



Relate

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policy and legislation in Ireland

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Courts and Civil Law (Miscellaneous Provisions) Act 2013

The Courts and Civil Law (Miscellaneous Provisions) Act 2013 provides for changes to several different laws. Its amendments to the personal insolvency legislation were described in the September 2013 issue of *Relate*. Here we describe the other main elements of the Act.

Reporting of family law cases

In general, court proceedings must be held in public. However, family law cases are exceptions to this general rule – they must be held “otherwise than in public” or *in camera* (which literally means in a chamber). Family law cases include cases dealing with separation, divorce, maintenance, domestic violence orders, adoption and childcare issues. The reason for hearing such cases *in camera* is to protect the privacy of the individuals involved and, in particular, to protect children. The only people who can be present are the parties to the proceedings, their lawyers and the judge. In general, the press are not entitled to be present.

Regulations have been made that allow certain people to attend family court sittings in order to draw up and publish reports on what happened in the cases concerned. The parties to the case or any child involved in the case may not be identified. In 2006, the Courts Service introduced the family law reporting service on a pilot basis – this aimed to provide information on the operation of family law in the courts: its reports are available at courts.ie.

While the preservation of the right to privacy of the individuals concerned remains a major factor, there has been concern that not enough information is available about what actually happens in family law cases. This Act aims to address that concern.

The Act provides that the press may be present at family law cases and may report on them. The reports must not include any information likely to identify the parties involved or any children to whom the cases relate. It will be a criminal offence to publish such information. The courts will be able to exclude or restrict the presence of members of the press from all or part of the proceedings, where this is necessary, in the following circumstances:

- To protect the anonymity of the parties to the proceedings or any children to whom the proceedings relate
- Because of the nature and circumstances of the case or
- In the interests of justice

The court will also have the power to order that certain evidence given in family law cases not be published or broadcast. Before making an order on press attendance or publication of information, the court must consider the views of any of the parties involved. It must also take account of the views of any child involved in the case if that child is able to express such views.

When deciding whether or not to make an order on press attendance the court must have regard to, among other things:

- The desirability of promoting public confidence in the administration of justice
- The best interests of any child involved
- The views of the parties and the children involved
- Whether the evidence includes sensitive personal information, commercially sensitive information or information that might prejudice a criminal trial
- The extent to which the attendance of members of the press might inhibit or cause undue distress to a party or a child because of the emotional condition or any medical condition, physical impairment or intellectual disability of the party or the child concerned
- The need to protect a party or a child against coercion, intimidation or harassment
- Whether the evidence would lead members of the public to identify a party or a child involved in the proceedings

Jurisdiction of the courts

The Act provides for changes in the monetary limits for the jurisdiction of the different courts. It provides that the upper limit will increase:

- From €6,350 to €15,000 in the District Court
- From €38,092 to €75,000 in the Circuit Court; however, the limit for personal injury cases will be €60,000

Cases involving amounts above these limits will be heard in the High Court.

The current limits were set in 1991. (Legislation was passed in 2002 to increase the limits to €20,000 for the District Court and to €100,000 for the Circuit Court but this was never brought into effect.)

This change is not yet in effect.

Juries

The Act provides for the appointment of up to three extra jurors to deal with lengthy trials. This was recommended by the Law Reform Commission's *Report on Jury Service*. Website: lawreform.ie.

At present, a jury of 12 people is empanelled to hear a case. A decision may be made by 10 members. If more than two jury members become unable to continue, the trial collapses.

The Act provides that, in cases that are likely to last more than two months, the judge can order up to 15 people be selected to serve on the jury. If there are more than 12 remaining at the end of the trial, the 12 who will make the decision will be chosen by drawing names from a drum. This will be done in open court. In cases where extra jurors are chosen, the accused person or the prosecution may challenge up to eight potential jurors without showing cause. In cases where 12 jurors are chosen, up to seven potential jurors can be challenged without cause shown. In all cases, any number of potential jurors may be challenged if cause is shown.

Legal advice/aid for inquests

The Act provides that legal advice and legal aid may be available for certain inquests. The *Coroners Bill 2007* that is before the Oireachtas provides for this but the entire Bill is being reviewed. The European Court of Human Rights has emphasised that it is important that the next of kin can effectively participate and engage in a coroner's inquest into certain categories of death, including cases where a person has died while being involuntarily detained by the State. Effective participation requires that the next of kin are given the relevant information before the inquest and this may require that they get legal assistance.

