



**EXECUTIVE SUMMARY,
GUIDING PRINCIPLES
&
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Comparison of legal systems in access to justice for persons with intellectual disabilities in the following countries:

- **Bulgaria**
- **Finland**
- **France**
- **Hungary**
- **Ireland**

May 2015



Executive Summary

“(T)he human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making.”¹

‘Access to Justice for Persons with Intellectual Disabilities’ (AJuPID) is a project that aims to identify how five European countries – Bulgaria, Finland, France, Hungary and Ireland – provide for equal recognition before the law and access to justice for people with intellectual disabilities. Particular attention is paid to adults with intellectual disability who are under substituted decision-making arrangements, such as guardianship laws or wards of court systems. The aim is to promote a shift to supported decision-making and accessible justice in line with the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

Current laws and policies in each country are outlined and compared, including consideration of the role of legal guardians, general support persons and judicial staff. The report provides a comparative examination of the barriers to access to justice in each jurisdiction and at the level of the European Union (EU). This includes highlighting successful initiatives that can be seen to enhance the legal capacity of adults with intellectual disability, including those under current guardianship arrangements and to foster their access to justice on an equal basis with others.

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The research is the culmination of data gathering and research by all AJuPID partners. Chief investigation was undertaken by the Centre for Disability Law and Policy, NUI Galway in Ireland, and KU Leuven in Belgium. All country partners contributed to data gathering (namely: Hand in Hand Foundation in Hungary, KVPS in Finland, FEGAPEI in France, NFVB in Ireland, Foundation NET in Bulgaria and EASPD). By comparing national reviews and EU-level activity, the report addresses a gap in literature on how to implement rights to legal capacity and access to justice for persons with intellectual disabilities.

Research Design

The report analyses EU regional activity against reviews of law and policy in each of the five partner countries. The reviews include information on any currently proposed reforms to the systems of legal guardianship (including both plenary and partial guardianship). Particular reference was paid to the relevant legal proceedings (for example, statutory review of guardianship, revocation of guardianship, property, and choice of where and with whom to live) wherever possible. This included:

¹ Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law, Paragraph 34, UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session (April 2014) para. 3.



- a) law, policy and practice on persons with intellectual disabilities rights' to seek legal assistance and to directly instruct legal representation;
- b) legal standing of persons with intellectual disabilities to initiate a court or tribunal action (in civil and administrative cases) or to make complaints to dispute resolution forums, including arbitration and mediation mechanisms, and recourse to domestic complaints mechanisms of last resort, including Ombudsman's offices;
- c) legal mechanisms or practices in the justice system which require judges to personally meet with people with intellectual disabilities who are the subject of a case and regulations for this process;
- d) rules of evidence and procedure which enable people with disabilities to give direct testimony in court – and any regulations or reported cases involving the use of interpreters, or other communication supports – including augmented and alternative communication, facilitated communication, or total communication, and;
- e) procedural accommodations which enable persons with intellectual disabilities to participate in court proceedings – including the design of court rooms and proceedings, and the use of video testimony.

According to the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), the CRPD mandates the *replacement* of systems of substituted decision-making with supported decision-making.² As such, the researchers were concerned with the options for challenging guardianship arrangements, given that guardianship constitutes substituted decision-making. Particular attention was therefore paid to:

- a) procedures for challenging the appointments of guardians, specific decisions of guardians, or review/removal of guardians;
- b) introduction of less restrictive alternatives to guardianship to support individuals in the exercise of their legal capacity (without removing their legal capacity);
- c) data on numbers of cases where individuals:
 - have successfully and unsuccessfully challenged the appointment of guardians;
 - had guardians removed (comparing to failure of removal of guardians); and
 - had legal capacity restored (comparing to failure of restoration of legal capacity).

Conclusions and Recommendations

Overall, the research highlights the interrelated nature of guardianship law and policy, and access to justice for adults with intellectual disability. The five jurisdictions under

² CRPD Committee, 'Concluding Observations',

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5 last accessed 23 June 2014



consideration vary as to the specific nature of their guardianship systems and in the available mechanisms for achieving access to justice. Yet in all countries, it is clear that governments are uncertain as to how they can fully realise the 'paradigm shift' of the CRPD in achieving the transition from substituted to supported decision-making. Even governments who are more advanced in this respect have remained cautious in developing alternatives that would fully replace substituted decision-making. Hence, abandoning substituted decision-making as a cornerstone of laws relating to persons with intellectual disability remains an ongoing challenge. Indeed, a principle finding of this report is that there remains a considerable 'implementation gap' in achieving access to justice and equal recognition before the law for adults with intellectual disability.

To address this gap, the report makes a number of recommendations which are summarised below.

1. That governments consider implementing ongoing mechanisms to replace the framework of guardianship, mental capacity assessments and 'best interests' decision-making with a supported decision-making regime. This could include:
 - a. undertaking law reform to replace assessments of mental capacity with the provision of supports to exercise legal capacity;
 - b. prioritising the will and preference of the relevant person with intellectual disability rather than a 'best interests' model;
 - c. developing supported decision-making in policy and practice by drawing on the emerging range of good practices being promoted internationally;
 - d. making clear information and resources available to support people to challenge guardianship orders and arrange alternative supports that do not restrict legal capacity.

