating with a person with autism
- People with autism may come into contact with justice professionals in different ways. The guidance aims to be a useful and practical resource for a wide range of people in the justice system who may come into contact with witnesses, respondents and complainants with autism in the course of their work.
- The guide draws from a guidance booklet on ‘Autism: a guide for criminal justice professionals’ produced by the National Autistic Society Northern Ireland and the Department of Justice. The NDA obtained permission for using text from that publication in this guide
- The guide is based on the experiences of people with autism and those who work with individuals on the autism spectrum. It contains real-life examples and personal accounts by professionals, family members and people with autism themselves in Ireland. The NDA wishes to thank all who provided personal accounts, shared their personal stories and agreed to have them included in the guide. To ensure their anonymity and privacy, the stories in the guide are not attributed to named persons.
- The guide is designed to be used by justice system professionals as a regular reference. It is produced by the National Disability Authority with inputs from a range of bodies and individuals. Some repetition occurs from section to section so that each can be used individually.
- This guide is not intended to equip justice professionals to diagnose someone as being on the autism spectrum as some of the characteristics described could be attributed to other conditions.

A range of resources are available from autism support organisations. The Appendix lists support organisations and other sources of information and support.

Autism actions in the National Disability Strategy

The National Disability Strategy Implementation Plan (NDSIP) 2013–2015 set out a programme of actions for implementation by government departments and public bodies with the goal of ensuring a whole of government approach to advancing the social inclusion of all persons with disabilities, including those with autism.

The Programme of Actions on Autism is in keeping with the cross disability, whole of government, social model of disability approach set out in the NDSIP. It recognises that an increased understanding of autism across the public sector is required to ensure that effective implementation of the NDSIP.

The guide meets one of the commitments in the Programme which states that the NDA will develop guidance for the Justice system on engaging and supporting people with autism who come into contact with the system.

What is autism?

Although autism was first identified in 1943, it has remained a relatively unknown disability until recently. For this reason, many professionals, including those in the civil and criminal justice system, may be unsure how to work with someone they believe to be on the autism spectrum. Alternatively, they may not realise that behaviours they find unusual are due to someone having autism.

Autism, including Asperger syndrome, is a lifelong condition that affects how a person communicates with, and relates to, other people. It also affects how they make sense of the world around them. It is a spectrum condition, which means that, while all people with autism share certain difficulties, their condition will affect them in different ways. Some people with autism are able to live relatively independent lives but others may need a lifetime of specialist support. People with autism may also experience over- or under-sensitivity to sounds, touch, tastes, smells, light or colours.

Asperger syndrome is a form of autism. People with Asperger syndrome are often of average or above average intelligence. They have fewer problems with speech but may still have difficulties with understanding and processing language.

It is estimated that there are 1 in 65 primary school aged children in Ireland with an autism spectrum disorder. The prevalence may not be as high in adults, especially adults with Asperger syndrome, due to less diagnosis and less awareness when those adults were children. It is also estimated that between 40% and 69% of people who have autism also have an intellectual disability.

Psychiatric disorders are a common feature among people with Autism Spectrum Disorder. The prevalence rates vary but about 70% of children are estimated to have a psychiatric co-morbidity (Crowe and Salt, 2015), of which the most common is anxiety (Skokauskas and Gallagher, 2012). Other studies have estimated that around 30% of adults have obsessive compulsive disorder (Russell et al., 2013) and between 5% and 34% have depression. Psychiatric disorders are difficult to diagnose in those with ASD. They can be over diagnosed due to overlap between autism symptoms and those associated with the psychiatric disorder. People with ASD and a psychiatric disorder can see a worsening of their autism symptoms which can interfere with the education and behaviour.

The characteristics of autism

Some people with autism, including those with Asperger syndrome, may have a difficulty in making sense of the world around them.

A person with autism may show some of the following characteristics:

Social interaction

He or she may:

- appear to be indifferent to others or socially isolated
- be unable to read social cues
- behave in what may seem an inappropriate or odd manner
- appear to lack empathy
- avoid eye contact when under pressure.

Social communication

He or she may:

- have difficulty in understanding tone of voice, intonation or facial expression
- make a literal interpretation of figurative or metaphorical speech (for example, the phrases “has the cat got your tongue” or “he’d make mincemeat of you” could be alarming to a person with autism)
- find it difficult to hold a two-way conversation
- become agitated in responses or come across as argumentative or stubborn
- come across as over-compliant, agreeing to things that are not true
- use formal, stilted or pedantic language

- have poor concentration and thus poor listening skills
- be honest to the extent of bluntness or rudeness

Social imagination

He or she may:

- have difficulty in foreseeing the consequences of their actions
- become extremely anxious because of unexpected events or changes in routine
- like set rules, and overreact to other people's infringement of them
- often have particular special interests, which may become obsessions
- find it difficult to imagine or empathise with another person's point of view.