The Act provides that the Legal Aid Board may arrange for the granting of legal advice and legal aid to a family member where:

- The person has died in, or immediately after being in, State custody or
- The coroner is of the opinion that the death occurred in circumstances, the continuance or possible recurrence of which would be harmful to public health and safety, such that there is a significant public interest in the family member being granted legal advice and/or aid

The request for legal advice and/or aid must be made to the coroner and the coroner then decides whether or not to apply to the Legal Aid Board. The usual means test for eligibility for legal advice and legal aid will apply.

A death in State custody includes a death while in the custody of the Gardaí, in prison, in service custody under the Defence Acts, in involuntary detention under the *Mental Health Act 2001*, in a designated centre under the *Criminal Law (Insanity)*

Act 2006, in a remand centre or child detention school under the *Children Act 2001* or the death of a child in care under the Child Care Acts.

A family member includes immediate family (including uncles, aunts, nieces and nephews), spouses and civil partners, any person who normally lives in the deceased person's household and any child in foster care with the deceased or with any of the eligible family members.

Housing

Harmonised differential rent scheme

The *Housing (Amendment) Act 2013* provides for a technical change in the *Housing (Miscellaneous Provisions) Act 2009* that relates to the charging of local authority rents. It had been intended to bring the relevant section of the 2009 Act, Section 31, into effect in 2013 in order to facilitate the introduction of a new local authority rents system from January 2014. However, the section was technically faulty and did not allow this to happen. The section has now been amended by this Act.

The section provides for some harmonisation of local authority differential rent schemes. The details of the harmonisation will be set out in regulations. At present, differential rent schemes are drawn up separately by each local authority and there are considerable variations between the different schemes. This means that there are variations in the level of rent charged and the manner in which the rent is calculated. It is not intended that the schemes be totally harmonised and there will be some possibility of variation by local authorities but some basic conditions will be the same in all schemes. The stated intention is that there will be a base rent for each household member plus a differential rent based on a proportion of net household income in excess of a threshold that varies according to household composition. Local authorities will be able to include charges in the rent that are related to the costs of works and services provided. It is not yet clear when the harmonised rent system will be introduced but it is expected that it will be done on a phased basis.

Housing Assistance Payment

In March 2012, the Government decided in principle to transfer responsibility for long-term rent supplement recipients from the Department of Social Protection to local authorities and to establish a new Housing Assistance Payment (HAP) to replace Rent Supplement. In July 2013, it was announced that the new HAP would be introduced on a test basis.

The Department of Social Protection, the Department of the Environment, Community and Local Government and the City and County Managers Association are currently drawing up plans for its implementation. It is intended that the test phase of the scheme will be carried out in early 2014, provided the necessary legislation is in place. Limerick will be the lead local authority for the test phase and the other local authorities involved will be South Dublin, Louth, Kilkenny, Waterford City, Cork County and Monaghan.

It is expected that the HAP scheme will be based on the harmonised differential rent scheme that will also be introduced for local authority tenants (see above). The HAP will be available to people in employment.

Voluntary housing tenancies

The *Residential Tenancies (Amendment) (No 2) Bill 2012* has been passed by the Dáil. The Bill was described in the September 2012 issue of *Relate*. Among other things, it provides for the regulation of certain tenancies in the voluntary and cooperative housing sector in the same way as the private rented sector.

Pending the introduction of a statutory regulatory system, a new voluntary regulation code for approved housing bodies has been introduced. The approved housing bodies who agree to the code are expected to have a Charter of Commitments issued annually and to be monitored by the Department of the Environment, Community and Local Government and the Housing Agency. The requirements in the code differ in accordance with the size of the approved bodies concerned. It outlines a number of minimum standards that apply to all and additional standards for larger bodies. Website: envirom.ie.

Private tenancies and receivership

The Minister for Housing and Planning has also said that she is examining possible changes to the law to provide more clarity for tenants in private rented accommodation whose homes are put into receivership. When a receiver is appointed by the landlord's mortgage lender, the tenant must pay the rent to the receiver but it is the landlord who remains legally responsible for matters such as returning deposits to tenants. The receiver may arrange for repairs to be carried out but it is unclear whether or not the receiver is required to do this or whether the receiver takes on any of the responsibilities of a landlord.

The Irish Banking Federation has produced an information leaflet entitled *A Residential Tenant's Guide to Receivership*. Website: ibf.ie.

