

Submission on Draft Initial State Report Under

the

United Nations Convention on the Rights of

People

with Disabilities.

March, 2021.

INTRODUCTION.

Safeguarding Ireland is a not-for-profit organisation incorporated as a company limited by guarantee and registered with both the Companies Registration Office and the Charities Regulatory Authority. Its aims are to promote safeguarding of adults who may be vulnerable, protect them from all forms of abuse by persons, organisations and institutions and develop a national plan for promoting their welfare. This is achieved by promoting inter-sectoral collaboration, developing public and professional awareness and education, and undertaking research to inform policy, practice and legislation in the Republic of Ireland.

Safeguarding Ireland has made many submissions and recommendations to government departments, individual ministers, public bodies and private agencies on protecting and promoting the human rights of all vulnerable adults. Safeguarding Ireland is of the view that the protection and promotion of human rights for all will ensure people are enabled to participate in their communities, maximise their independence and help prevent them from being abused, exploited and/or neglected. Further information is available by accessing the Safeguarding Ireland website - <https://www.safeguardingireland.org/>

STATEMENT.

Safeguarding Ireland welcomes the opportunity to make a submission on the government's ***Draft Initial State Report Under the United Nations Convention on the Rights of People with Disabilities*** (UNCRPD) and believes that it is important that the Report accurately reflects the current actual compliance with the Convention. In this regard, the Introduction to the Report in paragraph 4 stating that Ireland '*has put in place new laws to protect the rights of people with disabilities*', should accurately state that, while Ireland enacted the *Assisted Decision-Making (Capacity) Act* in 2015, it has not yet been fully commenced and the *Irish Sign Language Act 2017* was not commenced until late December 2020. The comments made in the Draft Initial Report should, therefore, take account of the continuing non-compliance with human rights obligations in these matters even post ratification by Ireland of the UNCRPD which is the period being covered by the Initial Report. It should also be noted that Ireland's current legislation for people whose decision-making capacity is at issue or who lack decision-making capacity is still the *Lunacy Regulation (Ireland) Act 1871*. This is in spite of having enacted the *European Convention on Human Rights Act* in 2003 (the State shall perform its functions in a manner compatible with the provision of the European Convention on Human Rights) and having ratified the UNCRPD in 2018.

Safeguarding Ireland notes and welcomes the statement in the Draft, namely that the "*Irish Government is committed to the principles of the Convention and to its purpose to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity*". However, it is Safeguarding Ireland's belief that there is much more that the government can and must do to give effect to its stated commitment.

In framing this submission, Safeguarding Ireland will number and quote the relevant article of the UNCRPD and make its recommendations/observations/comments in respect of the Government's Draft Initial Report and progress on the practical implementation of the elements of the Article in question.

In formatting this submission, Safeguarding Ireland considers persons with disabilities as those outlined in Article 1 of the Convention, i.e., *"persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others"*. Therefore, the Convention accommodates those people not just in receipt of services labelled as "disability services" but rather examines the situation of all persons with disabilities. In that respect, Safeguarding Ireland welcomes the inclusion of people comprehended in the definitions listed in Part II Section 3, paragraphs 19, 20, 21 of the government's Initial Draft Report.

RECOMMENDATIONS.

In order for Ireland to fulfil its obligations under the United Nations Convention on the Rights of People with Disabilities, Safeguarding Ireland believes that implementation of the recommendations outlined below would represent a major, yet relatively easily achievable, measure.

1. Full and immediate commencement of the Assisted Decision Making (Capacity) Act, 2015.
2. It will be necessary to amend a number of pieces of legislation to comply with the requirements of the UN Convention on the Rights of Persons with Disabilities by the enactment of the Disability (Miscellaneous Provisions) Bill.
3. Develop and implement a comprehensive framework of adult safeguarding legislation which includes, but is not limited to, health and social care services.
4. The wishes, choices and preferences of all people with a disability should be respected and promoted through a statutory entitlement to independent advocacy.
5. Enactment of Deprivation of Liberty Legislation and Statutory Safeguards.
6. Amend the Domestic Violence Act, 2018, to expand the offence of coercive control beyond intimate relationships.
7. Mental health legislation should be updated and reformed within a specific timeframe.
8. Update and strengthen the regulation of health and social care services to include regulation of home care.

9. Provide for a statutory entitlement to home care.
10. Review progress on the implementation of ‘*A Time to Move on from Congregated Settings*’ and commit to an effective implementation plan with tighter timelines.
11. Provide a range of accommodation options for older people as they become disabled and/or dependent.
12. Expand the membership of the Disability Strategic Group to include specific representation for older people.
13. Regulate financial entities to ensure arrangements are made to assist people who may be challenged by advances in financial technology to manage their finances.

ARTICLES.

Articles 1 – 4.