Real Life Story, from a young man with autism

To the best of my memory I think I must have been about 16 or 17 years old at the time. I've always been very nervous as a young teenager. This could have been contributed to by the fact that I attended a very rough school and felt uncomfortable around many of the students. I suppose you could say that I found it difficult to trust many of my class mates at the time.

Anyway, one evening I decided to take a trip to a local late night shop just a few minutes from my house. Even though it wasn't particularly late, it was quite dark. As I was walking along I saw some teenagers my own age. I didn't know them and I guess I felt nervous and uncomfortable around them. I tried to act as confident as possible nonetheless. But I couldn't help every so often look back behind to see if anyone was behind me.

Suddenly a tall man with a beard approached me. He introduced himself by name first then told me he was with the Gardaí and presented his badge to me. He asked me if I knew he was with a Garda. I told him that I didn't as he was not in a uniform. He told me that I appeared to be very nervous. But to be honest that startled me as I didn't notice him approaching me at first. So he then asked me if I was carrying any drugs. I told him I wasn't. He then asked me if he could search me. I certainly didn't want to make the inspector (I think he was an inspector) more suspicious so I let him search me. I just wanted to prove to him that I had nothing to hide. So he searched my jacket pockets and trousers. Of course he found nothing as there was nothing to find. When he had finished searching he confirmed that the only reason he searched me was because I seemed very nervous.

Continued

After this event I felt rather embarrassed, confused and quite offended that the inspector felt a need to search me at all. It certainly made me feel more self conscious of my social awkwardness and nervousness. At that stage in my life, I knew nothing about Asperger's syndrome nor did it even seem to me that I may have Asperger's or any form of autism. It took me a great many years to build up the level of confidence I have reached today.

Sensory difficulties

Many people with an autism spectrum condition have difficulty processing everyday sensory information such as sounds, sights and smells. This is usually called having sensory integration difficulties, or sensory sensitivity. It can have a profound effect on a person's life. Every individual will be affected differently, and some will be oversensitive to sensory stimulation while others will be under-sensitive and seek out sensory stimulation.

People who struggle to deal with all this sensory information are likely to become stressed or anxious, and possibly feel physical pain.

Real Life Story, from a young person with autism

Once, I was re-enacting a dramatic movie scene in my head while I was daydreaming in public. I was semi-aware that my thoughts were affecting my body language, but did not realise how I appeared to other people. A security guard approached me and asked if I was okay. It turned out that onlookers thought that I was having a fit and had sent him over.

Why it is important to know if a person may have autism

It may not be immediately obvious to you that the person you have encountered has particular needs. His or her unusual behaviour may invite the attention of others, but in general autism is a hidden disability.

All people with autism can experience difficulties with communication and social interaction and some may develop strong, narrow, obsessional interests. They may also have sensory difficulties and some coordination problems (see page 6 for more details which may help in recognising the condition and communicating with a person on the autism spectrum). People with autism frequently suffer from high levels of anxiety due to their inability to make sense of what is going on around them.

Contact with the Justice System

Individuals with autism who come into contact with the Justice System may be from the more able end of the spectrum, with high-functioning autism or Asperger syndrome¹, as they generally have a greater degree of independence than those whose autism is accompanied by severe learning difficulties. Only a minority of people with autism tend to come into contact with the Criminal Justice System, either as a victim, witness, suspect or offender.

The main focus of this guide is on criminal justice cases, as less has been written about people with autism in the civil justice cases. However, most of the guidance is common to justice professionals operating in criminal and civil law cases.

Real Life Story, from a Family Court judge

In the course of various childcare cases, I have come across a situation where a parent is on the autistic spectrum with cognitive impairment.

One such case was an application for a full care order under section 18 of the Child Care Act 1991. When one of the parents went into the witness stand, it became very apparent that the witness was in serious difficulties in terms of their understanding of the proceedings due to their confused answers to the questions. I stopped the hearing because I suspected that this parent was on the autistic spectrum with cognitive impairment which was undiagnosed. I directed a psychological assessment of this parent with specific psychometric testing and I directed the psychologist, who conducted the assessment, to appear in court so that I could properly question him. His conclusion was that this parent was on the autistic spectrum with mild to moderate cognitive impairment with a tendency of borderline personality disorder.

Our brains are hard-wired to understand the world in terms of time, space, cause and effect and that understanding is expressed through the medium of language. This parent had difficulties in all these areas of understanding in their world. I adjourned the hearing and appointed a properly qualified advocate to assist the parent engage with their legal team. The hearing was adjourned until that appointment was made so as to ensure that the parent had the ability to meaningfully participate in the proceedings before the court.

¹ In 1994, Hans Asperger published an account of children with many similarities to Kanner autism (see below), but who had abilities including, for example, average or above average grammatical language.

