Realising Article 12 of the UN Convention on the Rights of Persons with Disabilities: Ireland’s journey from wardship to supported decision-making.

# Article 12 UNCRPD

The right to equal recognition before the law is recognised in several international human rights instruments, including the Universal Declaration of Human Rights[[1]](#footnote-1) and the International Covenant on Civil and Political Rights[[2]](#footnote-2). Article 12 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) describes the specific elements that States Parties, including Ireland, are required to take into account to ensure the right to equal recognition before the law for people with disabilities, on an equal basis with others.[[3]](#footnote-3) Significantly, Article 12 deals not just with the right to equal standing before the law, but also legal agency and the ability to enforce rights.[[4]](#footnote-4)

Article 12 UNCRPD does not exist in isolation, and is one of almost 30 substantive Convention articles covering all areas of life, from health, education and employment, to political participation, access to justice and freedom from exploitation, violence and abuse. However, the right to equal enjoyment before the law touches upon many other articles in the Convention.[[5]](#footnote-5)

Article 12 of the Convention addresses the right to equal recognition before the law and legal capacity as follows:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States 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. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.[[6]](#footnote-6)

Experts in the field of disability law have frequently asserted that Article 12 of the UNCRPD is emblematic of the paradigm shift of the Convention,[[7]](#footnote-7) from an approach to disabled people based on medical, charity and welfare models to one that is firmly rooted in human rights. Undoubtedly, Article 12 represents an important milestone in the advancement of disability rights, through the explicit recognition of the right of disabled people to enjoy legal capacity on an equal basis with others, and the need to provide supports and safeguards to exercise such capacity.

However, the text of the Convention does not overtly address several issues key to realising this right, including whether substituted decision-making is permissible or prohibited. Article 12 was one of the most contested articles to be considered during the treaty deliberation process,[[8]](#footnote-8) and it has been suggested that ambiguity regarding its meaning was necessary for agreement on the text:

‘Ambiguity was a necessary cost of unity for the advocacy strategy of disability organisations participating in the negotiation the Convention, it was the price of agreement amongst states parties when finalising article 12, and it was ambiguity about whether article 12 permitted or prohibited substitute decision making that enabled states parties who could not envisage abolishing systems of guardianship or deprivation of legal capacity to sign up to the Convention.’[[9]](#footnote-9)

The need to clarify the normative content of Article 12 was therefore recognised from the start, including by the UN Committee on the Rights of Persons with Disabilities.[[10]](#footnote-10)

## UNCRPD Committee and Article 12

The UN Committee on the Rights of Persons with Disabilities (UNCRPD Committee) is the body of independent experts which monitors implementation of the UNCRPD by States Parties. The UNCRPD Committee, like other UN human rights treaty bodies, provides guidance on and interprets the Convention through a range of mechanisms, including General Comments, Concluding Observations on periodic State reports, State inquiries and individual communications procedures.

While the views of UN human rights treaty bodies, including the General Comments of the UNCRPD Committee, may be of persuasive value,[[11]](#footnote-11) they are not legally binding in Irish courts.[[12]](#footnote-12) For example, in *Kavanagh v Governor of Mountjoy Prison* the High Court held that the views of a UN treaty monitoring body, in that case the UN Human Rights Committee, are not legally binding.[[13]](#footnote-13)

This paper seeks to consider the progress Ireland has made in meeting the requirements of Article 12 of the UNCRPD, and the UNCRPD Committee’s guidance on this topic, by comparing the old wardship system and the new supported decision-making framework under the 2015 Act.

The NDA recognises that Article 12 has proved contentious[[14]](#footnote-14) and that some elements of the UNCRPD Committee’s interpretation of Article 12 are strongly contested and criticised[[15]](#footnote-15). The controversial nature of Article 12 is evidenced by the high number of reservations and declarations that have been lodged on Article 12,[[16]](#footnote-16) with at least 14 States Parties to the UNCRPD doing so[[17]](#footnote-17) (the subject of reservations and declarations is explained in greater detail below).

In addition, we note that researchers have reported that States Parties’ interpretations of Article 12 have frequently been at variance with the UNCRPD Committee’s[[18]](#footnote-18) and that no States Party has implemented the required level of legislative, policy and practice change to give full effect to Article 12 in line with the interpretation afforded to it in the UNCRPD Committee’s General Comment No.1.[[19]](#footnote-19) However, although not legally binding, it is generally recognised that UN human rights treaty bodies provide the most authoritative guidance and interpretation on the international human rights treaty they are charged with overseeing[[20]](#footnote-20) and this paper therefore does not consider the merits of the UNCRPD Committee’s interpretation of Article 12.

### General Comment No.1

In April 2014, the UNCRPD Committee published General Comment No. 1, setting out its interpretation of Article 12 of the Convention (and other related articles). The General Comment is divided into four parts: normative content, obligations of States Parties, relationship with other provisions of the Convention and implementation at the national level. General Comment No.1 classified Article 12 as a ‘civil right’[[21]](#footnote-21), meaning that States Parties are required to immediately, rather than progressively, realise this right.

The UNCRPD Committee observed that there is a general misunderstanding of the exact scope of the obligations of States Parties under Article 12 of the Convention,[[22]](#footnote-22) including a conflation of the concepts of mental and legal capacity so that where a person ‘is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed’.[[23]](#footnote-23)

In its General Comment No.1, the UNCRPD Committee differentiated between ‘legal capacity’ and ‘mental capacity’. It defined ‘legal capacity’ as including, first, the capacity to be a ‘holder of rights’, entitling ‘the person to full protection of his or her rights by the legal system’. Second, it defined ‘legal capacity’ as including the capacity to be ‘an actor under law’, recognised ‘as an agent with the power to engage in transactions and in general to create, modify or end legal relationships’.[[24]](#footnote-24)

By contrast, the UNCRPD Committee stated that ‘mental capacity’ refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.[[25]](#footnote-25) However, the Committee continued by describing the ‘concept of mental capacity’ as ‘highly controversial in and of itself’, rejecting the common view that this is ‘an objective, scientific and naturally occurring phenomenon’.[[26]](#footnote-26) According to the Committee, mental capacity ‘is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity’.

According to General Comment No.1, legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others.[[27]](#footnote-27) This means that where legal capacity is denied, it must be denied to all on an equal basis, regardless of disability, and where an individual has difficulty making a decision or communicating a decision, they must be provided with support to exercise their legal capacity.[[28]](#footnote-28) The Committee was unequivocal that ‘perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity’ under Article 12 of the Convention.[[29]](#footnote-29)

In addition to distinguishing between the concepts of ‘legal capacity’ and ‘mental capacity’, General Comment No.1 also outlines key obligations on UNCRPD States Parties to:

* Replace substituted decision-making regimes with supported decision-making systems.[[30]](#footnote-30)
* Abolish mental capacity tests, including the status, outcome, and functional approaches to assessing decision-making capacity.
* Ensure that supports for the exercise of legal capacity respect the ‘rights, will and preferences’ of the person concerned as opposed to their perceived ‘best interests’.

These obligations are explored in greater detail in later sections.

### Concluding Observations of the UNCRPD Committee

States Parties to the UNCRPD are required to submit periodic reports to the UNCRPD Committee outlining the efforts they have taken to implement the Convention. These reports are examined by the UNCRPD Committee through a formal dialogue and the adoption of ‘Concluding Observations’. The observations and recommendations issued by the UNCRPD Committee after consideration of a State Party’s report, and any shadow reports submitted by civil society organisations and national human rights institutions, provide practical advice on further steps to implement the rights contained in the treaty.[[31]](#footnote-31)

The Committee has repeatedly focused on the following concerns in respect of Article 12:[[32]](#footnote-32)

* National laws, policies, practices and customs that deny or restrict the legal capacity of persons with disabilities.
* The lack of progress made to abolish guardianship systems and substituted decision-making regimes.

The most common related recommendations issued by the UNCRPD Committee to States Parties have included:

* Replace substituted decision-making with supported decision-making regimes that respect the person’s autonomy, will and preferences.
* Ensure that supported decision-making structures respect the person’s autonomy, will and preferences, and be in full conformity with article 12 of the Convention, including with respect to the individual's right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, to work and to choose his or her place of residence.
* Provide training, in consultation and cooperation with persons with disabilities and their representative organisations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on recognition of the legal capacity of persons with disabilities and on the primacy of supported decision-making mechanisms in the exercise of legal capacity.

## Inquiry and individual communications procedures

The Optional Protocol to the UNCRPD is an international treaty that establishes inquiry and individual communications procedures aimed at strengthening the implementation and monitoring of the UNCRPD.[[33]](#footnote-33) The inquiry procedure may be initiated if the UNCRPD Committee receives reliable information indicating that the rights contained in the Convention are being systematically violated by a State Party. To date, the UNCRPD Committee has conducted three such inquiries.