The National Disability Inclusion Strategy 2017-2021 (NDIS) is a welcome document and it does point out that *“disability is age-related and increases sharply with age. Three out of every five people aged over sixty years has at least one chronic condition¹”*. However, it is disappointing to note that the Disability Strategic Group does not have any specific representation from organisations representing older people. Moreover, the document is somewhat narrowly focused primarily on what might be termed the traditional disability sector and services rather than an all-embracing view of people with disabilities. It refers to need for services for ‘growing up’ in Ireland but makes little provision for ‘growing old’ in Ireland. Surprisingly, the NDIS does not mention respect for individual’s human rights. Safeguarding Ireland notes that consultees participating in the Mid-Term Review of the NDIS stressed *‘the need for a more rights based approach when talking about the disability sector, and moving the conversation away from health and illness’*. This is an important point in the context of the UNCRPD.

The main finding of Mid-Term Review of the NDIS carried out in 2020 found that progress had been slow. This is evident as most of the timeframes set for action in the NDIS document have not been met. As stated in the Draft Initial Report at Part II paragraph 12, the Mid-Term Review states that the focus for 2020 and 2021 will be on Strategy implementation and on the implementation of the Convention on the Rights of Persons with Disabilities.

¹ National Inclusion Strategy 2017-2021.

The Review sets out five Strands, one of which will be the Strengthening of Rights and another a CRPD implementation plan. This includes yet a further commitment for the commencement of the *Assisted Decision-Making (Capacity) Act 2015* in the period 2020-2021. The NDIS (published in 2017) contained a commitment for commencement in 2018 and, at the time of the publication of the Mid-term Review in 2020, the Minister for Justice confirmed in the Oireachtas commencement in 2020. Safeguarding Ireland now understands that the date for commencement is scheduled for mid-2022. To date the implementation plan has not been published. It is important that the Report to the UN contains clear information on the *de facto* implementation of the UNCRPD.

Article 5 – Equality and non-discrimination

Part III, Paragraph 22 of the Draft Initial Report states that *‘Ireland has robust equality legislation and a significant legal framework to protect human rights’*. Paragraph 34 of the Draft Initial Report states that Equality and Choice is one of the major themes of the NDIS and set out the actions which include:

- (a) Persons with disabilities are recognised and treated equally before the law and have the same rights and responsibilities as other citizens and
- (b) Persons with disabilities make their own choices and decisions, are treated with dignity and respect and are free from all forms of abuse.

While a legal framework has been adopted by the Oireachtas to recognise the right to equality and for persons with disabilities to make their own choices and decision-making, the legislation is not yet in place and equality before the law is not yet a reality in practice; nor is the right of a person with disability to make their own decisions.

It is important, therefore, that the Initial Report to the UN gives a firm commitment, with timelines that are capable of being effectively monitored, to the implementation of the UNCRPD.

Article 10 – Right to Life.

The Covid-19 pandemic has presented significant challenges for the whole of society and has affected, in one way or another, every person in Ireland, regardless of their dependencies. It has a very significant impact on Ireland’s economy, on peoples’ livelihoods and, of course, on health – both at individual level and in terms of service delivery. However, it is acknowledged that older people, in particular those in residential care, suffered more than any other group. Most older people in residential care have some form of disability, either physical in nature or related to cognitive impairment, or a combination of both.

The state encourages, through financial support (through the Nursing Homes Support Scheme), older people with dependencies to enter long term residential care. In fact, in relation to older people, the state is over reliant on institutional care². Older people with disabilities are the only group which the state actively encourages to avail of institutional care. In all other groups, for example people with mental health challenges and younger people with disabilities, the state's stated policy is a move away from congregated and institutional care.

"There is increasing evidence to show that highly dependent persons can live safely and more happily in domestic settings, provided their required homecare supports are in place³". The Special Committee on Covid-19 Response was of the view *"that future moves to support the older people at home must have, as a priority, a publicly funded and publicly provided model of care that is underpinned by community intervention teams from the HSE⁴".* The Committee also noted that there is a *"failure to prioritise empowering older persons to remain at home and develop models including smaller domestic-style units integrated into towns and city community areas⁵".*

In order to ensure people's human rights are promoted and protected, there is a need for a stronger regulatory framework for people in long term residential care. In that context, Safeguarding Ireland would strongly support the recommendations contained in the Covid-19 Nursing Homes Expert Panel's report that *"the current regulations need to be modernised and enhanced with additional powers and requirements⁶".*

Moreover, Safeguarding Ireland is aware that, currently, there is no regulation of home care. This places all people with disabilities, regardless of their age, who need care in the home at risk of abuse, exploitation and neglect. There is a need to introduce statutory regulation of all home care services. See below for more on this under Article 19.

Article 12 - Equal Recognition before the Law.

Part III, paragraph 141 of the Draft Initial Report states *that 'Ireland is putting in place the required legislation that will give full effect to its obligations under Article 12'*. It goes on to describe, at some length, a number of the provisions in the Assisted Decision Making (Capacity) Act, 2015, that will give effect to promoting and supporting decision making for those people who require decision making support. However, the reality is that, six years after the passing of the Assisted Decision Making (Capacity) Act, it still has not been fully commenced. If this Act was commenced, it would offer very substantial protections for people whose decision making is challenged.

² Special Committee on Covid-19 Response. Houses of the Oireachtas. 2020

³ Covid-19 Nursing Homes Expert Panel. Examination of Measures to 2021. Report to the Minister for Health.