Autism is a developmental disability affecting each individual to varying degrees. As the need to gain accurate information is central to the work of the Justice System it is therefore important to establish an individual's level of understanding and expressive ability at the outset. This will require the use of effective strategies on an individual basis to enable clear communication and mutual understanding. This will help the interviewer avoid receiving inaccurate or inappropriate responses when they are seeking clarification about a particular situation.

Those at the less able end of the spectrum, with classic 'Kanner'² autism, may have little or no speech, may attend day services, live in residential services or be in the constant care of their parents, and so are likely to spend much of their time in the presence of support workers or family members.

However, the command of spoken language in a person with high-functioning autism or Asperger syndrome does not necessarily indicate their true level of understanding or social awareness. Their apparent independence can mask their social disability: many people with autism are often confused by what goes on around them and may well be vulnerable individuals and thus more likely to be victims or to be manipulated into offending or confessing.

Lack of understanding

People with autism do not always understand the implications of their actions, or the motivations of others. Due to their difficulties with social imagination, problems with flexibility of thought and a tendency towards obsessive and repetitive behaviour, an individual may not learn from past experience. They will often find it difficult to understand how others perceive their actions and to intuitively transfer their experiences from one situation to another. As a result, some may become victims or repeat their behaviour if not offered appropriate support and intervention.

People with autism often find unexpected situations extremely difficult to cope with. In a dangerous situation where they are being intimidated, they may not know how to respond and will therefore become increasingly anxious. Sometimes individuals with autism become involved in activity which alarms others or which breaks the law. This may well not be intentional.

'We like rules... rules are secure... I haven't always been able to tell a good rule from a bad rule and I am sure that AS [Asperger syndrome] kids have difficulty with this. Adults, that's where you come in. It's up to you to explain these things clearly to the AS kid'.

Luke Jackson³

2 In 1943, Leo Kanner first described the specific pattern of behaviour with the range of difficulties in children who also had learning difficulties and special educational needs as 'early infantile autism'.

3 Luke Jackson (2002) *Freaks, geeks and Asperger syndrome*, London, Jessica Kingsley Publishers.

If the behaviour of a person with autism has become unacceptable, it may not be easy for them to change it in response to a warning. What is required are particular supports or intervention. Otherwise they may end up in the courts or custody. This, once again, may be necessary because people with autism find it difficult to generalise and adapt learning from one situation to another. It is important to ensure that the person with autism understands properly the consequences of their actions and the impact their behaviour may have on others. The following sections of this booklet will help justice professionals in their approach to individuals with autism if they meet them in the course of their work.

People with autism coming into contact with the Justice System

People with autism may be more vulnerable than others due to their social and communication disabilities, so they have a particular need for understanding and appropriate support from the criminal justice system. Making an emergency '999' call could be very difficult for someone with autism, as could giving a statement to a Garda officer following a burglary. The wider implications of the situation may not be apparent to them and they may not understand what kind of information they need to give.

A lack of understanding of autism can lead to certain behaviour being misconstrued as offending behaviour. This may arise where they are unaware of the consequences of their actions or the effect their behaviour will have on other people because they do not instinctively link cause and effect. Some can display extreme behaviour in certain circumstances, often resulting from their inherent high anxiety levels. Therefore, appropriate support is required to meet the proper needs of each individual. Below are some further examples of the kinds of behaviour to be aware of.

Misunderstanding social cues

Many people with autism find it difficult to make eye contact. In some cases it will be fleeting or may be avoided altogether. In others, eye contact may be prolonged or intrusive. Some people with autism may not know or understand social etiquette such as exchange of pleasantries with someone else.

Social naivety

Social naivety sometimes leads individuals with autism to make inappropriate social approaches; for instance, they may stand very close to another person, not realising they may be intruding into that person's perception of personal space.

Some people with autism, concerned about what is the correct thing to do, respond to a situation in a way which others find difficult to take. For example, having been taught about road safety, one young person with autism took to shouting instructions about crossing the road to everyone who came to the traffic lights near his house.⁴

People with autism, wanting friendship, to be part of a social group, and unable to read the motives of other people, have at times been duped into acting as unwitting accomplices in theft and robbery. One man with autism who worked in a jeweller's shop was persuaded to let the new night watchman 'look after' the keys, enabling that watchman to later steal from the shop.⁵

Social isolation

The behaviour of some people with autism may come across as odd or eccentric. They may appear to be socially isolated and this makes them particularly vulnerable to bullying.

'In many respects, children with Asperger's make perfect victims, a fact that most bullies are quick to discover: we have no tactics for verbal or physical self-defence, we are extraordinarily naive. We can be reduced to tears of frustration and rage with delicious ease by simple ploys like making fun of our obsessions'.