Other proposed housing legislation

As well as legislation dealing with the proposed HAP, the Minister has said that she intends to introduce legislation later this year to:

- Put in place a new procedure for the repossession of local authority dwellings to replace section 62 of the Housing Act 1966, which the Supreme Court declared in February 2012 to be incompatible with the European Convention on Human Rights in certain circumstances; this section was mainly used in cases of anti-social behaviour
- Underpin current requirements in relation to the entitlement of non-Irish nationals to be assessed by local authorities for social housing support
- Provide for a new tenant purchase scheme for existing local authority houses based on an incremental purchase model

Electoral, Local Government and Planning and Development Act 2013

The *Electoral, Local Government and Planning and Development Act 2013* provides for several changes in electoral and local government arrangements.

European Parliament

The new nomination procedures for European Parliament candidates are required by Directive 2013/1/EU. These procedures aim to make it easier for candidates to stand for election in member states of which they are not nationals.

Local authorities

Some local authorities are in the process of being amalgamated as part of the overall plans for local government changes outlined in *Putting People First – Action Programme for Effective Local Government*. Website: environ.ie.

In particular, Limerick (City and County), Tipperary (North and South) and Waterford (City and County) will elect one local authority in their areas in 2014. The Act provides for the preparation and publication of one register of electors for the 2014/15 period for these counties. This register will come into force on 15 February 2014 and will be used for the local government elections in 2014.

The Act also provides for transitional arrangements for the development plans of those local authorities that are being amalgamated and the town councils that are being abolished.

The legislation necessary to introduce further changes to local authority structures will be introduced before the end of 2013.

Electoral register

The Act extends the time allowed for applications to be made for inclusion in the supplement to the postal and special voters' lists on the electoral register for the purposes of referendums, presidential, European and local elections. You could apply to be included in these lists at any time. However, if an election or a referendum was called and you wanted to be able to vote in that, you had to apply for inclusion on these lists within two days of the announcement of the election date.

The Act provides that such applications for inclusion in the supplement to the postal and special voters' lists must be made 21 days in advance of polling day, excluding Sundays and public holidays. Applications for inclusion in the supplement to the general register must be made within 14 days of polling day, excluding Sundays and public holidays and this will continue to be the case.

This change does not apply to general elections or by-elections. The polling day for such elections can be as short as 21 days after the election is announced. If you want to be included in the supplement to the postal and special voters' lists for general elections and by-elections, you must apply within two days of the calling of the election.

Other recent legislation

Non-Use of Motor Vehicles Act 2013

This Act provides that motor vehicles must be declared to be off the road in advance for motor tax purposes. Until July 2013, it was possible to declare that your motor vehicle had been off the road and, as a result, you were not liable to pay motor tax for the period in question.

From 1 October 2013, you must declare in advance that your vehicle will be off the road for a period between three months and a year. (A transitional arrangement was in place between July and September 2013.) A specific form is available for this. This declaration must be made in the month before your motor tax expires or an earlier declaration of non-use expires. If you buy a vehicle (whether new or second hand) and you do not intend to use it for a period, you must make a declaration within 10 days from the date of purchase. Website: environ.ie.

Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013

This Act provides for the holding of inquiries into matters of public importance by the Houses of the Oireachtas. Inquiries could be concerned with systems, practices,

procedures, policies and the implementation of policy, and the effectiveness of legislative and regulatory systems. Such inquiries may not make any findings that adversely affect the good name of any person who is not a member of one of the Houses of the Oireachtas or an officeholder or someone who is directly accountable to the Oireachtas. A proposed Constitutional amendment to give such powers to the Oireachtas was rejected by the people in 2011.

Financial Emergency Measures in the Public Interest Act 2013

This is the fifth Act in a series of financial emergency measures in the public interest that have been introduced since 2008.

This Act provides for the reduction of the pay of public servants who have annual salaries greater than €65,000 and a reduction in the pensions of public servants where the pension is over €32,500. These provisions came into effect in July 2013.

Civil legal aid

A number of changes have been introduced in the means test for civil legal aid and in the contributions payable by those who qualify (in Regulations SI 346/2013). The main changes are:

- The minimum contribution you make towards legal advice is increased from €10 to €30 and the minimum for legal aid is increased from €50 to €130
- The maximum contribution for asylum seekers availing of the Refugee Legal Service is increased from €6 to €10
- No contribution is required if you are a parent getting legal services in proceedings with the HSE related to the welfare of a child, that is, child care proceedings
- The amount of disposable capital that you may have and still qualify is reduced from €320,000 to €100,000

You may qualify for legal advice and legal aid from the Legal Aid Board if you meet certain conditions relating to the nature and merits of your case and if you pass the means test.