⁴ Special Committee on Covid-19 Response. Houses of the Oireachtas. 2020

⁵ Ibid.

⁶ Covid-19 Nursing Homes Expert Panel. Examination of Measures to 2021. Report to the Minister for Health.

The Assisted Decision Making (Capacity) Act, 2015, will support people who may lack decision making capacity. It provides a statutory framework for people to make legally binding decisions and will provide support for people to make decisions about their welfare, property and affairs. The Act sets out new arrangements for supported decision-making to include the making of an Enduring Power of Attorney. The Act also provides that the Director of the Decision Support Service has a safeguarding role in the supervision of the various decision-makers, to include attorneys in relation to the performance of their functions.

The importance of the Act can be summarised as *“that a person is fully supported in all matters. The Act is specifically providing for a mechanism, where a relevant person can choose a person who can assist them in maximising their capacity to participate”*⁷.

Paragraph 146 of the Draft states that the ADMC Act *‘provides for the presumption of capacity and the protection and promotion of the person’s will and preferences and for the individual’s right of autonomy and self-determination to be respected...’*.

Safeguarding Ireland wishes to point out that the Guiding Principles contained in the ADMC Act sets out principles enshrined in in the UNCRPD which Ireland ratified in 2018. However, the ADMC Act limits the application of these principles and how they are given effect to (to include the presumption of capacity and the taking account of a person’s will and preferences) for the purposes of an intervention by persons who are identified as ‘interveners’. It is, therefore, necessary to amend Section 8 of the ADMC Act to provide for a statutory presumption of capacity for a ‘relevant person’ and respect for their ‘will and preferences’, regardless as to whether they are subject to an ‘intervention’ or not under the ADMC Act. Section 8 should, therefore, be amended to read: *The principles set out in subsection (2) to (10) shall apply for the purposes of this Act.*

It is important that the assessment of capacity to make an enduring power of attorney, an advance healthcare directive and the making of a will are all similar and consistent. In applying the principle of *equal recognition before the law*, in accordance with Article 12 of the UNCRPD, it is necessary to amend Section 140 of the ADMC Act to read: *A person’s capacity to make a will shall be construed in accordance with Section 3 of this Act.*

⁷ Law Society Submission. 2017

Paragraph 147 of the Draft Initial Report confirms that Part 6 of the ADMC Act provides for the abolition of wardship and for the phased transition from adult wardship to the new decision-making support arrangements and for the review by the wardship court of the capacity of all current wards of court within three years of the commencement of Part 6. Safeguarding Ireland questions the continuing of this timeline and points to some recent court decisions. Both the Supreme Court and the Court of Appeal raised questions in relation to some wardship applications about the lack of fair procedures, the absence in the current legislation to any form of legal aid, the absence of the voice of the person and that, in principle, appropriate legal measures should be directed at a third party rather than unnecessarily depriving a person of her liberty where the risk comes from that third party. It is evident that there are some persons who are wards of court whose human rights have not been respected - nor have they been given the necessary support to exercise their legal capacity and it is, therefore, necessary that commencement of Part 6 of the ADMC Act to review the decision-making capacity of all wards of court be given immediate priority.

The voice of the person can be accommodated now with the commencement forthwith of Sections 3 and 8 the ADMC Act – which gives statutory effect to the common law principle of the presumption of capacity and the giving effect to both rights under the Constitution and to the principles contained in the UNCRPD.

Paragraph 149 of the Draft Initial Report confirms that the ADMC Act provides for the investigation of complaints about decision-making supporters under a number of grounds, including fraud, and decisions not being in accordance with the will and preference of the person. However, there is no provision for the making of a complaint in relation to a person who has not been appointed a decision-making supporter but who is controlling or abusing the rights of a person who would be a ‘relevant person’ for the purpose of the ADMC Act. This needs to be addressed.

Article 12.4 of the UNCRPD provides that *‘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’*. Safeguarding Ireland wishes to highlight that it is difficult to comply with this obligation in the absence of adult safeguarding legislation. (See comments for Article 16 below).

The establishment of the National Office for Human Rights and Equality Policy within the HSE is a welcome development.

Paragraph 153 of the Draft Initial Report points out that under the ADMC Act, ‘a person will be presumed to have the capacity to make property decisions’. This is to comply with Article 12.5 of the UNCRPD which provides that ‘State Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own and inherit property’. While Safeguarding Ireland is aware of the definition of ‘Property and Affairs’ in the ADMC Act, it is of the view that, to give full effect to Article 12.5, it is also necessary to amend Section 49 of the *Statute of Limitation 1957* which provides for the extension of a limitation period in the case of disability to a period of 30 years, as opposed to the 12 year period for a person who has no disability. This section facilitates the abusive practice of the non-vesting of property in a person who has a disability and thereby frustrates their equal entitlement to property.