Clare Sainsbury⁶

A teenager with Asperger syndrome in England became prey to harassment by a neighbour's family. On one occasion they called the police when they saw him writing his name in salt in the driveway: he was copying what he saw on TV.⁷

Unusual behaviour

Unexpected changes, such as train delays, can be so distressing to a person with autism that they may react with an aggressive outburst. Conversely, an individual may express an outburst of absolute elation about something apparently trivial in a public place, which could cause alarm or undue interest from others.

One young man with autism, unable to cope easily with a change in his familiar travel route, reacted in a loud and explosive manner, swearing profusely and pacing up and down, on the day when his usual bus stop was moved temporarily. Another man, frustrated by others ignoring parking regulations, took to attacking the parked cars, causing criminal damage.

4 Example taken from Autism: a guide for criminal justice professionals, produced by the National Autistic Society Northern Ireland and the Department of Justice in Northern Ireland, 2014.

5 Ibid.

6 Claire Sainsbury (2000), Martian in the playground. Bristol: Lucky Duck Publishing.

7 Example taken from Autism: a guide for criminal justice professionals, produced by the National Autistic Society and the Department of Justice Northern Ireland.

By contrast, on one occasion, a 50-year-old man with high-functioning autism left work so delighted by the fact that he had a new credit card that he hopped and skipped along the road, talking aloud about it and laughing constantly. This caused passers-by to turn and stare, and one person to follow him for a short distance. Completely preoccupied with his thoughts, he stepped out into the road and caused a car to swerve. Fortunately, a work colleague saw him, led him to safety, and encouraged him to take a taxi home.⁸

Obsessional interests

People with autism are often so single-minded about their interest that they are unaware of the effect that their actions could have on others, or that those actions could lead to them putting themselves in danger. An individual may also not realise that by acting in a certain way they may have committed a crime.

Examples of single-minded interests include one five-year-old girl, obsessed with the leather tags on a pair of jeans, who would approach people wearing jeans and flick the tags with her finger. The obsession continued into her teens and it led her into more than one very vulnerable situation.

Another child with autism, fascinated with fire engines, set light to public waste bins so that he could see the fire brigade arrive and extinguish the fire. One man, obsessed with trains, took control of a steam engine at a station and set off along the track, while an interest and skill with computers led to another person with autism hacking into computer systems.⁹

Running away

Some people with autism, whether children or adults, are prone to run away whenever they are left unattended or when carers are otherwise occupied. It is not easy to understand why they do this: it may be that a particular individual does not recognise the need to stay or they may simply enjoy the stimulation of air rushing past their face. Some may have played hide and seek in the school playground and, not realising that this particular situation is different from school, expect that someone will come and find them. Others may run off to find a place or an activity which is the focus of a special interest or obsession.

'I was never going anywhere in particular, just going. I'd climb the stairs at the high-rise flats, play in the elevator or try to find out how to get on the roof with every intention to jump off and 'fly'.¹⁰

8 The above examples are taken from *Autism: a guide for criminal justice professionals* (2014) by the Department of Justice and the National Autistic Society Northern Ireland.

9 The above examples are taken from *Autism: a guide for criminal justice professionals* (2014) by the Department of Justice and the National Autistic Society Northern Ireland.

10 Donna Williams (1999) *Nobody nowhere: the remarkable autobiography of an autistic girl*. London: Jessica Knightly Publishers.

People on the autism spectrum often do not recognise danger. They may not, for example, observe boundaries, may run into oncoming traffic, climb into a neighbour's garden, enter unlocked vehicles or sheds, or peer into other people's windows. Water sources such as ponds, fountains, rivers and canals may be of particular fascination, and therefore danger, to the individual.

Real Life Story, from a Garda

There was an issue where a child with autism kept running away from home. The child in question was verbal but would not answer questions or respond to their name, the child could also bite if distressed. Both Gardai and family would search for the child. If the Gardai (unfamiliar to the child) were to locate the child first, there was often a scenario of the child becoming more distressed and attempting to bite the Garda as the natural reaction of the Garda was to ask questions or the child's name.

Following on from these incidents, I meet with parents of the local support group for Autism and an Autism Safety Plan was developed an Autism Safety Plan Person Information Sheet. The Person information forms were completed by parents of the support group and are kept in the Garda Divisional Headquarters. It means any Garda member responding to a call of a missing child/ engaging with any person with autism can reference the form to see all relevant information to liaise with the person in the most suitable manner and reduce the risk of causing further distress or injury. This has worked very well in the county.

Recognising and approaching people with autism

People with autism are all individuals, but each experiences difficulties with social interaction, social communication and social imagination. These difficulties differ in form and/or degree from one person to another, so it may not always be easy at first to recognise whether an individual has the condition, or to what degree. Nevertheless, if the behaviour and response of any individual encountered by a justice professional is unusual, it will be important to consider whether that person may be on the autism spectrum.

Justice professionals may, for example, encounter the person outdoors or somewhere away from their familiar home surroundings. Barristers and solicitors are more likely to meet the individual in the structured setting of an office or interview room, and court staff will probably only have contact within the court environment; but all of these unfamiliar surroundings and circumstances are likely to cause the individual particular stress.