In one of these inquiries, the UNCRPD Committee found that Hungary violated Article 12 of the Convention for, *inter alia*, as the Hungarian Civil Code ‘continues to allow the full or partial restriction of the capacity to act of persons with disabilities on the basis of impairment’.[[34]](#footnote-34) The UNCRPD Committee also found that Hungary’s system of supported decision-making remained anchored in substituted decision-making, and failed to provide persons with disabilities with support in the exercise of their legal capacity in accordance with the Convention.[[35]](#footnote-35)

The UNCRPD Committee can also receive and consider individual communications (also known as individual complaints) from or on behalf of a person or group of persons claiming to be victims of a violation of the Convention by a State Party. The UNCRPD Committee has issued decisions on several individual communications relating to Article 12. Some of these cases have concerned laws on fitness to stand trial and the right to exercise legal capacity.[[36]](#footnote-36)

# Ireland’s position on Article 12

Ireland ratified the UNCRPD in March 2018. It was long recognised that reform of Irish laws on decision-making capacity were required to enable the State to ratify the Convention.[[37]](#footnote-37) In anticipation of ratification, the Department of Justice and Equality (as it was then known) published a ‘Roadmap to Ratification of the UNCRPD’, recognising that full commencement of the Assisted Decision Making (Capacity) Act 2015 was essential for compliance with multiple articles of the Convention, in particular Article 12.[[38]](#footnote-38) The only other action identified in the Roadmap to ensure Article 12 compliance was an amendment to section 4 of the Criminal Law (Insanity) Act 2006 to address a lacuna that arose in the High Court judgment of *G. v. District Judge Murphy*.[[39]](#footnote-39)

When ratifying the UNCRPD, Ireland entered both a declaration and reservation in respect of Article 12 of the Convention. A reservation is a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state.[[40]](#footnote-40) A reservation enables a state to accept a multilateral treaty by giving it the possibility not to apply certain provisions with which it does not want to comply. However, according to both Article 19 of the Vienna Convention on the Law of Treaties[[41]](#footnote-41) and Article 46 of the UNCRPD itself[[42]](#footnote-42), reservations incompatible with the object and purpose of the Convention are not permitted.[[43]](#footnote-43)

Meanwhile, states can also make "declarations" as to their understanding of some matter or as to the interpretation of a particular provision. Unlike reservations however, declarations merely clarify the state's position and do not purport to exclude or modify the legal effect of a treaty.[[44]](#footnote-44) The UNCRPD Committee has recommended that at least one State Partywithdraw its interpretative declaration on Article 12 of the Convention.[[45]](#footnote-45)

A former United Nations Special Rapporteur on the rights of persons with disabilities, Catalina Devandas Aguilar, took the position that all reservations and declarations concerning Article 12 contradict the object and purpose of the UNCRPD. She asserted that Article 12 is central to the enjoyment and exercise of all rights set out in the Convention, and these reservations and declarations hinder and/or deny these rights.[[46]](#footnote-46)

Ireland’s declaration and reservation concerning Article 12 UNCRPD reads as follows:

‘Ireland recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Ireland declares its understanding that the Convention permits supported and substitute decision-making arrangements which provide for decisions to be made on behalf of a person, where such arrangements are necessary, in accordance with the law, and subject to appropriate and effective safeguards. To the extent that article 12 may be interpreted as requiring the elimination of all substitute decision making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards.’[[47]](#footnote-47)

This reservation and declaration are similar to those submitted by Australia, Canada and Norway.[[48]](#footnote-48) The Government contends that this declaration and reservation is necessary:

‘to ensure that difficulties are not encountered in the operation of provisions in Part 5 of the Assisted Decision-Making (Capacity) Act 2015, which allow for the appointment of a decision-making representative to take specified decisions on behalf of a person and for the taking of certain decisions by a court on behalf of a person in limited circumstances.’[[49]](#footnote-49)

Ireland also submitted a further declaration in respect of Articles 12 and 14 of the UNCRPD as follows:

‘Ireland recognises that all persons with disabilities enjoy the right to liberty and security of person, and a right to respect for physical and mental integrity on an equal basis with others. Furthermore, Ireland declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental disorders, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.’[[50]](#footnote-50)

The justification for this is as follows:

‘The rationale behind this declaration is to preserve the insanity defence under the Criminal Law (Insanity) Act 2006, and to preserve the ability of the state to detain persons with mental disorders differently to those without mental disorders, and to preserve the unfitness to be tried process.’[[51]](#footnote-51)

# Implementation of Article 12 in an Irish context

Implementation of Article 12, particularly implementation in line with the guidance afforded by the UNCRPD Committee through General Comment No.1, requires States Parties to radically depart from current prevailing practice, norms, and models upon which disabled people are engaged across a range of areas[[52]](#footnote-52), including those offered by financial services and healthcare providers. The right to equal recognition before the law also has profound implications for a wide range of legal frameworks, including guardianship laws, civil and criminal trial procedures, electoral laws, and mental health laws.[[53]](#footnote-53)

Implementation of Article 12 is also closely interconnected with other articles of the Convention, including the right to access justice (Article 13); the right to liberty (Article 14); the right to be free from violence, exploitation and abuse (Article 16); the right to respect for one’s physical and mental integrity (Article 17); the right to live independently, including to choose where and with whom to live (Article 19); the right to marry and found a family (Article 23); the right to health, including to consent to medical treatment (Article 25); and the right to participate in political and public life, including the right to vote and stand for election (Article 29).[[54]](#footnote-54)

To give effect to Ireland’s obligations under Article 12 of the Convention, the State enacted the Assisted Decision Making (Capacity) Act 2015 (as amended). The 2015 Act has heralded a new approach to legal capacity in Ireland, repealing the Lunacy Regulation (Ireland) Act of 1871 and reforming laws relating to persons who require or may require assistance in exercising their decision-making capacity. In particular, the legislation provides for a range of decision supporters, who can be appointed to support a person whose capacity to make their own decisions regarding their personal welfare, property, or financial affairs is in question. The 2015 Act also provided for the establishment and operation of the Decision Support Service, which undertakes a range of functions, including regulating and registering decision support arrangements, supervising the actions of decision supporters, maintaining panels of people who will act as decision-making representatives, special and general visitors, investigating complaints and promoting awareness and providing information about the legislation.

The 2015 Act provides for a phasing out of the system of wardship and the introduction of a new, more rights-based and person-centred legal framework for supported decision-making. While Ireland has yet to be formally reviewed for compliance with the UNCRPD, it is widely acknowledged that the Victorian-era system of wardship fell far short of the standards set out in Article 12 of the Convention and General Comment No.1.[[55]](#footnote-55) Underpinned by the Lunacy Regulation (Ireland) Act of 1871, Ireland’s system of wardship reflected a paternalistic approach to legal capacity, with ‘persons of unsound mind’ deprived of all legal capacity.

While the phasing out of the system of wardship and the transition of people previously under wardship to the new decision support arrangements is one of the changes arising from the commencement of the 2015 Act (as amended), the impact of the legislation and the supports available under it are not limited to those under wardship. The 2015 Act has the potential to affect a much wider group of people, with a demand forecasting report carried out by the Decision Support Service suggesting that 1 in 20 of the population may require supported decision-making services at some point in their lives.[[56]](#footnote-56)

Through a comparison of the wardship system and the new supported decision-making framework under the 2015 Act, this paper considers the progress achieved in meeting the requirements of Article 12 of the UNCRPD, and the UNCRPD Committee’s guidance on this topic, across the following certain select areas[[57]](#footnote-57):

* Ensuring that supports to exercise legal capacity respect the ‘rights, will and preferences’ of the individual.
* Providing an appropriate framework of safeguards for measures relating to the exercise of legal capacity.
* Establishing and providing access to supports for the exercise of legal capacity.
* Eliminating substituted decision-making arrangements.
* Applying a functional approach to assessing decision-making capacity.

## Ensuring that supports to exercise legal capacity respect the ‘rights, will and preferences’ of the individual.

### UNCRPD

Article 12(4) of the Convention outlines 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 and that ‘such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person’.

### UNCRPD Committee

In its General Comment No.1, the UNCRPD Committee stated that ‘support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities’ and must not be based on what is perceived as being in their objective best interests.[[58]](#footnote-58) In addition, ‘supported decision-making’ should provide protection for all rights, including those related to autonomy (right to legal capacity, right to equal recognition before the law, right to choose where to live, etc.) and rights related to freedom from abuse and ill-treatment (right to life, right to physical integrity, etc.).[[59]](#footnote-59) Furthermore, the UNCRPD Committee was clear that supported decision-making ‘must not be used as justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty’.[[60]](#footnote-60)

In addition, the UNCRPD Committee explained that the ‘primary purpose of these safeguards [under Article 12(4)] must be to ensure the respect of the person’s rights, will and preferences’.[[61]](#footnote-61)

The UNCRPD Committee was unequivocal that the ‘best interests’ principle is not a safeguard which complies with Article 12 in relation to adults. According to the Committee, the ‘will and preferences’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.[[62]](#footnote-62)

### Wardship under the Lunacy Regulation (Ireland) Act of 1871

The wardship system operated under a paternalistic 'best interests' model, with courts making decisions based on the ‘best interests’ of the person under wardship. The Supreme Court endorsed the ‘best interests’ requirement in the case of *Re a Ward of Court (No.2)*.[[63]](#footnote-63) In deciding what constituted the person’s ‘best interests’, the Court adopted the standpoint of ‘a prudent, good and loving parent’ and took several factors into account including the views of the committee and family members, the individual’s likely wishes and the constitutional rights of the individual.[[64]](#footnote-64) The UNCRPD Committee is clear that the ‘best interests’ principle utilised for wardship proceedings does not align with Article 12 of the Convention.

### Assisted Decision Making (Capacity) Act 2015 (as amended)

The 2015 Act is underpinned by a set of guiding principles that are the foundation for interpreting and administering the legislation. Specifically, Section 8 of the 2015 Act stipulates that an intervener, in making an intervention in respect of a relevant person, must ‘give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable’.[[65]](#footnote-65) While ‘in so far as is practicable’ acts as a qualifier, the focus on ‘will and preferences’ aligns with the UNCRPD and General Comment No.1. Additionally, the inclusion of ‘past’ will and preferences is progressive, obliging consideration of what the relevant person would have done prior to them losing capacity. Furthermore, the 2015 Act follows the approach outlined in General Comment No.1 by not referencing the ‘best interests’ principle, although the guiding principles state that intervenors are required to ‘act at all times in good faith and for the benefit of the relevant person’.[[66]](#footnote-66)

The legislation is also clear that one of the functions of decision-making assistants, co-decision-makers and decision-making representatives is to ascertain the will and preferences of the relevant person on a matter the subject of, or to be the subject of, a relevant decision and to assist the relevant person with communicating such will and preferences. When considering the appointment of a decision-making representative, the court must also have regard to the ‘known will and preferences’ of the person.[[67]](#footnote-67) ‘Will and preferences’ are also prominently referenced throughout the sections on Advanced Healthcare Directives in accordance with the UNCRPD and General Comment No. 1.