In relation to finances, abuse in this area is very common, particularly in older populations. As acknowledged in paragraph 156 of the government’s Draft Initial Report, Safeguarding Ireland and the Banking and Payments Federation Ireland have highlighted the need for greater awareness of financial abuse and urging adults to plan ahead to safeguard their finances. The Central Bank’s Consumer Protection Code also offers some safeguards for people and Safeguarding Ireland has made some proposals in relation to the revised Code. However, more is required to strengthen safeguards against financial abuse. These include real alternatives to remote banking for people who are challenged by the emergence of financial technology, mobile financial services to offset some of the effects of the closure of many bank and post office branches and greater oversight of publicly funded agency payments such as pensions.

Article 13 – Access to Justice.

Access to justice for people with decision making challenges would be greatly enhanced by the full commencement of the Assisted Decision Making (Capacity) Act, 2015 (see comments in relation to Article 12 above). The Act is underpinned by a number of fundamental principles (Section 8) aimed at promoting and protecting legally binding decision-making rights of people. These include the areas of –

- Presumption of capacity.
- Supported decision-making.
- Right to make unwise decisions.
- Provision for necessary intervention only.
- Least restrictive interventions.
- Interventions giving effect to the individual’s will and preferences.
- Consideration of other views.
- Likelihood of recovery and urgency of the issue.
- Obtaining, using and storing information.

In addition, the Act contains a number of important legal protections and supports, including provision for supported decision making; review of capacity of wards who are adults; enduring powers of attorney; and advance healthcare directives.

However, it is not true to state at paragraph 158 of the Draft Initial Report that *'persons with disabilities have equal access to legal aid'*. Legal Aid is currently not available to a person who is the subject of wardship applications as confirmed by the Supreme Court in *AC & Others V Cork University Hospital and Others* at paragraph 239. While the ADMC Act does provide for the amendment of the Civil Legal Aid Act 1995 to provide for legal aid in relation to Part 5 of the ADMC Act, it does not yet provide for legal aid to be available for wards of court whose capacity is to be reviewed under Part 6 of the ADMC Act. Safeguarding Ireland understands that such provision is to be made in the forthcoming Assisted Decision-Making (Capacity) (Amendment) Bill. Safeguarding Ireland is also strongly of the view that specific provision also needs to be made in the Civil Legal Aid Act 1995 for legal aid to be available to enable persons with disabilities to plan in advance to make an enduring power of attorney. Many such persons cannot afford to pay for private legal services.

Paragraph 165 of the Draft Initial Report states that *'draft rules of court to facilitate the operation of the new capacity regime have been prepared by the Courts Service'*. This is a statement that has been made a number of times in at least the last three years. It would be useful if these draft rules of court were published so that stakeholders who may have useful comments to make can be facilitated to do so. Comments have been made to the effect that part of the delay with the commencement of the ADMC Act relates to delays with the drafting of court rules and regulations provided in the Act.

Paragraph 168 confirms that on appointment, judges are provided with a bench book entitled *The Equal Treatment of Persons in Court* which contains the legal framework concerning disability. Safeguarding Ireland is aware that such a Guide is in existence but is not available to the public. Safeguarding Ireland also understands that this Guide was published in 2011 and is not aware that it has been updated to take account of persons whose decision-making capacity may be at issue and requirements under the UNCRPD. (Compare with the England and Wales Equal Treatment Bench Book latest version published 21 February 2021, being a major revision of version of February 2018). It is important that a detailed updated Irish Guide is prepared and made available.

The Draft Initial Report does not give any details of the programme of training for those involved in the administration of justice, particularly judges and lawyers. Safeguarding Ireland suggests that the Government liaise with the new Judicial Studies Committee to ensure that training in human rights and equality law (to include the ADMC Act) is given priority in the Committee's programme of training.

It is important to restate that due to the delay with the commencement of the ADMC Act, the current legislation for people whose decision-making capacity is at issue or who lack decision-making capacity is still the *Lunacy Regulation (Ireland) Act 1871*. The Rules of Court for wardship proceedings are based on the language and procedure set out in the 1871 Act with no mention of the rights of the person who is the subject of the application to wardship.⁸ The ongoing breaches of rights include:

- No access to medical reports upon which the application to the court is being made.
- No right to legal aid for the purpose of the application.
- No right to participate in court proceedings. This also includes the fact that, in relation to most applications, the person who is the subject of the application is not present in court and no effort is made to accommodate such attendance.
- No right to have an independent advocate or supporting person to voice their views/concerns to the court.
- No direction as to how and by whom the ‘proceedings’ are to be served on the person who is the subject of the application.
- No obligation on any person to ensure there is an explanation of the ‘proceedings’ given to the person who is the subject of the application.
- No enquiry as to conflicts of interest of a potential committee to be appointed.
- No obligation to consult ward in any matter post the wardship order, e.g., in relation to place of care decision, health decisions or other matter for which they may have capacity to decide.

These deficiencies must be referenced in the Initial Report to the UN.⁹

Article 14 – Liberty and security of Person.

Liberty is a well-established basic human right. Article 3 of the United Nations Declaration of Human Rights states that “*everyone has the right to life, liberty and security of person*”.¹⁰ Article 40.4.1 of the Constitution of Ireland provides that ‘*No citizen shall be deprived of his personal liberty save in accordance with law*’. The placement of a person in a place of care is a constant issue which arises in practice, where the rights, will and preferences of a person (either those who have decision making capacity or those who lack such capacity) may not be respected. Draft Heads of a Bill were published by the Department of Health in December 2017 as part of a consultation process. A public consultation followed but legislation has not yet been enacted to meet the ‘procedures required/prescribed by law’ under the Irish Constitution, the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities.

