

# ROUNDTABLE on ADVOCACY

**Patricia T Rickard-Clarke**  
Chair National Safeguarding Committee

**Safeguarding**  
I R E L A N D



17th October 2018

[safeguardingireland.org](http://safeguardingireland.org)



**“It’s all about Human Rights”**

**Baroness Hale [2014]**

The human rights approach to advocacy places the individual centre stage in all decisions affecting him/her

# OVERVIEW

- Legal Perspectives
- International Human Rights Obligations
- What is Advocacy?
- Other Jurisdictions
- Current Position – Ireland
- Regulation/Standards
- Conclusion

# LEGAL PERSPECTIVES

- Lack of understanding of the role of solicitor versus the role of an Independent Advocate
  - Legal Advocate v Non-legal Advocate
- Fear - Independent Advocate going to take away from business of solicitor
- Courts – non legal representation
- Legal Recognition
  - Statutory Regulation
  - Standards and Guidelines

# LEGAL V NON-LEGAL ADVOCACY

- Agency
- Implied Agency
- Instructed v Non-instructed
- Solicitor and Independent Advocate – both can be appointed with specific authority as agent
- Solicitor provides legal advice and legal representation
- Advocate does not provide legal advice or legal representation but may provide representation
- Charge for Service

# HUMAN RIGHTS PERSPECTIVE

- Advocacy is grounded in and reflects the underlying principles of a rights-based approach.
  - The inestimable dignity of each and every human being
  - The concept of autonomy or self-determination that demands that the person be placed at the centre of all decisions affecting her/him
  - The inherent equality of all regardless of difference
  - The ethic of solidarity that requires society to sustain the freedom of the person with appropriate social supports

# UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 2006

**(Signed by Ireland 2007, ratified by Ireland 2018)**

- State parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms **for all persons with disabilities** without discrimination of any kind on the basis of disability (Art 4)
- State parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law (Art 12.1)
- State parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (Art 12.2)
- State Parties shall ensure that all measures that relate to **the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse** in accordance with international human rights law (Art 12.4)

# WHAT IS ADVOCACY?

- **Advocacy** in all its forms seeks to ensure that people, particularly those who are most vulnerable in society, are able to:
  - Have their voice heard on issues that are important to them.
  - Defend and safeguard their rights.
    - Access to Justice
    - Liberty and security of person
    - Freedom from torture or cruel, inhuman or degrading treatment
    - Freedom from exploitation, violence and abuse
    - Protecting the integrity of the person
  - Have their views and wishes genuinely considered when decisions are being made about their lives.

# WHAT IS ADVOCACY

- Advocacy gives people who may not be able to speak for themselves a **voice**. Dealing with social workers, doctors and other professionals can be intimidating for anyone, but having an advocate means that there is somebody **standing up for the rights of the individual** and ensuring the[y]... **are at the heart of every decision**.
- Advocates are independent and represent the views and wishes of the individual without judgement or bias. Depending on the individual this **may mean empowering and enabling them to communicate their wishes or it may mean speaking on their behalf**. Advocates play a vital role in person-centred care ensuring the individual's wishes, beliefs and values are taken into account.

Rt Hon Norman Lamb – Department of Health England Report on IMCAs 2015

# MENTAL CAPACITY ACT 2005

## Appointment of Independent Mental Capacity Advocate

- IMCA must be appointed for the following decisions:
  - Change of Accommodation
  - Serious Medical Decisions
  - Deprivation of Liberty Safeguards
  - Care reviews

Where a person lacks capacity to agree to

- the outcome of an accommodation review or
- to protective measures taken in adult protection case

# MCA 2005 - FUNCTIONS OF IMCA

- Regulations may make provision requiring an advocate to:
  - Providing support to the person so that the person may participate as fully as possible in any relevant decision
  - Obtaining and evaluation information
  - Ascertaining what the person's wishes and feelings would be likely to be and the beliefs and values that would be likely to influence the person, if s/he has the capacity
  - Ascertaining what alternative course of action are available in relation to the person
  - Obtaining a further medical opinion where treatment is proposed
  - Provision as to the circumstances in which the advocate may challenge, or provide assistance for the purpose of challenging any relevant decision

# REGULATIONS [2006 1832 and 2883]

- Gathering information
- Evaluation information
- Making representations
  - IMCA should discuss findings with the decision-maker and raise any issues or concerns as soon as possible
- Challenging Decisions
  - IMCA should be able to resolve any issues or concerns with the decision-maker before the decision is made. Where this is not possible IMCA may formally challenge the decision-making process.