Moreover, in addition to ‘will and preferences’, the UNCRPD and General Comment No.1 are clear that decision-making supports must respect the ‘rights’ of the individual concerned. The Guiding Principles of the 2015 Act are largely modelled on this requirement, obliging any intervention to be made in a manner that minimises the restriction of the relevant person’s rights and freedom of action, and to have due regard to the need to respect the right of the relevant person’s dignity, bodily integrity, privacy autonomy and control over their financial affairs and property.[[68]](#footnote-68) However, while the Convention requires that safeguards for the exercise of legal capacity ‘respect’ an individual’s rights, interventions under the 2015 Act must only ‘have due regard to the need to respect’ rights.

## Providing an appropriate framework of safeguards for measures relating to the exercise of legal capacity.

### UNCRPD

In addition to respecting a person’s ‘rights, will and preferences’, Article 12(4) stipulates that safeguards relating to the exercise of legal capacity must be free of conflict of interest and undue influence, be proportional and tailored to the person’s circumstances, apply for the shortest time possible and be subject to regular review by a competent, independent and impartial authority or judicial body. Article 12(4) continues that ‘safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests’.

### UNCRPD Committee

In addition to respecting the ‘rights, will and preferences’ of the person, the UNCRPD Committee’s General Comment No.1 is clear that safeguards for the exercise of legal capacity must include protection against undue influence; however, this protection must respect the rights, will and preferences of the person, including the right to take risks and make mistakes.[[69]](#footnote-69) The Committee characterises undue influence ‘as occurring, where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation’.[[70]](#footnote-70)

In addition to the safeguards expressly stipulated in Article 12(4), the UNCRPD Committee’s General Comment No.1 articulates other safeguards, including ‘a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting based on the will and preference of the person concerned’.[[71]](#footnote-71) Another safeguard specified by the UNCRPD Committee is that the person using support must be free to reject offers of support, and terminate or change the support relationship at any time.[[72]](#footnote-72)

### Wardship under the Lunacy Regulation (Ireland) Act of 1871

#### Regular review

While the 1871 Act provided for the President of the High Court to direct a Medical Visitor to visit a person after they have been made a Ward of Court,[[73]](#footnote-73) there was no requirement for the regular review of a wardship order or for periodic review of the person’s decision-making capacity or welfare under the wardship system.[[74]](#footnote-74)

In addition, while the Registrar of the Office of Wards of Court had (and continues to have until all persons under wardship have been discharged) the power to require the Committee to provide details of the Ward’s residence and physical and mental condition periodically,[[75]](#footnote-75) the Law Reform Commission reported that this only likely happened where a specific complaint was received by the Office of Wards of Court.[[76]](#footnote-76)

#### Proportionality

Persons under wardship were deprived of all legal capacity, regardless of the nature of the decision in question. Safeguards relating to and restrictions on capacity were neither proportional nor tailored to a person’s circumstances[[77]](#footnote-77), contrary to Article 12(4) of the Convention.

#### Time-limited

An order of wardship was of an indefinite duration,[[78]](#footnote-78) and was therefore not consistent with the Article 12(4) requirement that safeguards relating to the exercise of legal capacity apply for the shortest time possible. Although a procedure for temporary wardship was available under section 103 of the Lunacy Regulation (Ireland) Act 1871, the Law Reform Commission noted that this was rarely used in practice.[[79]](#footnote-79)

#### Undue influence and conflicts of interest

Under wardship, a person with an interest in the institution in which the person under wardship lives was prohibited from acting as their Committee,[[80]](#footnote-80) although some Health Service Executive employees acted as Committees for persons under wardship in exceptional circumstances.[[81]](#footnote-81) Concerns were also raised about the lack of clear guidelines around possible conflicts of interest arising between the Ward and their Committee[[82]](#footnote-82) (typically comprising family members).

### Assisted Decision Making (Capacity) Act 2015 (as amended)

#### Regular review

The 2015 Act provides that all people currently under wardship will be reviewed and discharged from wardship within a three-year period following commencement of the legislation (i.e. by 26 April 2026).[[83]](#footnote-83) If, following this review, the High Court (or ‘wardship court’) declares that the person under wardship lacks decision-making capacity, the court shall make an order that the Circuit Court reviews that declaration either within 12 months or within 3 years, if the person is ‘unlikely to recover’ [their decision-making capacity].[[84]](#footnote-84) This brings the person formerly under wardship into substantially the same review process as applies to those who are declared to lack capacity under Part 5 of the Act.[[85]](#footnote-85)

Under Part 5 of the 2015 Act, the Circuit Court will regularly review a declaration that a person lacks capacity. The review will take place no later than 12 months from the date on which the court made or last reviewed the declaration, or no later than three years where the Court is satisfied there will be no change in capacity.[[86]](#footnote-86) In addition, Part 10 of the new legislation requires the High Court to review all persons under wardship detained by order of a court as soon as possible from the commencement of the legislation.[[87]](#footnote-87)

Under the Constitution, judges are entirely independent in the exercise of their judicial functions[[88]](#footnote-88), satisfying the Article 12 requirement of regular review of safeguards ‘by a competent, independent and impartial authority or judicial body’. The review periods, ranging fromno later than 12 months or up to 3 years, would also likely meet the threshold of ‘regular’ stipulated by the Convention.

Furthermore, the 2015 Act also includes safeguards requiring the Director of the Decision Support Service (DSS) to oversee and supervise decision support arrangements.[[89]](#footnote-89) This includes monitoring decision supporters, for example, through general and special visitors and through the review of annual reports that decision supporters are required to provide to the DSS. The 2015 Act also permits the Decision Support Service to investigate complaints about appointed decision supporters and active decision support arrangements.[[90]](#footnote-90)

#### Proportionality

One of the Guiding Principles of the 2015 Act is that an intervention in respect of a relevant person shall ‘be proportionate to the significance and urgency of the matter the subject of the intervention’[[91]](#footnote-91) in line with Article 12 UNCRPD. In contrast to the system of wardship, there is no longer a blanket authority afforded to any body or person to make all decisions for a person, based on a lack of capacity to make one decision. The principle of proportionality is also considered in the ‘time-specific, issue-specific’ approach to decision-making capacity.

#### Time-limited

One of the Guiding Principles of the 2015 Act is that an intervention in respect of a relevant person shall ‘be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention’.[[92]](#footnote-92) This aligns with the provisions of Article 12(4), which states that safeguards for the exercise of legal capacity must apply for the shortest time possible.

#### Undue influence and conflicts of interest

The 2015 Act introduces several criminal offences, including offences to use fraud, coercion, or undue influence to force another person to make, change or revoke a decision-making assistance agreement, co-decision-making agreement, enduring power of attorney or advance healthcare directive.[[93]](#footnote-93) The 2015 Act specifies that ‘coercion or undue influence’ includes any case where a person’s access to, or continued stay in, a designated centre or mental health facility is contingent (whether in whole or in part) on the person having to, or being led to believe that he or she has to, make, vary or revoke a decision-making assistance agreement, co-decision-making agreement, enduring power of attorney or advanced healthcare directive.[[94]](#footnote-94)

The 2015 Act also authorises the Director of the Decision Support Service to investigate a written complaint (or pursue an investigation on their own initiative) that fraud, coercion or undue pressure was used to induce a person to enter into, or to vary or revoke, a decision-making assistance agreement, a co-decision-making agreement, or an enduring power of attorney.[[95]](#footnote-95) The legislation further authorises certain categories of individuals to object to the registration of a co-decision-making agreement and an enduring power of attorney on account of fraud, coercion or undue influence being employed to induce the person to enter into the agreement or execute the instrument creating the enduring power of attorney.[[96]](#footnote-96)

In determining the suitability of a person to act as a decision-making representative or attorney, the 2015 Act states that the Court must consider any conflict of interest.[[97]](#footnote-97) In addition, the legislation prohibits some people from acting as decision supporters where potential conflicts of interest may arise, such as the owner or a registered provider of a designated centre or mental health facility where the person lives (unless they are a relative of the person).[[98]](#footnote-98)

## Establishing and providing access to supports for the exercise of legal capacity.

### UNCRPD

Article 12(3) UNCRPD recognises that States Parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. However, the article does not specify what form the ‘support’ should take.

