



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT

VULNERABLE ADULTS AND THE LAW

(LRC 83 - 2006)

IRELAND

Law Reform Commission

35-39 Shelbourne Road, Ballsbridge, Dublin 4

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LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 81 Reports containing proposals for reform of the law; eleven Working Papers; 41 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 27 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at www.lawreform.ie

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INTRODUCTION

1. This Report forms part of the Commission's *Second Programme of Law Reform 2000-2007*.¹ The Second Programme includes the heading *Vulnerable Groups and the Law*, under which two related topics are listed: first, the law as it affects older people,² and second, the law affecting persons with physical, mental or learning disabilities.³

2. In June 2003 the Commission published a *Consultation Paper on Law and the Elderly*⁴ which made provisional recommendations concerning legal mechanisms for the protection of older people under a number of specific headings.⁵ It also set out the Commission's proposed framework for a new decision-making structure – Guardianship – to replace the current Wards of Court structure, which is based primarily on the *Lunacy Regulation (Ireland) Act 1871*.

3. The focus of the *Consultation Paper on Law and the Elderly* was to make recommendations concerning older persons, but the Commission also acknowledged that the recommendations made were also relevant to other adults with decision making disabilities or who otherwise need protection. As a result, in May 2005 the Commission published its *Consultation Paper on Vulnerable Adults and the Law: Capacity*.⁶ This second Consultation Paper provisionally recommended the enactment of new capacity legislation in order to create clear rules on legal capacity which would apply to a wide range of decisions, including making contracts such as buying groceries at a shop, transferring ownership in land, entering into a personal relationship and making healthcare decisions. The Commission

¹ *Second Programme for Examination of Certain Branches of the Law with a view to their reform 2000-2007*, approved by the government in December 2000 under the Law Reform Commission Act 1975.

² Topic 27 of the Second Programme.

³ Topic 28 of the Second Programme.

⁴ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23 - 2003).

⁵ See Chapter 1, below.

⁶ Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005).

also concluded that its proposed capacity legislation would be the appropriate context for establishing the new Guardianship system.

4. This Report brings together the related issues dealt with in these two Consultation Papers. In broad terms, the Report can be divided into two parts: first, reform of the law on mental capacity, and, second, the establishment of a new Guardianship structure. At this general level, the Report mirrors the approach in the two Consultation Papers, but the final detailed recommendations made in this Report diverge in a number of respects from those in the Consultation Papers, taking into account the many submissions received and further reflection by the Commission, notably having regard to developments since the publication of the *Consultation Paper on Law and the Elderly* in 2003.

5. In Chapter 1, the Commission sketches out the key elements of the Report, and in particular the extent to which developments since 2003 should inform the extent and nature of its final recommendations.

6. In Chapter 2, the Commission sets out the general principles which have informed its recommendations concerning reform of the general law on mental capacity, particularly having regard to national and international standards in this area. The Commission includes a set of guiding principles, which would inform the implementation of the entire legislative scheme.

7. In Chapter 4, the Commission makes detailed recommendations for reform of the law concerning enduring powers of attorney, including its extension to certain minor health care and treatment decisions.

8. In Chapter 5, the Commission sets out its overall view on the need to establish an institutional decision-making structure – Guardianship- to replace the current Wards of Court system. The Commission also sets out how the proposed system is directly linked to the Commission’s proposals for reform of the general law on mental capacity.

9. In Chapter 6, the Commission sets out its proposals for the role of and function of the Guardianship Board. The Guardianship Board would be empowered to make Guardianship Orders and Intervention Orders. Where a Guardianship Order is made, the Guardianship Board may appoint a Personal Guardian over the property, financial affairs and welfare of a person who lacks capacity, whether in a specific context or more generally. An Intervention Order would be made for a specific purpose where a more general Guardianship Order would not be required.

10. In Chapter 7, the Commission proposes an 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 co-operation with other bodies, including the National Disability Authority and the Health Service Executive.

11. The Appendix to the Report contains a *draft Scheme of a Mental Capacity and Guardianship Bill* to give effect to those recommendations, which require legislative implementation.

CHAPTER 1 OVERVIEW AND RECENT DEVELOPMENTS

A Introduction

1.01 As already mentioned, this Report forms part of the Commission's *Second Programme of Law Reform 2000-2007*.¹ The Second Programme includes the heading *Vulnerable Groups and the Law*, under which two related topics are listed: first, the law as it affects older people, in particular in the context of transfer of assets and advance care directives,² and second, the law affecting persons with physical, mental or learning disabilities, including issues of capacity, guardianship and the right to marry.³ In 2003, the Commission published its *Consultation Paper on Law and the Elderly*⁴ and in 2005 its *Consultation Paper on Vulnerable Adults and the Law: Capacity*.⁵ This Report combines the related issues dealt with in these two Consultation Papers.

1.02 In broad terms, the Report deals with two central elements: first, how should the law approach the concept of capacity to make decisions, and second, what structures are needed to support vulnerable persons when they come to make those decisions? At this general level, the Report mirrors the approach in the two Consultation Papers, but the final detailed recommendations made in this Report diverge in a number of respects from those in the Consultation Papers, taking into account the many submissions received and further reflection by the Commission, notably having regard to developments since the publication of the Consultation Paper on Law and the Elderly in 2003.

1.03 In this Chapter, the Commission provides an overview of the key elements of the Report, and in particular how developments since 2003

¹ *Second Programme for Examination of Certain Branches of the Law with a view to their reform 2000-2007*, approved by the government in December 2000 under the *Law Reform Commission Act 1975*.

² Topic 27 of the Second Programme.

³ Topic 28 of the Second Programme.

⁴ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23 - 2003). (Hereafter "Consultation Paper on Law and the Elderly").

⁵ Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005). (Hereafter "Consultation Paper on Capacity").

should inform its final recommendations. In Part B, the Commission briefly sketches the general and demographic background for the Report. In Part C, the Commission sets out the developments since 2003 which have informed the extent and nature of the Commission's final recommendations in this Report. In Part D, the Commission sketches out the essential elements of the recommendations being made for reform.

B General context for reform

1.04 In this Part, the Commission briefly reiterates the general and demographic background against which its proposals for reform in the two Consultation Papers should be seen.

(1) Older People

1.05 In the Consultation Paper on Law and the Elderly, the Commission noted that the projected demographic growth in the number of older people – those over 65 – had already been identified. By 2001, about 430,000 people over 65 – 11% of the population – were living in the State and it was projected that by 2031 this would rise to about 840,000. This clearly identified the proportion of the population to which any reform proposals would apply.

1.06 The Commission also outlined the extent to which the law as it affected those over 65 had been addressed publicly up to 2003. It noted that the National Council on Ageing and Older People had already published a number of significant documents which provided a comprehensive view of the life and lifestyle of older people. Among other issues, the Council had identified the significant risks of abuse, neglect and mistreatment of older people. It had also recorded the natural wish of those over 65 to maximise their independence and autonomy, including the desire to continue living in their own homes.⁶

1.07 The Consultation Paper noted that, in 2001, an investigation by the Ombudsman into the scheme of State subvention for nursing home charges had identified what amounted to financial abuse of older people by State authorities, in which charges were imposed on older persons and family members without a proper legislative foundation.⁷ The Ombudsman's investigation attracted enormous publicity, and resulted in a series of actions at government level and further inquiries in the various media which continue to the present. The Commission also noted that the 2003 research

⁶ See www.ncaop.ie for a list of relevant material.

⁷ Office of the Ombudsman *Nursing Home Subventions – An Investigation by the Ombudsman of Complaints Regarding Payment of Nursing Home Subventions by Health Boards* (2001), available at www.ombudsman.ie

report commissioned by the Irish Human Rights Commission, *Older People in Long Stay Care*,⁸ had identified many difficulties in the position of older people in long stay care, including the absence of a clear legislative framework for admissions to nursing homes or for the State subvention of nursing home treatment, which had also been discussed by the Ombudsman in his 2001 investigation.

1.08 In the Consultation Paper, the Commission also noted that in 2002 the Working Group on Elder Abuse, appointed by the Minister for Health and Children, had made significant recommendations for future action – including relevant legislative change – in its Report *Protecting Our Future*.⁹

1.09 It was against this general background that the Commission, in its Consultation Paper on Law and the Elderly, examined a number of specific areas of vulnerability and made provisional recommendations for reform. In addition, the Commission examined how the issue of mental capacity was addressed in general terms, and it made further recommendations for replacement of the Wards of Court system, which is based primarily on the *Lunacy Regulation (Ireland) Act 1871*.

(2) *Mental capacity and disability*

1.10 The focus of the Consultation Paper on Law and the Elderly was to make recommendations concerning older persons. But the Commission acknowledged that these recommendations were also relevant to other adults with limited decision-making abilities and to adults who otherwise needed protection.¹⁰

1.11 As part of its consultation process, the Commission hosted a seminar on the Consultation Paper on Law and the Elderly.¹¹ On the basis of the views expressed at the seminar and submissions received, the Commission decided that, before it published its Report on the issues raised in that Consultation Paper, it should prepare and publish a second Consultation Paper which would focus – as the Second Programme had envisaged – on the related issues of legal capacity relevant to all adults with limited decision-making capacity, and not just older adults. As a result, in May 2005 the Commission published its *Consultation Paper on Vulnerable Adults and the Law: Capacity*. As was noted in the 2005 Consultation

⁸ Mangan *Older People in Long Stay Care* (2003), available at www.ihrc.ie

⁹ Working Group on Elder Abuse *Protecting Our Future* (2002), available at www.dohc.ie

¹⁰ Consultation Paper on Law and the Elderly paragraph 6.04.

¹¹ Law Reform Commission *Seminar on Consultation Paper on Law and the Elderly* (LRC SP 2-2003).

Paper,¹² to be autonomous and capable of self-determination is a large part of what humans cherish in terms of liberty and independence. It was also noted that some adults have a decision-making ability which is permanently or temporarily limited so that they may not have the capacity to make certain decisions. Most commonly an adult with limited decision-making ability may have an intellectual disability, some form of dementia, mental illness, acquired brain injury or an inability to communicate their decisions. These adults were the focus of the 2005 Consultation Paper.

1.12 It was acknowledged in the 2005 Consultation Paper that there is no universally accepted definition of intellectual disability, but that one definition is “the presence of a significantly reduced ability to understand new and complex information and to learn new skills (impaired intelligence), with a reduced ability to cope independently (impaired social functioning).”¹³ Although the term “intellectual disability” (or “learning disability”) is generally used with reference to a greater than average difficulty in learning, within that frame the term is applied to describe people within a very wide range of ability. The spectrum of intellectual disability extends from people with mild difficulty in learning to those with more profound disabilities. Some adults with an intellectual disability lead independent lives within the community while some are entirely dependent on others and require intensive levels of care and support.¹⁴

1.13 The Consultation Paper went on to note that, while some adults with an intellectual disability reside in an independent or semi-independent setting with the ability to make important decisions for themselves, either by themselves or in consultation with others, other individuals have limited scope to exercise personal autonomy in their daily lives. The decision-making capacity of adults with intellectual disability may depend in part on factors such as their experience of making decisions and the opportunities available to them to make, or participate in the making of, decisions relevant to their life.

1.14 The 2005 Consultation Paper also referred to people with dementia, another group within the category of those with limited decision-making capacity. This group is largely but not exclusively comprised of people over 65, and thus also falls into the older person category discussed in the 2003 Consultation Paper. Dementia is an umbrella term used to describe a collection of symptoms caused by degenerative changes in the

¹² Consultation Paper on Capacity, paragraph 1.04.

¹³ Consultation Paper on Capacity, paragraph 1.06, quoting Irish College of Psychiatrists *Proposed Model for the Delivery of a Mental Health Service to People with Intellectual Disability* (Occasional Paper OP58 2004) at 10.

¹⁴ Consultation Paper on Capacity, paragraph 1.06, quoting World Health Organisation *Report on Ageing and Intellectual Disabilities* (Geneva 2000).

brain. It is characterised by the loss of cognitive and social function and behavioural changes that affect ability to think, speak, reason, remember and move. As the 2005 Consultation Paper noted, having a form of dementia does not in itself mean that a person will not have the capacity to make decisions and manage their affairs. However, as the illness progresses a person's memory, comprehension and judgement may be affected, and consequently their decision-making capacity in some or many areas may be impaired. It is estimated that approximately 33,000 people in Ireland have dementia. The most common cause of dementia is Alzheimer's Disease, which represents about 60% of all cases.¹⁵

1.15 Another group referred to in the Consultation Paper is people with mental illness, though the Commission emphasises that mental illness is not directly connected with mental capacity. Common types of mental illness include depression, bipolar disorder (or manic depression) and schizophrenia. A person may experience mental illness on a once-off basis or it may be experienced on an episodic or cyclical basis in which a period of mental illness is followed by a period of remission. The spectrum is wide in terms of the effect on the individual. For some people the illness may be enduring and without remission. While undergoing an episode of mental illness, a person's cognitive functioning may be impaired and they may find it difficult to make decisions or to carry them through. Alternatively, the person may make inappropriate decisions which they would not make when they were well. The Consultation Paper noted that there were 23,234 in-patient admissions to psychiatric hospitals in Ireland in 2003, but that many persons suffering from mental illness do not require hospitalisation and may be treated by their medical practitioner who may prescribe medication and/or counselling. Others do not seek professional help. It is therefore difficult to calculate accurately the prevalence of mental health problems in Ireland but the figure of 'one in four' is regularly cited as an estimate of the proportion of people who will experience mental illness in their lifetime.¹⁶

1.16 The 2005 Consultation Paper also referred to persons with acquired brain injury, which can arise due to trauma in an accident, or as a result of a stroke, brain haemorrhage or brain surgery. It is estimated that more than 10,000 people sustain a brain injury annually and more than 7,000 suffer a stroke.¹⁷ Finally, the Consultation Paper referred to persons who

¹⁵ Consultation Paper on Capacity, paragraph 1.06, based on information from the Alzheimer Society of Ireland.

¹⁶ Consultation Paper on Capacity paragraph 1.13, quoting Amnesty International (Irish Section) *Mental Illness: The Neglected Quarter* (Dublin, 2003).

