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14 February 2025

Dear Mr. White,

We understand that Governance Ireland has been engaged by the Board of the Mental Health Commission to conduct a review and prepare a report under section 102(3) of the Assisted Decision-Making (Capacity) Act 2015 (as amended) (“**the Act**”) and that the report is to be completed and submitted by 25 April 2025, latest.

Fundamental Issue Regarding Scope of Review

We note that the provisions of section 102(3) of the Act require that the Report addresses the following matters:

- “(a) on the effectiveness of the Director,
- (b) on the adequacy of the functions assigned under this Act to the Director, and
- (c) containing such recommendations (if any) that the Mental Health Commission considers would improve the effectiveness of the Director or the adequacy of the functions assigned to the Director under this Act, or both.”

We note that in a note that accompanies the stakeholder survey, you have stated: “References to the Director in section 102(3) are considered to mean the DSS as a service and this report is not an evaluation of the Director’s personal performance.”

We note that under section 2(1) of the Act, the reference in section 102(3) to the “Director” means the Director appointed under section 94 – that being the Director of the Decision Support Service.

About the Law Society

The Law Society of Ireland (“**the Law Society**”) is the educational, representative and professional body of the solicitors’ profession in Ireland. The Law Society’s main statutory functions in relation to the education, admission, enrolment, and discipline of the solicitors’ profession are provided by the Solicitors Acts 1954 to 2015. These statutory functions are exercised by the Council of the Law Society or by the various committees, task forces and working groups to which the Council may delegate certain statutory functions. There are over 12,000 practising solicitors in Ireland.

Law Society of Ireland Perspective

In this letter we set out the perspective of the Law Society by reference to the parameters of the review as asserted by you in your note accompanying the stakeholder survey.

We welcome the initiation of a review of under section 102(3) of the Act. We also welcome the fact that a stakeholder survey forms part of that review. We have provided a response to the survey and this letter is intended to supplement the information that we provided in respect of the survey.

The Law Society is not satisfied at the effectiveness of the Decision Support Service (“**DSS**”). Our concerns principally relate to the processes and requirements that the DSS has put in place governing the creation of an Enduring Power of Attorney (“**EPA**”).

By any measure, having regard to its oversight role in the creation of EPAs, the DSS has failed.

Over €37 million has been allocated to the DSS since 2019. In its own service demand forecasting report in 2021, the DSS estimated that “A reasonable estimate for the first six months of operations (July to December 2022) would be 5,556 decision-support arrangements”. The reality is that over the first year of operation of the new system, the number of decision support arrangement applications that have been approved by the DSS was 421 - very significantly less than the 5,556 that had been projected in respect of a six-month period.

Another reasonable measure of effectiveness (or lack thereof) in this regard are processing times. It is the case that EPA applications are not processed for months – as of the date of this letter, the DSS currently states on their website that they are only now processing digital applications made in October 2024, and paper-based applications made in October 2024. This is certainly not a positive indicator of the effectiveness of the DSS.

Under the previous system, the volume of EPAs activated was steadily increasing year-on-year, doubling from 620 in 2014 to 1,245 in 2022. In stark contrast, as of July 2024, just 10 Enduring Powers of Attorney had been activated since the system under the DSS came into operation in April 2023.

There is a complete absence of up-to-date data on the DSS website concerning the numbers and status of EPAs at different stages. This lack of transparency does not reflect well on the DSS and is not in the public interest.

We have, over a period of many months, spelled out the impact that the current approach of the DSS is having on members of the public who wish to create an EPA. I attach a copy of a letter that we sent to the Minister of State with responsibility for Disabilities last July which lays out our concerns in clear terms.

It has become increasingly clear that the current system for establishing EPAs, as administered by the DSS, is failing to meet the needs of the very individuals it is intended to support. This is an issue of great concern, as it places vulnerable individuals - especially those unable to manage their legal and financial affairs due to incapacity - at significant risk.

The current EPA process is overly complex and inaccessible. The steps involved are difficult to navigate, and the resources available to guide individuals through the process are insufficient. This results in delays or, in some cases, abandonment of the process, leaving individuals vulnerable at a time when they are most in need of protection. These issues are creating a crisis in waiting for many individuals who are unable to manage their legal and financial affairs in the event of incapacity.

Moreover, the DSS has adopted a digital-first approach that is both restrictive and unnecessarily complex. For instance, individuals must meet the following criteria to gain access to the DSS digital platform:

- an email address,
- a mobile phone,
- a public services card,
- a computer,
- an internet connection,
- and a MyGov ID,
- only to then have to create a separate new account on MyDSS.