### UNCRPD Committee

In its General Comment No.1, the UNCRPD Committee explained that ‘support’ is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity.[[99]](#footnote-99) The UNCRPD Committee cited several examples of ‘support’ including persons with disabilities choosing one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication.[[100]](#footnote-100)

The UNCRPD Committee was clear that ‘the type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities’ and that a ‘person’s level of support needs, especially where these are high, should not be a barrier to obtaining support in decision-making’.[[101]](#footnote-101) Additionally, the UNCRPD Committee outlined that legal recognition of the support persons formally chosen by a person must be available and accessible[[102]](#footnote-102) and that a person must have the right to refuse support and terminate or change the support relationship at any time.[[103]](#footnote-103)

Moreover, the UNCRPD Committee recognised that advance planning is an important form of support, enabling people with disabilities to state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others.[[104]](#footnote-104) In its General Comment No.1, the UNCRPD Committee stated that ‘all persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others.’[[105]](#footnote-105)

The UNCRPD Committee was clear that while States Parties can provide various forms of advance planning mechanisms to accommodate various preferences, all options must be non-discriminatory.[[106]](#footnote-106) In addition, General Comment No.1 stated that the point at which an advance directive enters into force (and ceases to have effect) should be decided by the person and included in the text of the directive; it should not be based on an assessment that the person lacks mental capacity[[107]](#footnote-107) (‘mental capacity’ is referred to as ‘decision-making capacity’ in the 2015 Act).[[108]](#footnote-108)

### Wardship under the Lunacy Regulation (Ireland) Act of 1871

Under Ireland’s system of wardship, the High Court was vested with jurisdiction over all matters relating to the person and estate of the ward, depriving the person of all decision-making capacity and autonomy. The wardship system entrenched a binary approach: people either had full capacity to engage in decision making or had no capacity. The Supreme Court described the repercussions of wardship as follows:

‘An order making a person a ward of court has real consequences. It can deprive a person of the power to make many of the choices which are fundamental and integral to day-to-day life. Orders can be over-broad in their effect and disproportionate in their scope.’[[109]](#footnote-109)

Apart from wardship, the only other legal mechanism or support available to people with capacity issues was an enduring power of attorney under the Powers of Attorney Act 1996.[[110]](#footnote-110) This allowed a person (‘the donor’) to appoint an ‘attorney’, typically a trusted person such as a family member, to make decisions on their behalf if they became ‘mentally incapable’[[111]](#footnote-111) of making these decisions independently. Under the 1996 Act an enduring power of attorney could be created for property, financial affairs and personal care matters.

Where personal care decisions were made by an attorney, the attorney was required to act in the person’s best interests, while taking into account several factors, including the past and present wishes and feelings of the donor.

### Assisted Decision Making (Capacity) Act 2015 (as amended)

The 2015 Act sets out five decision support arrangements for people with decision-making capacity challenges. In addition to enhanced tools for advance planning by way of enduring powers of attorney and advance healthcare directives, the 2015 Act offers a tiered framework of decision-making supports, introducing three new roles – decision-making assistants, co-decision-makers, and decision-making representatives.

There are three decision support arrangements for people who currently, or may shortly, face challenges making certain decisions:

* Decision-making assistant: A person who requires support to make certain decisions can appoint a decision-making assistant to help them access information, understand their options, and communicate their decisions to others. This support is managed through a formal decision-making assistance agreement, notified to the Decision Support Service.
* Co-decision-maker: A person who requires more support than that provided by a decision-making assistance agreement can appoint a co-decision-maker (typically a trusted family member or friend) to make certain decisions jointly with them. The support is managed through a co-decision-making agreement, supervised by the Decision Support Service.
* Decision-making representative: If a person is unable to make certain decisions, the court may appoint a decision-making representative to make those decisions on their behalf. The court can also make a decision-making order to make a decision on behalf of the person.

A decision-making representation order, which is supervised by the Decision Support Service, sets outs what functions the decision-making representative will have and what decisions they can make. While the court will seek to appoint someone who is known to and trusted by the person in the role of decision-making representative, the court can select someone from a panel of trained experts maintained by the Decision Support Service.

If the court appoints a decision-making representative, the person deemed to lack decision-making capacity cannot refuse or terminate this support, in contradiction of General Comment No.1.

There are also two types of advance planning tools for people who wish to plan for a time in the future when they might lose decision-making capacity:

* Advanced healthcare directive: A person can set out their wishes regarding healthcare treatment decisions, including treatment refusals, in case they are unable to make those decisions at some time in the future.
* Enduring power of attorney: A person can appoint someone (or multiple people) to make certain decisions about their welfare, property and financial matters if they are unable to make those decisions for themselves at some time in the future.

The advance planning tools provided for under the 2015 Act do not enter into force unless a person lacks capacity to make decisions for themselves.[[112]](#footnote-112) This appears to contradict guidance in General Comment No.1 that advance planning mechanisms should not enter force based on an assessment that the person lacks mental capacity.

In addition, the 2015 Act precludes two categories of people from enforcing their advance healthcare directive on an equal basis with others, raising concerns about consistency with General Comment No.1. Specifically, advance healthcare directives cannot be enforced where the refusal relates to mental health treatment[[113]](#footnote-113) and the directive-maker is:

* an involuntary patient under the Mental Health Act 2001 due to a serious likelihood that they will cause immediate and serious harm to themselves or others[[114]](#footnote-114), or
* an individual has been found not guilty by reason of insanity or is unfit to be tried and has been granted conditional discharge under the Criminal Law (Insanity) Act 2006 (as amended).[[115]](#footnote-115)

The Minister for Children, Equality, Disability, Integration and Youth stated that full and proper consideration will be given to those whose treatment is regulated under Part 4 of the Mental Health Act 2001 within the context of the ongoing reform of the 2001 Act.[[116]](#footnote-116)

The Mental Health Bill 2024, which will replace the Mental Health Act 2001 (as amended), provides that where an individual’s (i) treatment is regulated by Chapter 3 of Part 3 of the 2024 Bill, or (ii) they are the subject of a conditional discharge under section 13A of the Criminal Law (Insanity) Act 2006, the advanced healthcare directive will be complied with, subject to, *inter alia*, the provisions of Chapter 3 of Part 3 of the 2024 Bill. These provisions propose to allow a consultant psychiatrist to apply to the High Court in certain circumstances to seek authorisation to provide mental health treatment to an involuntary admitted person where an advanced healthcare directive specifies that there is no consent to the mental health treatment concerned. These circumstances are where:

1. the treatment concerned is– immediately necessary for the protection of life of another person(s), or necessary for protection from an immediate and serious threat to the health of another person(s);
2. the involuntarily admitted person requires the treatment concerned;
3. there is no alternative safe and effective treatment available;
4. it is likely that the condition of the involuntarily admitted person will benefit from such treatment.[[117]](#footnote-117)

Accordingly, despite the additional safeguards provided for in the Mental Health Bill 2024, there may still be instances where an advance healthcare directive cannot be enforced where the refusal relates to mental health treatment.

##  Eliminating substituted decision-making arrangements.

### UNCRPD

Article 12(3) UNCRPD provides that ‘States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ Paragraph 4 requires States Parties to create safeguards to ensure that persons with disabilities can exercise their legal capacity. However, the text of the Convention itself is silent as to whether Article 12 permits or prohibits substitute decision making.

### UNCRPD Committee

In its General Comment No.1, the UNCRPD Committee was clear that support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making.[[118]](#footnote-118) The UNCRPD Committee added that the ‘development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention’[[119]](#footnote-119) and that States Parties are required to abolish all forms of substituted decision-making.[[120]](#footnote-120)

While noting that substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship, the Committee asserted that they have certain common characteristics and can be defined as systems where:

1. legal capacity is removed from a person, even if this is in respect of a single decision;
2. a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; or[[121]](#footnote-121)
3. any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.[[122]](#footnote-122)

In light of the foregoing, the UNCRPD Committee accepted that States Parties are not required to abolish all decision-making systems which involve the appointment of a person to take a decision for another person.[[123]](#footnote-123) However, the UNCRPD Committee explained that the appointer must choose who to delegate decision-making to, that decision cannot be made against their will and any decisions taken on the appointer’s behalf must be based on their will and preferences as opposed to their best interests.[[124]](#footnote-124)

The UNCRPD Committee also provided some guidance on how to proceed where it is difficult to determine the ‘will and preferences’ of the person concerned. The General Comment permits the appointment of a decision-maker, where a decision is required and it is not ‘practicable’, despite significant efforts, to determine the will and preferences of the person. However, the UNCRPD Committee stated that the decision-maker must make a decision based on a ‘best interpretation of will and preferences’ rather than a person’s perceived ‘best interests’.[[125]](#footnote-125)

### Wardship under the Lunacy Regulation (Ireland) Act of 1871

The system of wardship has been characterised as a form of ‘plenary guardianship’[[126]](#footnote-126) and ‘substituted decision-making’[[127]](#footnote-127). Persons under wardship were deprived of all decision-making autonomy, sometimes referred to as ‘civil death’.[[128]](#footnote-128) The Law Reform Commission noted that under wardship, ‘a person’s general legal capacity is seen in black and white terms as either present or absent’.[[129]](#footnote-129)

The High Court was vested with jurisdiction over all matters relating to the person under wardship and their estate, making decisions based on the person’s ‘best interests’ as opposed to their ‘will and preferences’. The High Court, rather than the person under wardship, appointed the committee to manage the person’s property, personal care decisions and day-to-day affairs by reference to court orders. Additionally, the High Court could admit a person to wardship and appoint a committee even if the person entering wardship objected.

The wardship system possessed all the characteristics of a substituted decision-making regime specified by the UNCRPD Committee in its General Comment No.1.

### Assisted Decision Making (Capacity) Act 2015 (as amended)

The highest level of ‘support’ available under the 2015 Act is the appointment by a court of a decision-making representative, although the Circuit Court can also make decisions on behalf of a relevant person where it is satisfied that the matter is urgent or that it is otherwise expedient for it to do so.[[130]](#footnote-130) A decision-making representative is appointed to make specific decisions on behalf of a person in relation to their personal welfare or property and affairs or both. They are required to make decisions based not on ‘best interests’ but by giving ‘effect, so far as is practicable to the individual’s will and preferences’ as per the Guiding Principles of the legislation.

