

## Adult Capacity and Guardianship

In 2006, the Commission published a [\*Report on Vulnerable Adults and the Law\*](#) (LRC 83-2006), following from its [\*Consultation Paper on Law and the Elderly\*](#) (LRC CP 23-2003) and [\*Consultation Paper on Vulnerable Adults and the Law: Capacity\*](#) (LRC CP 37-2005). The Report thus deals with the two related topics: the law and older people; and the law concerning adults whose ability to make decisions may be limited, for example, through intellectual disability, dementia or an acquired brain injury.

The Report is divided into two parts. The first part recommends the enactment of a new adult capacity law to create clear rules on when a person has the legal capacity to make a wide range of decisions, including commercial and healthcare decisions. The second part recommends that the current Wards of Court system (governed mainly by the *Lunacy Regulation (Ireland) Act 1871*) should be replaced by a new adult guardianship system.

**Empowerment and protection:** In the Report, the Commission aims to promote the empowerment of vulnerable adults, while also recognising that some protections are still needed. In terms of empowerment, the Commission recommends that the proposed law should include a clear presumption that all people over 18 should be presumed to have mental capacity. The Commission also recommends that a modern "functional" approach to legal capacity should be put in place. The functional approach means assessing a person's decision-making ability in relation to a particular decision at the time the decision is made. The Commission also recognises that vulnerable adults may still need protection against abuse. For example, the Commission has recommended that all types of equity release schemes - many of which are aimed at older people - should come under IFSRA, the Financial Regulator. Some equity release schemes have been designed so that they are not financial products, so that IFSRA cannot currently regulate these types of schemes.

**Guiding principles:** The Report recommends that the proposed capacity legislation should contain specific guiding principles, which must always be taken into account. These are: no intervention can take place unless it is necessary for the person, including whether the person might regain their capacity; any intervention should be the least restrictive of the person's freedom; account must always be taken into account. These are: no intervention can take place unless it is necessary for the person, including whether the person might regain their capacity; any intervention should be the less restrictive of the person's freedom; account must be taken of their wishes, past and present; account should be taken of the views of their relatives, carers and those who they live with; and due regard should be given to their right to dignity, bodily integrity, privacy and autonomy.

**Enduring powers of attorney:** The *Enduring Powers of Attorney Act 1996* allows a person who currently has capacity to appoint someone (such as a spouse or partner) to make decisions on their behalf: the power of attorney only comes into force when the person loses capacity, for example, through dementia. The 1996 Act is currently limited to financial matters only. The Commission recommends that the 1996 Act should be extended to include minor health care and treatment decisions.

Guardianship system to replace Wards of Court: The Report also recommends that the Wards of Court system should be replaced by a new decision-making structure, called Guardianship. This would involve the creation of a Guardianship Board, which would make decisions about whether a person does or does not have continuing capacity to make key decisions about themselves. The Guardianship Board would be a three person full-time multi-disciplinary Board, chaired by a High Court judge. The Board could make Guardianship Orders and Intervention Orders. Where a Guardianship Order is made, a Personal Guardian could be appointed over the property, financial affairs and welfare of a person who lacks capacity, whether in a limited way or more generally. An Intervention Order would be made for a specific purpose (such as ordering a once-off service), where a Guardianship Order would not be required. The Commission also recommends the establishment of the Office of Public Guardian, which would have a supervisory role over personal guardians and those acting under enduring powers of attorney. The Public Guardian would also have the power to develop and publish suitable codes of practice and have an educational role in this area, acting in cooperation with other bodies, including the National Disability Authority and the Health Service Executive.