2. That governments consider implementing ongoing mechanisms to promote access to justice for people with intellectual disabilities. This could include:
 - a. auditing specific barriers in access to justice, for example, the lack of reasonable accommodations regarding speech and language for people with intellectual disabilities in legal proceedings;
 - b. collecting data on the types of support that people with disabilities are requesting or availing of in legal proceedings;
 - c. ensuring that legal proceedings – from courtrooms to administrative tribunals and reporting mechanisms – are accessible to people with disabilities in general;
 - d. reforming laws so that denial of reasonable accommodation is deemed by law to be an act of disability-based discrimination.



In conclusion, it is important to emphasise that guardians, curators, and tutors are often considered as supportive, empowering and enabling towards adults with intellectual disabilities. However, according to the interpretation of the CRPD Committee, the overarching legal framework for appointing guardians (and similar substitute decision-makers) violates the right to equal recognition before the law. Further, there is ample evidence to show that, in practice, guardianship provisions provide a troubling discretionary power to guardians in directing the lives of those for whom they are legally empowered to make decisions.³ The paradoxical role of guardianship in this transitional period continues to challenge people with disabilities and their families, policymakers, professionals and others wishing to promote the rights of persons with disabilities. This report makes inroads to resolving these tensions.

³ See generally, Mental Disability Advocacy Centre, 'Legal Capacity in Europe Legal Capacity in Europe: A Call to Action to Governments and to the EU,' Author, October 2013 <mdac.info/sites/mdac.info/files/legal_capacity_in_europe.pdf> viewed 10 December 2014



Annex III: Guiding Principles Table

The table on the following page depicts the elements of the two key international human rights considered in this project—Article 12 CRPD (right to equal recognition before the law) and Article 13 CRPD (access to justice). The table refers to elements that were defined in the guiding principles of this report. The principles help to gain a better idea of what these rights mean in practice, and help to identify steps along the way to their realization. The rights refer specifically to the rights of adults with intellectual disabilities. The tables include recommendations of a *very general* nature, though we have sought to refer to specific areas of concern or specific examples of promising practices emerging in each country. They are based on the evaluative expert opinions of researchers and AJuPID members.



Table 1.1































A. 12 & 13 Elements	Finland	Recommendation	Bulgaria	Recommendation	Ireland	Recommendations
i – legal capacity on equal basis w others		Finland is initiating supported decision-making measures in addition to existing alternatives to guardianship. These efforts should include broad-based national supported decision-making legislation and a suite of support practices to this end. Gaps remain in ensuring access to justice and equality before the law for this group. We therefore recommend: judicial training on the support needs and human rights of persons with intellectual disabilities and the re-enforcement of procedural accommodations, such as courtroom videolink.		Bulgaria is making considerable progress at the regional level by initiating supported decision-making pilot programs. This active step toward implementation of the provisions of A12 CRPD is unique in Europe and should be used as a launching site for similar law, policy, and practice throughout Europe.		The development of the Assisted Decision-Making (Capacity) Bill 2013 in Ireland is a promising example of efforts to introduce supported decision-making and equal recognition before the law for adults with intellectual disabilities (and people w disabilities generally). It should be used as an example of progressive law that enables access to justice for people with intellectual disabilities. However, the Bill maintains a discriminatory assessment of mental capacity and should instead be moved to a focus on choice, and on the wishes and preferences of the individual. It is recommended that as well as amending the Bill, a comprehensive audit of laws relating to legal capacity and access to justice be undertaken to address gaps.
ii – enjoyment of legal capacity in access to justice						
iii – access to support in exercise of legal capacity, incl. right to access to justice						
iv – support measures respecting rights						
v – effective access to justice ensured						
vi - procedural and age-appropriate accommodations ensured						
vii - enabled to take part in legal proceedings						
Viii - enabled to take part in proceedings directly and indirectly						
ix - provided with access to information and communication						
x - judiciary trained about their obligation to respect rights of PwID.						

Table 1.2





















A. 12 & 13 Elements	France	Recommendations	Hungary	Recommendations
i – legal capacity on equal basis w others		<p>The use of family councils in France provides a novel practice with potential application in supporting adults with intellectual disability to exercise their legal capacity and access justice elsewhere.</p> <p>It is recommended that France builds on the family council model, which rightly identifies the interdependence of all adults with their family and other supporters, to develop the model without requiring a denial of legal capacity based on an assessment of mental incapacity. We are concerned that France does not appear to be taking steps to introduce broad-based supported decision-making legislation, and we recommend this to occur. These steps could include introduce supported decision-making trials for people with disabilities and others (not guardians). We also recommend introducing training of the judiciary on disability rights, and introduce procedural accommodations. While there is considerable training for guardians, we recommend that other support persons are ensured education and training for fulfilling their role, including by emphasizing the will and preferences of the key person.</p>		<p>Hungary has initiated supported decision-making practices and has created a role for professional supporters and preliminary legal statements to support adults with intellectual disability to exercise legal capacity and access justice.</p> <p>Yet Hungary still has unacceptably high rates of partial and plenary guardianship, and a number of barriers to access to justice remain. Plenary guardianship must be abolished immediately. Further, although good practice in supported decision-making exist, there is a strong need to implement supported decision-making initiatives, to build upon them so that they are accessible to Hungarians with intellectual disability, and to <i>ensure that the provision of supported decision-making is separated from guardianship</i> – at present the distinction between supporters and guardians is not clear enough. In the specific realm of access to justice it is also recommended that Hungary bolster its efforts to ensure the possibility for direct testimony of adults with disabilities. Finally, adults with intellectual disability should have legal standing regardless of their mental capacity status.</p>
ii – enjoyment of legal capacity in access to justice				
iii – access to support in exercise of legal capacity incl. right to access to justice				
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