Any person aged 18 years or over and with a bona fide interest in the welfare of a relevant person can apply to be a decision-making representative.[[131]](#footnote-131) While the decision-making representative may be known and trusted to the relevant person, it may also be a professional third party drawn from an expert panel operated by the Decision Support Service. The 2015 Act requires the Decision Support Service to establish and maintain a panel of ‘suitable persons willing and able’ to act as decision-making representatives.[[132]](#footnote-132) The court may ask the Decision Support Service to nominate two or more suitable representatives from the panel when a person does not have a suitable person who can act as their decision-making representative. The court may appoint more than one decision-making representative to act for a relevant person in respect of different decisions.

When considering the suitability of a person to be a decision-making representative for a relevant person, the court must have regard to several factors, including the known will and preferences of the relevant person and the desirability of preserving existing relationships within the family of the relevant person. Where the court appoints a decision-making representative to make decisions on the relevant person’s property and affairs, it is required to consider several other factors, including any professional expertise, qualification or experience required to manage the relevant person’s financial affairs.[[133]](#footnote-133)

In all cases, the decision-making representation order must be as limited as possible in duration and scope.[[134]](#footnote-134) In addition, the support provided must be the least restrictive on a person’s rights and freedoms (as per the Guiding Principles) and there should also be consideration of whether the support could be provided in a more appropriate, practicable and less intrusive manner (e.g. through a decision-making assistant or co-decision-maker).[[135]](#footnote-135)

In line with General Comment No.1, decision-making representatives must abide by the Guiding Principles of the 2015 Act and give ‘effect, so far as is practicable to the individual’s will and preferences’. Additionally, in exercising their functions, a decision-making representative is also required, insofar as is possible, to ascertain the will and preferences of the relevant person on a decision and assist the relevant person with communicating such will and preferences.[[136]](#footnote-136)

However, a decision-making representative can only be assigned to a person through a court order.[[137]](#footnote-137) In addition, while the court is required to have regard to the known will and preferences of the relevant person when considering the appointment of a decision-making representative, as well as other considerations, they are not obliged to follow the relevant person’s instruction or preference.[[138]](#footnote-138) This would appear to qualify as ‘substituted decision making’ in line with the definition provided by the UNCRPD Committee, with a substituted decision maker appointed by a third party, and this can be done against the will of the relevant person.

In any consideration of compliance with Article 12, it is also relevant to recall that Ireland explicitly entered a declaration and reservation concerning Article 12 reserving the right to permit substitute decision-making arrangements, subject to appropriate and effective safeguards.

Furthermore, the 2015 Act does not cover all situations where substituted decision-making may occur, and in particular does not make provision for informal substitute decision-making. An earlier version of the draft Assisted Decision Making (Capacity) legislation provided for informal decision-making in personal welfare matters,[[139]](#footnote-139) akin to section 5 of the Mental Capacity Act 2005 in England and Wales, proposing to indemnify from liability an ‘informal decision-maker’ who made decisions in personal welfare matters outside of the framework of the Act.[[140]](#footnote-140)

It has been suggested that the removal of provision for informal decision-making leaves unanswered the question of what a health and social care professional is to do when faced with a non-emergency decision, where (after all efforts have been exhausted), the person lacks capacity to consent to a proposed measure and no formal supports are in place.[[141]](#footnote-141) Some of these questions have since been answered by the Health Service Executive’s National Consent Policy 2022, which adopts the position that treatment may be given in some situations, notwithstanding that the person lacks the capacity to decide about an intervention, based on a reasonable interpretation of the likely operation of the doctrine of necessity consistent with the Guiding Principles under the 2015 Act.[[142]](#footnote-142)

## Applying a functional approach to assessing decision-making capacity.

### UNCRPD

The text of the UNCRPD does not address assessment of decision-making or mental capacity.

### UNCRPD Committee

In its General Comment No.1, the UNCRPD Committee explicitly rejected the status, outcome, and functional approaches to assessing ‘mental’ or decision-making capacity.[[143]](#footnote-143) The UNCRPD Committee reaffirmed that a person’s ‘status’ as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in Article 12.[[144]](#footnote-144) In addition, the Committee dismissed the ‘outcome approach’, defined as one where a person is denied capacity owing to a decision that is considered to have negative consequences.[[145]](#footnote-145)

Furthermore, the UNCRPD Committee took the view that the functional approach is incompatible with Article 12 of the Convention as a person’s decision-making skills are taken as legitimate grounds for denying their legal capacity.[[146]](#footnote-146) According to the UNCRPD Committee, the functional approach is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information.[[147]](#footnote-147)

The UNCRPD Committee asserted that the use of a functional approach is ‘flawed for two key reasons’:

‘…(a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person’s disability and/or decision making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.’[[148]](#footnote-148)

While emphatic that the functional approach and all other decision-making capacity assessments do not adhere to Article 12, the UNCRPD Committee was less clear about the alternative:

‘The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.’[[149]](#footnote-149)

The UNCRPD Committee did not elaborate as to what these alternative indicators of support entail.[[150]](#footnote-150)

More recently, in its concluding observations under the second report of Australia, the UNCRPD Committee recommended that Australia implement a nationally consistent supported decision-making framework, as recommended in the Australian Law Reform Commission’s 2014 report, ‘Equality, Capacity and Disability in Commonwealth Laws’.[[151]](#footnote-151) Contrary to General Comment No.1, this report endorsed the functional approach to capacity:

‘with appropriate safeguards, and a rights emphasis, there is no ‘discriminatory denial of legal capacity’ necessarily inherent in a functional test [of decision-making capacity, or ‘ability’ as the ALRC proposed] —provided the emphasis is placed principally on the support necessary for decision-making and that any appointment [of a decision-maker] is for the purpose of protecting the person’s human rights.’[[152]](#footnote-152)

It has been suggested that the Committee’s endorsement of the ALRC’s approach may signal a change in tack or a softening of its position on the functional test for capacity.[[153]](#footnote-153)

### Wardship under the Lunacy Regulation (Ireland) Act of 1871

A status approach to capacity was evident in the wardship system (and in respect of enduring powers of attorney under the Powers of Attorney Act 1996)[[154]](#footnote-154), with persons declared to be ‘of unsound mind and incapable of managing his person or property’[[155]](#footnote-155) losing all legal capacity. The ‘status approach’ to the assessment of decision-capacity which operated under the wardship system was clearly not consistent with the UNCRPD Committee’s General Comment No.1.

### Assisted Decision Making (Capacity) Act 2015 (as amended)

One of the Guiding Principles of the 2015 Act is the presumption of decision-making capacity – all adults are presumed to have capacity to make decisions unless proven otherwise.[[156]](#footnote-156) The legislation explicitly provides that the presumption of capacity also applies to a person whose capacity is in question or may shortly be in question. Where a person’s capacity is in question, the 2015 Act endorses a functional, time-specific, and issue-specific approach to the assessment of capacity.[[157]](#footnote-157) The legislation explicitly rejects the ‘outcome approach’ to capacity, with one of the Guiding Principles stating that a person should not be considered as lacking capacity by reason of making, having made, or being likely to make, an unwise decision.[[158]](#footnote-158)

The 2015 Act endorses a purely functional test for the assessment of decision-making capacity, and does not contain any medical elements.[[159]](#footnote-159) As part of the functional approach, a person’s capacity is assessed on the basis of their ability to understand, at the time that a decision is to be made, the nature and consequences of the decision in the context of the available choices at that time. A person lacks capacity if they are unable to:

* understand information and facts relevant to the decision;
* retain that information long enough to make a voluntary choice;
* use or weigh up that information as part of the process of making the decision; or
* communicate the decision by any means, including by assistive technology.[[160]](#footnote-160)

The 2015 Act places important emphasis on supportingindependent decision-making beforeany consideration is given to assessing capacity,[[161]](#footnote-161) with the Guiding Principles outlining that a person ‘shall not be considered as unable to make a decision unless all practicable steps have been taken, without success, to help him or her to do so’.[[162]](#footnote-162)

While the functional approach to decision-making capacity provided for in the 2015 Act does not adhere to the UNCRPD Committee’s General Comment No.1, it remains to be seen whether the UNCRPD Committee’s more recent concluding observations in respect of Australia’s second report signal a change in approach on this question. In addition, guidance from the UNCRPD Committee on the form these ‘new, non-discriminatory indicators of support needs’ should take – as an alternative to capacity assessments – would be helpful.[[163]](#footnote-163)

# Conclusion

In summary, while the debate surrounding General Comment No.1 will likely continue, with critics querying whether perfect compliance is achievable or desirable,[[164]](#footnote-164) there can be no doubt that Article 12 of the UNCRPD has prompted positive reform of Ireland’s legislation on legal capacity with a focus on dignity, autonomy, and human rights.

In abolishing the system of wardship and operationalising the supported decision-making framework under the Assisted Decision Making (Capacity) Act 2015 (as amended), Ireland has taken a substantial step forward in terms of compliance with Article 12 of the Convention and the UNCRPD Committee’s General Comment No.1. The 2015 Act contains a range of advances, including the cessation of wardship, the rejection of the ‘best interests’ paradigm in favour of the ‘will and preferences’ of the person concerned as well as the introduction of a statutory presumption of capacity, a tiered framework of decision-making supports and more advance planning tools. The legislation also provided for the establishment of the Decision Support Service, which is responsible for a range of functions, including registering and regulating certain decision support arrangements; supervising the actions and activities of decision supporters; and investigating complaints made under the Act.