An informed approach

Whichever of these circumstances apply, there are certain characteristics, detailed below, which are worth looking out for if you suspect an individual may be on the autism spectrum. Identifying these will help to inform how you approach the person concerned.

Depending on the nature of their autism, the individual may display some of the following characteristics.

Behaviour

He or she may:

- not recognise Gardaí or other emergency services' uniforms or vehicles and may not understand what is expected of them; conversely, their association of Gardaí with uniforms may be so strong that they will not understand the concept of 'Garda' in a plain clothes situation
- cover ears or eyes, stare, or look down or away constantly
- walk on tiptoe or in an unusual way
- react to stressful situations with extreme anxiety, which could include pacing, flapping or twirling of hands, self-harming, screaming or groaning, shouting and loss of control. All of these are a response to fear, confusion and frustration and are an effort to stop the stimuli and retreat into a calm state.

Speech

He or she may:

- speak in a monotone voice and/or with unusual or stilted pronunciation: even if a person appears to have normal language, this may be masking his/her actual level of understanding
- repeatedly ask the same question or copy/repeat the last phrase they heard (this is known as 'echolalia')
- not respond to questions or instructions
- communicate non-verbally; many people with autism cannot speak
- become noisy or agitated if required to deviate from regular routine
- speak obsessively about a topic that is of particular interest to them, but which may have no apparent relevance to the situation.

Real Life Story, from a parent of a child with autism

A young boy with autism spectrum disorder was sexually assaulted by an older boy. Both boys were neighbours. A third party told the parents about the abuse. Having discussed the matter with the little boy, he told his parents about the assault that had taken place, after what appeared to be a week of pressuring and propositioning of the child by the older boy. The parents made contact immediately with child services about the incident. A duty social worker was assigned to the family and called to the house to discuss the allegation, which she explained had to be reported to the Gardaí. A report was made and sent to the Gardaí. In the meantime, the parents were told to keep their son safe and away from the other child. The little boy did not understand why he was no longer allowed to play with his friend and due to his autism, he was unable to control his emotions and frequently got angry and verbalised his frustrations frequently outside the front of the home, for all to hear. The parents would try and take him in home during these meltdowns to ensure the neighbours and other family concerned would not hear him. There were no services appointed to the child or his family at this time. They had no support from any service, and were more or less hiding out in their home, avoiding the other family, friends and neighbours, while the devastation hit them and the confusion of what had happened set in for the young boy.

The parents were informed that two special investigators would have to interview the young boy because of his disability. The parents felt that one investigator was quite rude and very unsympathetic towards the parent who along with her family, was going through a very difficult time. Investigators began the process of taking a statement from the young boy. The family had been assured that the investigators were highly trained and used to dealing with children with autism. However, the parents felt that the investigators were very loud and proceeded to explain the process to one parent, outlining that they would determine whether the little boy would make a good witness for court or not. The parent tried to explain that they would have to use a low tone of voice, and speak slowly to the child, asking him about his interests or playing a quick little game in order to put him at ease. When the boy would not look at one investigator, they demanded eye contact whereupon the child became uneasy and got up from his seat and fled the room. The child was brought back and the investigators then followed the mother's advice which worked better as the child began to speak.

The next interview with the boy was much better and the little boy was more at ease with the body language of the investigators and that they asked him about school and his interests before starting the interview. He managed to give some testimony. A meeting was scheduled for videotaped interview to take the young boy's statement at a special interview room. The young boy continued to have some issues with explosive outbursts, internalising his feelings and some withdrawal and depression during the year. The young boy was referred to specialist services but he did not receive any therapy whatsoever.

Communicating with a person with autism

A person with autism will often find unexpected or unusual situations very difficult. The following points will be helpful to professionals throughout the justice system – particularly criminal justice - when communicating with someone who has the disability.

Aim to keep the situation calm

- Do not attempt to stop the person from flapping, rocking or making other repetitive movements as this can sometimes be a self-calming strategy and may subside once things have been explained to them clearly.
- People with autism may carry an object for security, such as a piece of string or paper. Removing it may raise anxiety and cause distress.
- If sirens or flashing lights are being used, turn them off to avoid alarm and distraction.
- If possible, and if the situation is not dangerous or life-threatening, try to avoid touching a person with autism, as they may respond with extreme agitation due to their heightened and acute sensitivity.
- People with autism may have an unusual response to pain and not report or be able to communicate injury. Check the person for any injuries in as non-invasive a way as possible, looking for unusual limb positions, e.g. limping or hanging arm, or other signs, such as abdominal pain.

