**IMPROVING THE INSTITUTE OF LEGAL CAPACITY OF PEOPLE WITH DISABILITES**

**summary**

*The Social Inclusion and Poverty Reduction Unit* within the Office of the Deputy Prime Minister for European Integration, in collaboration with an expert team of lawyers specialising in the field of social protection and family law, conducted the analysis of the legal framework governing the instrument of deprivation of legal capacity[[1]](#footnote-1) and its impact on the employment of persons with disabilities, with a focus on persons with intellectual disabilities.

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| **The aim of the analysis**The analysis aims to contribute to promoting the process of social inclusion of persons with disabilities, with a focus on persons with intellectual disabilities, and to facilitate their access to the labour market, by way of improving the normative legal framework, that is to say by altering and amending legislation and subordinate regulations, as well as by improving the judicial case-law, the procedures before state bodies and other services pertaining to persons with disabilities and persons with intellectual disabilities. |

Legal capacity and capacity to enter into employment contracts are related, but not identical legal instruments. To begin with, and for the purpose of better understanding, the differences between legal capacity and capacity to enter into employment contracts should be explained.

**Legal capacity** can be described as a person’s power to independently decide on all the rights and obligations set forth by the legal system, that is to say the person’s ability to excercise certain rights, to undertake certain responsibilities, and to independently enter into majority of legally binding relations through one’s own free will. Legal capacity is a prerequisite for the capacity to enter into employment contracts. Legal capacity is the right of every adult citizen to enter into all legal affairs recognized by the legal system, in short, to be a party to legal transactions.

**Capacity to enter into employment contracts** is the right of every person with legal capacity to be the subject of labour relations (e.g. to enter into employment). Only a person who possesses the capacity to enter into employment contracts may be registered with the employment service. Legal capacity is a prerequisite for capacity to enter into employment contracts. A person lacking legal capacity also lacks the capacity to enter into employment contracts. Evaluation of capacity to enter into employment contracts is made only for persons who possess legal capacity. Therefore, if a person with disabilities is in the labour market, it possesses legal capacity, or if it does not possess legal capacity, it may not be in the labour market and consequently can not be eligible for employment. A disabled person must possess legal capacity in order to be registered with the National Employment Service. Only persons with legal capacity may enjoy labour rights. That is the point of binding the two main legal instruments of this analysis – legal capacity and employment of people with intellectual disabilities. On the one hand, given that they fall into the category of disabled persons, people with intellectual disabilities have the right to enter into employment. However, this is not possible because people with intellectual disabilities are deprived of legal capacity and consequently, in addition to other rights, are precluded from getting employed in accordance with the law.

Legislation of the Republic of Serbia governing deprivation of legal capacity, as well as the judicial case-law and practices of Centres for Social Work, as the main actors in the process of deprivation of legal capacity, do not provide sufficient scope to promote the process of social inclusion of persons with intellectual disabilities and their access to the labour market. This especially holds true for the period after May 2009 and the passing of the *Law on Vocational Rehabilitation and Employment of Persons with Disabilities*[[2]](#footnote-2). According to the data from the ***First National Report on Social Inclusion and Poverty Reduction in the Republic of Serbia***, there were 9,090 adults and elderly persons under guardianship in 2007, 9,579 in 2008, and 10,740 persons under guardianship in 2009. With the additional fact that, according to the data collected by the Republic Institute for Social Protection in Belgrade, there were 11,721 adult and elderly persons under guardianship in 2010, there is an evident increase in the number of persons placed under guardianship.

As regards the matter of legal incapacity, particularly relevant document is the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol (2006), foreseeing an inclusive approach to the enforcement of legal incapacity and guardianship provisions[[3]](#footnote-3). In addition to the UN Convention on the Rights of Persons with Disabilities, the most important documents at the European level are the European Disability Strategy 2010-2020, EU Directive 2000/43/EC and EU Directive 2000/78/EC.

The conclusions in this report are based on: international legislation; national legislation; enforcement of guardianship over persons deprived of their legal capacity; the role of courts and Centres for Social Work in the deprivation of legal capacity and guardianship; employment opportunities for persons with intellectual disabilities; as well as the practice of hiring persons with intellectual disabilities.

**The recommendations have been conceived on several levels, in the following manner:**

**Recommendations regarding changes to the legal framework and procedures of public bodies and public services in relation to deprivation of legal capacity and facilitating employment and social inclusion** of persons with intellectual disabilities are as follows:

1. Compliance with signed and ratified international documents;

2. Compliance with positive national legislation;

3. Acting in accordance with the case-law of the European Court of Human Rights in terms of deprivation of legal capacity and the violations of the following rights: the right to a hearing, the right to a fair trial, the right of access to court and the right to family life;

4. Improved work of Social Welfare Centres in connection with their role in the implementation of the instrument of deprivation of legal capacity;

5. Changes in court procedures in the cases of deprivation of legal capacity;

6. Necessity of an inclusive approach in relation to the needs of persons with disabilities and their hiring, with a focus on persons with intellectual disabilities.