⁸ Order 67 Superior Courts Rules

⁹ Review of current practice in the use of wardship for adults in Ireland (Safeguarding Ireland) 2017

¹⁰ <https://www.un.org/en/universal-declaration-human-rights/index.html>

In the AC Case, the Supreme Court stated that *“it must be borne in mind that a patient’s lack of capacity to make a decision is not, in itself, an answer to a complaint of unlawful deprivation of liberty. People with impaired mental abilities are protected by the same constitutional guarantees as any other person – that they will not be deprived of liberty otherwise than in accordance with law”*¹¹. The delay in the enactment of legislation to deal with the issue of deprivation of liberty in relation to care arrangements is a matter of ongoing concern as the State continues to be in breach of both constitutional and international human rights obligations.

This issue relates in many ways to the observations made above in relation to Article 10 – the Right to Life. It can be summed up by an extract from Report on Public Consultation on Deprivation of Liberty which acknowledged *“that people are routinely deprived of their liberty because of a lack of support to enable them to live independently or due to the absence of more suitable accommodation”*¹². As outlined above, older people, in particular, may be deprived of their liberty due to a lack of appropriate accommodation and supports to enable them to live independently. It is suggested that the statement in the Draft Initial Report at paragraph 171 *‘No distinction if made on the grounds of disability’* should be deleted as it does not reflect the actual position.

In relation to younger people with disabilities, the State’s policy is to accommodate people in community houses and out of congregated settings. The policy document¹³ driving the move to community living was published by the HSE in 2011 and, at that time, it was estimated that over 3,000 people with a disability were living in congregated settings, largely isolated from family and community. Following its publication, a seven-year timeframe was planned for full implementation of the recommendations contained in the report. While some progress has been made in accommodating people with disabilities in community settings, a total of 1,953 people remained in congregated settings at the end of 2019¹⁴. Of these, 65% are aged between 18 and 59 years of age with many having spent a very considerable period of their lives in congregated settings. There is a need to hasten the move from congregated settings for people with disabilities and offer real choice for older people as they become more dependent and try to cope with disabilities of various types.

Paragraph 175 states that *everyone ‘who is involuntarily admitted to an approved centre under the Mental Health Acts, 2001-2018 has their case reviewed by what is known as “mental health tribunal” within 21 days of the making of the admission or renewal order detaining the person’*.

It should be noted that there were two mental health acts enacted in 2018 – the *Mental Health (Amendment) Act 2018* enacted in July 2018 and the *Mental Health (Renewal Orders) Act 2018* enacted in October 2018.

¹¹ 2 AC & Ors v Cork University Hospital and Ors [2019] IESC]

¹² *The Deprivation of Liberty Safeguard Proposals; Report on the Public Consultation.*

¹³ *A Time to Move on from Congregated Settings. HSE. 2011*

¹⁴ <https://www.hse.ie/eng/services/list/4/disability/congregatedsettings/time-to-move-on-annual-progress-report-2019.pdf>

The *Mental Health (Amendment) Act 2018* has not yet been commenced. The 2018 Act provides for capacity to be assessed on a functional basis, in accordance with the ADMC Act, and further provides that Guiding Principles replace the ‘best interest’ principle contained in the *Mental Health Act 2001*. Even though the AMDC Act has not been commenced, it is regrettable, given that the functional approach to the assessment of decision-making capacity has been part of the common law since 2008 and the guiding principles are giving effect to a human rights approach to decision-making, that this very necessary piece of amending mental health legislation has not yet been commenced to respect the rights of persons who are mentally ill.

It should also be noted that a person who has a ‘mental disorder’ and is a ward of court does not have the benefit of the review process provided for in the Mental Health Acts but rather remains within the jurisdiction of the wardship court under the provisions of the *Mental Treatment Act 1945*. Until very recent years (around 2014), such wards did not have the benefit of a review of their detention (which was in breach of their constitutional rights) but limited reviews now take place under practice direction of the wardship court. While Section 108 of the ADMC Act makes statutory provision for a review of detention to those persons who are not detained in an ‘approved centre’, it is important that persons who lack capacity and who are detained in either an approved or non-approved centre have the benefit of timely reviews of original and/or renewal orders consistent with the reviews available to persons who do not lack decision-making capacity and in accordance with the *Mental Health (Renewal Orders) Act 2018*.

Paragraph 176 states that a ‘*comprehensive review of the Mental Health Act is underway. Draft heads of bill have been prepared, taking into account the recommendations of the Expert Group Review of the Act, the views of the Mental Health Commission and Ireland’s obligations under the UNCPRD. It is hoped to finalise the draft bill in 2020*’. It is clear that this timeline has now passed and, to date, there has been no publication of a draft Bill. Safeguarding Ireland would point out that the Review by the Expert Group was commenced in 2012 and published in March, 2015. On 1st March 2021, the Department of Health has opened a public consultation on the Expert Group Review. Again, Safeguarding Ireland would ask that, in the Report to the UN, the State give a firm commitment, with timelines that are capable of effective monitoring, to the reform of the mental health legislation to ensure that Ireland’s obligations under the UNCPRD are, in fact, met without further delay.