Guidelines for effective communication

- People with autism often understand visual information better than spoken words.
- It may be useful to use visual supports/aids, such as drawings or photos, to explain to the person what is happening. If they can read, it may be useful to put your information in writing.
- To prepare the individual, explain clearly the situation that they are in and what the professional will be asking questions about. If you are taking the individual somewhere else, explain clearly where and why to lessen their anxiety.
- Try to avoid shouting at the person with autism.
- Keep language clear, concise and simple: use short sentences and direct commands.
- Allow time for the person to respond. Individuals with autism may take a long

time to digest information before answering, so do not move on to another question too quickly.

- Reinforce gestures with a statement to avoid misunderstanding.
- If you know the person's name, use this at the start of each sentence so that they know you are addressing them. Give clear, slow and direct instructions; for example, "Pat, get out of the car."
- Avoid using sarcasm, metaphors or irony. People with autism may take things literally, causing huge misunderstandings. Examples of idioms that would cause confusion to someone who interprets language literally are "You're pulling my leg", "Have you changed your mind?" and "It caught my eye".
- Ensure that questions are direct, clear and focused to avoid confusion. A person with autism may respond to your question without understanding the implication of what they are saying, or they may agree with you simply because they think this is what they are supposed to do. If a person with autism is asked "You didn't do this, did you?" they may repeat the question (known as 'echolalia') or say "No" but if the question is 'You did this, didn't you?' they may repeat the question or say 'Yes'.

Responses by the person with autism

Do not expect an immediate response to questions or instructions, as the person with autism may need time to process them. Give the person at least ten seconds to respond.

If a response indicates echolalia, i.e. repetition of the question, it is important not to construe this as insolence: check that you have posed the question clearly enough.

Avoidance of eye contact by the person with autism should not be misconstrued as rudeness or a cause for suspicion.

A person with autism may not understand the notion of personal space. They may invade your personal space, or may themselves need more personal space than the average person.

Questioning people with autism

People with autism are individuals with their own particular ways of relating to others, and no two people with autism are likely to display all the characteristics outlined in this guide. Nevertheless, it can be helpful if you are aware of the points below when interviewing a person with autism.

Stress and anxiety leading up to the interview

Be aware that people with autism find changes in routine very difficult to handle. They will certainly be stressed if their routines are disturbed by, for example, being taken to a Garda station. Even planned events, such as an interview with a solicitor, may be very stressful for them. An individual may also be extremely anxious in a strange environment, such as a court or waiting room.

Some people with autism are hypersensitive to noise and light, while others are fearful of crowds. They often have difficulty in waiting their turn or understanding social conventions such as queuing. An individual may be unable to tolerate such an experience, their anxiety leading them to become agitated or disruptive. If their anxiety increases they may even lash out. If an individual is in this type of situation, any questioning may be adversely affected.

Difficulties in understanding

People with autism are likely to have difficulty understanding what is said to them, and can struggle to maintain a meaningful two-way conversation; this is even more likely when they are stressed. Even those with seemingly good expressive speech are likely to struggle with non-literal communication such as figures of speech, sarcasm, or jokes. They often take what is said to them completely literally – so, for example, if given an appointment at 2pm they may expect to be seen at precisely that time.

Guidance for the interview process

Since autism can impact on someone's ability to communicate, you may not be able to gather all the information you need during one interview. It might be necessary to hold several sessions in order to build up familiarity with the individual. If possible, talk to their parents, carers or the professionals involved with them to seek advice on the best way to interview them.

Additionally, it may be necessary to seek the advice of a psychologist or social worker who specialises in the field of autism. The support of an 'appropriate adult' for either a child or adult with autism, is often essential to help the process move forward. On occasion, it may be a good idea to call upon the services of a support organisation. A list of support organisations are listed in the Appendix.

You should seek to ensure that anyone brought in to provide support has the specialist knowledge and skills to support someone with significant communication difficulties.

It will be helpful to keep the interview as short as possible. A child with autism, or an adult with autism who also has a learning disability, may not be able to concentrate for any longer than ten to fifteen minutes at the most.

The following tips will also help you during the interview itself.

Keeping the environment as calm as possible

- The individual may be more relaxed if they are interviewed in a familiar place, with a familiar person present.
- If known, explain how long the interview is likely to last and what will happen at the end of the session.
- Where a person is eligible for “special measures”, court procedures allow for the use of certain measures to meet the needs of people with disabilities who are giving evidence.¹¹
- Ensure there are no background noises which could provide a distraction during the interview.
- Children and some adults with autism often have an attachment to a particular object, such as a piece of string. The child or adult may wish to hold the object or possibly twiddle or flap with it during the interview. Research suggests that sometimes this helps them to concentrate and removing the object may cause the person unnecessary distress.
- You may see the person use repetitive movements – such as hand-flapping or rocking – which are known as “stimming”. These should be permitted, since they often have a calming effect, though they can also indicate agitation or that the person may need a break.