However, like all other UNCRPD States Parties, Ireland’s new statutory framework of supported decision-making does not fully align with the UNCRPD Committee’s interpretation of Article 12, as set out in General Comment No.1. Some areas where the 2015 Act diverges from General Comment No.1 include:

* the retention of a form of substitute decision-making, with the potential for the appointment of a decision-making representative by a court against the wishes of the relevant individual, although such representatives are required to act with reference to the will and preferences of the person concerned as opposed to their perceived best interests. Nevertheless, Ireland has placed a reservation and declaration on Article 12 of the Convention permitting the continuance of substituted decision-making, which the UNCRPD Committee would factor into any assessment of compliance;
* the application of a functional test of decision-making capacity to determine access to appropriate supports provided for under the 2015 Act;
* the inability of persons subject to involuntary mental health treatment owing to the risk to themselves or others or persons who have been granted conditional discharge under the criminal law insanity provisions to enforce advance healthcare directives relating to mental healthcare.

Despite the foregoing, the extent to which the 2015 Act aligns with General Comment No.1 will ultimately be considered and assessed by the UNCRPD Committee, with Ireland’s first examination under the Convention now tentatively scheduled for August 2028.[[165]](#footnote-165) We await the outcome.

1. Article 6 of the **Universal Declaration of Human Rights** states: **‘**Everyone has the right to recognition everywhere as a person before the law.’ [↑](#footnote-ref-1)
2. Ireland ratified the **International Covenant on Civil and Political Rights** in December 1989.Article 16 states as follows: ‘Everyone shall have the right to recognition everywhere as a person before the law.’ [↑](#footnote-ref-2)
3. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.1. [↑](#footnote-ref-3)
4. Council of Europe (2017) **A study on the equal recognition before the law - Contribution towards the Council of Europe strategy on the rights of persons with disabilities (National University of Ireland, Galway),** Strasbourg: Council of Europe, p.8. [↑](#footnote-ref-4)
5. Series, L. and Nilsson, A. (2018) ‘Article 12 CRPD: Equal Recognition before the Law’ in Bantekas, I., Stein, MA., and Anastasiou, D. ed., **The UN Convention on the Rights of Persons with Disabilities: A Commentary**, Oxford: Oxford University Press. [↑](#footnote-ref-5)
6. **United Nations Convention on the Rights of Persons with Disabilities**, article 12. [↑](#footnote-ref-6)
7. For example, see Quinn, G. (2010) ‘Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD’, **HPOD Conference, Harvard Law School**. [↑](#footnote-ref-7)
8. Dinerstein, R.D. (2012) ‘Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making’, **Human Rights Brief**, 19(2), 8-12. States Parties to the UNCRPD have also lodged a high number of reservation and declarations concerning Article 12, highlighting the contentious nature of this article. [↑](#footnote-ref-8)
9. Series, L. and Nilsson, A. (2018) ‘Article 12 CRPD: Equal Recognition before the Law’ in Bantekas, I., Stein, MA., and Anastasiou, D. ed., **The UN Convention on the Rights of Persons with Disabilities: A Commentary**, Oxford: Oxford University Press. [↑](#footnote-ref-9)
10. Council of Europe (2017) **A study on the equal recognition before the law - Contribution towards the Council of Europe strategy on the rights of persons with disabilities (National University of Ireland, Galway),** Strasbourg: Council of Europe, p.10. [↑](#footnote-ref-10)
11. Law Reform Commission (2020) **Discussion Paper – Domestic Implementation of International Obligations**, Dublin: LRC, p.186. Notably, in the case of *N.v.H. v Minister for Justice & Equality* [2017] IESC 35, the Supreme Court relied directly on the UN Committee on Economic, Social and Cultural Rights General Comment No.18 on the right to work (para.16) when finding that the absolute, indefinite prohibition on asylum seekers from seeking employment was unconstitutional. [↑](#footnote-ref-11)
12. Ireland operates a ‘dualist’ approach to international law, whereby international agreements to which Ireland becomes a party are not automatically incorporated into domestic law. Article 29.6 of the Irish Constitution states, ‘No international agreement shall be part of the domestic law save as may be determined by the Oireachtas [Parliament]’. To be enforceable, a treaty must be incorporated into domestic law, either through an Act of the Oireachtas or an amendment to the Constitution. [↑](#footnote-ref-12)
13. [2001] IEHC 77. This judgment was upheld by the Supreme Court, with a citation of [2002] IESC 13. [↑](#footnote-ref-13)
14. Arstein-Kerslake, A. & Flynn, E. (2016) ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law’, **The International Journal of Human Rights**, 20(4), 471-490. [↑](#footnote-ref-14)
15. See for instance Ruck Keene, A., Kane, N.B., Kim, S.Y.H., and Owen, G.S. (2023) ‘Mental capacity—why look for a paradigm shift?’, **Medical Law Review**, 31(3), 340–357. See also Freeman, M. C., Kolappa, K., de Almeida, J. M. C., Kleinman, A., Makhashvili, N., Phakathi, S., Saraceno, B., & Thornicroft, G. (2015) ‘Reversing hard won victories in the name of human rights: A critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities’. **The Lancet Psychiatry**, 2(9), 844–850. [↑](#footnote-ref-15)
16. Arstein-Kerslake, A. & Flynn, E. (2016) ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law’, **The International Journal of Human Rights**, 20(4), 471-490. [↑](#footnote-ref-16)
17. These include Australia, Canada, Egypt, Estonia, Georgia, Ireland, Kuwait, the Netherlands, Norway, Poland, Singapore, Syria, Uzbekistan and Venezuela. [↑](#footnote-ref-17)
18. Oireachtas Library & Research Service (2022) **L&RS Bill Digest: Assisted Decision-Making (Capacity) (Amendment) Bill 2022**, p.28. [↑](#footnote-ref-18)
19. Mirfin-Veitch, B. (2016) **Exploring Article 12 of the United Nations Convention on the Rights of Persons with Disabilities: An Integrative Literature Review**, Donald Beasley Institute: Dunedin, p.ix. [↑](#footnote-ref-19)
20. More information on the role of United Nations human rights treaty bodies is available on the website of the **UN Office of the High Commissioner for Human Rights** <<https://www.ohchr.org/en/instruments-and-mechanisms>>. [↑](#footnote-ref-20)
21. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.1. [↑](#footnote-ref-21)
22. ibid. [↑](#footnote-ref-22)
23. ibid, p.4. [↑](#footnote-ref-23)
24. ibid, p.3. [↑](#footnote-ref-24)
25. ibid. [↑](#footnote-ref-25)
26. ibid, p.4. [↑](#footnote-ref-26)
27. ibid, p.2. [↑](#footnote-ref-27)
28. Arstein-Kerslake, A. & Flynn, E. (2016) ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law’, **The International Journal of Human Rights**, 20(4), 471-490. [↑](#footnote-ref-28)
29. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.3. [↑](#footnote-ref-29)
30. Substituted and supported decision-making regimes are not terms which appear in the UNCRPD itself. [↑](#footnote-ref-30)
31. Ireland has submitted its first periodic report under the UNCRPD but has yet to be reviewed by the UN Committee on the Rights of Persons with Disabilities. The tentative date for the formal dialogue in Geneva is currently August 2028. [↑](#footnote-ref-31)
32. The NDA carried out a piece of desk research (in March 2024) in which it examined the Concluding Observations issued by the UNCRPD Committee in respect of EU Member States, the European Union itself and Australia, Canada, New Zealand, Norway, Switzerland and the United Kingdom. The latter States were chosen due to the similarities in some areas of disability law and policy with Ireland, and to offer a sample of State Parties outside the EU. [↑](#footnote-ref-32)
33. Ireland ratified the **Optional Protocol to the UNCRPD** on 31 October 2024 and it will come into force on 30 November 2024. [↑](#footnote-ref-33)
34. UN Committee on the Rights of Persons with Disabilities (2020) **Inquiry concerning Hungary under article 6 of the Optional Protocol to the Convention**, Geneva: OHCHR, p.13. [↑](#footnote-ref-34)
35. ibid, p.14. [↑](#footnote-ref-35)
36. See for instance **C.L. v. Australia** - Case 17.2013 (30.08.2019), **M.D. v Australia** - Case 18.2013 (31.08.2019) and **Arturo Medina v. Mexico** - Case 32.2015 (06.09.2019). [↑](#footnote-ref-36)
37. See for instance Department of Justice and Equality (2013) **Explanatory Memorandum – Assisted Decision-Making (Capacity) Bill 2013**, Dublin: Houses of the Oireachtas, p.2. [↑](#footnote-ref-37)
38. Department of Justice and Equality (2015) **Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities**, Dublin: Department of Justice and Equality. In *G v District Judge Murphy* [2011] IEHC 445, the High Court (Hogan J.) ruled that section 4 of the Criminal Law (Insanity) Act 2006 contained an unconstitutional lacuna in respect of people with mental disorders. The Criminal Procedure Act 1967 provides that the District Court may, subject to certain conditions, try summarily an indictable offence where it ascertains that the accused wishes to plead guilty and it is satisfied that the accused person “understands the nature of the offence and the facts alleged.” The DPP had consented to the defendant being tried summarily before the District Court if he pleaded guilty. However, an issue arose as to the defendant’s fitness to plead. The District Court had ruled that it could not try the defendant summarily as there was a question in relation to whether he understood the nature of the offence or the facts alleged. The District Court was thus precluded from determining the issue of the defendant’s fitness to be tried under section 4(3)(a) of the Criminal Law (Insanity) Act 2006 and had to send the defendant forward to the Circuit Court. If the Circuit Court determined that the defendant was fit to be tried, it was then required to try him. This meant that the defendant, who by virtue of his lack of decision-making capacity was unable to fulfil the conditions to be tried summarily, would be subject to a harsher sentencing regime. The High Court found that this amounted to a violation of the right to equality under Article 40.1 of the Constitution. The Oireachtas has yet to remedy this issue. [↑](#footnote-ref-38)