Article 16 – Freedom from exploitation, violence and abuse.

The government's Initial Draft Report states that *"Ireland has robust legislation and policy to ensure the protection of persons with disabilities in health and social care settings as well as in the home"*. This is an overstatement and Safeguarding Ireland's strongly held view is that there is a complete lack of legal safeguards to ensure freedom from exploitation, violence and abuse. While there have been welcome developments in recent years, such as the introduction of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012; the National Standards for Adult Safeguarding; the publication of the Law Reform Commission's paper on a Framework for Adult Safeguarding; and the offence of Coercive Control under the Domestic Violence Act, 2018, there are significant limitations to afford people freedom from exploitation, violence and abuse.

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The development of a national safeguarding policy for the health and social care sector, while welcome, frames abuse of vulnerable adults within the health and social care sector only. Abuse and exploitation require a whole of society response and there is a requirement for all policies to be underpinned by specific safeguarding legislation. It is a fact that much abuse occurs in peoples' own homes and is perpetrated by family members. The HSE National Safeguarding Office Annual Report for 2019 reported that, of the 3,990 concerns alleging abuse by persons other than other service users, 2,518, or 63%, were allegedly perpetrated by a relative or friend/neighbour¹⁵. Physical abuse, psychological abuse and financial abuse were the three main abuse types reported.

The HSE's policy, referred to in the government's Draft Initial Report - *Safeguarding Vulnerable Persons at Risk of Abuse - National Policy and Procedures* - applies primarily to HSE Older Persons and Disability Services only. This is evidenced by the fact that 80% of referrals notified to the HSE come from within Disability and Older Persons' Services¹⁶. There would be a reasonable expectation that there would be a significantly higher percentage of referrals from services that deal with vulnerable people on a daily basis, for example, acute services and mental health services. There is an obvious need for the HSE policy to be extended across all HSE services. The Draft Initial Report notes that *the HSE 'has developed a draft revised policy which envisages a major expansion in scope, so that the policy will apply across all HSE and HSE-funded healthcare services in addition to social care services'*. However, this policy has not yet been implemented, despite the final draft of the revised policy being published in 2019.

¹⁵ National Safeguarding Office. Annual Report. 2019

¹⁶ Ibid.

The Draft Initial Report notes that HSE '*staff are supported by the development of a national adult safeguarding training programme*'. Notwithstanding the safeguarding training provided to health and social care staff by the HSE National Safeguarding Office, there is a need for wider, discipline- and service-specific safeguarding training across many services, including public services overseen by government departments such as the Departments of Social Protection; Justice; Housing, Local Government and Heritage; and Public Expenditure and Reform to ensure they meet the legal and human rights obligations to persons with disabilities. In addition, specific and targeted safeguarding training should also be mandatory for staff in financial services, An Post and other agencies interacting with people with disabilities. Ideally, training and education should be consistent and integrated while, at the same time, tailored to particular needs – such as, for example, for the medical community, legal community, law enforcement, social services and government agencies. It should encompass all aspects of safeguarding, including recognition, detection, reporting, investigating, prosecuting, caring for victims and prevention. In addition, the training should go beyond any existing training programmes on safeguarding by offering multidisciplinary and tailored team training that addresses how to work effectively with other agencies, overcoming data protection concerns, where/how to report, how to conduct abuse assessments and how to investigate complex cases of abuse.

While the content of training and education programmes may need to differ, to some extent, depending on the particular agency in receipt of the programmes, there are core requirements to any safeguarding training and education programmes.

The *Guidance on a Human Rights-based Approach in Health and Social Care Services*¹⁷, developed by Safeguarding Ireland in conjunction with HIQA, should be a mandatory inclusion in all safeguarding training programmes. This document is written in simple language and provides practical examples, making it easy to understand and apply in everyday care practices. Though the document is confined to health and social care, it can be easily modified to apply to other all other areas where safeguarding concerns can arise.

The publication by the Mental Health Commission and HIQA in 2019 of the *National Standards for Adult Safeguarding*¹⁸ is a further addition to help to safeguard people. It outlines a number of principles to help promote people's rights and safeguard them from abuse, neglect and exploitation. These principles are –

- Empowerment.
- A Rights-Based Approach.
- Proportionality.
- Prevention.
- Partnership.

¹⁷ *Guidance on a Human Rights-based Approach in Health and Social Care Services. Safeguarding Ireland & Health Information and Quality Authority.*

¹⁸ *National Standards for Adult Safeguarding. MHC & HIQA. 2019.*

However, the document is again confined to health and social care settings. There is a pressing need, at national policy level, to understand that, in order to adequately safeguard and protect people from abuse, exploitation and neglect, there is a need to adopt a whole of society response and the development and implementation of adult safeguarding legislation.

There is no specific adult safeguarding legislation in Ireland. It is fair to say that, in the continued absence of such legislation, full realisation of Article 16 will not be achieved. It might be worth restating some of the sections underpinning this Article.