Conducting the interview

- Talk calmly in your natural voice, keeping language as simple and clear as possible. Use only necessary words. Try not to exaggerate your facial expression or tone of voice as this can be misinterpreted.
- Keep gestures to a minimum, as they may be a distraction. If gestures are necessary, accompany them with unambiguous statements or questions that clarify their meaning.
- Use the individual’s name at the start of each question so that they know they are being addressed.

¹¹ Special measures are statutory provision to allow vulnerable and intimidated witnesses give their best possible evidence in criminal proceedings. There is currently no provision to have screens as a special measure in court but it is hoped to introduce this option under the EU Victims of Crime Bill. There is legislation for using intermediaries but there has been little use of them. To qualify for these special measures, there are specific criteria applied. Further information can be found at: http://www.citizensinformation.ie/en/justice/witnesses/witnesses_under_17_years.html

- Cue the individual in to the language you are about to use, preparing them for the instructions or questions that might follow. For example, “John, I am going to ask you a question.”
- Give time for the person to respond; don’t assume that silence means there is no answer forthcoming.
- Avoid open questions: closed questions are more likely to be understood. For example, asking a person with autism to “tell me what you saw yesterday” may be too vague. The individual may not be able to judge exactly what the interviewer needs to know. A better approach would be to say “Tell me what you saw happen in the shopping centre at around 10 o’clock.”
- People with autism have a very literal understanding of language. Avoid using irony or sarcasm.
- Back up questions with the use of visual aids or supports. People with autism often understand visual information better than words. Consider asking them to draw or write down what happened.

Interviewee response

- Allow the individual extra thinking time to respond to each question. People with an ASD often take longer to process information. If there is no response at all, try rephrasing the question. A person with autism is unlikely to be able to inform you when they don’t understand what you have asked: be prepared to prompt the individual in order to gather sufficient relevant information.
- People with autism may have better expressive language skills than receptive language skills. Be aware that they may not comprehend fully what is said to them.
- Some people with ASD have echolalia: they may echo and repeat the words of others without understanding the meaning of those words.
- Don’t expect the individual to necessarily make eye contact during the interview.
- Remember that people with autism may speak in a monotone, and/or use very stilted language.

In some situations, people with autism may come across as stubborn or belligerent. Alternatively, they may be over-compliant, agreeing with the interviewer’s suggestions or to statements that are untrue. They may not understand the consequences of this action.

Real Life Story, from a barrister

A young boy who suffered from profound autism made two allegations of sexual assault against a neighbour. They both lived in a large country town. The boy's mother brought him to a Garda station and a local garda took a short and simple statement from the boy, in which he named the accused man as the man who had touched him inappropriately on two occasions.

The Garda investigation concluded with interviews in which the accused man denied any inappropriate physical contact with the boy.

The Gardaí and the Director of Public Prosecutions had concerns as to the ability of the boy to give evidence effectively. At that time, in the 1990s, the video link facilities were only available in Dublin and the boy would have to come to Dublin in order to give his evidence via video link. The boy was taciturn and, while not monosyllabic, it was difficult to conduct a conversation with him; he had no facility for small talk whatsoever.

Before the Director made the final decision as to whether or not to prosecute, Counsel met with the boy and his mother. The boy's mother was adamant that he would be able to give cogent evidence and that it was in his and his family's interests to vindicate his rights in this way. Guided by her, the decision was made to proceed with the case.

When the boy came to give evidence, he described one incident of assault clearly and convincingly, though without much surrounding detail. When asked about the second incident he said he could not remember it.

His cross-examination began with a question about his trip to Dublin on the train. Counsel for the Defence knew that his client had met the young complainant on the train and introduced the subject by asking the witness "who was on the train this morning?" Any other witness would have known that the barrister was actually asking the boy to confirm to the jury that he had seen the accused on the train. The witness took the question literally, however, and answered (with a somewhat puzzled look, as if to say that this was wholly irrelevant to the proceedings) "there were lots of people on the train". From that moment on, it was obvious to the jury that this witness was going to answer every question exactly and honestly.

The accused was found guilty of sexual assault in relation to the one incident which the boy had been able to recall. He served a custodial sentence even though the offending behaviour had not been especially severe due to the vulnerability of his victim and the fact that he could not rely on the mitigation of having pleaded guilty; he had not spared his victim the ordeal of giving evidence about the incident.

For those held in custody

Individuals with autism who are being held in custody must be supported. It is best practice to follow the advice above when communicating with them and to remember that their disability renders them vulnerable. If left unattended, those held in custody may react by self-harming, which could involve repeated biting or poking of parts of their body or banging their heads against a wall.

Individuals with autism should have access to a professional who understands their disability, can provide advice and explain their needs; a registered intermediary and an appropriate adult may also be needed during the interview process. Family and carers should be consulted as to the support, care or intervention that the individual requires.