39. Department of Justice and Equality (2015) **Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities**, Dublin: Department of Justice and Equality, p.4. [↑](#footnote-ref-39)
40. United Nations Treaty Collection, **Glossary of terms relating to Treaty actions** <<https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml>>. [↑](#footnote-ref-40)
41. Article 19 of the **Vienna Convention on the Law of Treaties** reads as follows: ‘A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.’ [↑](#footnote-ref-41)
42. Article 46(1) of the **UN Convention on the Rights of Persons with Disabilities** reads as follows: ‘Reservations incompatible with the object and purpose of the present Convention shall not be permitted.’ [↑](#footnote-ref-42)
43. Article 20.1 of the **Vienna Convention on the Law of Treaties** provides that where a reservation is specifically authorised by a treaty, the making of a reservation by a State does not require any subsequent acceptance by the other contracting States unless the treaty so provides. [↑](#footnote-ref-43)
44. United Nations Treaty Collection, **Glossary of terms relating to Treaty actions** <<https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml>>. [↑](#footnote-ref-44)
45. UN Committee on the Rights of Persons with Disabilities (2018) **Concluding observations on the initial report of Poland**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.3. Nevertheless, Poland still maintains this interpretative declaration. [↑](#footnote-ref-45)
46. UN Special Rapporteur on the rights of persons with disabilities (2017) **Report of the Special Rapporteur on the rights of persons with disabilities**, Geneva: OHCHR, p.10. [↑](#footnote-ref-46)
47. **United Nations Treaty Collection website**, Convention on the Rights of Persons with Disabilities <<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&clang=_en>>. [↑](#footnote-ref-47)
48. Flynn, Á. (2020) ‘Ireland: Assisted Decision-Making (Capacity) Act 2015 and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities’, **Julgar**, 41, 231-259. A full list of declarations, understandings and reservations on Article 12 are available on the **United Nations Treaty Collection website** <<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&clang=_en>>. [↑](#footnote-ref-48)
49. Department of Children, Equality, Disability, Integration and Youth (2021) **Initial Report of Ireland under the Convention on the Rights of Persons with Disabilities**, Dublin: DCEDIY, p.23. [↑](#footnote-ref-49)
50. **United Nations Treaty Collection website**, Convention on the Rights of Persons with Disabilities <<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&clang=_en>>. [↑](#footnote-ref-50)
51. Department of Children, Equality, Disability, Integration and Youth (2021) **Initial Report of Ireland under the Convention on the Rights of Persons with Disabilities**, Dublin: DCEDIY, p.23. [↑](#footnote-ref-51)
52. Mirfin-Veitch, B. (2016) **Exploring Article 12 of the United Nations Convention on the Rights of Persons with Disabilities: An Integrative Literature Review**, Donald Beasley Institute: Dunedin, p.v. [↑](#footnote-ref-52)
53. Series, L. and Nilsson, A. (2018) ‘Article 12 CRPD: Equal Recognition before the Law’ in Bantekas, I., Stein, MA., and Anastasiou, D. ed., **The UN Convention on the Rights of Persons with Disabilities: A Commentary**, Oxford: Oxford University Press. [↑](#footnote-ref-53)
54. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.8. [↑](#footnote-ref-54)
55. O’Mahony, C. and de Paor, A. (2024) ‘Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Ireland’ in Domanski, M. and Lackoronski, B. ed., **Models of implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) – Private and Criminal Law Aspects**, New York: Routledge, p.301. [↑](#footnote-ref-55)
56. Decision Support Service, ‘DSS could assist up to 5,500 people in its first six months of operation’ <https://decisionsupportservice.ie/news-events/dss-could-assist-5500-people-its-first-six-months-operation> [↑](#footnote-ref-56)
57. These areas are not intended to be exhaustive. [↑](#footnote-ref-57)
58. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.7. [↑](#footnote-ref-58)
59. ibid, p.6-7. [↑](#footnote-ref-59)
60. ibid, p.7. [↑](#footnote-ref-60)
61. ibid, p.5. [↑](#footnote-ref-61)
62. ibid, p.5. [↑](#footnote-ref-62)
63. **Re a Ward of Court (No.2)** [1996] 2 IR 79. [↑](#footnote-ref-63)
64. Law Reform Commission (2005) **Consultation Paper on Vulnerable Adults and the Law: Capacity*,*** Dublin: Law Reform Commission, p.189. [↑](#footnote-ref-64)
65. **Assisted Decision Making (Capacity) Act 2015 (as amended)**, section 8(7)(b). [↑](#footnote-ref-65)
66. ibid, section 8(7)(e). [↑](#footnote-ref-66)
67. ibid, section 38(5)(a). [↑](#footnote-ref-67)
68. ibid, section 8(6). [↑](#footnote-ref-68)
69. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.5. [↑](#footnote-ref-69)
70. ibid. [↑](#footnote-ref-70)
71. ibid, p.7. [↑](#footnote-ref-71)
72. ibid. [↑](#footnote-ref-72)
73. **Lunacy Regulation (Ireland) Act 1871**, section 56. The National Safeguarding Committee also reported that this practice had ‘fallen into abeyance for very many years. National Safeguarding Committee (2017) **Review of current practice in the use of wardship for adults in Ireland**, Dublin: National Safeguarding Committee, p.91. [↑](#footnote-ref-73)
74. Law Reform Commission (2005) **Consultation Paper on Vulnerable Adults and the Law: Capacity*,*** Dublin: Law Reform Commission, p.90. [↑](#footnote-ref-74)
75. Order 67, rule 59 of the **Rules of the Superior Courts 1986** (S.I. No. 15 of 1986). [↑](#footnote-ref-75)
76. Law Reform Commission (2005) **Consultation Paper on Vulnerable Adults and the Law: Capacity*,*** Dublin: Law Reform Commission, p.91. [↑](#footnote-ref-76)
77. O’Mahony, C. and de Paor, A. (2024) ‘Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Ireland’ in Domanski, M. and Lackoronski, B. ed., **Models of implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) – Private and Criminal Law Aspects**, New York: Routledge, p.301. [↑](#footnote-ref-77)
78. Law Reform Commission (2005) **Consultation Paper on Vulnerable Adults and the Law: Capacity*,*** Dublin: Law Reform Commission, p.90. [↑](#footnote-ref-78)
79. ibid. [↑](#footnote-ref-79)
80. Order 67, rule 58 of the **Rules of the Superior Court Superior Courts 1986** (S.I. No. 15 of 1986) states: ‘Neither the proprietor nor the keeper nor the medical superintendent of the hospital or institution in which the ward shall, for the time being reside nor any person residing with or in the employment of any such proprietor, keeper or medical superintendent shall be appointed committee of the ward's person or estate either solely or jointly with any other person.’ [↑](#footnote-ref-80)
81. National Safeguarding Committee (2017) **Review of current practice in the use of wardship for adults in Ireland**, Dublin: National Safeguarding Committee, p.76. [↑](#footnote-ref-81)
82. ibid, p.117. [↑](#footnote-ref-82)
83. **Assisted Decision Making (Capacity) Act 2015 (as amended)**, section 54(2). [↑](#footnote-ref-83)
84. ibid, section 55A. [↑](#footnote-ref-84)
85. Mulligan, A. and Slattery, E. (2023) ‘The Assisted Decision Making (Capacity) Act 2015 (as amended): Discharge from wardship and minor wards’, **Legal Ease**, 6(1), 6-10. [↑](#footnote-ref-85)
86. **Assisted Decision Making (Capacity) Act 2015 (as amended)**, section 49(2). [↑](#footnote-ref-86)
87. Ibid, sections 107 and 108. [↑](#footnote-ref-87)
88. Article 35.2 of the **Constitution** provides that judges are to be ‘independent in the exercise of their judicial functions and subject only to this Constitution and the law.’ [↑](#footnote-ref-88)
89. ibid, section 95(1)(e). [↑](#footnote-ref-89)
90. See for instance **Assisted Decision Making (Capacity) Act 2015 (as amended)**, sections 15, 30, 47, 76 and 88(4). [↑](#footnote-ref-90)
91. ibid, section 8(6)(c). [↑](#footnote-ref-91)
92. ibid, section 8(6)(d). [↑](#footnote-ref-92)
93. ibid, sections 15A(1), 34(1), 80(1) and 90(1). [↑](#footnote-ref-93)
94. See for instance **Assisted Decision Making (Capacity) Act 2015 (as amended)**, section 15A(2). [↑](#footnote-ref-94)
95. ibid, sections 15(1)(c), 30(1)(e) and 76(1)(c). [↑](#footnote-ref-95)
96. ibid, sections 24(2)(h) and 71(2)(d). [↑](#footnote-ref-96)
97. ibid, sections 38(5)(f) and 77(2)(d). [↑](#footnote-ref-97)
98. ibid, sections 11(1)(f), 18(1)(f), 39(1)(f), 65(1)(f) and 87(2)(d). [↑](#footnote-ref-98)
99. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.4. [↑](#footnote-ref-99)
100. ibid. [↑](#footnote-ref-100)
101. ibid, p.7. [↑](#footnote-ref-101)
102. ibid. [↑](#footnote-ref-102)
103. ibid. [↑](#footnote-ref-103)
104. ibid, p.5. [↑](#footnote-ref-104)
105. ibid. [↑](#footnote-ref-105)
106. ibid. [↑](#footnote-ref-106)
107. ibid. [↑](#footnote-ref-107)