**Recommendations regarding changes in the legal framework** are related to: *amendments to the Family Law:* eliminating the instrument of complete deprivation of legal capacity, revision of partial deprivation of legal capacity, changing the essence of the legal instrument of guardianship, *amendments to the Law on Non-Adversarial Proceedings* in order to ensure adequate legal representation of persons being deprived of their legal capacity and not to permit the same body to initiate the procedure for deprivation of legal capacity and to represents that person (the centre for social work), as well as to ensure regular periodic reviews of the decision on deprivation of legal capacity and the longest period within which the decision on the deprivation of legal capacity must be reviewed, and to set forth the conditions for initiating the procedure for restoring legal capacity.

**Recommendations regarding activities of public bodies and services** include:*recommendations for the courts; recommendations to improve social support in connection with guardianship and practices of Centres for Social Work;* as well as *recommendations for improving the practices by developing other systemic possibilities and instruments.*

Detailed conclusions and recommendations may be found in a separate section of this report – “Conclusions and Recommendations.”

**I. INTRODUCTION**

Traditional perception of disability from the viewpoint of social welfare and rehabilitation, medical services and other forms of assistance and protection (medical model) has largely been superseded by perceiving disability from the spectrum of human rights (model based on human rights principles), by way of accepting and implementing international standards crowned by the UN Convention on the Rights of Persons with Disabilities. The society should strive to realize political, economic, social and cultural rights of persons with disabilities.

Persons with disabilities in Serbia still constitute a group of citizens which face impediments in the realization of their basic human and civil rights. Quality of life for most people with disabilities is low. The causes for this situation are manifold. One of the reasons is insufficient familiarity with the phenomenon of disability within the systems that are supposed to improve the quality of life of persons with disabilities and to enable them to exercise their rights. Stereotypes and prejudices about disability, as well as the characteristics of cultural context in Serbia, are not conducive to the realization of the rights of persons with disabilities and the introduction of conditions necessary for improving the quality of their life. Persons with disabilities themselves often do not recognize the need for personal engagement and improvement of their own quality of life[[4]](#footnote-4).

Employment is one of the most powerful mechanisms for achieving social inclusion of vulnerable groups. With regard to the status of persons with disabilities and persons with intellectual disabilities, the issue of their hiring is among the most important, since employment is a way to greater social inclusion. Income earned through employment contributes to greater independence for persons with disabilities. The main reason for social exclusion and poverty lies in the underestimation of people with disabilities as potential employees and as socially active participants. The Madrid Declaration[[5]](#footnote-5) emphasizes employment as the key to social inclusion, and employment of persons with disabilities within the open labour market is perceived as one of the most important ways to curb social isolation and promote independent living and dignity. European Disability Strategy 2010-2020 highlights the need to improve the knowledge about the labour status of women and men with disabilities, identify problems and propose ways to address them. Special attention is given to young persons with disabilities in their transition from education to work. It also deals with the issues of mobility between job positions in the open labour market and in sheltered workshops, by exchanging information and mutual learning. The main objective of the Strategy, within the section on employment of persons with disabilities, is to enable as many persons with disabilities as possible to earn a living within the open labour market[[6]](#footnote-6).

Previously, children with disabilities were entering the education system through the so-called categorization committees, which had been tasked with making a diagnosis and recommending a special educational programme in order to “correct” the defect. Therefore, such children were generally referred to special schools. The enactment of the *Law on Fundamentals of the Education System* created the conditions necessary to facilitate successful inclusion of every child in the process of education through systemic and institutional support. *The Rulebook on Additional Educational, Medical and Social Support to Children and Pupils* has been adopted on the basis of this law. This rulebook regulates specific requirements for assessing the needs for additional educational, medical or social support to children and pupils, as well as the composition and operation of the Inter-Sectoral Committee. The assessment is based on the all-encompassing and individualized approach based on equal opportunities for understanding the needs of children and pupils, with a view to providing adequate support to facilitate social inclusion through access to rights, services and resources. Additional support includes medical, social and educational services provided to children which allow complete social inclusion and improvement. Additional support refers to rights and services that enable the child to overcome physical and social barriers to the smooth performance of daily living activities of importance for the inclusion in the education process, community life and successful development. ***The*** ***Joint Body to Support the Work and Coordinate the Supervision of the Operations of Inter-Sectoral Committees for Assessing the Needs for Providing Additional Educational, Medical and Social Support to Children and Pupils*** has been established at the national level. This body has the task to support the work of coordinators and members of the local inter-sectoral committees in estimating the needs to provide additional educational, medical and social support to children and pupils as well as the coordinators in line ministries in charge of cooperation and support to local inter-sectoral committees. In order to support inter-sectoral committees in the implementation of the Rulebook on Additional Educational, Medical and Social Support to Children and Pupils, the Joint Body drafted a Vocational Guidance in July 2012. Inter-sectoral committee work entails a number of situations in which dilemmas arise that can not be easily solved by examining the text of the said rulebook. Therefore, this guidance deals with some characteristic situations that have occurred in the practice of inter-sectoral committees, in order to assist them in resolving a number of dilemmas. At the time of drafting this analysis, activities directed towards detecting the needs for altering and amending the Rule Book on Additional Educational, Medical and Social Support to Children and Pupils have been underway.