¹⁷ Consultation Paper on Capacity, paragraph 1.14, quoting Headway Ireland, the national head injuries association, www.headwayireland.ie

cannot communicate their decisions, including those who have stroke or rarer conditions such as ‘locked-in syndrome’.

1.17 The 2005 Consultation Paper provisionally recommended the enactment of new capacity legislation in order to create clear rules on legal capacity which would apply to a wide range of decisions, including making contracts such as buying groceries at a shop, transferring ownership in land, entering into a personal relationship and making healthcare decisions. Under the current law, there is a presumption that, once a person reaches 18, they have the legal capacity required to make these decisions affecting their lives. But if it is shown that a person lacks capacity for some reason, the current law sometimes has the effect of completely changing their status from a person with capacity to a person without capacity. The clearest example of this is the Wards of Court system, which the Commission had provisionally recommended in the Consultation Paper on Law and the Elderly should be replaced by a new Guardianship system. The Commission concluded in the Consultation Paper on Capacity that this all-or-nothing status approach to capacity should be reformed and that existing law on capacity, which is piecemeal and not systematic, also required reform. The Commission also concluded that its proposed capacity legislation would be the appropriate context for establishing the new Guardianship system.

C Developments since 2003

1.18 In this Part, the Commission sketches the context in which the 2003 Consultation Paper on Law and the Elderly¹⁸ and its 2005 Consultation Paper on Capacity¹⁹ were published, and the changes since then which have affected the approach taken by the Commission in preparing this Report.

(1) Older Persons and the Law since 2003

1.19 When the *Consultation Paper on Law and the Elderly* was published in 2003, the issue of older people and the law was beginning to receive some attention, and the provisional recommendations made by the Commission must therefore be seen in that context.

(a) Long stay care and nursing homes

1.20 Since 2003, there has been intense public debate on the position of older persons in society. One aspect of this is the standard of care and treatment of older persons in long term care. Partly in response to the Ombudsman’s 2001 investigation of the scheme of State subvention for

¹⁸ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003).

¹⁹ Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005).

nursing home charges, mentioned above, and to increased media attention on this issue during 2004, the government proposed, in the *Health (Amendment) (No.2) Bill 2004*, to establish a new long stay subvention scheme for the future. However, the 2004 Bill also provided that the charges identified as unlawful in the Ombudsman’s investigation would be declared to have been lawful. The 2004 Bill proposed to establish an *ex gratia* compensation scheme under which some repayments would be made to those affected by the pre-2004 charges.

1.21 The 2004 Bill was referred by the President to the Supreme Court under Article 26 of the Constitution for a determination of its compatibility with the Constitution. In *In re the Health (Amendment) (No.2) Bill 2004*²⁰ the Supreme Court held that the proposed new long stay subvention scheme was not in conflict with the Constitution.²¹ But the Supreme Court also held that the provisions in the 2004 Bill which attempted to validate retrospectively the unlawful charges imposed were in conflict with the property rights of the – primarily older – persons involved. The Court concluded its judgment by stating:²²

“The Constitution, in protecting property rights, does not encompass only property rights which are of great value. It protects such rights even where they are of modest value and in particular, as in this case, where the persons affected are among the more vulnerable sections of society and might more readily be exposed to the risk of unjust attack [under Article 40.3 of the Constitution].”

Arising from this decision, the *Health (Repayment Scheme) Act 2006* now provides for a means for the full repayment of all charges unlawfully imposed on public nursing home residents prior to 2004.²³

1.22 In addition, the standard of care of those in long term care became a subject of major controversy in 2005 and 2006 arising from the broadcast in 2005 of a television documentary on a nursing home called Leas Cross, which included video footage inside the nursing home taken by a member of the documentary team who had obtained a care position in the nursing

²⁰ [2005] IESC 7, [2005] 1 IR 105.

²¹ A scheme to deal with private nursing home subvention is now proposed in the *Health (Nursing Homes) (Amendment) Bill 2006*, which was passed by Dáil Éireann on 5 December 2006 and is (at the time of writing) currently before Seanad Éireann. A scheme to deal with all aspects of long term care, both public sector and private sector was announced by the Minister for Health and Children on 11 December 2006. See *The Irish Times*, 12 December 2006.

²² [2005] 1 IR 105, 208.

²³ The Commission understands that a number of claims concerning charges imposed prior to 2004 on those in private nursing homes may be initiated in the courts.

home.²⁴ The documentary indicated that the standard of care in the nursing home was unacceptable. The nursing home subsequently closed in 2005. In November 2006, a review of the nursing home conducted by Professor Des O'Neill, a consultant geriatrician, was published by the Health Service Executive (HSE), together with responses from those affected by the review.²⁵ The review concluded that there had been elements of systematic failure in the standard of care of older people in the nursing home and made over 60 recommendations for reform.

1.23 In the Commission's view, it is clear that events such as the Leas Cross review indicate that there is a need for review and reform of existing national standards on the care and treatment of older people in nursing homes. This is currently regulated by the *Health (Nursing Homes) Act 1990*, which is limited to privately owned nursing homes. The need to review the law in this area is evidenced by the government's decision to publish the *Health Bill 2006*, which will replace the 1990 Act. The Minister for Health and Children stated, in response to the Leas Cross Review, that a key element of the 2006 Bill is to provide for an independent, statutory body to set standards and inspect all nursing home places, both public and private.²⁶ The Commission welcomes these developments. The Commission also notes that, while the care of older persons is not "solved" by legislative reform alone, these are being accompanied by significant funding initiatives. In particular, the Commission notes that such commitments have been included in the most recent social partnership agreement *Towards 2016*.²⁷ The Commission welcomes the policy approach that this funding includes provision to maximise the potential of older people remaining in their own homes. This would, of course, support the views of older people, reflected in the findings of the National Council on Ageing and Older People, discussed earlier.

²⁴ The documentary was broadcast on RTE, the national broadcasting station, on 30th May 2005. In *Cogley and others v RTE* [2005] IEHC 180, [2005] 4 IR 79, the plaintiffs sought an interlocutory injunction in the High Court (Clarke J) to prevent the documentary being broadcast, in particular on the ground that the video footage taken inside the nursing home by the 'undercover' documentary crew had been obtained in breach of various rights of privacy. The Court held that the public interest in airing the issue of possible abuse and neglect of older persons took priority over the plaintiffs' claims concerning privacy.

²⁵ *Leas Cross Review*, available at www.hse.ie

²⁶ Statement by the Minister for Health and Children on the Publication of the Leas Cross Review, 10 November 2006, available at www.dohc.ie. A draft Scheme of the *Health Bill 2006* was published in March 2006, also available at www.dohc.ie

²⁷ Available at www.taoiseach.gov.ie The Commission also notes that the 2007 Budget, announced to Dáil Éireann by the Minister for Finance in December 2006, contains the first element of the funding to which the government was committed by *Towards 2016*.

(b) Equity release schemes

1.24 In the 2003 Consultation Paper on Law and the Elderly, the Commission dealt with a number of different issues concerning the financial vulnerability of older people, notably the potential abuse arising from “equity release” schemes. In this area, there have been significant developments since 2003 which change the general legal background against which this Report has been prepared. The Commission was happy to have been actively involved in these developments as an adjunct to its usual consultation process which occurs after the publication of Consultation Papers.

1.25 The Commission had noted in the 2003 Consultation Paper that “equity release” schemes are marketed primarily at those over 65. The Commission agrees with the comments of the Chief Executive of the Financial Regulator, IFSRA, that two general types of such schemes have emerged, though there are many variations of each.²⁸ The first is known as a “lifetime mortgage”, which is a loan secured on the consumer’s home where no repayments need to be made until the property is sold, or the owner of the property dies or permanently leaves the home. This type is a financial product within the remit of the Financial Regulator. In 2006, the Financial Regulator issued a *Consumer Protection Code* under the *Central Banks Acts 1942 to 1998*.²⁹ The Code incorporates provisions concerning “lifetime mortgages”.³⁰

1.26 The second type of scheme is sometimes advertised as a “home reversion” scheme, where a consumer sells part of their home in return for cash. This takes the form of a conveyance of property and currently falls outside the remit of the Financial Regulator. The Commission agrees with the view of the Chief Executive of the Financial Regulator concerning the potential for mis-selling of the home reversion products because they are currently unregulated. The Commission also concurs with his view, expressed to the Oireachtas Committee on Finance and the Public Service in January 2006, that these types of equity release schemes and their providers should be regulated, and the Commission notes that this was supported by

²⁸ See Opening Statement by Liam O’Reilly, Chief Executive, IFSRA, to the Joint Committee on Finance and the Public Service, 18th January 2006, available at www.ifsra.ie. The full text of the presentation is available at www.oireachtas.ie

²⁹ Financial Regulator *Consumer Protection Code* (2006), available at www.financialregulator.ie. The Code came into force in August 2006.

³⁰ In its consultation process leading to the formulation of the *Consumer Protection Code*, IFSRA noted that the inclusion of provisions on lifetime mortgages had been influenced by the views of the Commission: see the draft *Consumer Protection Code* published in February 2005, available at www.financialregulator.ie

the Oireachtas Committee members.³¹ In December 2006, the Minister for Finance announced that the government had agreed to a major consolidation and modernisation of the legislation governing the regulation of the financial services industry, under the aegis of an expert advisory group. The group is to be mandated to publish a consolidated and reformed Financial Services Bill within 2 years of its establishment.³² The Commission welcomes this development and recommends that all equity release schemes should be regulated under the consolidated and reformed statutory regime that will emerge from this project.

1.27 *The Commission recommends that equity release schemes not currently within the remit of the Financial Regulator should be regulated under the proposed new statutory regime for the financial services industry announced by the Minister for Finance in December 2006.*

(c) *Unfair Commercial Practices*

1.28 In the 2003 Consultation Paper on Law and the Elderly the Commission examined the issue of whether specific legislative provisions were required to deal with the potential vulnerability of older persons. This involved an examination in particular of the existing provisions of the general – non-statutory – law of contract in which agreements entered into under undue influence or which amount to improvident bargains can be declared invalid or set aside.³³ In its 2005 Consultation Paper on Capacity, the Commission revisited this area in the wider context of those whose decision-making mental capacity is limited. In the 2005 Consultation Paper the Commission also noted the development of a considerable body of consumer protection legislation, including provisions dealing with unfair contract terms, which already provided a further basis on which vulnerability could be prevented.

1.29 The 2005 Consultation Paper also noted that a proposed EC Directive on Unfair Business-to-Consumer Commercial Practices had been published in 2003.³⁴ Indeed, this proposal became the 2005 EC Directive on Unfair Business-to-Consumer Commercial Practices (the UCP Directive).³⁵ In August 2006, the Department of Enterprise, Trade and Employment

³¹ See Opening Statement by Liam O'Reilly, Chief Executive, IFSRA, to the Joint Committee on Finance and the Public Service, 18th January 2006, available at www.ifsra.ie. The full text of the Committee hearing is available at www.oireachtas.ie

³² See Statement by Minister for Finance on 1st December 2006 announcing the reform and consolidation project, available at www.finance.gov.ie

³³ See Consultation Paper on Law and the Elderly, paragraph 5.28 ff.

³⁴ Consultation Paper on Capacity paragraph 5.05, fn 14.

³⁵ Directive 2005/29/EC of 11 May 2005 on Unfair business-to-consumer Commercial Practices ('Unfair Consumer Practices Directive'), OJ L149, 11/06/2005, pp.22-39.

published the draft General Scheme of the *Consumer Protection (National Consumer Agency) Bill 2006*.³⁶ The draft Scheme has two purposes: to establish the National Consumer Agency (to replace the Office of the Director of Consumer Affairs) and to implement the 2005 UCP Directive.

1.30 The general scope of the UCP Directive is extremely wide, and it contains specific provisions dealing with its application to individuals who may be vulnerable because of age or limited decision-making capacity. As to its scope, Article 5 of the UCP Directive prohibits any “unfair commercial practice”. This is defined as a practice that: (a) is contrary to the requirements of “professional diligence” (which means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity); and (b) materially distorts or is likely to materially distort the economic behaviour with regard to the product or service of the average consumer whom it reaches or to whom it is addressed. Annex 1 to the UCP Directive sets out over 30 practices regarded as unfair in all circumstances. Two examples from the Annex are: falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice; and establishing, operating or promoting a pyramid promotional scheme. It is clear from this overview that the implementation of the UCP Directive, as proposed in the draft General Scheme of the *Consumer Protection (National Consumer Agency) Bill 2006*, will have a profound impact on consumer law in Ireland, because it will introduce for the first time a general ‘fair trade practices’ obligation.

1.31 In the specific context of this Report, two additional elements of the UCP Directive are worthy of particular mention because of their reference to vulnerable consumers. Article 5.3 states:

“Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of *their mental or physical infirmity, age or credulity* in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of *the average member of that group*.”³⁷

³⁶ The draft Scheme of the *Consumer Protection (National Consumer Agency) Bill 2006* is available at www.entemp.ie

³⁷ Emphasis added.

Article 5.3 contains two significant elements: it identifies as particularly vulnerable those with mental or physical infirmity or whose age or credulity may make them susceptible to unfair commercial practices; and it provides that the test to be used is referable to the perspective of the average member of the group, rather than the particular consumer affected by the unfair practice.³⁸ A potential difficulty could arise here in determining the particular characteristics of an “average member” of a group, but it is hoped that this definition will not reduce the protection available to vulnerable adults.

1.32 The second aspect of the UCP Directive of direct relevance to this Report is its inclusion of a prohibition on the use of “harassment, coercion, including the use of physical force, or undue influence”.³⁹ In particular, Article 2 of the UCP Directive defines “undue influence” as:

“exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision.”

The reference to limiting the consumer’s ability to make an informed decision also reinforces the wide scope of the changes to consumer protection law which the UCP Directive involves.

1.33 Because of the wide scope of the UCP Directive (which must be implemented in the State in 2007), and in particular its inclusion of vulnerable persons within its ambit and the prohibition of commercial practices involving undue influence, the Commission has concluded that it is

³⁸ See also recital 19 to the UCP Directive, which states: “Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.”