Means test

In order to qualify, you must have disposable income of less than €18,000. Virtually all income with the exception of Child Benefit is taken into account. Your disposable income is your gross income less Pay Related Social Insurance (PRSI), Universal

Social Charge (USC) and public service pension deduction plus the following maximum deductions:

- | | |
|-------------------------------------|---------------------------|
| • Dependent spouse or partner: | €3,500 |
| • Other adult and child dependants: | €1,600 for each dependant |
| • Cost of accommodation | €8,000 |
| • Ex-gratia payments | €1,040 |

Your capital assets are also taken into account. These include any assets you have other than the family home. Any other property you have is assessed taking account of charges and mortgages.

Contributions

The legal aid scheme is not a free legal aid scheme. In general, you may have to make a contribution based on your income and possibly also on your capital.

If your disposable income is less than €11,500, you pay the minimum contribution (now €30) for legal advice. You then pay one tenth of difference between €11,500 and your disposable income. The maximum contribution for legal advice is €150.

The minimum contribution for legal aid is €130. This is payable if your disposable income is less than €11,500. If it is more than €11,500, you pay €130 plus one quarter of the difference between your disposable income and €11,500.

If you have disposable capital of more than €4,000, you have to pay a further contribution for legal aid as follows:

- 2.5% of the amount between €4,001 and €54,000 (maximum €1,250)
- €1,250 plus 5% of the amount over €54,000

The Legal Aid Board collected €830,000 in contributions in 2012. Website: legallaidboard.ie.

Assisted Decision-Making (Capacity) Bill 2013

The *Assisted Decision-Making (Capacity) Bill 2013* has been published but has not yet been discussed by the Oireachtas. The Heads of a *Mental Capacity Bill* were published in 2009 (see *Relate*, July 2009). Since then, there has been a public consultation process. It has now been decided to re-name the Bill in order to more accurately reflect its content. The proposals in the Bill are based on the Law Reform Commission's report on *Vulnerable Adults and the Law*. Website: lawreform.ie.

The Bill aims to put in place a new system to support decision-making by adults who have lost some or all capacity to make decisions. The present system is described in *Relate*, August 2005. The Bill is lengthy and detailed. The following are its main points.

General principles

The Bill sets out the general principles underpinning the new arrangements. These include:

- It is presumed you have capacity unless the contrary can be shown
- You may not be treated as lacking capacity unless all practicable steps have been taken to help you make the relevant decision
- Making an unwise decision is not a sign that you lack capacity
- No intervention may be made unless it is necessary and then the option that is least restrictive of your rights and freedom of action must be taken
- If intervention does occur, you must be encouraged to participate as much as possible; the intervention must give effect to your preferences, if known, and must take into account your values and beliefs

Capacity

The Bill provides for a functional definition of capacity. This means that your capacity must be assessed on the basis of your ability to understand the nature and consequences of a decision in the context of available choices at the time of the decision. You may be considered to lack capacity to make a

particular decision or to make it at a particular time if you are unable to understand, retain or weigh information relevant to the decision or are unable to communicate the decision directly or through a third party.

The Circuit Court will make decisions on capacity and will be responsible for approving assisted decision-making arrangements and the appointment of decision-making representatives for people who lack capacity. Some decisions, for example, certain decisions in relation to powers of attorney, non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment and organ donation will be made by the High Court.

The Bill makes provision for legal aid to be provided in certain circumstances where capacity is in issue.

Assisted decision-making

The Bill provides for different kinds of assisted decision-making in respect of your personal welfare and/or property. Personal welfare may include decisions about:

- Where you should live
- People with whom you may have contact
- Your employment, training and rehabilitation
- Your diet and dress
- Inspection of your personal papers
- Whether or not you may travel outside the State
- Granting or refusing consent to the carrying out or continuation of your treatment by a healthcare professional

If you consider that your capacity is in question, you may enter into a *decision-making assistance agreement* in which you appoint another person, a decision-making assistant, to help you make decisions about your personal welfare and/or property. The decision-making assistant would help you to get the relevant information or help you to communicate the decision but you would make the decision yourself. The Bill sets out the formalities involved and the scope and authority of decision-making assistants.

If a court decides that you lack the capacity to make a decision or decisions on your own but that you would have the capacity if helped by another person, a co-decision maker, it may make an order approving a *co-decision making agreement*. This means that decisions would be made jointly by you and the co-decision maker. The Bill details who may apply to the court for a decision on capacity, who is considered suitable to be a co-decision maker, the scope and authority of a co-decision maker and the safeguards to apply to you in such an arrangement.

You may yourself appoint a co-decision maker if you consider your capacity is in question. Again, there are detailed formalities and provisions for safeguards involved.