These obstacles are disproportionate, unjustifiable, and, importantly, not mandated by existing legislation. While digital systems can offer efficiency, the current platform is overly complicated and difficult to navigate, particularly for individuals with limited digital literacy.

It should be noted in the context of your review that the Law Society urges immediate action to address these barriers before they result in further harm.

We attach an Appendix, which contains a number of summaries of real-life experiences of members of the public's attempts to create an EPA.

It is to be regretted that the DSS has chosen to act unilaterally on fundamental aspects of the process relating to the creation of an EPA, and over the past several months, has not engaged constructively with the Law Society. A more open and collaborative approach on the part of the DSS could have helped to avoid some of the shortcomings to which members of the public are now exposed. We respectfully suggest that the outcome of the present effectiveness review should recommend the taking of immediate steps which will result in a greater degree of meaningful collaboration on the part of the DSS, as well as the implementation of immediate solutions that can begin to alleviate the current challenges, pending the implementation of more medium-term solutions.

Our proposed solutions include:

- Expanding the DSS' digital approach to make it more inclusive and accessible.
- Introducing webforms, electronic templates, and downloadable PDFs to be used by the public, solicitors, and their clients.
- Developing an online portal for solicitors, similar to the platforms used by other public agencies (e.g., the Injuries Resolution Board, the Revenue Commissioners, etc).
- Conducting a review of the current DSS procedures to assess potential simplifications, particularly with regard to identity verification.

These measures, we believe, will help address some of the critical challenges currently faced by members of the public as well as solicitors.

However, we also stress the need to address the significant delays in processing EPA applications, which exacerbate the current issues.

It is evident that the current EPA process is unfit for purpose. The complexity of the DSS' digital platform - highlighted by the publication of 38 different forms and 13 Codes of Practice, as well as 10 instructional YouTube videos - suggests a system that is overengineered and failing those who need it most.

There is a severe lack of guidance on how to expedite the EPA process in emergency situations, such as when an individual's health rapidly deteriorates. Historically, EPAs could be established within a day in urgent cases, but there is currently no clear process for such emergencies.

In addition to the need for changes to be made to the requirements that are imposed by the DSS on individuals who seek to create an EPA, in certain areas legislative change is also required.

The Act ought to reflect the availability of these different channels being available to members of the public who wish to put in place an EPA (for example, users should have the option to utilise: (a) a paper-based process, or (b) a hybrid paper and digital process (e.g., downloadable PDF forms), or (c) a wholly digital process). The Act should also explicitly recognise the creation of a solicitors' portal. The Act should also explicitly detail the process that applies in respect of the creation of an EPA in an emergency situation.

The Act should also be amended to remove the on-site presence requirement for attorneys as this is unduly restrictive. The requirement to have the donor and the attorneys present at the execution of the EPA (s.60(4)) in practical terms confines the appointment of attorneys to those with geographic proximity to the donor, rather than enabling the attorneys to be selected on the basis of the donor's will and preference.

Another aspect of the Act that requires amendment is the requirement to register the creation of the EPA. This appears to be a disincentivising measure, but even more so is the provision requiring that other parties be notified (s.68). Solicitors have had experience of clients declining to proceed with the creation of an EPA when informed of the obligation to notify all of their children or when confronted with having to identify up to four notice parties where s.68(3)(j) is applicable.

The Act also requires amendment in respect of the present limitations on making changes to EPAs. The prohibition on varying an EPA within six months of its registration following creation, or any more frequently than annual intervals (s.73(4B)), except with the approval of

the Director of the DSS is also off-putting to members of the public, and constrains their ability to engage in a legal process in a manner not replicated in any other legal process of which we are aware.

Expectations of the Current Review

Having regard to the most basic measures of performance and effectiveness, such as those referenced on page 2 of this letter, the DSS has failed in its efforts to provide a fit for purpose public service regarding the creation of EPAs.

Without immediate reform, the system will continue to fail vulnerable individuals at a time when they need access to essential public services. This is a matter requiring urgent attention. Every day that these issues remain unresolved, more vulnerable and elderly people are being denied access to the support they need.

There should be no doubt that the Law Society has long-standing concerns about the approach that the DSS is taking towards the creation of EPAs. The effectiveness review and resulting report should not close its eyes to the many patent deficiencies inherent in the system for the creation of an EPA.

We are available to meet with you to expand upon any aspect of this letter. We look forward to the concerns outlined in this letter being fairly reflected in your report and particularly so in the context of proposed recommendations or actions that the report contains.

We also look forward to the Law Society being afforded an opportunity to contribute to the development of the necessary system improvements.

Yours sincerely,

Brian Hunt

Director of Policy