³⁹ Article 9 of the UCP Directive. Article 9 states that in determining whether a commercial practice uses undue influence (or any of the other means prohibited by Article 9), account is to be taken of: (a) its timing, location, nature or persistence; (b) the use of threatening or abusive language or behaviour; (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgement, of which the trader is aware, to influence the consumer’s decision with regard to the product; (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; (e) any threat to take any action that cannot legally be taken.

not necessary in this Report to make any further recommendations for reform in this context.

(2) Decision-making capacity and the law since 2005

1.34 To a lesser extent, the Commission's 2005 *Consultation Paper on Vulnerable Adults and the Law: Capacity* has also been affected by developments since it was published.

(a) The Disability Act 2005

1.35 When the 2005 Consultation Paper was published, the *Disability Act 2005* had not yet been enacted. The *Disability Act 2005* forms part of the State's wider disability strategy, which includes legislative provisions and significant funding of policy initiatives on a long term basis. The Commission acknowledges that the 2005 Act – and the related funding initiatives – is an important step forward in the recognition of the need to underpin policy with a legislative base. The Commission also notes that the 2005 Act must be seen against the background of a series of legislative codes aimed at achieving equality across a wide spectrum, notably, the *Employment Equality Act 1998*, the *National Disability Authority Act 1999*, the *Equal Status Act 2000*, the *European Convention on Human Rights Act 2003*, the *Equality Act 2004* and the *Education for Persons with Special Educational Needs Act 2004*. The Commission considers that it is important to set out here the essential elements of the 2005 Act to indicate the recent changes in the legislative context against which its proposals for reform should now be considered.

1.36 The Commission notes that the 2005 Act falls short of a “rights based” approach to disability but also notes that it does not include the “non-justiciability” clause which was originally contained in section 47 of the *Disability Bill 2001*.⁴⁰ Principally because of the widespread opposition to section 47, the 2001 Bill was withdrawn by the government. After this, a consultation process occurred with representative groups, through the Disability Legislation Consultation Group (“the DLCCG”). This culminated in the publication in 2003 of the DLCCG document *Equal Citizens*,⁴¹ which contained a detailed analysis of the required legislative framework and policy responses. The 2005 Act reflects some of the proposals in *Equal Citizens*, such as a right to an independent assessment of need, transparency as to related services, a right of redress, mainstream service provision, a 3% target for the employment of people with disabilities and the absence of any equivalent of section 47 of the *Disability Bill 2001*. *Equal Citizens* also recommended that the legislative framework would be supported by multi-

⁴⁰ Consultation Paper on Capacity paragraph 1.42. See also Whyte (ed) *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002).

⁴¹ Available at www.disability-federation.ie

annual funding for disability services, and the Commission notes that such commitments have been included in the most recent social partnership agreement, *Towards 2016*.⁴²

1.37 The Commission notes that section 2 of the 2005 Act defines “disability”, in relation to a person, as:

“a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.”

This definition reflects the wide definition contained in the *National Disability Authority Act 1999*. Sections 8 to 10 of the 2005 Act provide that any person who considers that he or she may have a disability is entitled to apply for an independent assessment of need, without regard to cost or capacity to provide any services identified in the assessment. The assessment will be undertaken by assessment officers, appointed by the HSE, who will arrange for assessments of need and will be independent in carrying out their statutory functions. Arising from the assessment, the person concerned will be given an assessment report. The assessment report will indicate: whether a person has a disability; the nature and extent of the disability; the health and education needs arising from the disability; the services considered appropriate to meet those needs and the timescale ideally required for their delivery; and when a review of the assessment should be undertaken.

1.38 A relative, guardian or personal advocate may apply for an assessment on behalf of a person with a disability. Each person with a disability will be encouraged to participate in their own assessment while taking account of the nature of their disability and their age. This will include taking note of their views regarding their needs or preferences in relation to the provision of services. The Health Information and Quality Authority (HIQA), which was established on an interim basis in 2006 (and which will be established on a formal basis when the *Health Bill 2006* is enacted) by the Minister for Health and Children, will set appropriate standards for carrying out the assessment process.

1.39 Sections 14 and 15 of the 2005 Act provide that a person may make a complaint to the HSE about: a finding that he or she does not have a disability; the failure of the assessment to meet the standards set by the

⁴² Available at www.taoiseach.gov.ie. The Commission also notes that the 2007 Budget, announced to Dáil Éireann by the Minister for Finance in December 2006, contains the first element of the funding to which the government was committed by *Towards 2016*.

HIQA; the contents of the service statement; the failure to start or complete an assessment within the required timescales; and the failure of a health or education service provider to provide a service set out in the service statement or to provide it within any timeframes prescribed. Complaints will be heard by a complaints officer, appointed by the HSE. The complaint will be resolved informally, if possible. If informal resolution is not possible, the complaint will be investigated and a recommendation will issue, which will include a timeframe for the action directed. The recommendation will have regard to the outcome of the investigation as well as other considerations, including the eligibility of the person for the service, the practicality of providing the service and the resources available to the service provider.

1.40 Sections 16 to 20 of the 2005 Act provide that a person, the HSE or an education service provider may lodge an appeal against a recommendation of a complaints officer. Appeals will be investigated by an independent appeals officer, appointed by the Minister for Health and Children. The 2005 Act confers substantial statutory powers on the appeals officer, including powers to summon witnesses, to enter premises and to obtain information. If the parties to the appeal agree, an appeal may be resolved by mediation. Otherwise, an appeal hearing will take place and a formal determination will issue. The appeals officer's determination is final and may only be appealed on a point of law to the High Court.

1.41 Section 30 of the 2005 Act provides that the Minister for Justice, Equality and Law Reform may request the National Disability Authority (NDA) to prepare codes of practice specifying what public bodies must do to comply with their obligation to make their mainstream services, information resources and heritage sites properly accessible. A *Code of Practice on Accessibility of Public Services and Information Provided by Public Bodies* was published in 2006 by the NDA,⁴³ and was made a code of practice for the purposes of section 30. This document includes clear guidance on how public bodies can comply with their statutory duties under the 2005 Act, and formed the basis for the sectoral plans required by the 2005 Act.

1.42 Sections 31 to 37 set out obligations on six Government Departments to prepare Sectoral Plans under the 2005 Act. Sectoral plans set out information on the services, facilities and activities which come within the remit of each of the six Departments. The plans highlight how the functions of the Departments, and the key bodies which they oversee, serve the needs of people with disabilities and set out a programme for future development. Each plan must include arrangements for complaints, monitoring and review procedures. Under the 2005 Act, the following six Ministers are required to draw up Sectoral Plans: the Minister for Health and Children; the Minister for Social and Family Affairs; the Minister for

⁴³ Available at www.nda.ie

Transport; the Minister for the Environment, Heritage and Local Government; the Minister for Communications, Marine and Natural Resources; and the Minister for Enterprise, Trade and Employment. The plans envisaged by section 31 were published in July 2006.⁴⁴ The Commission welcomes the publication of the six statutory Departmental Plans to implement in detail the commitments in the 2005 Act. In conjunction with the funding to be provided, these indicate that public policy in this area has begun to reflect the need to put in place concrete action plans.

1.43 Sections 38 to 40 of the 2005 Act provide that public bodies must appoint “inquiry officers” to process complaints about any failure by a public body to provide access as required by sections 25 to 29 of the 2005 Act. Each sectoral plan must establish a complaints mechanism for individuals who have not been able to access a service specified in the plan. Any person who is not satisfied with the outcome of a complaint may appeal to the Ombudsman. The 2005 Act confers new powers on the Ombudsman to investigate any failure by a public body to comply with any commitment made in a sectoral plan.

1.44 The Commission considers that the 2005 Act provides an important legislative context against which the interaction between the State and persons with limited decision-making capacity can be considered. The Commission notes that the 2005 Act provides for a novel structure by which these matters are determined, in particular through the direct involvement of State bodies, such as the HSE and government Departments, together with appropriate independent complaints machinery. The Commission welcomes in this respect the enhanced role of the Ombudsman, whose investigation into nursing home charges in 2001 was a significant catalyst for policy change in this area.

(b) *United Nations Convention on the Rights of Persons with Disabilities*

1.45 The 2005 Consultation Paper referred to the progress made towards the preparation by the United Nations of a *Convention on the Rights of Persons with Disabilities*.⁴⁵ In August 2006, the Ad Hoc Committee involved in its drafting adopted the final draft text of the Convention. After further drafting work, on 5 December 2006 the Committee forwarded the final draft of the Convention to the General Assembly for adoption. At the

⁴⁴ See www.taoiseach.gov.ie for a link to each sectoral plan.

⁴⁵ Consultation Paper on Capacity, paragraph 1.44.

time of writing, it is expected that adoption of the Convention by the General Assembly will take place on 13th December 2006.⁴⁶

1.46 Among the rights for persons with a disability included in the Convention are the following: an equal right to life; a right to own and inherit property, to control their financial affairs and have access to financial services; not to be deprived of their liberty “unlawfully or arbitrarily”; not to be forcibly institutionalised; a right to privacy and access to medical records; removal of barriers to accessing the environment, transport, public facilities and communication; and the right to live independently. Signatory States would also be required to make essential equipment affordable, end discrimination relating to the right to marriage, family and personal relationships; and to have equal access to education, employment, public life and cultural life.

1.47 The Commission acknowledges that the UN Convention on the Rights of Persons with Disabilities will provide a further framework for the future discussion of such rights in Ireland. The “rights-based” approach of the Convention does not sit easily with the approach in the *Disability Act 2005*, although the Commission accepts that the sectoral plans and funding arrangements surrounding the 2005 Act provide tangible evidence of movement towards the objectives of the UN Convention.

1.48 When the draft text of the Convention was agreed in August 2006, the Chairperson of the National Disability Authority (NDA) noted that the voluntary sector, disability organisations, the Department of Foreign Affairs, the Department of Justice, Equality and Law Reform and the NDA had worked together on the final drafting. She also noted that much that was in the draft Convention was already in place in Ireland, for example in the *Equal Status Acts*. She was quoted as saying that the issue of intellectual capacity remained to be resolved, in particular how best to respect the decision-making rights of people with intellectual disabilities, while simultaneously protecting their interests.⁴⁷ The Commission concurs with these views. The need for a framework law for mental capacity in Ireland remains an essential component of the legal recognition and protection of those with limited decision-making capacity.

(3) *Changes in the institutional framework since 2003*

1.49 The first group of recommendations in the Commission’s 2003 Consultation Paper on Law and the Elderly and in the 2005 Consultation Paper on Capacity focused on reform of the law as it affected individual decision-making – such as financial decisions – by older persons and those

⁴⁶ <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>, last accessed on 8th December 2006.

⁴⁷ See ‘Groups praise draft UN treaty for disabled’ *The Irish Times*, 28 August 2006.

with limited capacity. In the preceding pages, the Commission has reviewed developments since 2003 in respect of that group of recommendations. The second group of recommendations concerned institutional reform at national level - notably the replacement of the Wards of Court system with a Guardianship system. In respect of this group of recommendations, there have also been significant developments which have affected the Commission's preparation of this Report.

1.50 In the Consultation Paper on Law and the Elderly, the Commission envisaged that the role of the proposed Office of Public Guardian (OPG) would include two major elements. First, the OPG would have a general supervisory role in respect of personal guardians appointed by the proposed Guardianship Board. Second, the OPG would be empowered to make various Orders concerning the care and treatment of older persons. These Orders would include:⁴⁸

- a Service Order, which would require the provision of a particular service, for example, home help;
- an Adult Care Order, which would specify that an adult be provided with certain facilities, which could involve moving to a different place or facility; and
- an Intervention Order, which would apply where a once-off order was required, for example, requiring an investigation into suspected abuse or neglect.

1.51 The Commission considers that the nature and function of the proposed OPG must be reconsidered in the light of the fundamentally altered institutional legal framework which exists in 2006. For example, in 2003 the role proposed for the OPG was made against the background of a regional health board system. The health boards have since been replaced by a unified national system under the aegis of the Health Service Executive (HSE), established in early 2005.⁴⁹ The Commission considers that the establishment of the HSE does not obviate the need for an institutional framework, such as the proposed OPG, to deal with the issues specific to older persons identified in the Consultation Paper on Law and the Elderly, but it has at least altered significantly the landscape against which the Commission must consider its final recommendations in this Report.

1.52 Two developments in particular are worth mentioning in this context. First, the Commission considers it to be significant that the HSE has established a number of national directorates and units with responsibility for the development and management of its services. For example, the HSE has appointed an Assistant National Director with

⁴⁸ See Consultation Paper on Law and the Elderly, paragraph 6.07.

⁴⁹ The HSE was established pursuant to the *Health Act 2004*.

responsibility for Older Persons and Social Inclusion, which forms part of the HSE's Primary Community and Continuing Care (PCCC) Unit. Second, in the wider context of persons with limited mental capacity, it is instructive to note the HSE's approach to how it proposes to implement the *Health (Repayment Scheme) Act 2006*. Among those to whom repayments must be made are people in long stay care who do not have capacity, such as those with late-stage Alzheimer's Disease. In this context, in 2006 the HSE has published *Patients Private Property Guidelines*,⁵⁰ which have adopted the Commission's view, as outlined in the 2005 Consultation Paper on Capacity, that mental capacity should be assessed primarily using a functional approach.

1.53 In light of these developments, the Commission has concluded that the wide-ranging role envisaged for the OPG in 2003, particularly as regards the making of Service Orders and Adult Care Orders, would not be appropriate given the developments within the HSE. The Commission has concluded that such wide-ranging Orders would have clear potential for conflict with the provision of appropriate services by the HSE. The Commission is also conscious that, in respect of the future arrangements for long stay care in the State, the *Health Bill 2006* envisages an independent nursing home inspectorate which, together with the Health Information and Quality Authority (HIQA), will be involved in independent standard-setting in this context.

1.54 In light of these developments, the Commission envisages that a more tailored and case-specific intervention would be more appropriate for the Guardianship system it envisages. Thus, the Commission has concluded that, in appropriate circumstances, it would still be appropriate for an Intervention Order to be made in the context of a particular older or vulnerable person. For reasons discussed in detail later in this Report,⁵¹ the Commission has concluded that such Orders would be made by the proposed Guardianship Board.