Real Story, from a Probation Officer

Shane lived in the UK as a teenager where with special educational supports he got on reasonably well in school. He didn't attend school after the family returned to Dublin when he was 16 years, but he retains a keen interest in and ability with computers. He has pursued this interest via internet cafes or DVD stores, as he has not always had other access to a computer.

While other members of his family had issues with alcohol and related offending, Shane did not come before the Courts until he was 22 years of age when he was charged with "Indecency". He was seen by other customers at an internet cafe to be engaging in inappropriate sexual behaviour while apparently watching on-line pornography. He admitted the behaviour on his arrest and was referred by the Court for a Probation assessment report. The following is his account of important aspects of his life as he described to his Probation Officer.

He missed his special support teacher desperately after moving to Dublin. He found it impossible to approach training, employment or educational services because he was scared of talking to strangers. He hadn't accessed a medical card and had no GP. He never formed any friendships in Dublin and was conscious of being quite over-weight. He was only content when playing computer games and his only relationships were with internet contacts. He vaguely described a few casual sexual encounters but seemed uncertain about his sexuality. He described recurrent periods of depression that appeared to be related to his isolation, during which he could become very agitated and irritated. If depressed or agitated he was more likely to use the internet in cafes to access pornography sites. He said he had seen others engaging in inappropriate sexual behaviour while watching pornography in the cafes and did so himself, taking steps to avoid being seen. He knows it wasn't right.

Shane's Probation Officer had concerns that he might be someplace on the autism spectrum and referred him for psychological assessment. This confirmed that Shane was on the Adult Autism Spectrum with considerable autism traits. After the assessment he accessed services that included formal computer training as well as group-work and social skills supports through a support organisation for people on the autism spectrum.. His family learned to reduce stress around him.

The Probation Officer was given some hints for communication which included the following: he had high anxiety levels that were not apparent; his understanding of visual communication was better than words - draw what happened; explain everything very clearly and simply to lessened anxiety; use short sentences, direct commands, and give time to respond - don't rush on to the next question; avoid open questions, be careful with language - he takes things literally; interview him in a familiar place; have short interviews; talk to parents and professionals to seek advise on how to deal with him. Shane completed 12 months probation successfully.

Further help or support

Any person with autism who comes into contact with the justice system

is likely to experience higher than usual levels of anxiety. Not only is it likely to be a stressful experience because of the circumstances leading to their involvement, but for many, the anxiety of having their routine changed, their actions questioned or their circumstances scrutinised, can lead to unmanageable outbursts of frustration (known as “meltdown”) or equally inexplicable silences (known as “shutdown”). The reactions that people with autism display are different in every individual. Professionals involved in their care and support whilst they are in contact with the justice system should be prepared and able to assist them as much as possible.

Autism is a hidden disability but, with knowledge and understanding, the justice system can assist the people it affects, ensuring that they play a full role in society and are afforded the rights and protection they need.

A list of autism organisations which can offer advice and support are included in the Appendix on page 25.

Appendix – Autism Organisations

Autism Ireland	Coole Road Multyfarnham, Mullingar, Co. Westmeath N91 WC67 Phone: 044 9371680 Email: info@autismireland.ie
Aspire – Asperger Syndrome Association of Ireland	Carmichael Centre, Coleraine House, Coleraine Street, Dublin 7. Phone: 01 878 0027 Email: info@aspireireland.ie
Irish Society for Autism	Unity Building, 16/17 Lower O’Connell Street, Dublin 1. Phone: 01 874 4684 Email: admin@autism.ie
Shine Ireland	The Shine Centre, Weston View, Ballinrea Road Carrigaline, Co.Cork. Phone: 021 4377052 Email: info@shineireland.com
AsIAm.ie	Please visit the website: AsIAm.ie

Other Organisations

Victims of Crime Helpline

The Helpline offers a confidential national helpline service providing information and support to victims of crime and people impacted by crime is currently being funded by the Commission for the Support of Victims of Crime. Volunteers are trained to understand the effects of crime and provide practical and emotional support to people struggling to cope and recover after being victimized and to navigate the criminal justice system. The Helpline also serves as a gateway for victims to the large number of face-to-face and specialised services available to crime victims in Ireland.

Tel: 116006

Victim Support at Court

Victim Support at Court or V-SAC, is the only voluntary service in Ireland dedicated solely to court accompaniment for victims of crime, their families and witnesses. It provides a court accompaniment service within the Irish judicial system:

www.vsac.ie

Useful Resources

The Victims of Crime Office has a virtual library of booklets and leaflets for victims of crime:

www.victimsofcrimeoffice.ie/en/vco/Pages/WPI0000001

Guidance on going to Court

A Going to Court as a Witness Guide is available on the website of the Director of Public Prosecutions:

www.dppireland.ie/filestore/documents/information_booklets_-_revised_nov_2013/Going_to_Court_as_a_Witness_-_ENG.pdf

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nda

National Disability Authority

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Fax 01 660 9935

Email nda@nda.ie

www.nda.ie



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