Article 16. 1 states that *'States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects'*.

Article 16.3 states that *'In order to prevent the occurrence of all forms of exploitation, violence and abuse, State Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities'*.

Article 16.5 states that *'States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted'*.

There is a compelling need to develop and implement safeguarding legislation. An Adult Safeguarding Bill (see reference above to paragraph 149, page 8) was introduced to the Oireachtas in 2017, received all party support and was the subject of a Report of the Oireachtas Joint Committee on Health in December 2017 but was not carried over with the change of Government. The purpose of that Bill was to make *'further and better provision for the care and protection of adults who are at risk; to establish the National Adult Safeguarding Authority; to require certain persons to make reports to the National Adult Safeguarding Authority in respect of adults at risk of abuse or harm in certain circumstances; and to provide for related matters'*. The functions of the Authority, as proposed in the Bill, included –

- the promotion of standards in the safety and quality of services provided to adults at risk;
- the undertaking of investigations where the authority believes, on reasonable grounds, that there is a risk of abuse or harm to an adult at risk;
- receiving reports from mandated persons;
- to promote education, training and public awareness and matters concerning adults at risk;
- to provide information to adults at risk in respect abuse and harm that he or she may be suffering;
- to supervise compliance with the duties imposed by or under the legislation;

- to provide information and guidance to service providers, organisations and bodies in the State in relation to their interaction with adults at risk, including the carrying out of risk assessments and safety statements;
- determining if an adult needs support and assistance;
- other matters which included the provision of an independent advocate to an adult at risk who is the subject of an investigation.

The provision in the Adult Safeguarding Bill of 2017 to establish a National Adult Safeguarding Authority was to meet the requirements of Article 16.3 of the UNCRPD.

The purpose of the Health (Adult Safeguarding) Bill contained in the government's legislative programme for Spring 2021 is described as *'to underpin a planned national health sector policy on safeguarding vulnerable or at-risk adults in the context of their interactions with the health sector'*. This, once again, misses the crucial point that safeguarding is not a matter that affects only those people interacting with the health services. It is a matter that arises in all areas of society and, therefore, requires a whole of society approach with legislation that provides for an overarching statutory safeguarding authority, independent in its functions and with overall responsibility for the Decision Support Service, statutory independent advocacy and legally enforceable investigative powers.

The need for adult safeguarding legislation, at this juncture, should not be in doubt. The findings in a recent Red C Poll commissioned by Safeguarding Ireland found that 91% of respondents support stronger laws to safeguard people from abuse or neglect, particularly those who are vulnerable¹⁹. In 2019, the HSE National Safeguarding Office was notified of 11,929 safeguarding concerns²⁰, the vast majority of which related to people with some form of disability. While the HSE's National Safeguarding Office provides statistics on safeguarding concerns each year, these reflect only safeguarding concerns referred to them. It is reasonable to assume that many safeguarding concerns arise in other services, for example financial institutions, and these are not reflected in the statistics. Moreover, there is no provision for interagency/multi-disciplinary co-operation, no obligation to share information to prevent or deal with abuse or exploitation of adults, or no obligation to promote a continuous learning approach to adult safeguarding with an emphasis on training and awareness.

In the 2019 HSE National Safeguarding Office report, reference is made in strong terms on the need for adult safeguarding legislation – *"there remains an urgent need to progress on a statutory basis for adult safeguarding as reflected by the information in this and previous NSO annual reports. Also, adult safeguarding should be seen as an issue beyond health care.....there is a need for a broader cross societal responsibility²¹"*.

¹⁹ Safeguarding Ireland Incidence of Adult Abuse in Ireland RedC October 2020

²⁰ National Safeguarding Office. Annual Report. 2019.

²¹ Ibid

The report goes on to point out that *“HSE safeguarding teams.....continue to be restricted in adequately safeguarding adults at risk of abuse because of the lack of a statutory basis to adult safeguarding activity²²”*. The Houses of the Oireachtas Committee on Covid-19 Response recommended that *“there should be no unnecessary delay in implementing legislation on adult safeguarding²³”*. A study on the prevalence of elder abuse, i.e., abuse taking place against people 65 years of age and older, in 28 countries, including Ireland, published in the Lancet found that *“elder abuse seems to affect one in six older adults worldwide, which is roughly 141 million people. Nonetheless, elder abuse is a neglected global public health priority, especially compared with other types of violence²⁴”*. Abuse of all adults, irrespective of age, is a neglected area. The introduction of safeguarding legislation, coupled with the immediate commencement of the Assisted Decision Making (Capacity) Act, 2015, would go a very long way in ensuring Ireland meets its obligations under the United Nations Convention on the Rights of People with Disabilities.

In addition to a statutory framework, a statutory code of practice is essential to ensure that guidance is given to those who have statutory obligations under the legislation on how to meet the legal obligations imposed on them and also to inform those who need to avail of safeguarding services as to what services are available.