1.55 There have been other major institutional developments since 2003 which are relevant to the Commission's approach in this Report, notably, the wide-ranging changes effected by the *Disability Act 2005*. The Commission has already outlined the main elements of the 2005 Act, but for present purposes the key elements are the standard-setting roles in the 2005 Act to be performed by the National Disability Authority (NDA) and the Irish Health Information and Quality Authority (HIQA). As has already been noted, the NDA has already developed Codes of Practice – in effect, standards – for the purposes of the *Disability Act 2005* which thus already

⁵⁰ See www.repay.ie, which forms part of the HSE website, www.hse.ie

⁵¹ See Chapter 6 below.

provide an important institutional structure around which service provision for older persons and those with a disability can be organised. It is envisaged that the HIQA, which will be formally established when the *Health Bill 2006* is enacted, will deal with the related issue of clinical standard-setting across all aspects of health service provision. The Commission notes that, in 2003, it envisaged that the OPG might be required to fulfil functions which are now being performed by the NDA under the 2005 Act and which are envisaged for the HIQA when it is fully operational. In that context, the Commission considers that it is no longer appropriate to recommend that the OPG would perform such a standard-setting role. The Commission has thus concluded⁵² that the OPG would have a role that is focused on supervising Personal Guardians and on ensuring that it interacts on a co-operative basis with other national service providers, including the HSE, the NDA and the HIQA.

1.56 The Commission also envisages that the OPG will also play an educational role concerning vulnerable adults, including older persons and those with limited mental capacity.⁵³ The Commission envisages that such a role would complement the much wider advocacy role envisaged for the Citizens Information Board (the proposed new title for Comhairle) by the *Citizens Information Bill 2006*, which is currently before the Oireachtas. In summary, the effect of all these developments is that, whereas in 2003 the Commission's proposals dealt with the need to protect vulnerable adults with limited capacity as well as those with no capacity, the main focus of the Commission's proposals in this Report are on those with no capacity.

D Essential elements of Reforms proposed by the Commission

1.57 Having discussed the most significant developments since 2003 which have influenced the preparation of this Report, the Commission now outlines the essential elements of the recommendations being made for reform. These fall into two broad categories: first, the Commission's proposals concerning the law on mental capacity, and, second, the structures which should be put in place to support the proposed new capacity legislation.

(I) Defining capacity

(a) Introduction

1.58 One of the challenges which a review of the law on capacity presents is to achieve an appropriate balance between the traditional focus on protection for the vulnerable and the philosophical shift in policy towards an

⁵² See Chapter 7 below.

⁵³ See Chapter 7 below.

emphasis on autonomy, capacity and empowerment.⁵⁴ There is also a need to reflect the fact that individuals may have the capacity to make some decisions but not others.

1.59 In recent years, a fundamental shift has been taking place away from a medical model of disability towards a social and rights-based model.⁵⁵ The medical model of disability focuses on impairment from a medical perspective.⁵⁶ The alternative social or human rights model focuses on the dignity of the human being and on issues of integration. The goal of the social and human rights-based model is to build an inclusive society which respects the dignity and equality of all human beings regardless of difference. The move from a medical to a social model entails a corresponding emphasis on ability rather than disability.

1.60 In the Commission's view, the enactment of capacity legislation would serve to promote the interests of vulnerable adults and would assist in shifting from a medical model to a social and human rights model of ability. Legislation would also permit the establishment of a systemic structure for dealing with legal capacity issues and facilitate provisions to safeguard the interests of adults with limited decision-making capacity.

(b) Capacity Models

1.61 Current Irish law begins with a presumption of capacity. This may be displaced by evidence establishing that a person lacks capacity. At present, however, there is no generally applicable definition of capacity at common law or in statute.

1.62 In approaching the central question as to what test of capacity might be included in any proposed legislation, the Commission has looked at three models: the 'outcome' approach, the 'status' approach (also known as the 'category' approach) and the 'functional' or 'understanding' approach.

⁵⁴ See Lush "Capacity" in Whitehouse (ed) *Society of Trust and Estate Practitioners Finance and the Law for the Older Client* (Lexis Nexis 2002) at D1.3; King "Paternalism and the Law: Taking a Closer Look" (2004) 4 UCCLR 134.

⁵⁵ See Quinn and Degener *Human Rights and Disability* (United Nations HR/PUB/02/01 2002) Chapter 1; Commission on the Status of People with Disabilities *A Strategy for Equality: Report of the Commission on the Status of People with Disabilities* (1996) at 2.2; Disability Legislation Consultation Group *Equal Citizens – Proposals for Core Elements of Disability Legislation* (Disability Legislation Consultation Group 2003) at Part IV. These changes are evident in the *Disability Act 2005* and the *Citizens Information Bill 2006*.

⁵⁶ Dr Pat Bracken "We need to develop services that move us beyond the limitations of the traditional medical model of care" *Irish Times* 21 September 2005.

(i) ***Outcome approach***

1.63 Under the ‘outcome’ approach, capacity is determined by the content of the individual’s decision, so that a decision which does not conform to normal societal values (or the values of the assessor) might be deemed to be evidence of incapacity.⁵⁷ In England a number of respondents to the Law Commission’s *Consultation Paper on Capacity*⁵⁸ argued that an ‘outcome’ approach is used by many doctors – if the outcome of the patient’s deliberations is to agree with the doctor’s recommendations then he or she is taken to have capacity, while if the outcome is to reject a course which the doctor has advised then capacity is found to be absent.⁵⁹ The Law Commission concluded that the ‘outcome’ approach “penalises individuality and demands conformity at the expense of personal autonomy”.⁶⁰

(ii) ***Status approach***

1.64 The ‘status’ approach to capacity involves making a decision on a person’s general legal capacity based on the presence or absence of certain characteristics. It usually involves an across-the-board assessment of a person’s capacity based on disability, *rather than the person’s capacity in relation to the particular decision being made at a particular time*. Under this approach, for example, a person who is in a long-stay psychiatric ward may be automatically denied capacity to make a will or to vote without regard to their actual capabilities. The status approach to capacity is evident in the Wards of Court system and in respect of enduring powers of attorney under the *Powers of Attorney Act 1996*, both of which involve a broad assessment of general legal capacity.

1.65 A status approach to capacity has particular potential to operate inequitably in relation to persons whose capacity fluctuates. The status approach is also not appropriate for a person who, in the words of the *Powers of Attorney Act 1996*, “is becoming mentally incapable”⁶¹ because clearly they have some cognitive ability and are capable of making some decisions. Neither is the status approach appropriate for a number of persons

⁵⁷ Consultation Paper on Law and the Elderly paragraph 1.20.

⁵⁸ Law Commission of England and Wales *Mentally Incapacitated Adults and Decision-Making: An Overview* Consultation Paper No 119.

⁵⁹ An illustration of circumstances where there may be a predisposition towards an outcome approach is found in the English High Court decision in *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819.

⁶⁰ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) paragraph 3.4.

⁶¹ Section 9 of the *Powers of Attorney Act 1996*.

with intellectual disability who clearly have the capacity to make *some* decisions.

1.66 The status approach was rejected by the Law Commission of England and Wales as being “out of tune with the policy aim of enabling and encouraging people to take for themselves any decision which they have capacity to take.”⁶²

(iii) Functional approach

1.67 The ‘functional’ approach assesses capacity on an ‘issue-specific’ basis. Indeed, the question of legal capacity generally arises in a specific context – such as capacity to make a will, capacity to make a gift, to marry or to consent to medical treatment. In such circumstances the assessment of capacity is ‘issue-specific’ – therefore, a decision on legal capacity in relation to one issue will not necessarily be decided in the same manner in relation to another issue.

1.68 The Commission notes that a ‘functional’ model of capacity is now the most widely accepted.⁶³ An issue-specific, ‘functional’ approach to capacity assesses a person’s capacity to make a particular decision. As a result, this model is in direct contrast to the all-or-nothing approach to capacity which tends to prevail under the status approach. In addition, the individual assessment of capacity which characterises the functional approach has the resulting benefit of involving a proportionate, minimum incursion on an individual’s decision-making autonomy.

(c) Towards a Predominantly Functional Approach

1.69 The Commission accepts that there are obvious shortcomings in assessing an individual’s capacity based on a once-off look at their status generally. At the same time the Commission accepts that there will be cases where a person does not have the ability required to make *any decisions* with legal consequences for themselves. This will arise, for example, where a person is in a persistent vegetative state (PVS)⁶⁴ or a coma, or where dementia has advanced to such an extent that a person’s decision-making ability is minimal and there is no prospect of regaining lost capacity.⁶⁵ Thus, any new scheme would need to acknowledge these realities.

⁶² Law Commission of England and Wales *Mental Incapacity* (No.231 1995) paragraph 3.3.

⁶³ Consultation Paper on Capacity paragraph 2.14 ff.

⁶⁴ See *Re a Ward of Court (No.2)* [1996] 2 IR 79.

⁶⁵ Consultation Paper on Law and the Elderly, paragraph 1.22 and Consultation Paper on Capacity, paragraph 2.39.

1.70 The Commission therefore recommends that a predominantly functional approach should be taken to the issue of legal capacity. This would involve consideration of a person's capacity in relation to the particular decision to be made at the time it is to be made. The Commission also recognises that where an adult's lack of capacity is profound and enduring, a new functional determination may not be required in every situation in which a decision has to be made.

(d) A Statutory Definition of Capacity

1.71 The Commission has concluded that there are strong arguments in favour of the enactment of capacity legislation. These relate to the role which legislation could play in creating certainty about the law on capacity - and its potential to promote and safeguard the interests of vulnerable adults. Some areas of the law on capacity are well developed, but there is a dearth of judicial authorities on the crucial issue of how capacity should be understood and defined, and this is particularly marked in areas such as wardship.

1.72 The Commission has also taken the view that the legislation should contain a statutory definition of capacity. The Commission has examined the differing approaches to defining capacity in a number of jurisdictions. For example, in Scotland and the Australian State of Victoria, capacity is defined in terms of *lack of capacity*, by reference to 'mental disability' or 'mental disorder'. In the United States, the general trend is a movement away from a determination of mental status and towards *measurement of the ability to function in society*. In the Canadian province of Saskatchewan, capacity is defined positively in terms of *the ability to understand information relevant to making a decision* and to appreciate the reasonably foreseeable consequences of making or not making a decision. The Commission's preferred approach to defining capacity is one which views people as individuals and not on the basis of labels such as mental disorder.

1.73 The Commission also confirms the view it has previously expressed⁶⁶ that capacity cannot be simply captured in an all-embracing test. Instead, the Commission has concluded that any proposed legislation would provide a broad definition of capacity in the form of guiding principles which assist in determining an adult's capacity to make a particular decision. The England and Wales *Mental Capacity Act 2005* provides a general statutory definition in the form of guiding principles.

1.74 Having examined the essential elements of the Commission's proposals concerning the law on mental capacity, we now turn to discuss the

⁶⁶ Consultation Paper on Capacity paragraph 3.27.

issue of what structures should be put in place to support the proposed new capacity legislation.

(2) ***The existing Wards of Court system***

1.75 The Wards of Court system, which is centred in the High Court, is the only existing formal mechanism for managing the affairs of persons who lack decision-making capacity. The Supreme Court has pointed out that the impact of being made a Ward of Court on a person's decision-making and legal capacity is monumental.

“When a person is made a ward of court, the court is vested with jurisdiction *over all matters relating to the person and estate of the ward ...*”⁶⁷

1.76 The result of this is that a person who has been made a Ward of Court loses the right to make any decisions about their person and property. Although the Court will have regard to the views of the ward's committee (in effect, guardian) and family members, the Court will make decisions based on the criterion of the ‘best interests’ of the ward but generally no attempt is made to consult the ward in relation to those decisions.

1.77 The Commission has already made a number of comments on aspects of the Wards of Court system in the two Consultation Papers, which it confirms in this Report:

- The criteria for wardship and the procedure for bringing a person into wardship are archaic and complex;
- The paternalistic concepts which are at the heart of the wardship system sit somewhat uncomfortably with the more recent social and human rights models which emphasise ability over disability and the conception of capacity in functional terms;
- Aspects of the wardship procedure do not contain adequate procedural safeguards designed to protect human rights;
- While there is provision for the *estate and person* of the ward to be protected, it is normally only when the protection of assets is at issue that a person is taken into wardship and then the main focus of wardship administration is on the protection of those assets;
- The wardship inquiry would appear to be more inquisitorial than adversarial in nature and the rules of evidence are therefore relaxed unless the person has sought to have the inquiry heard before a jury. This has relevance in the assessment of capacity because a clearly adversarial system would allow for cross examination by the respondent in relation to medical evidence on capacity which is

⁶⁷ *Re A Ward of Court (No.2)* [1996] 2 IR 79.

required as a matter of fair procedures under the Constitution or the European Convention on Human Rights.

1.78 The Commission has recommended the replacement of the Wards of Court system and the establishment of a new comprehensive statutory framework specifically tailored for the unified legal protection of vulnerable adults' person and property. In doing so, the Commission has attempted to strike a balance between, on the one hand, the need to protect persons who require assistance with decision-making, personal care or protection against abuse and, on the other hand, the countervailing importance of preserving an appropriate degree of autonomy for such persons and of respecting their dignity and human and constitutional rights.

1.79 Accordingly, the Commission's aim (which is echoed in very many of the submissions it received), is to recommend a system of protection but also to ensure that the degree of intervention in each case is the minimum necessary to achieve the required purpose. For example, a vulnerable adult may not require assistance in making a decision but may need assistance in order to implement the decision they have made. The Commission's overall approach is to maximise personal autonomy in so far as possible. A particular concern of the Commission is the need to ensure procedural fairness in the formulation of a statutory framework which will facilitate the making of orders to assist vulnerable adults. While, in formulating its proposals, the Commission is mainly concerned with legal issues, it is conscious that the law does not and should not operate in a vacuum and that it is important that any system of protection for vulnerable adults must be placed in the wider context of health and social services and in particular the developments since 2003 which have been outlined in Part C above.

(3) *The Proposed Framework*

1.80 The Commission now turns to outline the essential elements of its proposed structure.

(a) *Limited scope of the proposed structure*

1.81 In recommending a structure, the Commission emphasises that any structure should be limited in the sense that it should only operate where it is required either to enhance or optimise autonomy or to protect vulnerable persons. In line with this, the proposed structure should not in any way affect arrangements which currently do not require any formal intervention. Any proposed structure should not unnecessarily encroach in areas where regulation is not required. Where informal assisted decision-making is appropriate, this should be facilitated as far as possible, while being subject to the principles to be set out in the general legislative scheme.

