



DISABILITY – A HUMAN RIGHTS PERSPECTIVE

A century after proclaiming that independent Ireland would give “equal rights and equal opportunities to all its citizens”, Irish people with disabilities enjoy fewer legal protections than their British counterparts

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Today in Ireland there are at least 3,000 people with disabilities living in institutions, with a further 1,100 under the age of 65 inappropriately placed in nursing homes. Census data shows that Irish people with disabilities have significantly poorer educational outcomes and job opportunities, and are far more likely to experience poverty than their non-disabled peers. Ordinary things like choosing what time to get up, what to have for breakfast, and what to wear are denied to many – as is accessing public transport, socialising, marrying, having a family, and other norms of life. Basic challenges arise; for example, if you are a wheelchair user, you have to give at least 24 hours' notice to Iarnód Éireann should you wish to use the DART.

Social model

Although it is beginning to shift perspective, the state unfortunately continues to view disability very much from a medical stance – in other words, that disability is intrinsic to the individual. Internationally, the past 50 years has seen a move away from this medical model towards a social model of disability. The social model views the inability of a person to participate in society not as limitations within the person themselves, but rather as barriers that can be removed by society: remove the barriers, and people with disabilities can live on an equal basis with their non-disabled peers.

Viewing it from this angle, we can see how appropriate it is to adopt a human-rights-based approach to disability.

It's sad to reflect that 100 years after proclaiming a free and independent Ireland that would give “equal rights and equal opportunities to all its citizens”, people with disabilities in Ireland are less well-off and enjoy fewer legal protections than their peers in Britain. Indeed, Ireland's decade-old [National Disability Strategy](#) is founded upon three statutes, none of which has been fully commenced. Perhaps most discouraging of all is Ireland's failure to

ratify the first major international human rights treaty of the 21st century, a treaty that details basic human rights for people with disabilities.

The UN *Convention on the Rights of Persons with Disabilities* (CRPD), together with its optional protocol, was adopted on 13 December 2006. It was negotiated faster than any other human rights treaty, enjoying unprecedented consensus along the road to its adoption. The CRPD is about promoting and protecting the human rights and fundamental freedoms of people with disabilities. In keeping with a social/rights based model of disability, article 1 describes people with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

Rights covered by the convention are varied and include those in respect of independent living, housing, personal security, liberty, health, employment, education, and access to justice. It should be noted that it doesn't actually create new rights, but rather collates existing rights in one comprehensive treaty. There is an obligation on each state to set up an independent monitoring framework to ensure progress in implementing the state's obligations to promote and protect the rights of people with disabilities. A groundbreaking provision regarding monitoring is its requirement for the involvement of “civil society, in



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particular persons with disabilities and their representative organisations” who shall be “involved and participate fully in the monitoring process”.

The CRPD also establishes a UN committee consisting of 18 independent experts to monitor its implementation. Within two years of ratifying the CRPD, states must submit a report to this committee and thereafter must report every four years. Of particular interest to practising lawyers is the optional protocol to the CRPD. This provides for an individual complaints mechanism that enables individuals and groups to bring complaints to the UN committee in circumstances where a state has breached one or more of its obligations under the CRPD. The committee also has the power to undertake an inquiry where it receives evidence of “grave and systematic violations” of the CRPD.

Ducks in a row

On 9 December 2016, North Korea became the 172nd country to ratify the CRPD. At the time of writing, Ireland (despite signing it on 30 March 2007 and giving repeated assur-



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ances over the past decade) has failed to ratify. Indeed, it stands alone among all other EU member states in that regard. Underlying the importance of the CRPD, the EU as a body took the unprecedented step of ratifying it, which has certain consequences for Ireland.

The Irish State’s position is that it cannot ratify an international treaty unless it is first in compliance. Whether the State has been busy for the past ten years getting its ‘ducks in a row’ is debatable, especially given austerity measures brought in during the recession. This failure to ratify may be down more to economic and policy reasons rather than legal impediments. However, it should be noted

that the State has concerns around imposing any requirement that may infringe upon the private property rights of business owners, in light of the Supreme Court decision following the referral of the *Employment Equality Bill 1997* to it by then-President Mary Robinson.

In 2015, the Government finally published its *Roadmap to Ratification* and, on 21 December 2016, the *Disability (Miscellaneous Provisions) Bill 2016* was presented to the Dáil. The bill is intended to bring Irish legislation in line with the CRPD and so pave the way to ratification. However it falls well short of this. The hope is that it will be significantly amended as it progresses. Of par-



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ticular concern is the dropping of provisions to provide legislative clarity regarding deprivation of liberty, which had been included in the original heads of the bill. Currently, many people with disabilities are effectively being deprived of their liberty in nursing homes and other congregated settings, contrary to the CRPD.

Guiding principle

Even though Ireland has not ratified the CRPD, as a result of EU ratification it is still bound by it in certain circumstances where the EU has competence or shared competence. In 2012, the High Court in MX v HSE ([2012] IEHC 491) looked at Ireland's obligations under the CRPD in light of EU ratification, noting that the CRPD should be a "guiding principle". The question before

the court concerned capacity, which is covered by article 12 of the CRPD. The court noted that this is within the sole competency of member states and, as such, the EU ratification did not extend convention obligations upon Ireland in relation to this article.

Article 12 has been described as the very heartbeat of the convention. In a nutshell, it seeks to ensure that people with disabilities have equal status before the law. To comply with this, the long-overdue Assisted Decision Making (Capacity) Act was signed into law in December of 2015. Central to this act is the establishment of the Decision Support Service. Unfortunately, at the time of writing, the act has not been fully commenced, and the Lunacy Regulation (Ireland) Act 1871 still plays a central role. Indeed, over recent months, the number of people being made a

ward of court under the 1871 act is actually increasing. There is some concern that the State will ratify the convention subject to a reservation regarding its article 12 obligations. Indeed, many disability activists are worried that the State will water down its obligations by making a number of other reservations also.

The continued failure of this state to ratify the convention is all the more ironic, given the huge contribution to the advancements of the rights of people with disabilities made on the international stage by many Irish people, including Frank Mulcahy (founder of the European Disability Forum) and Martin Naughton (founder of the European Network on Independent Living), both of whom died last year without seeing Ireland ratify the CRPD. [G]

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