



Ms Áine Flynn
Director of Decision Support Service
Mental Health Commission
Waterloo Exchange
Waterloo Road
Dublin 4

By email to: aine.flynn_dss@mhcirl.ie

**Re: Codes of Practice Consultation Phase 1
Consultation on the draft Code of Practice for Legal Practitioners (“the draft Code”)**

Dear Ms Flynn,

The Law Society (“the **Society**”) welcomes the opportunity to provide feedback on the draft Code and supports the establishment of a modern legal framework (to support decision-making by adults who may have difficulty making decisions without help) under the Assisted Decision-Making (Capacity) Act 2015 (“the **Act**”).

The Society was involved in work on a draft code in 2017 together with representatives of the Bar, the NDA and other groups. This Writing Group first met in December 2017 (and a further six times thereafter) to review a draft prior to submitting its work to the NDA and the DSS in July 2019. We wanted to draw your attention to same and we reiterate some aspects of that work below.

We note that the draft Code represents a substantial reworking of the Writing Group’s draft. We welcome the use of plain English principles in the terms and language of the draft. Our feedback is informed by the input of solicitors from the Society’s Committees which are comprised of experts who practice regularly in these areas. We wanted to offer feedback to assist in devising the most effective draft Code within the spirit of the Act, and having regard to the duties of solicitors to their clients and to the court.

We have highlighted below one area of concern and four proposed amendments to the draft Code.

1. Concern over use of the term ‘intervention’ in the code

Paragraph 1.4 of the draft Code states that the term ‘intervention’ is used throughout in its ordinary, broader sense unless otherwise specified. The front cover states “*This Code should be read in conjunction with the Assisted Decision-Making (Capacity) Act 2015. For the avoidance of doubt, in the event of any conflict or inconsistency, the legislative provisions prevail*”.

It is noted that “intervention” is defined in section 2(1) of the Act as:-

“in relation to a relevant person, means an action taken under this Act, orders made under this Act or directions given under this Act in respect of the relevant person by—

- (a) the court or High Court,*
- (b) a decision-making assistant, co-decision-maker, decision-making representative, attorney or designated healthcare representative,*
- (c) the Director,*
- (d) a special visitor or general visitor, or*
- (e) a healthcare professional:*

The term “intervener” is defined (in the same section) as:-

“in relation to an intervention in respect of a relevant person, means the person referred to in paragraph (a), (b), (c), (d) or (e) of the definition of “intervention” making the intervention”

It is submitted that the term ‘intervention’ should not be used throughout the draft Code in its ordinary, broader sense as this conflicts with the definition and use of the term in the Act and it is clear that, in the event of any conflict, the statutory definition would prevail. The term ‘intervention’ should only be used in its narrow sense as defined in the Act. To use it otherwise may inadvertently confuse or mislead legal practitioners in their attempts to follow the draft Code and lead them into error.

Recommendation: Delete the paragraph referring to broad interpretation at 1.4 and amend the draft Code to reflect the statutory definition of ‘intervention’.

2. Paragraph 1.1 Purpose of this code of practice

We would suggest that the below underlined text be added:

“Good practice includes adhering to the guiding principles within the Act where applicable to legal practitioners and working with decision supporters and other interveners.”

Rationale: Only interveners who are specified in the Act are obliged to apply the statutory guiding principles. Legal practitioners are not included in the statutory definition of interveners. The intention is to encourage legal practitioners to adhere to same and the suggested amendment reflects that.

3. Paragraph 1.2: About the Act

The inclusion of reference to the international disability rights context is, we believe, worth considering. The draft Code does not explicitly reference the UN Convention on the Rights of Persons with Disabilities (the “UNCRPD”).

While it may not be appropriate to refer to recent jurisprudence in the draft Code, in recent years, the courts have explicitly aligned the Irish concept of disability with EU law developments which align the human rights approach to persons with disabilities with the UNCRPD.

In this context, an explicit reference to the UNCRPD would be appropriate and would benefit practitioners in assisting their understanding of the context in which the Decision Support Service and the Act operate.

4. Paragraph 1.8 Matters not affected by the Act

We would suggest that the below underlined text be added and that greater prominence would be given to the paragraph in the draft Code:

1.8 Matters not affected by the Act

As set out under section 138 and 140 of the Act, unless otherwise expressly provided, nothing in the Act shall be construed as altering or amending the law in force relating to capacity or consent required as respects a person in relation to certain matters. These include marriage, civil partnership, judicial separation, divorce or a non-judicial separation agreement, the dissolution of a civil partnership; the placing of a child for adoption, the making of an adoption order, guardianship; sexual relations, serving as a member of a jury and making a will. During the transition period post commencement, orders can still be made in wardship in respect of current wards of court, until the ward is discharged from wardship, following the procedure set out in Part 6 of the Act.

Rationale: Sections 138 and 140 detail matters not affected by the Act. These are significant matters which legal practitioners encounter in practice. In order to prevent a legal practitioner falling into error, it is suggested that all specific matters listed in these sections should be included in the draft Code.

5. Paragraph 3.1.3 Authority of family and/or friends of the relevant person

We would suggest that the below underlined text be added:

3.1.3 However, where the relevant person indicates that they wish a family member, friend or advocate to be present, and where the legal professional is satisfied that there is no undue influence or coercion being exerted on the relevant person or no other good reason exists, that decision should be respected.

Rationale: Legal practitioners should be afforded some level of discretion in relation to the authority of family and/or friends of the relevant person. The addition of the above text provides such a discretion however, it is limited to the existence of a good reason. The proposed amendment respects both the spirit of the Act and the role of the legal practitioner.

It is further suggested that the interaction of this paragraph and the in-camera rule should be addressed.

6. Paragraph 3.5 Changes in capacity

We would suggest that the below underlined text be added:

3.5 Changes in capacity

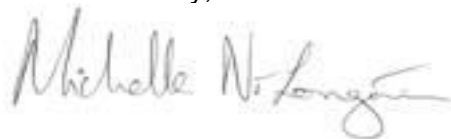
Where you become aware that the decision-making capacity of a relevant person in respect of whom you are instructed has changed (deteriorated or improved) to an extent that the decision support arrangement in place is no

longer appropriate to the relevant person's level of decision-making capacity, you should discuss this issue with the relevant person and if appropriate with the decision supporter. It may also be appropriate to notify the Director of the changed circumstances. Equally, if it becomes apparent that a relevant person's decision supporter no longer has the capacity to support the relevant person and carry out their functions under the decision support arrangement. In this case, it may be appropriate to notify the Director of the changed circumstances. In addition to capacity changes, where you have concerns regarding a decision supporter's ability to meet any other eligibility criteria, you may need to notify the Director of these concerns.

Rationale: The language of the paragraph refers to 'appropriate and 'may need to' which confer discretion on a legal practitioner to exercise their judgement and discretion depending on the circumstances of the case. However, the final sentence refers to a more mandatory 'should'. To ensure consistency of approach and afford an appropriate and reasonable level of discretion to the legal practitioner, we would ask that the paragraph be amended as proposed.

The Society will be glad to assist further in relation to the draft Code and please contact us if we can help in that regard.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Michelle Ní Longáin". The signature is written in a dark ink and is positioned above the typed name and title.

Michelle Ní Longáin
President