(b) *Informal authorisation process*

1.82 The Commission has recommended that the proposed legislation should clarify the circumstances in which day-to-day decisions can be taken on behalf of a person who lacks capacity without the need to undergo any formal authorisation process, and at the same time protect third parties who act in the best interest of the vulnerable adult. The legislation should provide for a general authority to act and also clarify the scope of this general authority. The concept of general authority is provided for in legislation in a number of other jurisdictions.⁶⁸

(c) *Adults who do not have capacity*

1.83 In the Consultation Papers, the Commission recommended that the proposed system should cater for “adults who may be in need of protection”, in other words:

- adults who have general legal capacity but are vulnerable to being abused or neglected and are unable to access remedies.
- adults who do not have general legal capacity.

In light of the developments since 2003, in particular and which have been outlined in Part C, above, the Commission's final recommendations are primarily confined to adults who do not have capacity.

(d) *Health care issues*

1.84 The area of assessment of capacity to make healthcare decisions is fraught with uncertainty.⁶⁹ This uncertainty is not in the interests of the patients or their families, nor is it in the interest of the healthcare professionals. Under current arrangements, health professionals have to exercise personal judgement in assessing capacity and determining how to proceed if an adult is assessed as lacking the capacity to make a healthcare decision. The Commission considers that it is particularly important that such decisions should be based on a coherent legal and ethical framework.⁷⁰ In non-emergency situations (where the doctrine of necessity is not applicable) healthcare professionals find themselves in a difficult position. Practices have become well established (such as seeking a signature on a consent form) which have no standing in law. The Commission is aware that there is a need for guidance for medical practitioners in relation to:

⁶⁸ See section 5 of the *Mental Capacity Act 2005* (England and Wales).

⁶⁹ Consultation Paper on Capacity Chapter 7.

⁷⁰ Consultation Paper on Capacity, paragraph 7.80.

- how capacity to make healthcare decisions should be assessed, and
- what action the law requires if a person is judged not to have the capacity to make a healthcare decision.

In order to assist in this process, the Commission considers that the proposed capacity legislation should make provision for the formulation of a code of practice by a specialist Working Group on Capacity to Make Healthcare Decisions.

(e) *Enduring Powers of Attorney (EPA)*

1.85 The Commission acknowledges that the EPA system has the potential to be a very useful mechanism.⁷¹ While safeguards have been provided for in the *Powers of Attorney Act 1996* at the time of the execution of an EPA, the Commission⁷² identified issues that gave cause for concern particularly after the EPA is registered. Under the 1996 Act, a person can give their attorney the power to make ‘personal care’ decisions on their behalf when they become incapable of making such decisions for themselves. ‘Personal care’ decisions *do not*, however, currently include ‘health care’ decisions on medical treatment and surgery. The Commission recommends that attorneys appointed under EPAs should have the same powers as those proposed for Personal Guardians, which would encompass minor or emergency healthcare decisions, unless this is specifically excluded by the person who is appointing an attorney.⁷³

(f) *Incremental Orders*

1.86 Central to the proposed framework is to make statutory provision for two types of Orders where these are necessary: an Intervention Order and a Guardianship Order. An Intervention Order would be relevant where a person continues to have capacity – perhaps limited in some way – and therefore only limited intervention is required. An Intervention Order would apply where a once-off order was required, for example, requiring an investigation into suspected abuse or neglect.

1.87 A Guardianship Order would be relevant where the person requires the assistance of another person to make decisions, and lacks legal capacity. A Guardianship Order would be made in respect of adults in need of protection, if that is appropriate, and would be subject to two conditions: first, that they do not have legal capacity, and second, that they are in need of protection either in the substitute decision-making sense in relation to

⁷¹ Consultation Paper on Law and the Elderly Chapter 3.

⁷² Consultation Paper on Law and the Elderly, paragraphs 3.32-3.45.

⁷³ See Chapter 4, below.

their property and affairs, or in relation to their personal and healthcare decisions. When a Guardianship Order is made a ‘Personal Guardian’ would be appointed to make day-to-day decisions.

(g) *The Guardianship Board*

1.88 The Commission has recommended that a Guardianship Board rather than a court should make the decision about the general legal capacity of an individual. The courts’ jurisdiction in relation to issue specific capacity will continue to be made by the court in which the issue arises. The Commission was conscious of course that this would involve significant changes in the current legal arrangements and received many submissions on this matter. In the Report, the Commission notes that one of the advantages of a board model would be the inclusion of legal, medical, health and social care professionals in the decision-making process.

1.89 Detailed procedural safeguards are also a key part of the proposed system. These are discussed in Chapter 6, below.

(h) *The High Court*

1.90 The High Court will be the ultimate appeal body in respect of any Order made by the Guardianship Board. In addition, in the Commission’s view certain major health care decisions (for example, turning off a life support machine) should be specifically reserved to the High Court.

(i) *Office of Public Guardian*

1.91 The establishment of a new independent Office of Public Guardian is a central feature of the proposed new system of protection for vulnerable adults. Its primary role would be to oversee and supervise the arrangements for substitute and assisted decision-making for Protected Adults and to make specific decisions in relation to those adults.

1.92 It is envisaged that the Office of the Public Guardian will take over many - *but not all* - of the functions currently exercised by the Registrar of Wards of Court. It is not, however, simply the successor to the existing structure, but rather a new office with new functions and more extensive supervisory powers.⁷⁴ The Commission recommends that the Office should be separate from the Courts Service and be headed by the Public Guardian who would be an independent office holder.

1.93 The Office of Public Guardian would have a range of powers and would issue codes of practice and guidelines for persons dealing with vulnerable adults. The Public Guardian should take many of the routine decisions which are currently made by the Registrar of Wards of Court in

⁷⁴ See Chapter 7, below.

wardship cases, and will also take decisions that have not been delegated to a Personal Guardian.

(j) *Personal Guardian*

1.94 The making of a Guardianship Order would also involve the appointment of a Personal Guardian to make decisions on behalf of a person who does not have general legal capacity. In line with good practice and to emphasise that the level of intervention should be limited where appropriate, this should normally be a spouse or family member. In exercising their powers of decision, the Personal Guardian's first and paramount consideration should be the promotion and protection of the welfare and best interests of the Protected Adult. Many of the submissions received by the Commission highlight that for a guardianship system to work, and in particular to guard against the potential for abuse, a key issue which must be resolved is the accountability of Personal Guardians.

1.95 The Personal Guardian may have power to make day to day decisions which could include:

- day-to-day care of the person, if that is required, including the employment of a carer, home help or other domestic help
- normal day-to-day decisions for the person, including diet and dress
- the giving of consent to any necessary routine or minor medical treatment
- any other matters specified in the Guardianship Order, in particular to act in the best interests of the person.

(k) *Supervisory Role of Public Guardian*

1.96 The Public Guardian will play a supervisory role in relation to all Personal Guardians, who will be required to report to the Public Guardian. Attorneys operating under Enduring Powers of Attorneys should also be subject to the general supervision of the Public Guardian. The Public Guardian should also be a source of advice and assistance to Personal Guardians and Attorneys to help them carry out their obligations. Any person should also be able to contact the Office of Public Guardian to express concern about the possible abuse of a vulnerable adult or about any perceived inadequacies.

(l) *Interaction with Service Providers*

1.97 There should be a mechanism for interaction with service providers, and indeed a mechanism so that anyone may complain to the Public Guardian in relation to abuse, to ensure that the necessary investigation can take place and relevant action instigated. Coordination will be required between the Office of Public Guardian, and other bodies such as

the National Disability Authority, the Health Service Executive and the proposed Health Information and Quality Authority.

(m) General Education Role

1.98 The Public Guardian should have a general educational role by issuing codes of practice and general advice and guidelines to a range of people dealing with vulnerable adults including medical, health and care staff, financial institutions, legal professionals and others.

1.99 The Office of Public Guardian will have a key role (by setting up specialist groups) in ensuring appropriate codes are initiated and implemented. This will be particularly important in determining the criteria to be used in the assessment of legal capacity but will also be necessary, for example, in relation to consent to medical treatment, health care decisions, and contractual arrangements.

(4) The Commission's Draft Legislative Scheme

1.100 As noted already, in this Report the Commission confirms the provisional recommendation in the two Consultation Papers that the current Wards of Court system, based primarily on the *Lunacy Regulation (Ireland) Act 1871*, should be replaced by the proposed Guardianship system. The Commission is conscious, however, that the recommendations for reform in this Report are limited to those over 18 years of age, but that the Wards of Court system, whether it applies to those over 18 or under 18, can be said to derive from the general inherent jurisdiction of the High Court under Article 34 of the Constitution.⁷⁵ The historical basis for the Wardship jurisdiction may also derive from the pre-1922 jurisdiction of the Lord Chancellor under the royal prerogative of the Sign Manual, but the Commission notes that the question as to whether any royal prerogatives survived the enactment of the Constitution is itself a complex issue on which there is no clear answer.⁷⁶ In that respect, the Commission acknowledges that any replacement legislative scheme for the Wards of Court system (including a scheme to replace the 1871 Act) would need to take all these matters into account. In addition, the Commission is also conscious that, while the outmoded language associated with the 1871 Act- including its title- has long been regarded as objectionable, considerable reforms have actually been implemented in practice by those involved in the administration of the Wardship jurisdiction. Notably, significant changes have been introduced in recent years by the Office of the Registrar of Wards of Court (under the general supervision of

⁷⁵ See generally O'Neill *The Wards of Court in Ireland* (First Law 2004), the Consultation Paper on Law and the Elderly, Chapter 4, and the Consultation Paper on Capacity, Chapter 4.

⁷⁶ See generally, Hogan and Whyte *Kelly's The Irish Constitution* 4th ed (Butterworths 2003).

the President of the High Court) in connection with the manner in which funds are managed and invested for wards of court. The Commission is also aware that the Office of the Registrar of Wards of Court has put forward proposals for reform of other aspects of the procedures under the 1871 Act. Of course, the Commission retains its view that the 1871 Act should be replaced in its entirety by a modern scheme which removes the objectionable aspects that have been identified. Taking into account all the issues identified here, the Commission is publishing a *draft Scheme of a Mental Capacity and Guardianship Bill* (rather than a draft Bill), which is limited to setting out the legislative changes recommended in this Report as they apply to persons over 18 years of age. Further consideration of the effects of reform on persons under 18 – and taking into account the other dimensions referred to – would be required before a comprehensive legislative scheme is prepared.

CHAPTER 2 GENERAL PRINCIPLES

A Introduction

2.01 This chapter sets out general principles which will form the basis of mental capacity legislation. The recommendations which follow reflect the Commission’s final views as guided by submissions received and by extensive discussion and debate with interested parties. Many of the recommendations were discussed in greater detail in the Commission’s earlier companion Consultation Papers on Law and the Elderly¹ and Vulnerable Adults and the Law: Capacity.²

2.02 Part B of this chapter sets the context for reform proposals in this area by situating the law of capacity within a human rights framework. Part C makes the case for the enactment of mental capacity legislation. Part D considers the appropriate understanding of decision-making which will form the lynchpin of the proposed mental capacity legislation and details an appropriate statutory framework for understanding capacity including a legislative definition of capacity. Part E discusses issues concerning the assessment of capacity. Part F concludes the chapter with recommendations concerning the provision of guidance in relation to decision-making concerning adults who may lack capacity.

B Capacity and Rights

(I) *Consultation Paper Recommendations*

2.03 In the Consultation Paper on Capacity, the Commission recommended that, in order to ensure that it complies with relevant constitutional and human rights standards, the law on capacity should reflect

¹ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) (hereafter “Consultation Paper on Law and the Elderly”). See further Donnellan “The Law Reform Commission’s Proposals on Law and Older People” and Schweppe “The Law Reform Commission’s Proposals on Legal Capacity of Older People” in O’Dell (ed) *Older People in Modern Ireland: Essays on Law and Policy* (FirstLaw 2006).

² See Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) (hereafter “Consultation Paper on Capacity”) paragraph 2.28 ff.

an emphasis on capacity rather than lack of capacity and should be enabling rather than restrictive in nature, thus ensuring that it complies with relevant constitutional and human rights standards.³

(2) *Discussion*

2.04 The above recommendation reflected a concern by the Commission that the law relating to capacity should reflect current thinking on disability and comply with the requirements of constitutional and human rights law. Submissions received by the Commission concerning capacity issues have emphasised the human and civil rights context. Two intertwined issues are significant in this context. The first relates to societal attitudes, the second to legal protection for the rights of the individual.

2.05 In the Consultation Paper on Capacity, the Commission noted a fundamental shift in societal attitudes documented in disability literature. This is a movement away from benign paternalism in the direction of a social and human rights understanding of disability which emphasises the autonomy and right to self-determination of a person with a disability.⁴ Current thinking now describes disability in terms of a more complex biopsychosocial model which combines aspects of ability and disability.⁵ The biopsychosocial perspective states that “at the heart of disability is a disorder of health, but the impact of the illness is manifested and expressed in a psychosocial and social milieu which mediates the influence of the disease.”⁶

2.06 The contemporary understanding of disability is based on a core understanding of dignity and autonomy which arise from equal sharing of the human condition. This sociological perspective is buttressed by protection in the law. Indeed, there is an inextricable link between the law on capacity and human rights since if a person is judged to lack legal decision-making capacity, this results in the removal of autonomy.⁷ The intersection between the two is under the spotlight in relation to work on a

³ Consultation Paper on Capacity paragraph 1.47; paragraph 3.19.

⁴ This is reflected in World Health Organisation *International Classification of Functioning, Disability and Health* (Geneva 2001).

⁵ Consultation Paper on Capacity paragraph 1.19 ff.

⁶ O’Neill “Nursing Home Care and Disability in Ireland: A Biopsychosocial Perspective” in O’Dell (ed) *Older People in Modern Ireland: Essays on Law and Social Policy* (FirstLaw 2006) at 133.

⁷ See further Consultation Paper on Capacity paragraph 1.2 ff; Liddy “Older People and the European Convention on Human Rights” in O’Dell (ed) *Older People in Modern Ireland: Essays on Law and Social Policy* (FirstLaw 2006).