Includes challenging a decision as to capacity

Includes challenging a DoLs application, if the person wishes to appeal the decision the role of IMCA is to pursue appeal regardless of whether or not they feel that the placement is in the person's best interests.

# CURRENT POSITION – Policy, Guide + Standards

- HSE National Consent Policy
- HIQA – *National Standards for Residential Care Settings for Older People in Ireland*
- HIQA – *National Standards for Residential Services for Children and Adults with Disabilities*
- NAS – *Advocacy Service Guide 2015*
- Sage Advocacy – *Quality Standards for Support and Advocacy 2015*
- Statutory codes for the *Assisted Decision-Making(Capacity) Act* (15 of them) *reference an Independent Advocate*

# CURRENT POSITION – Legislation

- *Mental Health Act 2001* – legal advocacy (representation at tribunal)
- *Disability Act 2005*
- *Citizens Information Act 2007* – personal advocacy
- *Assisted Decision-Making (Capacity) Act 2015*
  - *Support required for the purposes of the UNCRPD*
  - *Section 103 – code of practice for the guidance of persons acting as advocates on behalf of relevant persons*
  - *Section 36(8) + Section 100(12) – Court application*
- *Adult Safeguarding Bill 2017*- Independent Advocate
- Part 13 ADMCAct 2015 – Deprivation/Protection of Liberty

# APPLICATION TO COURT

- Part 5 ADMC Act provides for an application to court
- Relevant Person is entitled to legal aid for the purposes of obtaining legal advice or legal representation in respect of application
- Any application must be heard in the presence of the RP unless:
  - The fact that the RP is not or would not be present in court would not cause an injustice to RP
  - Such attendance may have an adverse effect on the health of RP
  - RP is unable, whether by reason of old age, infirmity or any other good and substantial reason, to attend the hearing or
  - RP is unwilling to attend

# NON-LEGAL REPRESENTATION IN COURT

There are cases where the rules of justice and fairness do require accommodation to be afforded to a category of person coming to court

- Court of Protection Rules (Court of Protection Handbook 2016)

“Most courts deal only with litigious matters. The Court of Protection is unusual in that much of its work, particularly on the property and financial side, is non litigious. Here, there is often a common goal, which is to put in place a protective legal framework for a person who is unable to protect and promote their own personal interests”

**CC v KK and STCC[2012] EWHC 2136(COP)**

# REPRESENTATION/ASSISTANCE IN COURT

- RP can make application to court or
- A person who has a bona fide interest in the welfare of RP may make application to the court
- Certain persons must be put on notice of application
- RP will be entitled to represent him/herself or be represented by a legal practitioner
- RP may instruct a legal practitioner or be assisted in court by others, another person (Independent Advocate) or a Court Friend

# IF NO LEGAL PRACTITIONER INSTRUCTED

- RP may be assisted by:
  - (a) Decision-Making Assistant, Co-Decision Maker, Decision-Making Representative, Attorney or Designated Healthcare Representative who is willing to assist the relevant person during the course of the hearing or
  - (b) There is another person in respect of whom the court is satisfied that such person is suitable, willing and able to assist RP during the course of the hearing (Independent Advocate)
- Where there is no legal practitioner or anyone within category (a) or (b) the court may direct the Director of the Decision Support Service to appoint a Court Friend from a panel

