06 January 2022

Áine Flynn,

Director,

Decision Support Service,

Waterloo Road,

Dublin 4.

# Subject: NDA Submission to the Public Consultation on six Codes of Practice under the Assisted Decision-Making (Capacity) Act 2015

Dear Áine,

We were delighted to see the first tranche of Codes of Practice in relation to the Assisted Decision-Making (Capacity) Act 2015 progress to public consultation stage. Given our involvement in their initial drafting, the NDA offers this brief letter outlining a number of points that we suggest may merit further consideration, rather than a formal submission through the consultation process. We were very pleased to see that many of the headings, several vignettes and much of the original text set out in the draft Codes we provided, have all been retained, especially given the thorough process carried out with experts and other stakeholders in respect of the proposed language used in the draft Codes of Practice. We also note that several issues, gaps or sticking points that we had flagged in accompanying cover letters to the DSS have been given due regard in the Codes. Following our reading of the Codes, we outline some further considerations below, focusing on the Code of Practice on Supporting Decision-Making and Assessing Capacity, Code of Practice for Financial Professionals and Code of Practice for Legal Professionals.

**Code of Practice on Supporting Decision-Making and Assessing Capacity**

* Section 2.8.2 states, where will and preferences cannot be ascertained, “the best interpretation of will and preferences of the relevant person should be made”. The NDA advises that this guidance should be attributed to the CRPD General Comment No. 1, Section 20, in order to lend it further support.
* A vignette showing good practice in Section 3 (how to support decision-making) was included in the NDA draft Code of Practice, but does not appear in the DSS Code. We believe this vignette was useful in rounding up all the guidance contained in that section and giving it a practical context, and we suggest that it (or a similar vignette) be re-inserted. Our work on the draft Codes indicates that those who will be required to implement the Assisted Decision-Making legislation following its commencement, welcome practical examples of how the Act will impact on the real-world situations they are likely to encounter, and the vignettes offer an easily accessible way to outline same.
* Section 6 of NDA draft Code of Practice contained a short ‘FAQ’ style section, outlining practical issues that may arise. These are issues that our expert group had identified, or issues they suggested relevant persons or decision-making supporters may have. We suggest including this section in the Code of Practice, or developing a wider FAQ document, again to ensure this Code, and the others drafted, can be of immediate practical use to all relevant stakeholders.
* In the Glossary, we advise that ‘another person’ should be included in the definition of ‘intervener’.
* The list of experts contained in the section entitled ‘Acknowledgements’ requires some updating. We have attached the correct list in an appendix to this letter.

**Code of Practice for Financial Professionals**

* While the Technical Experts Group provided advice and guidance on this draft Code, the bulk of the writing was carried out by a Writing Group, which is not acknowledged in the DSS Code. A list of members of the Writing Group has been included in the appendix to this letter. A similar approach was adopted in the case of the Code of Practice for Legal Professionals (see further below).
* From the outset, members of both Writing Groups strongly advised that repetition of some main points of the legislation should appear in all Codes. This includes material on the guiding principles, guidance on how to support a person, how and when to assess capacity, and an outline of the five decision-making supporters. They noted that their colleagues working in the relevant fields would be much more inclined to read one longer comprehensive code than have to find and read two or more Codes. In one section of the DSS Codes for legal and financial professionals, the reader is advised to find and read five other Codes, to learn about the decision-making supporters. The NDA is aware that information on all the points mentioned above appear in various Codes, but advise that they also be included – perhaps as an appendix – in the two Codes relevant to these professional areas, rather than referring to other Codes.
* In the same vein, both Codes, as currently written, assume the reader has prior knowledge/experience of the legislation. This will not be the case for the majority of readers, especially in the financial services sector. The Codes provide only summary detail in some areas, providing a sentence or two on ‘becoming a decision-making supporter’ or ‘providing an expert report in court’ without much context. Again, including some of the main boilerplate text on guiding principles/ supporting and building capacity, and the roles of the decision-making supporters in every Code may help to set the context for the reader.
* Vignettes seem to have been removed from the Code for Financial Professionals. We advise that these vignettes in particular served an important purpose, as they were written by members of the Writing Group, and therefore provided a nuanced insight into the types of issues that might arise in day-to-day service provision in this sector. The vignettes showcased real-life scenarios that would occur in credit unions, MABS or a financial advisor’s office. We suggest re-inserting these vignettes would be beneficial in supporting this sector to adopt and implement the spirit of the legislation as readily as possible.