United Nations Disability Convention⁸ and lobbying by the European Disability Forum for the adoption of a European disability directive.

2.07 Personal autonomy and dignity have been recognised as falling under the rubric of Article 8 of the European Convention on Human Rights⁹ which concerns respect for private and family life. A person who lacks legal capacity has personal constitutional rights and is entitled to have these rights upheld and protected from unjust attack.¹⁰ As discussed in the Consultation Paper on Capacity, of particular relevance is the right to privacy¹¹ and the right to respect for dignity.¹²

2.08 The equality guarantee under Article 40.1 of the Constitution permits the State in its laws to have regard to differences of capacity¹³ provided that it does not create invidious discrimination.¹⁴ Thus, in the formulation of a legislative scheme dealing with legal capacity, it is appropriate to draw distinctions between persons who lack capacity and persons who possess capacity, provided that the distinctions drawn and the consequences of such distinctions are proportionate.

2.09 The Commission endorses the view that the law in this area should meet the benchmarks provided by constitutional and human rights law by respecting the rights, both of adults with legal capacity, and of those who may lack legal capacity to make a decision with legal consequences. This reflects the fact that “legislators and courts alike have very properly

⁸ See <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm> and the Consultation Paper on Capacity paragraph 1.44.

⁹ Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms* 4 November 1950, E.T.S. No. 005. See further the *European Convention on Human Rights Act 2005*; Consultation Paper on Capacity paragraph 1.34-1.36.

¹⁰ *Re a Ward of Court (No. 2)* [1996] 2 IR 79, 126 per Hamilton CJ.

¹¹ It has been recognised as an unenumerated right under Article 40.3.1° of the Constitution: *Norris v Attorney General* [1984] IR 36; *Kennedy v Ireland* [1987] IR 587; *Bailey v Flood* Supreme Court 14 April 2000; *Foy v An t-Ard Chlaraitheoir* High Court (McKechnie J) 9 July 2002. See further Consultation Paper on Capacity paragraph 1.28 – 1.29.

¹² See the reference to the dignity of the individual in the Preamble to the Constitution and recognition as an unenumerated right under Article 40.3.1° of the Constitution: *Re a Ward of Court (No. 2)* [1996] 2 IR 79, 163 per Denham J; *Foy v An t-Ard Chlaraitheoir* High Court (McKechnie J) 9 July 2002. See further Consultation Paper on Capacity paragraph 130-1.31.

¹³ See *Re Clarke* [1950] IR 235; *Re Keogh* High Court (Finnegan P) 15 October 2002.

¹⁴ *O’B v S* [1972] IR 144; *Brennan v Attorney General* [1983] ILRM 449; *Re Article 26 of the Constitution and the Employment Equality Bill, 1999* [2000] 2 IR 321. See further Consultation Paper on Capacity paragraph 1.32-1.33.

insisted upon proper regard being paid to the rights of a vulnerable person.”¹⁵

2.10 The Commission also maintains its view that the law on capacity should reflect changing perceptions of disability.¹⁶ To this end the law should, where possible, emphasise and promote capacity. Support for this approach can be found in equality legislation,¹⁷ the *Mental Health Act 2001* and the enactment of the *Disability Act 2005*.¹⁸ In addition, when enacted, the *Comhairle (Amendment) Bill 2004* will enable Comhairle to introduce personal advocacy services for persons with disabilities including intellectual disability.¹⁹ This will represent a significant step in assisting such adults to obtain appropriate services.

(3) Report Recommendation

2.11 *The Commission recommends that the law on capacity should promote capacity by having an emphasis which is enabling rather than restrictive in nature and should meet the requirements of constitutional and human rights law.*

C The Need for Capacity and Assisted Decision-Making Legislation

(1) Consultation Paper Recommendations

2.12 In the Consultation Paper on Capacity, the Commission recommended the enactment of capacity legislation.²⁰ This recommendation was made for the following reasons:

- Existing legislative and judicial consideration of capacity matters has been piecemeal rather than systematic and wide-ranging;
- The law on capacity should be clear, transparent and accessible;

¹⁵ *Bailey v Warren* [2006] EWCA Civ 51, paragraph 75 per Hallett LJ.

¹⁶ See eg Disability Legislation Consultation Group *Equal Citizens: Proposals for Core Elements of Disability Legislation* (2003); *A Vision for Change: Report of the Expert Group on Mental Health Policy* (2006).

¹⁷ See O’Cinnéide “Age Discrimination and Irish Equality Law” in O’Dell (ed) *Older People in Modern Ireland: Essays on Law and Policy* (FirstLaw 2006).

¹⁸ This legislation *inter alia* provides persons with disabilities over the age of 18 with a statutory entitlement to an assessment of health and social services needs which is designed to lead to the development of an individual service statement.

¹⁹ *The Citizens Information Board is the proposed new name for Comhairle. See Citizens Information Bill 2006*, currently before the Oireachtas.

²⁰ Consultation Paper on Capacity paragraph 3.12.

- Capacity legislation would permit a coherent uniform legislative understanding of legal capacity to be put in place which would apply in all situations;
- Capacity legislation could seek to achieve an appropriate balance between autonomy and protection by promoting the interests of vulnerable adults;
- Capacity legislation would also be an appropriate vehicle to deal with the consequences of a finding of lack of capacity, in particular through making provision for substitute and assisted decision-making structures of the type envisaged in the Commission’s Consultation Paper on Law and the Elderly.

2.13 In the Consultation Paper on Law and the Elderly, the Commission also recommended a legislative scheme to deal with “adults who may be in need of protection”.²¹ It was envisaged that this would consist of two strands:

- a substitute decision making system which it was proposed to call Guardianship. This would provide for the making of Guardianship Orders for the appointment of a Personal Guardian who would be able to make some of the required substitute decisions in respect of an adult who lacked decision-making capacity;
- an intervention and personal protection system which would provide for specific orders – services orders, intervention orders and adult care orders.²²

For the reasons already referred to in Chapter 1, this Report is focused primarily on the Guardianship system and a mental capacity legal framework.

(2) Discussion

2.14 In making the first recommendation concerning capacity, the Commission set out cogent reasons for the enactment of specialist capacity legislation. The Commission sees no reason to depart from this central recommendation which provides the impetus for a statutory capacity scheme. It is the considered view of the Commission that the enactment of a comprehensive capacity and assisted decision-making scheme would go a long way towards clarifying the rights of vulnerable adults in this area.²³ In

²¹ Consultation Paper on Law and the Elderly paragraph 6.07.

²² Consultation Paper on Law and the Elderly paragraph 6.07. See the discussion in Chapter 1 of this Report as to why it is proposed to provide for Intervention Orders only in the Commission’s legislative scheme in this Report.

²³ It is not proposed to interfere with the law concerning the discrete area of involuntary admissions for psychiatric treatments in the *Mental Health Act 2001*.

particular, it would afford the opportunity to provide a uniform statutory definition of capacity pivoting around the axis of a functional understanding of capacity. The Commission also believes that a transparent framework will allow individuals to make provision for any future loss of capacity they may experience. The Commission's views are reinforced by the fact that support for the enactment of mental capacity legislation in discussions with interested parties and submissions received by the Commission has been overwhelming.

2.15 While the Consultation Paper on Capacity focused on issues relating to legal capacity, the earlier Consultation Paper on Law and the Elderly recommended the establishment of a new substitute decision-making system for adults who lack capacity. Central to this recommendation was the need to replace the outdated and inflexible mechanism of the system of wards of court.²⁴ Submissions received by the Commission indicate strong support from interested parties for the establishment of new assisted decision-making structures. This reflects the fact that all-or-nothing nature of the wards of court regime makes it ill-equipped to deal with contemporary perspectives on capacity, autonomy and welfare.²⁵

2.16 The creation of supervisory structures such as the Office of the Public Guardian (recommended in the Consultation Paper on Law and the Elderly²⁶ and developed later in this Report), will necessitate the adoption of primary legislation. Therefore it is envisaged that a unified capacity and assisted decision-making legislative scheme would greatly assist in creating transparent structures and making related principles of law accessible. Like other legislation in the equality and disability sectors, the normative potential of mental capacity legislation is significant. This provides an opportunity to incorporate protection for rights which reflect best practice under administrative, constitutional and human rights law.

2.17 The Commission is particularly aware of the opportunity the creation of new integrated decision-making structures would give to include a tailor-made body for the assistance of all vulnerable adults including older persons in Irish society.²⁷ The details of the proposed new structures including an independent Office of the Public Guardian are dealt with in detail in later chapters of this Report.

²⁴ See further Consultation Paper on Law and the Elderly Chapter 4 and Consultation Paper on Capacity Chapter 4.

²⁵ See further Consultation Paper on Capacity Chapter 4.

²⁶ Consultation Paper on Law and the Elderly Chapter 6.

²⁷ On the role of the Ombudsman see Feldman "The Ombudsman: Redressing the Balance for Older People" in O'Dell (ed) *Older People in Modern Ireland: Essays on Law and Policy* (First Law 2006).

2.18 Finally, in making the decision to recommend the enactment of mental capacity legislation, the Commission is buoyed by the body of experience available from other jurisdictions which have pursued this route. Such jurisdictions include Scotland,²⁸ England and Wales,²⁹ New Zealand,³⁰ Germany,³¹ Canada³² and Australia.³³

2.19 The Commission also considers that it would be useful to provide in the proposed legislation for formulation of codes of practice to accompany the legislation. Experience in other jurisdictions has shown the utility of codes of practice using accessible language and containing case study examples in order to explain the detailed operation of legislative principles in this area.³⁴ Making provision for the development of statutorily-backed codes of practice enables such codes to be responsive to change. Furthermore, the use of codes to elucidate best practice guidelines concerning the detailed working of mental capacity legislation is consistent with recognition of the proportionality principle of regulation which encourages regulation to be as light as possible and consideration of alternative means of achieving the required aims.³⁵

(3) Report Recommendations

2.20 *The Commission recommends the enactment of specialist mental capacity legislation which will contain provisions concerning the definition of legal capacity, assisted decision-making and will provide for appropriate regulatory mechanisms.*

2.21 *The Commission recommends that the proposed mental capacity legislation will provide for the development of codes of practice concerning the operation of the legislation in practice.*

²⁸ *Adults with Incapacity (Scotland) Act 2000.*

²⁹ *Mental Capacity Act 2005.*

³⁰ *Protection of Personal and Property Rights Act 1988.*

³¹ *Betreuungsgesetz 1990.*

³² See, for example, Ontario's *Substitute Decisions Act 1995*, *Consent to Treatment Act 1995* and *Advocacy Act 1995*.

³³ See, for example, *Guardianship Act 1997* (New South Wales) and *Adult Guardianship Act 2004* (Northwest Territories).

³⁴ See *Adults with Incapacity (Scotland) Act 2000 Code of Practice for Persons Authorised under Intervention Orders and Guardians* SE/2002/65; Department for Constitutional Affairs (UK) *Mental Capacity Act 2005 – Draft Code of Practice for Consultation* (2006).

³⁵ See Government White Paper *Regulating Better* (2004) PRN 1395.

D Choosing an Approach to Capacity

(1) Formulating a ‘Capacity’ Test

(a) Consultation Paper Recommendation

2.22 In the Consultation Paper on Capacity, the Commission recommended that a predominantly functional approach be taken to the issue of legal capacity. This would involve consideration of a person’s capacity in relation to the particular decision to be made at the time it is to be made.³⁶

(b) Discussion

2.23 Finding the appropriate legal test is a crucial first step in any legislative capacity and decision-making scheme. The test of capacity is a threshold issue as important consequences flow from its application. As Arden LJ observed in *Bailey v Warren*:

“Capacity is an important issue because it determines whether an individual will in law have autonomy over decision-making in relation to himself and his affairs. If he does not have capacity, the law proceeds on the basis that he needs to be protected from harm. Accordingly, in determining an issue as to an individual's capacity, the court must bear in mind that a decision that an individual is incapable of managing his affairs has the effect of removing decision-making from him. The decision is not made lightly...”³⁷

(i) The Status Approach

2.24 The status approach to capacity involves making an across-the-board assessment of a person’s capacity.³⁸ It views capacity in all-or-nothing terms and typically involves concluding that a person has no legal capacity based on the presence of a disability rather than on an assessment of their actual decision-making capability. In Ireland the status approach is evident in the Wards of Court system which involves making a broad assessment of general legal capacity. A status approach was rejected in *Re C (Adult: Refusal of Medical Treatment)*³⁹ where the fact that a patient had been diagnosed with paranoid schizophrenia and had grandiose delusions that he was a doctor was not determinative of whether he had capacity to

³⁶ Consultation Paper on Capacity paragraph 2.40.

³⁷ *Bailey v Warren* [2006] EWCA Civ 51, paragraph 105 per Arden LJ.

³⁸ See further Consultation Paper on Capacity paragraph 2.04 ff.

³⁹ [1994] 1 All ER 819.

decline to consent to the amputation of a gangrenous limb. Rather, the court's test was whether the man understood the nature, purpose and effects of the proposed amputation.

2.25 At the most fundamental level, the Commission does not favour the status approach to capacity because, rather than being capacity and autonomy-building in nature, this approach to assessing capacity is unnecessarily disabling in effect. It does not take account of adults whose capacity fluctuates, such as persons who experience episodic mental illness. Operating at a macro level, the status approach does not take a micro view of the capacity to make decisions in a particular decision-making sphere. Furthermore, the status approach is often associated with a once-off capacity assessment with no built-in review mechanism.⁴⁰ Many of the submissions received by the Commission indicated a dissatisfaction with the unobtrusive approach to capacity presented in the existing wards of court regime operating under the *Lunacy Regulation (Ireland) Act 1871*.