The Domestic Violence Act 2018 was commenced on 1st. January 2019 and it amends and consolidates the law on domestic violence and introduces changes that serve to strengthen the rights of victims of domestic violence who seek the protection of the courts. The 2018 Act was to consolidate and to provide for a number of matters which are very welcome. However, some amendments are required to further safeguard victims. While the new offence of coercive control as provided for in Section 39 of the Act is welcome, the definition of a ‘relevant person’ is too narrowly defined and confined to a spouse or civil partner, or to a person who is, or was, in an intimate relationship with another. Coercive control can take place in any close relationship and, therefore, the definition of a relevant person needs to be expanded. In a recent survey commissioned by Safeguarding Ireland, a quarter of cases witnessed occurred outside of intimate relationships such as between frail older people and family members, or in the care of people with intellectual or physical disabilities either at home or in an institution²⁵.

²² *Ibid*

²³ *Houses of the Oireachtas Committee on Covid-19 Response Interim Report on Covid-19 in Nursing Homes July 2020*

²⁴ *Elder abuse prevalence in community settings: a systematic review and meta-analysis. Yongjie Yon, Christopher R Mikton, Zachary D Gassoumis, Kathleen H W. Lancet Global Health 2017.*

²⁵ <https://www.safeguardingireland.org/public-awareness/>

Article 17 – Protecting the Integrity of the Person.

The UN Convention states that *‘every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others’*. The right to integrity for every person with a disability in Ireland can only be properly guaranteed through legislation, specifically the legislation already referred to, including legislation not yet commenced and legislation proposed in this document. The integrity of every person with a disability can only properly be assured through the provision of a statutory entitlement to independent advocacy.

Article 19 – Living Independently and being included in the community.

Safeguarding Ireland considers that Ireland has made some important advances in encouraging independent living and community participation for people with disabilities. The continued move away from congregated settings, both for people with disabilities and those with mental health challenges, notwithstanding the slow pace of implementation, is a welcome and positive development. However, considerable shortcomings remain.

Section 34 (b) of the government’s Draft Initial Report states that *“persons with disabilities make their own choices and decisions, are treated with dignity and respect and are free from all forms of abuse”*. Unfortunately, the reality is somewhat different. In relation to choice, some people with disabilities have little or no choice in terms of their living accommodation. For example, approximately 1,500 younger people (under 65 years of age) with disabilities are currently residing in nursing homes in Ireland²⁶, mainly because of insufficient community supports and/or a lack of accommodation appropriate to their needs. It has long been acknowledged that nursing home accommodation, which is primarily designed and provided for older people, is not suitable for younger people with disabilities.

The lack of appropriate accommodation neither affords people the respect or dignity they are entitled to. In addition, because of the absence of any safeguarding legislation in Ireland, the aspiration that people with disabilities are free from all forms of abuse remains just an aspiration.

As outlined above, too many younger people with disabilities remain in nursing home accommodation which is primarily designed for older people. Older people with disability challenges are extremely limited in their choice of accommodation with, for the most part, living at home or living in long term residential care the only options available. If an older person with considerable dependencies requires home care, there is no statutory entitlement, unlike the entitlement to long term residential care through the Nursing Homes Support Scheme. In addition, there are no mandatory standards in the provision of home care.

²⁶ https://www.disability-federation.ie/assets/files/pdf/dfi_rr_2018_web.pdf

There is a need for a range of accommodation options to ensure that people can continue to live independently in their own communities despite whatever disability challenges they might face. These accommodation options might include, for example,

- Home Share – Older people having someone else living with them for low rent and some support in return.
- Split Housing – Older people living independently or adjacent to relatives.
- Boarding Out – People who require support moving into another person’s home on a paid basis.
- Supportive Housing – Dedicated Housing for people which provides supports for independent living.
- Retirement Villages – Clustered age-friendly housing with provision for social interaction.
- Older Persons’ Co-Housing Communities - Group living which groups of houses around shared space and amenities.
- Housing with Supports – round-the-clock support and care.
- Long Term Residential Care.

SUMMARY.

The view of Safeguarding Ireland is that implementation of the United Nations Convention on the Rights of People with Disabilities can be achieved through relatively straightforward measures. Considerable advances can be made almost immediately through the full commencement of the Assisted Decision Making (Capacity) Act, 2015. The implementation of appropriate adult safeguarding legislation and deprivation of liberty legislation, along with amendments to the Domestic Violence Act, 2018, would further enhance the implementation of the UNCPRD in Ireland. Affording greater choice, in terms of living arrangements and accommodation would represent a further major step in the right direction.

Laws are powerful mechanisms, not only for regulating society, but can and do bring about major social change. They play an important role in bringing about social equity and in the promotion and enhancement of human rights. Laws reflect the culture, values and norms of a society and, importantly, they can shape a nation’s culture, values and norms. The legislative changes suggested above, coupled with the suggested amenities and services that facilitate real choice, could have a profoundly positive impact. It is, therefore, regretted, as evidenced in this submission, the unacceptable delays in both in the enactment of appropriate legislation to deal with problems that have been identified over an extended period but urgently need to be addressed and in giving effect to legislation that has been enacted. Safeguarding Ireland considers that the Initial Report to the United Nations should be candid as to the extent to which the UNCPRD has not been implemented and should explain why.