108. Typically, Advance Healthcare Directives set out an individual’s instructions in relation to the healthcare treatments they wish to refuse or would like to request, in the future when they no longer have the decision-making capacity to do so. There has been criticism of the UNCRPD Committee for failing to explain how advance care planning is compatible with the approach that mental incapacity is invalid or how to address a situation whereby a person’s current will and preferences are incompatible with prior ones i.e. prior to them losing decision-making capacity. See for example Ruck Keene, A., Cooper, R. and Hobbs, T., ‘When past and present wishes collide: the theory, the practice and the future’ (2017) **Elder Law Journal** 132-140. See also Scholten, M. and Gather, J. ‘Adverse consequences of article 12 of the UN Convention on the Rights of Persons with Disabilities for persons with mental disabilities and an alternative way forward’ (2018) 44(4) **Journal of Medical Ethics** 226-233. [↑](#footnote-ref-108)
109. **AM v HSE [2019] IESC 3**, para.8. [↑](#footnote-ref-109)
110. From the date of entry into force of the 2015 Act, no new Enduring Power of Attorneys will be created under the **Powers of Attorney Act 1996**, even though enduring powers of attorney made under the 1996 Act will remain valid. [↑](#footnote-ref-110)
111. Section 4(1) of the **Powers of Attorney Act 1996** defines “mental incapacity” as “incapacity by reason of a mental condition to manage his or her own property and affairs”. [↑](#footnote-ref-111)
112. **Assisted Decision Making (Capacity) Act 2015 (as amended)**, sections 59(4) and 85(2). [↑](#footnote-ref-112)
113. However, the directive-maker may still however rely on his or her AHD to refuse physical health measures as per section 85(7)(b) of the **Assisted Decision Making (Capacity) Act 2015 (as amended)**. [↑](#footnote-ref-113)
114. AHD’s however do apply where the person is a voluntary patient and an involuntary patient detained under Section 3(b) of the 2001 Act (detained for reasons other than posing a risk to themselves or others). [↑](#footnote-ref-114)
115. **Assisted Decision Making (Capacity) Act 2015 (as amended)**, section 85(7)(a). [↑](#footnote-ref-115)
116. [↑](#footnote-ref-116)
117. **Mental Health Bill 2024**, section 51(1). [↑](#footnote-ref-117)
118. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.4. [↑](#footnote-ref-118)
119. ibid, p.6. [↑](#footnote-ref-119)
120. ibid. [↑](#footnote-ref-120)
121. The original version of General Comment No. 1 contained a typo, reading i), ii) andiii). The UNCRPD Committee subsequently published a correction to General Comment No.1. For example, see ‘CRPD corrections and updates’ <[CRPD corrections and updates – Mental Capacity Law and Policy](https://www.mentalcapacitylawandpolicy.org.uk/crpd-corrections-and-updates/)>. See also Series, L. and Nilsson, A. (2018) ‘Article 12 CRPD: Equal Recognition before the Law’ in Bantekas, I., Stein, MA., and Anastasiou, D. ed., **The UN Convention on the Rights of Persons with Disabilities: A Commentary**, Oxford: Oxford University Press. See also de Bhailís, C. & Flynn, E. (2017). ‘Recognising legal capacity: commentary and analysis of Article 12 CRPD’, **International Journal of Law in Context**, 13(1), 6-21. [↑](#footnote-ref-121)
122. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.6. [↑](#footnote-ref-122)
123. Arstein-Kerslake, A. & Flynn, E. (2016) ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law’, **The International Journal of Human Rights**, 20(4), 471-490. [↑](#footnote-ref-123)
124. ibid. [↑](#footnote-ref-124)
125. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.5. [↑](#footnote-ref-125)
126. Flynn, Á. (2020) ‘Ireland: Assisted Decision-Making (Capacity) Act 2015 and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities’, **Julgar**, 41, 231-259. [↑](#footnote-ref-126)
127. See for instance, the **Courts Service** <https://www.courts.ie/content/new-decision-making-support-services-available-assisted-decision-making-capacity-act-comes> [↑](#footnote-ref-127)
128. Flynn, Á. (2020) ‘Ireland: Assisted Decision-Making (Capacity) Act 2015 and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities’, **Julgar**, 41, 231-259. [↑](#footnote-ref-128)
129. Law Reform Commission (2005) **Consultation Paper on Vulnerable Adults and the Law: Capacity*,*** Dublin: Law Reform Commission, p.102. [↑](#footnote-ref-129)
130. **Assisted Decision Making (Capacity) Act 2015 (as amended)**, section 38(2)(a). [↑](#footnote-ref-130)
131. ibid, section 36(1). [↑](#footnote-ref-131)
132. ibid, section 101. [↑](#footnote-ref-132)
133. ibid, section 38(6). [↑](#footnote-ref-133)
134. ibid, section 38(9). [↑](#footnote-ref-134)
135. ibid, section 36(5)(c). [↑](#footnote-ref-135)
136. ibid, section 41(1) [↑](#footnote-ref-136)
137. Decision-making representatives are – under the 2015 Act (as amended) - the only decision supporters appointed by a court. [↑](#footnote-ref-137)
138. In addition, certain people are not eligible for appointment as decision-making representative, irrespective of the person’s wishes. **Assisted Decision Making (Capacity) Act 2015 (as amended)**, section 39. [↑](#footnote-ref-138)
139. **Assisted Decision-Making (Capacity) Bill 2013**, section 53. [↑](#footnote-ref-139)
140. Flynn, Á. (2020) ‘Ireland: Assisted Decision-Making (Capacity) Act 2015 and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities’, **Julgar**, 41, 231-259. [↑](#footnote-ref-140)
141. ibid. [↑](#footnote-ref-141)
142. Health Service Executive (2022) **National Consent Policy**, HSE: Dublin, p.42. [↑](#footnote-ref-142)
143. UN Committee on the Rights of Persons with Disabilities (2014) **General comment No.1 – Article 12: Equal recognition before the law**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.4. [↑](#footnote-ref-143)
144. ibid. [↑](#footnote-ref-144)
145. ibid. [↑](#footnote-ref-145)
146. ibid. [↑](#footnote-ref-146)
147. ibid. [↑](#footnote-ref-147)
148. ibid. [↑](#footnote-ref-148)
149. ibid, p.7. [↑](#footnote-ref-149)
150. Flynn, Á. (2020) ‘Ireland: Assisted Decision-Making (Capacity) Act 2015 and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities’, **Julgar**, 41, 231-259. [↑](#footnote-ref-150)
151. UN Committee on the Rights of Persons with Disabilities (2019) **Concluding observations on the combined second and third report of Australia**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.6. [↑](#footnote-ref-151)
152. Australian Law Reform Commission (2014) **Equality, Capacity and Disability in Commonwealth Laws**, Sydney: ALRC, p.74. [↑](#footnote-ref-152)
153. Ruck Keene, A., Kane, N.B., Kim, S.Y.H., and Owen, G.S. (2023) ‘Mental capacity—why look for a paradigm shift?’, **Medical Law Review**, 31(3), 340–357. [↑](#footnote-ref-153)
154. Law Reform Commission (2005) **Consultation Paper on Vulnerable Adults and the Law: Capacity*,*** Dublin: Law Reform Commission, p.55. [↑](#footnote-ref-154)
155. **Lunacy Regulation (Ireland) Act 1871**, section 15. [↑](#footnote-ref-155)
156. **Assisted Decision Making (Capacity) Act 2015 (as amended)**, section 8(2). [↑](#footnote-ref-156)
157. ibid, section 3. [↑](#footnote-ref-157)
158. ibid, section 8(4). [↑](#footnote-ref-158)
159. This contrasts with the position in England and Wales, where the functional test outlined in the Mental Capacity Act 2005 requires the functional inability to be caused by an impairment of or disturbance in the functioning of the person’s mind or brain. For more discussion, see Ruck Keene, A., Kane, N.B., Kim, S.Y.H., and Owen, G.S. (2023) ‘Mental capacity—why look for a paradigm shift?’, **Medical Law Review**, 31(3), 340–357. [↑](#footnote-ref-159)
160. ibid, section 3(2). [↑](#footnote-ref-160)
161. Flynn, Á. (2020) ‘Ireland: Assisted Decision-Making (Capacity) Act 2015 and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities’, **Julgar**, 41, 231-259. [↑](#footnote-ref-161)
162. **Assisted Decision Making (Capacity) Act 2015 (as amended)**, section 8(3). [↑](#footnote-ref-162)
163. Before the enactment of the Assisted Decision Making (Capacity) Act 2015, Eilionóir Flynn and Piers Gooding argued that the Bill could change the eligibility for different decision-making arrangements to ensure it did not rely on a functional test of mental or decision-making capacity. Instead, they suggested adults could choose their preferred support arrangement (assisted or co-decision-making) as long the individual’s will and preferences were known. The last resort appointment of a decision-making representative could be reserved for situations in which the person’s will and preferences remained unknown, after significant efforts to support the person and to discover their will and preferences have been made. In such situations, they argued that decisions made by these representatives would be guided by the principle of ‘best interpretation of will and preferences’ as set out in General Comment 1. Flynn, E. (2021) ‘Will and Preferences in the Assisted Decision-Making (Capacity) Act – Key Achievements and Missed Opportunities’ in Donnelly, M, and Gleeson, C. ed., **The Assisted Decision-Making (Capacity) Act 2015: Personal and Professional Reflections**, Kildare: Donovan Print, p.111. [↑](#footnote-ref-163)
164. Flynn, Á. (2020) ‘Ireland: Assisted Decision-Making (Capacity) Act 2015 and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities’, **Julgar**, 41, 231-259. [↑](#footnote-ref-164)
165. UN Committee on the Rights of Persons with Disabilities (2024) **Tentative forecast of country reviews**, available on the website of the Office of the UN High Commissioner for Human Rights <<https://www.ohchr.org/en/treaty-bodies/crpd>>. [↑](#footnote-ref-165)