(ii) The Outcome Approach

2.26 The outcome approach to capacity involves making a decision on a person's capacity based on an assessment of the projected outcome of their preferred decision-making choice.⁴¹ This is objectionable because its subjective basis tends to involve the projection of the reviewer's subjective values onto the decision of the subject. For example, in the area of healthcare decisions, a 'doctor knows best' mentality may lead a doctor to label a person as lacking capacity if they express an unconventional choice as to their treatment. The Commission recognises that the likely outcome of a person's choice may provide a guide as to their wider understanding of the decision. However, the Commission does not regard the outcome approach as providing a satisfactory stand-alone test of decision-making capacity.⁴² Failure to make what are perceived as prudent decisions should not of itself lead to an assessment that a person lacks decision-making capacity. As Hallett LJ pointed out in *Bailey v Warren*:

“[H]owever much judges may wish to protect an individual from the ill advised consequences of his or her own actions, courts should tread very carefully and only interfere with an individual's rights when absolutely necessary.”⁴³

⁴⁰ For criticism of the lack of automatic review mechanisms in relation to wardship see Consultation Paper on Capacity paragraph 4.25 ff.

⁴¹ See further Consultation Paper on Capacity paragraph 2.11 ff.

⁴² This is supported by the decision of the Court of Appeal in the leading English case on legal capacity, *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162. See also *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819.

⁴³ *Bailey v Warren* [2006] EWCA Civ 51 at paragraph 76.

Therefore the mere fact that a person may display a lack of wisdom or gullibility does not of itself demonstrate an inability to manage his or her own affairs.⁴⁴ The Commission endorses the judicial sentiment that the matter of concern is:

“the quality of the decision-making and not the wisdom of a decision. A rational individual has in general the right to make an irrational decision about himself or his affairs. So if an individual was capable in law of making a decision, it will not be set aside because it was unwise or because its outcome is materially adverse to him.”⁴⁵

Moreover, as Letts points out, “people who have mental disabilities which could affect their decision-making capacity should not be expected to make ‘better’ or ‘wiser’ decisions than anyone else.”⁴⁶

(iii) The Functional Approach

2.27 The functional approach to capacity involves an issue-specific and time-specific assessment of a person’s decision-making ability. It is related to ability to make a particular decision at the time it is to be made. This is in sharp contrast to the all-or-nothing, one-off nature of a status approach to capacity. A person may be able to decide that they do not want to live with a particular relative, but they may not understand a hire-purchase contract. A functional approach facilitates proportionate intervention and enables the maximisation of autonomy.

2.28 The functional approach best accommodates the reality that decision-making capacity is a continuum rather than an endpoint which can be neatly characterised as present or absent. This approach has been approved of by interested parties who expressed their views to the Commission. It is in line with the social model of disability and with the legal presumption of capacity.⁴⁷ Furthermore, this understanding of capacity reflects the principle of maximum preservation of capacity in the Council of

⁴⁴ *Morley v Hunt & Co (a firm)* [2005] All ER (D) 41 (Jan).

⁴⁵ *Bailey v Warren* [2006] EWCA Civ 51 at paragraph 118 per Arden LJ. See also paragraph 2.61 ff below.

⁴⁶ Letts “Mental Capacity Act 2005: The Statutory Principles and Best Interests Test” (2005) *Journal of Mental Health Law* 150, 154.

⁴⁷ See *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162; Consultation Paper on Capacity at paragraph 2.28-2.33.

Europe *Recommendation on Principles Concerning the Legal Protection of Vulnerable Adults*.⁴⁸

2.29 While wholeheartedly endorsing the functional approach, the Commission is conscious of the need to reflect on how such an approach would work in practice. Further consideration is given to this in later parts of this chapter dealing with the assessment of capacity and guiding principles for decision-making in relation to adults who may lack capacity.

(c) **Report Recommendation**

2.30 *The Commission recommends a functional approach whereby an adult's legal capacity is assessed in relation to the particular decision to be made, at the time it is to be made.*

(2) **Terminology**

(a) **Consultation Paper Recommendations**

In the Consultation Paper on Capacity, the Commission recommended that the proposed capacity legislation should use appropriate terminology to refer to persons who lack legal capacity.⁴⁹ In particular, the Commission regarded the use of phrases such as 'idiot', 'lunatic' and 'person of unsound mind' as out of step with the contemporary understanding of disability and recommended that they should not form part of any reforming legislation.⁵⁰

(b) **Discussion**

2.31 Submissions received by the Commission highlighted the damage done by inappropriate labels such as "of unsound mind" and "lunacy" in the *Lunacy Regulation (Ireland) Act 1871*.⁵¹ The enactment of mental capacity legislation would facilitate the swift replacement of outdated terminology and concepts, particularly evident in the Wards of Court system, which reflect the modern understanding of disability and which place the emphasis on recognising and promoting individual capacity levels. This will be aided by the use of positive language which promotes the recognition of capacity. The Commission is also of the view that the enactment of mental capacity legislation would provide an important opportunity to review existing legislation and where appropriate to amend terminology used in relation to persons who lack capacity.

⁴⁸ Council of Europe Committee of Ministers *Recommendation No. R (99) on Principles Concerning the Legal Protection of Incapable Adults* (23 February 1999). See Consultation Paper on Capacity paragraph 1.37 ff.

⁴⁹ Consultation Paper on Capacity paragraph 3.19.

⁵⁰ Consultation Paper on Capacity paragraph 4.51.

⁵¹ See *FD v Registrar of Wards of Court* [2004] 3 IR 95.

(c) Report Recommendation

2.32 *The Commission recommends that the proposed mental capacity legislation is framed in terminology appropriate to a functional understanding of capacity which recognises the dignity of all human beings.*

2.33 *The Commission recommends that where inappropriate terminology is used in existing legislation in relation to persons who lack capacity, such as in the Lunacy Regulation (Ireland) Act 1871, this should be repealed and replaced.*

(3) A Statutory Statement of Presumed Capacity

(a) Consultation Paper Recommendation

2.34 In the Consultation Paper on Capacity, the Commission recommended that the proposed capacity legislation should set out a rebuttable presumption of capacity to the effect that every adult is presumed, until the contrary is demonstrated, to be capable of making decisions affecting them.⁵²

(b) Discussion

2.35 A rebuttable presumption of capacity operates at common law but it received little judicial consideration before the decision of the English Court of Appeal in *Masterman-Lister v Brutton & Co.*⁵³ In that case the Court clarified the application of the common law rule of evidence whereby the law presumes that a person is competent to manage their own affairs. The corollary of this is that the burden lies on those who seek to assert that an individual is not competent to manage their own affairs. Since then a number of judicial decisions have applied *Masterman-Lister*.⁵⁴

2.36 A number of other jurisdictions who have enacted guardianship legislation have set out a presumption of capacity or “presumption of capability”. For example, in British Columbia, Canada, section 3 of the *Adult Guardianship Act 1996* states:

“(1) Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about personal care, health

⁵² Consultation Paper on Capacity paragraph 3.25. See also Consultation Paper on Law and the Elderly at paragraph 1.54.

⁵³ [2003] 3 All ER 162; Consultation Paper on Capacity at 2.28.

⁵⁴ See *eg Dixon v Were* [2004] EWHC 2273; *A v Archbishop of Birmingham* [2005] EWHC 1361 (QB); *E (by her litigation friend the Official Solicitor) v Channel Four* [2005] 2 FLR 913; *Mitchell v Alasia* [2005] EWHC 11 (QB); *Sheffield City Council v E* [2005] FLR 965; *Morley v Hunt & Co (a firm)* [2005] All ER (D) 41 (Jan); *Bailey v Warren* [2006] EWCA Civ 51; *Folks v Faizey* [2006] EWCA Civ 381; *Ahmad v Cleasby* [2006] All ER (D) 78 (Mar).

care, legal matters or about the adult's financial affairs, business or assets.

(2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of making decisions about anything referred to in subsection (1)."

2.37 Incorporating the common law presumption into a statutory statement of presumed capacity would promote legal certainty. In addition, a statutory statement of presumed capacity would have the advantage of dovetailing into the human rights disability model by embracing the concept that unless there is evidence to the contrary, an adult is to be taken as capable of autonomous decision-making. In line with the functional approach to capacity, presumed capacity ensures that any incursion into personal autonomy is minimum and proportionate. The Commission believes that the inclusion of a legislative rebuttable presumption couched in positive terms would reflect the enabling ethos which capacity legislation should embrace. This would also ensure the replacement of any doubtful remnants of an older era such as the objectionable concept that a "deaf mute" is presumed to lack capacity.

2.38 The Commission therefore recommends that the proposed capacity and guardianship legislation should include a statement of presumed capacity. As is currently the case at common law, the evidential presumption would be rebuttable on the civil standard of proof on the balance of probabilities. This means that in order to displace the presumption of capacity, a person making the case that a person lacks capacity must show that it is more likely that the individual lacks capacity than that he or she has capacity in relation to the particular matter at issue.

(c) Report Recommendation

2.39 *The Commission recommends that the proposed capacity legislation should set out a rebuttable presumption of capacity to the effect that, unless the contrary is demonstrated, every adult is presumed to be capable of making a decision affecting them.*

(4) A Statutory Definition of Capacity

(a) Key Aspects of a Functional Definition

(i) Consultation Paper Recommendations

2.40 In the Consultation Paper on Capacity, the Commission recommended that the proposed capacity legislation should contain a statutory definition of capacity.⁵⁵ This would encapsulate a functional understanding of capacity focusing on an adult's cognitive ability to

⁵⁵ Consultation Paper on Capacity paragraph 3.29.

understand the nature and consequences of a decision in the context of available choices.⁵⁶ In line with this focus on cognitive decision-making ability, the Commission recommended that an adult should not be regarded as unable to make a decision merely because they make a decision which would ordinarily be regarded as imprudent.⁵⁷

(ii) Discussion

2.41 The Commission is in favour of the inclusion in mental capacity legislation of a positive definition of ‘capacity’ as opposed to ‘incapacity’. In choosing a statutory definition of capacity, the Commission is against the linking of lack of capacity with causative terminology such as ‘by reason of mental disorder’ which appears in legislation in other jurisdictions.⁵⁸

2.42 A core aspect of the proposed mental capacity legislation will be making statutory provision for a definition of capacity which can be applied to a range of different settings. It is envisaged that a legislative definition of capacity would build on common law principles and enshrine a functional understanding of capacity. It should be stressed, however, that the application of a legislative definition of capacity will not erode the relevance of pre-existing common law which is of assistance in elucidating legal understanding of capacity issues. The courts have evolved well-developed principles in a number of areas. These will continue to be relevant in any application of the statutory capacity test which, in many respects, is designed to build on existing principles.

2.43 It is proposed that the statutory definition of capacity will focus essentially on functional cognitive ability. Cognitive ability concerns the ability to arrive at a decision by weighing relevant information in the balance. Relevant information would include the likely consequences of making available choices (including the likely consequences of failing to make a decision). Cognitive ability requires a level of understanding but in this instance would not rule out understanding which results from the assistance of another, for example, where a third party explains the issue in appropriate language and/or through the use of pictorial aids.⁵⁹ This is built

⁵⁶ Consultation Paper on Capacity paragraph 3.44.

⁵⁷ Consultation Paper on Capacity paragraph 3.46.

⁵⁸ See, for example, in the United Kingdom, section 1(6) of the *Adults with Incapacity (Scotland) Act 2000* and section 2(1) of the English *Mental Capacity Act 2005*. For a contrary approach see Queensland, Australia’s *Guardianship and Administration Act 2000*.

⁵⁹ It is implicit in this that the third party’s support and assistance does not amount to undue influence in relation to the choice to be made. See further Consultation Paper on Law and the Elderly paragraph 5.35.

into the legislative understanding of capacity in England and Wales where section 3(2) of the *Mental Capacity Act 2005* provides:

“A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).”⁶⁰

Key to this approach is that it does not prejudge the issue of whether a person with a disability lacks capacity nor does it require a causative link with a mental disability.⁶¹ Furthermore, the fact that a person can only retain information for a short time should not of itself be a bar to them having capacity to make a particular decision.⁶² The Commission sees no reason to depart from its preference for this flexible basis for defining capacity which will lend itself to a common-sense approach in individual application.⁶³

2.44 Having regard to the earlier discussion in relation to the outcome approach capacity,⁶⁴ the Commission reiterates its position in the Consultation Paper on Capacity that “adults are free to make what others regard as poor or eccentric decisions provided that they understand the nature of the decision they are making.”⁶⁵

(iii) Report Recommendation

2.45 *The Commission recommends that capacity will be understood in terms of an adult’s cognitive ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made.*

2.46 *The Commission recommends that a person will not be regarded as lacking capacity if they have the ability to make a decision with the assistance of simple explanations or visual aids.*

⁶⁰ For a similar approach see Queensland, Australia’s *Guardianship and Administration Act 2000* and Ontario, Canada’s *Substitute Decisions Act 1992*.

⁶¹ This is in line with the position in jurisdictions such as New Zealand (under the *Protection of Personal and Property Rights Act 1988*) but a causative mental disability link is required in other jurisdictions: see *eg* the English *Mental Capacity Act 2005* and the *Adults with Incapacity (Scotland) Act 2000*.

⁶² See Section 3(3) and (4) of the English *Mental Capacity Act 2005*.

⁶³ The English Parliament inserted an express provision in section 2(3) of the *Mental Capacity Act 2005* to the effect that a lack of capacity cannot be established merely by reference to a person’s age, physical appearance, behaviour or condition. This is known as the principle of equal consideration.

⁶⁴ See paragraph 2.64 below.

⁶⁵ Consultation Paper on Capacity paragraph 3.45.

2.47 *The Commission recommends that a person will not be regarded as lacking capacity simply on the basis of making a decision which appears unwise.*

(b) Communicative Ability

(i) Consultation Paper Recommendation

2.48 The Commission recommended in the Consultation Paper on Capacity that a person would be regarded as lacking capacity if they are unable to communicate their choices by any means where communication to a third party is required to implement the decision.⁶⁶

(ii) Discussion

2.49 In many cases where an adult's communication abilities are limited, they may have developed forms of indicating their wishes to family members in everyday situations.⁶⁷ However, the Commission recognises that, in a very limited number of circumstances, an adult may be unable to communicate their wishes to third parties. A person in a coma is at one end of the spectrum. At the other end is a person who has the ability to make decisions but not the ability to implement them because they have no means of making their wishes understood to others in circumstances where third party assistance is required to carry out the decision. Thus under the English *Mental Capacity Act 2005*, a person is regarded as unable to make a decision for himself if he is "unable to communicate his decision (whether by talking, using sign language or any other means)".⁶⁸ The *Adults with Incapacity (Scotland) Act 2000* accommodates a "lack or deficiency in a faculty of communication" which cannot "be made good by human or mechanical aid".⁶⁹

2.50 The Commission is of opinion that, in addition to decision-making ability, the ability to communicate effectively by some means needs to be taken into account in statutorily defining legal capacity. This is on the basis that an inability to communicate choices may have the unavoidable consequence of removing decision-making autonomy.