**Code for Legal Professionals**

* Similar to the draft Code for Financial Professionals, a Writing Group was established to write this Code. A list of members has been included in the appendix below, and the points made above remain relevant here.

In summary, the NDA advises that each Code should contain a section on how to support a person to make a decision, when an assessment of capacity is needed, who should carry it out, and how it should be carried out. During our months of drafting, certain stakeholders did not consider themselves implicated in the responsibilities of supporting, building and assessing decision-making capacity. By excluding these sections from Codes of Practice aimed at specific sectoral audiences, it may support such a belief that supporting, building and assessing capacity is outside the remit of those professionals.

We have examined the Codes of Practice for Healthcare Professionals, on Advance Healthcare Directives and for Designated Healthcare Representatives. We do not have any substantive comments to make on these Codes, noting that the NDA also participated in the working groups established to draft same.

The NDA is more than happy to continue to engage with the Decision Support Service on the Codes of Practice, and look forward to examining the second tranche of Codes in the coming weeks.

Yours sincerely,

**Dr Aideen Hartney**

Director

Appendix 1

# Members of the NDA Codes of Practice Technical Expert Group

|  |  |  |  |
| --- | --- | --- | --- |
| **Surname** | **Name** | **Position** | **Organisation** |
| Donnelly | Mary | Professor of Law (Chair) | UCC |
| Rickard Clarke | Patricia | Chair | National Inter-Sectoral Safeguarding Committee |
| Smyth\* | Rosemary | Director of Standards and Quality Assurance | Mental Health Commission |
| Quinn | Phelim | CEO | Health Information and and Quality Authority |
| Doherty | Noel | Directorate of Reform and Development | Courts Service |
| Taylor\*\* | Mervyn | Manager | SAGE |
| O’Loughlin | Louise | Director | National Advocacy Service |
| Gleeson | Caoimhe | ADM Act Steering Group and HSE Accessibility Expert | HSE |
| O’Mahony | Louise | Head of Mortgage Policy | Banking and Payments Federation Ireland |
| Evoy\*\*\* | Bernice | Legal Adviser | Banking and Payments Federation Ireland\*\*\* |
| Gibson\*\*\*\* | Gerry | Manager of Group Financial Fraud Unit | Bank of Ireland |
| Condell | Mary | Solicitor | Law Society |
| Lillis | Nora | Solicitor | William Fry Solicitors |
| Gorman | James | Finance Unit | HSE |
| Dunn | Rachel | Civil Law Section | Dept of Justice |
| Jones | Suzanne | Civil Law Section | Dept of Justice |
| Keville | Martin | State pension non-contributory | Department of Employment Affairs and Social Protection |
|  |  |  |  |
| \* Rosemary Smyth was replaced by Roisin Hennessy | | |  |
| \*\* Mervyn Taylor stood down in 2017 | | |  |
| \*\*\*Bernice McAvoy is an alternate member for BPFI | | |  |
| \*\*\*\*Gerry Gibson stood down in 2016 | | |  |

# Members of the Code of Practice for Financial Professionals Writing Group

|  |  |  |
| --- | --- | --- |
| **Surname** | **Name** | **Organisation** |
| McCarthy | Rosarie | National Disability Authority |
| Kennefick | Susan | National Disability Authority |
| Rickard-Clarke | Patricia | Safeguarding Ireland |
| Evoy | Bernice | Banking and Payments Federation Ireland |
| O’Mahony | Louise | Banking and Payments Federation Ireland |
| Nolan | Colm | Society of Financial Planners Ireland |
| O’Connor | Annmarie | Money Advice and Budgeting Service |
| Gill | Meagan | Financial Services and Pensions Ombudsman |
| Hoban | Jennifer | Insurance Ireland |
| Carrick | Michael | An Post |
| Slowey | Mary | Irish League of Credit Unions |
| Larke | Elaine | Credit Union Development Association |
| Doyle | Linda | Brokers Ireland |

# Members of the Code of Practice for Legal Professionals Writing Group

|  |  |  |
| --- | --- | --- |
| **Surname** | **Name** | **Organisation** |
| Kennefick | Susan | National Disability Authority |
| Condell | Mary | Law Society |
| Walsh | Keith | Law Society |
| Kirwan | Linda | Law Society |
| Doyle | Olive | Law Society |
| Hynes | Áine | Law Society |
| Hammond | Richard | Law Society |
| Brady | Paul | Bar Council |