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| ***Facilitating*** social inclusion ***through education of children with disabilities, increases the possibility of their later easier employment within the labour market and achieving the goal of*** social inclusion ***and independent economic existence of persons with disabilities.*** |

The other side of social inclusion of persons with disabilities and persons with intellectual disabilities, through the employment process, is the recognition of their civil rights. Despite the intention of the legislator to employ people with disabilities, expressed most concretely by the adoption of the *Law on Vocational Rehabilitation and Employment of Persons with Disabilities*, such intentions are being thwarted by impeded realization of civil rights which are a precondition for exercising the right to work. Among such rights is legal capacity – the right of every adult citizen to have rights and obligations (to be a party to a contract, to participate in court proceedings, to marry, to enter into employment, etc.). Deprivation of legal capacity and placement under guardianship, either completely deprives the person of civil rights or narrows them. Analysis of deprivation of legal capacity in the context of employment of persons with disabilities, with a focus on persons with intellectual disabilities, should enable the elimination of the initial barriers to achieving their social inclusion.

For the further course of the analysis it is important to note that within the group of persons with disabilities, the instrument of deprivation of legal capacity and all its effects are **primarily related to persons with intellectual disabilities who are at the focus of this analysis[[7]](#footnote-7).**

**Methodology**

The analysis was founded on **participatory basis**, which follows the good practice of modern research and evaluation approaches. Viewpoints and experiences of representatives of associations concerned with disabled persons, parents of people with intellectual disabilities, employers, as well as representatives of state bodies and public institutions relevant to the issues of disabled persons and persons with intellectual disabilities and their social inclusion, have been collected in the course of the analysis.

 The analysis was conducted, partly simultaneously and partly consecutively, in the following stages: (a) **preparation and analysis planning**, including: identifying resources for desk-analysis; selection of research techniques; selection of social actors for semi-structured depth interviews (interview) and group meetings with elements of focus groups (meeting); planning the dates and agenda for interviews and meetings, (b**) the implementation of the plan**, by way of: desk analysis of legal documents (international and national regulations) and secondary research materials (the results of other analyses and research); conducting interviews and arranging meetings; the analysis and synthesis of research products gained by using the above techniques; (c) **drafting reports**.

The data was collected during the period between December 2011 and March 2012. While drafting the report, ***qualitative analysis*** has mainly been used to process the research material.

1. Full legal capacity is attained with the coming of age, that is to say when an individual reaches the age of 18, and when a person enters into wedlock before coming of age with the permission of the court. The court may permit the acquisition of full legal capacity to a minor who has reached the age of 16 and became a parent, if he or she has reached physical and mental maturity necessary to take care of their own personality, interests and rights. Prior to the acquisition of full legal capacity, a person acquires the ability to enter into employment (capacity to enter into employment contracts) when it reaches the age of 15. Persons under 18 years of age may be employed with the written consent of a parent, adoptive parent or guardian, if such work does not jeopardize their health, morals or education, and if such work is not prohibited by law. Person under 18 years of age may only be employed on the basis of the findings of the competent medical authority stating capability to perform the particular job and that such work is not damaging to health. (Family Law and Labour Law.) [↑](#footnote-ref-1)
2. “Official Gazette of RS” No. 36/09. [↑](#footnote-ref-2)
3. Serbia ratified the Convention and Optional Protocol in July 2009. [↑](#footnote-ref-3)
4. “The Basic Training Programme for Personal/Employment Assistant for Persons with Physical Disabilities,” Gordana Rajkov and Mimica Živadinović, Belgrade 2011 [↑](#footnote-ref-4)
5. The Madrid declaration “Non-Discrimination plus Positive Action Results in Social Inclusion,” European Congress on People with Disabilities, Madrid, 2002. [↑](#footnote-ref-5)
6. The general aim of this strategy is to empower people with disabilities so that they can fully enjoy their rights and have the full benefit of participation in society and the economy of Europe, especially within the single market. [↑](#footnote-ref-6)
7. Namely, the problem of deprivation of legal capacity, and thus the inability of getting hired, occurs only with regard to persons with intellectual disabilities, whereas physically disabled persons are usually not deprived of their legal capacity. [↑](#footnote-ref-7)