# ASSISTANCE BY INDEPENDENT ADVOCATE/COURT FRIEND

- Independent Advocate or Court Friend is a person who **assists RP in relation to an (Part 5) application to court** in respect of which RP is the subject
- **The court** on hearing such application, **may hear submissions** from the Independent Advocate or Court Friend on behalf of RP
- Independent Advocate/Court Friend may
  - examine and take copies of any health, personal welfare or financial record held in respect of RP by any person or body or organisation and
  - Interview RP in private or otherwise than in public

Consent is required from RP unless Director DSS dispenses with requirement where with

- there has been a declaration that RP lacks capacity
- an enduring power of attorney has been registered

# ASSISTANCE BY INDEPENDENT ADVOCATE/COURT FRIEND

- An Independent Advocate/Court Friend **shall assist and attend with RP in court** or, if RP is not attending the hearing, **promote the interests and the will and preferences of RP in court**
- An Independent Advocate/Court Friend may attend and represent RP at any meeting, consultation or discussion, **in connection with an application to court**, in respect of which RP is the subject, **at which the interests or the will and preferences of RP are being considered**, whether or not RP is attending the meeting, consultation or discussion
- Act is silent as to whether advocate/court friend is entitled to legal representation – AOD [2016] IEHC – right of guardian as item to be legally represented in court

- English IMCA must be appointed (to represent and support RP where acts or decisions are proposed by a state body and RP has not appointed any person to make the decision, no attorney or court has not appointed any to make decision)
- Functions – providing support
  - IMCA can question and challenge decisions that do not appear to be in the interests of RP
  - If IMCA unable to resolve by informal means can use formal methods of challenge which **ultimately includes referring the matter to the Court of Protection**
  - If IMCA wishes to challenge the manner in which a serious decision has been made **can seek legal advice and consider applying for a judicial review**
  - In making a formal challenge IMCA must first approach the Official Solicitor.
  - Official Solicitor can decide to apply to the court as litigation friend acting on behalf of RP
  - If Official Solicitor does not apply to Court of Protection, IMCA can ask permission to apply to Court and Official Solicitor can still be requested to act as litigation friend
- Distinction between litigation friend and advocate in England
  - IMCA can be litigation friend but different roles
  - **Litigation friend must ensure RP voice before the court and must ultimately make decision as to what arguments to advance on RP's behalf**

# REGULATION/STANDARDS AND EDUCATION



- Legal recognition for the practice of Independent Advocacy
- Safeguarding Ireland - in submission on draft scheme on DoLs suggested that statutory regulations as to the appointment and functions of Independent Advocates
- Standards
- Training and Education key

# NEW ZEALAND

## Health and Disability Commissioner Act 1994

### Independent Director of Advocacy

- In the Office of Health and Disability Commissioner but independent of it
- Independent of the Ministry
- Independent of Health and Disability purchasers and providers
- For instructed and non-instructed advocacy
- Code of Rights
- Responsibilities
  - To administer advocacy services agreements (contracts for advocacy services)
  - To promote, by education and publicity, advocacy services
  - To oversee the training of advocates
  - To monitor the operation of advocacy services and report to the Minister from time to time on the results of that monitoring
- National Advocacy Service – independent, free and ‘partial’

# CONCLUSION

- Human Rights agenda demands appropriate mechanisms to ensure that the voice of the person is centre stage
- The person who requires support and assistance by an Independent Advocate is deserving of the high standards in practice
- Equally Independent Advocates who perform this role is deserving of respect
- Now external oversight – Irish Human Rights and Equality Commission to act as independent mechanism to promote, protect and monitor implementation of the UNCRPD

**Safeguarding**  
I R E L A N D



[safeguardingireland.org](http://safeguardingireland.org)



**I only take a few euros  
to cover my expenses.  
I never thought of it  
as abuse.**



**Promoting the rights of vulnerable adults**

**Safeguarding  
IRELAND**



**I locked the door to keep  
him safe when I went  
shopping.  
I never saw it as abuse.**



**Promoting the rights of vulnerable adults**

**Safeguarding  
IRELAND**



I gave her something  
to calm her.  
I never considered  
it abuse.

Promoting the rights of vulnerable adults

Safeguarding  
IRELAND