Co-decision makers are required to report annually to the Public Guardian (see more below).

Decision-making representative

The court may appoint a decision-making representative if it is unable to make a co-decision making order or if it decides that you lack capacity even with the help of another person. Alternatively, the Court may decide to make the decisions itself.

The Bill sets out the general powers of the representative and the court may make specific orders in some cases. The representative must submit an annual report to the Public Guardian (see below for more details of the role of the Public Guardian).

Wards of Court

The new decision-making arrangements are designed to replace the Wards of Court system. The Bill provides that people, who are currently in wardship, may have their capacity reassessed and be brought under the new system.

Enduring power of attorney

The Bill provides for some changes in the current enduring power of attorney arrangements. Among other things, attorneys appointed after this comes into effect will have the power to make certain healthcare decisions. Attorneys will be required to report annually to the Public Guardian.

Informal decision-making

In practice, people frequently make informal decisions about the welfare of another because there is no formal decision-maker in place and a decision is required. The Bill will give legal backing to such decisions provided certain conditions are met. For example, if an informal decision-maker decides to buy clothes for you, he or she may use your money but must keep an account of this.

Public Guardian

The Bill provides for the appointment of a Public Guardian by the Courts Service. The main function of the Public Guardian will be to supervise decision-making assistants, co-decision makers, decision-making representatives and attorneys who have enduring powers of attorney.

The Public Guardian will have the power to appoint special visitors or general visitors to help monitor the decision-making arrangements. He or she may appoint court friends to help people whose capacity is in question in dealing with issues arising in the courts.

International Conventions

The Bill provides for the implementation in Ireland of the Hague Convention on the International Protection of Adults.

Its provisions are required before the UN Convention on the Rights of Persons with Disabilities can be ratified by Ireland. It does not itself provide for this ratification.

Child and Family Agency Bill 2013

The Child and Family Agency Bill is before the Oireachtas at present. It provides for the setting up of a new agency – the Child and Family Agency – that will take over the functions of the Health Service Executive (HSE) in relation to child and family welfare and protection and the functions of the National Educational Welfare Board (NEWB) and the Family Support Agency (FSA). The Bill provides for the governance of the new agency and the transfer of staff from the existing agencies to it.

Main functions

The Bill provides that the main functions of the new agency will include:

- Supporting and promoting the development, welfare and protection of children: this includes providing for the protection and care of children where their parents have not given, or are unlikely to be able to give, adequate protection and care

The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities.

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- Supporting and promoting the effective functioning of families: this includes an obligation to provide care and protection for victims of domestic, sexual or gender-based violence whether in the context of the family or otherwise
- Carrying out the functions currently carried out by the NEWB and the FSA
- Maintaining and developing support services, including support services in local communities relating to its other functions

While the agency will be obliged to provide services relating to the psychological welfare of children, these do not include:

- Psychological services associated with the provision of specialist mental health services to children
- Adult psychological services other than services that relate to the effective functioning of families and the improvement of relationships between parents and children, including effective parenting
- Psychological services to a child in respect of a disability or psychological assessments under the *Disability Act 2005* or the *Education for Persons with Special Educational Needs Act 2004*

Services to be provided

When the new agency is established, it will be responsible for the child welfare and protection services that are currently provided by the HSE – these include child protection, foster care, residential care, aftercare services and adoption services. There are over 6,200 children in care at present and 1,500 young people are receiving aftercare services. It will also be responsible for pre-school inspection services.

The HSE will continue to be responsible for sexual assault treatment units as these are based in acute hospitals. The new agency will be responsible for rape crisis centres and refuges and other support services for victims of domestic, sexual or gender-based violence.

The new agency will take over responsibility for the work of the Family Support Agency. This includes:

- A network of 106 family resource centres
- Funding 600 voluntary and community organisations to provide counselling services to couples and families

The agency will have the power to make arrangements with service providers for the provision of services in broadly the same way as the HSE has. It will also have similar powers in relation to the funding of service providers.

Best interests and views of the child

When making decisions under the *Child Care Act 1991* (that is, decisions in relation to placing children in care because they are considered to be at risk) and under the *Adoption Act 2010*, the agency must regard the best interests of the child as the paramount consideration. The views of the child must be heard and given due weight where the child is capable of forming and expressing such views. These provisions reflect the changes to the Constitution of Ireland that were agreed in 2012 in respect of children.

The Constitution has not yet been changed in this respect as a challenge has been made to the validity of the referendum and a High Court decision on that challenge is awaited. (See *Relate*, November 2012 for a description of the constitutional changes involved and of the child care and adoption legislation.)

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