(iii) Report Recommendation

2.51 *The Commission recommends that a person will lack capacity if they are unable to communicate their choices by any means where communication to a third party is required to implement the decision.*

⁶⁶ Consultation Paper on Capacity paragraph 3.49.

⁶⁷ See *eg Re AK (Medical Treatment: Consent)* [2001] 1 FLR 129.

⁶⁸ Section 3(1)(d) of the English *Mental Capacity Act 2005*.

⁶⁹ Section 1(6)(e) of the *Adults with Incapacity (Scotland) Act 2000*.

E Assessment

2.52 The Commission recognises the significance of the assessment of capacity to the contemplated capacity and assisted decision regime. However, in order to allow for an appropriate degree of flexibility to make the capacity and assisted decision-making regime workable in practice, the recommendations in this area are not highly prescriptive. As a starting point, any such assessment would need to be informed by the legal understanding of capacity contained in the proposed legislation. Where an issue of legal capacity is concerned *eg* the capacity to make a healthcare decision, as opposed to everyday decision-making ability such as what to eat, a legal assessment is required and where a court or board is required to make a decision on capacity it will form its own opinion independently of any medical or professional evidence provided.

2.53 The Commission is cognisant of the fact that when mental capacity legislation is enacted, there will be scope for the development of guidance from the Office of the Public Guardian and relevant professional bodies.⁷⁰ Accordingly, what follows is a preliminary discussion of some of the issues which will arise for consideration on a day to day basis in relation to the assessment of capacity for the purposes of the proposed mental capacity legislation.

(1) Formal and Informal Assessment

2.54 The question of who is to carry out an assessment of capacity is an important one. On a day to day basis it will be carers and family members who will make their own assessment of capacity. In other circumstances a professional assessment of capacity may be appropriate. A general rule of thumb which may usefully be adopted is ‘the more serious the decision, the more formal the assessment’. This is the approach taken in the Draft Code of Practice to accompany the English *Mental Capacity Act 2005*:

“The majority of decisions made on behalf of people lacking capacity will be day-to-day decisions and as such, those caring for them on a daily basis will be able to assess their capacity to make these decisions. However, certain more complex or major decisions may require the involvement of different people in order to assess capacity. In many cases all that may be needed is an opinion from the person’s GP or family doctor. Where the person has been diagnosed with a particular condition or disorder, it may be appropriate to seek an opinion from a specialist, such as a

⁷⁰ See *eg* in Scotland the good practice guidance produced by the Highland Council and Highland Health Board *Assessment of Capacity* (2002). Available at <http://www.scotland.gov.uk/Topics/Justice/Civil/16360/assesscapacity>.

consultant psychiatrist or psychologist who has extensive clinical experience of the disorder and is familiar with caring for patients with that condition. In other cases, a multi-disciplinary approach is best, using the skills and expertise of different professionals.”⁷¹

2.55 The Draft Code of Practice states that the situations in which a formal assessment of capacity should be carried out include:

“Where a doctor or other expert witness certifies that in their professional opinion a person who has signed a legal document (such as a will) has capacity to do so but whose capacity could be challenged;

To establish that particular person who is or is likely to be involved in litigation requires the assistance of the Official Solicitor or other litigation friend;

Where the Court of Protection is required to make a decision as to whether a person has or lacks capacity;

Where the court is required to make a decision as to a person’s capacity;

Where there may be legal consequences of a finding of capacity – for example in a settlement of damages following a claim for personal injury;

Where legal proceedings are contemplated (for example, divorce proceedings) and there is doubt about the person’s capacity to instruct a solicitor or take part in the proceedings.”⁷²

2.56 The Draft Code goes on to indicate some other situations which may indicate the need for a judgment to be made on the need for professional involvement in an assessment:

“The gravity of the decision or its consequences;

Where the person concerned disputes a finding of a lack of capacity;

Where there is disagreement between family members, carers and/or professionals as to the person’s capacity;

⁷¹ Department for Constitutional Affairs (UK) *Mental Capacity Act 2005 – Draft Code of Practice for Consultation* (2006) at paragraph 3.51.

⁷² Department for Constitutional Affairs (UK) *Mental Capacity Act 2005 – Draft Code of Practice for Consultation* (2006) at paragraph 3.54.

Where the person concerned is expressing different views to different people, perhaps through trying to please each one or tell them what s/he thinks they want to hear;

Where the person's capacity to make a particular decision may be subject to challenge, either at the time the decision is made or in the future – for example a person's testamentary capacity may be challenged after his/her death by someone seeking to contest the will;

Where the person concerned is repeatedly making decisions that put him/her at risk or could result in preventable suffering or damage.”

The Commission believes that the formulation of these type of flexible guidelines in relation to when a professional capacity assessment may be required is extremely useful for those seeking to implement the spirit of capacity legislation. Nevertheless, in every case a judgment call will need to be made. In the Commission's opinion, a non-exhaustive list of the type of situations in which it may be appropriate for a formal, professional assessment of capacity to be carried out would include:

- Where the consequences of the decision are serious or of lasting significance for the adult concerned;
- Where the adult concerned disputes a finding of a lack of capacity;
- Where there is disagreement between family members, carers and/or professionals as to the person's capacity;
- Where there are concerns as to an adult's testamentary capacity;
- Where there are concerns as to an adult's capacity to execute an enduring power of attorney;
- Where there are concerns as to an adult's capacity to marry;
- Where there are concerns as to an adult's capacity to institute and conduct legal proceedings.

2.57 Guidance of this nature in relation to capacity assessment would best be accommodated in the context of a code of practice developed by the proposed Office of the Public Guardian.⁷³ This would reflect the need to exercise judgement in individual cases as to how best to proceed. The proposed Guardianship Board⁷⁴ would have a role to play in giving directions on these matters and, where appropriate, giving its assessment.

⁷³ See generally Chapter 7 below.

⁷⁴ See generally Chapter 6 below.

2.58 *The Commission recommends that the codes of practice to be developed by the Office of the Public Guardian will give guidance on matters relating to the assessment of capacity. The type of situations in which it may be appropriate for a professional assessment of capacity be carried would include:*

- *Where the consequences of the decision to be made are serious or of lasting significance for the adult concerned;*
- *Where the adult concerned disputes a finding of a lack of capacity;*
- *Where there is disagreement between family members, carers and/or professionals as to the person's capacity;*
- *Where there are concerns as to an adult's testamentary capacity;*
- *Where there are concerns as to an adult's capacity to execute an enduring power of attorney;*
- *Where there are concerns as to an adult's capacity to marry;*
- *Where there are concerns as to an adult's capacity to institute and conduct legal proceedings.*

2.59 In relation to professionals such as legal professionals, medical practitioners, nurses, dentists and social workers, the Commission envisages that professional codes of practice may be developed in association with the proposed Office of the Public Guardian to ensure a congruence of approach.⁷⁵ The development of professional guidance is occurring in the United Kingdom in relation to the *Adults with Incapacity (Scotland) Act 2000* and the *Mental Capacity Act 2005*. For example, the British Psychological Society is developing Guidelines on Assessing Capacity.⁷⁶

2.60 *The Commission recommends that guidelines on matters relating to the assessment of capacity be developed by professional bodies in association with the proposed Office of the Public Guardian.*

(2) *Poor Decision-making and Capacity*

2.61 The Commission believes that it is necessary to acknowledge that in some situations a pattern of decision-making may give rise to concerns that an individual is at risk of serious neglect or harm or open to exploitation and/or undue influence.⁷⁷ This give rises to difficult questions where the

⁷⁵ See Capacity Assessment Office, Ontario Ministry of the Attorney General *Guidelines for Conducting Assessments of Capacity* (2005).

⁷⁶ See also British Medical Association and Law Society *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (2nd ed) (London BMJ Books 2004).

⁷⁷ The Commission notes that the implementation of a national elder abuse strategy is currently underway. See the discussion in paragraph 1.53 above.

adult appears to have decision-making capacity. This is the border where capacity and vulnerability meet and it can be difficult to find the appropriate balance between what has aptly been described as “empowerment, autonomy and capacity, on the one hand, and vulnerability and the need for benign paternalistic protection, on the other.”⁷⁸ There are some indications that right to respect for private life under Article 8 of the European Convention on Human Rights is not unlimited where there is a risk of harm, even when the risk of such harm is voluntarily assumed.⁷⁹

2.62 Submissions received by the Commission highlighted the difficulty for public health nurses and other community workers in knowing when it is appropriate to intervene. A measure of discretion needs to be afforded to those persons who have to make a judgement in a difficult situation. As one commentator remarks in relation to dealing with persons who have capacity but are vulnerable, “[p]assing laws does not necessarily resolve social problems.”⁸⁰ In the UK, these issues have been dealt with in an interdisciplinary fashion.⁸¹ Consequently, the Commission’s view is that as each situation is different it is not appropriate to formulate any rigid legislative guidelines in this area. The development of professional guidelines would be of assistance in this respect.

2.63 *The Commission recommends that professional bodies formulate guidelines in relation to intervention where an adult is at risk of serious neglect, harm or exploitation.*

(3) A Common Sense Approach

2.64 An assessment of capacity will seek to determine whether a person meets the proposed statutory definition of issue-specific, time-specific capacity,⁸² having regard to the presumption of capacity.⁸³ The Commission would like to emphasise the need for a common sense approach to the assessment of capacity given that it is inappropriate for legislation to

⁷⁸ Lush “Capacity” in STEP (Radford, ed) *Finance and Law for the Older Client* (LexisNexis Tolley loose-leaf) at D1.3.

⁷⁹ See *Laskey v United Kingdom* (1997) 24 EHRR 39; Williams “When I’m sixty four: Lawyers, Law and ‘Old Age’” (2003) 34 *Cambrian Law Review* 103, 117.

⁸⁰ Williams “When I’m sixty four: Lawyers, Law and ‘Old Age’” (2003) 34 *Cambrian Law Review* 103, 117. Nonetheless, the Commission notes the potential impact of the implementation of the 2005 Unfair Commercial Practices (UCP) Directive in this respect: see the discussion in paragraphs 1.28 ff, above.

⁸¹ See Social Services Inspectorate for Wales *In Safe Hands* (2000) and Department of Health and Home Office (UK) *No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse* (2000).

⁸² See paragraph 2.45 above.

⁸³ See paragraph 2.39 above.

spell out detailed rules on how this should be carried out. This was recognised by the Court of Appeal in *Masterman-Lister v Brutton & Co*⁸⁴ where Kennedy LJ remarked:

“Capacity must be approached in a common sense way ... bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to intervene.”⁸⁵

2.65 Common sense is of particular importance given the potential complexity of the task. In a recent discussion paper published by the department of the Attorney General of New South Wales, Australia it was incisively remarked that:

“Capacity is not something that can always be accurately quantified. It is a construct that is based on the complexities of a person’s abilities as they interact with their environment. It is also subject to fluctuation. A person’s overall capacity to make decisions can be enhanced by personal strengths, good service provision, information and support. Personal limitations, poor service provision and lack of support can limit it.”⁸⁶

However, it is important that an assessor does not make a superficial assessment of capacity based on crude assumptions in relation to an individual’s intelligence. In the Consultation Paper on Law and the Elderly, the Commission observed:

“There is no one single criterion to determine whether or not a person has legal capacity. It is recognised internationally that there are problems in devising tests of capacity that are not simply intelligence tests There is a danger of regarding as lack of legal capacity what is in effect the result of educational or social neglect; the impairment may be with the family or the carer or the social services personnel who are too impatient or unwilling or preoccupied to listen and interpret correctly.”⁸⁷

Indeed, it is important that a capacity assessment is approached in an objective manner and does not rely on making a judgement based on personal appearance. This accords with what has been described as ‘the

⁸⁴ [2003] 3 All ER 162.

⁸⁵ [2003] 3 All ER 162, at paragraph 27, applying *White v Fell Boreham* J 12 November 1987.

⁸⁶ Attorney General’s Department of New South Wales, Australia *Are the rights of people whose capacity is in question being adequately promoted and protected?* Discussion Paper (2006) at 3.

⁸⁷ Consultation Paper on Law and the Elderly paragraph 1.34.

principle of equal consideration’.⁸⁸ A lay or professional assessor will need to be able to back up their assessment that a person lacks capacity based on reasonable, objective indicators.

2.66 A literal understanding of the functional approach would require a capacity assessment to be undertaken every time a person makes a decision with legal consequences. However, the Commission is of the opinion that in any given situation, common sense should prevail. This is recognised in the draft Code of Practice to accompany the English *Mental Capacity Act 2005* which states:

“Although as a general rule capacity should be assessed in relation to a particular decision or a specific issue, there may be circumstances where a person has an ongoing condition, which affects his/her capacity to make a type of decision or a range of inter-related or sequential decisions. One decision on its own may make sense but the combination of decisions may indicate that a person may lack capacity.”⁸⁹

2.67 The issue received further attention in the Court of Appeal’s decision in *Bailey v Warren*.⁹⁰ Arden LJ stated that where a transaction is self-contained and clearly separate from other matters, it is easy to determine the issue to which capacity should be related *eg* the making of a gift or the making of a will. She went on to say that it may not be as easy to determine the issue to which capacity should be related “where the transaction is multi-faceted, and a choice exists as to whether to break the transaction down into its component parts ... or to treat the transaction as a single indivisible whole.”⁹¹ In such circumstances Arden LJ’s view was that the correct approach was to ask “as a matter of common sense” whether the individual steps should be regarded as forming part of a larger sequence of events which should be seen as one, or whether they were distinct, self-contained steps.⁹² This is a sensible approach which could readily be incorporated into relevant codes of practice in this area.

2.68 A related but distinct issue concerns the utility of continuing to assess an adult’s capacity in a particular sphere where capacity has been lost and the chances of recovering capacity are very remote. In the Consultation

⁸⁸ Department for Constitutional Affairs (UK) *Mental Capacity Act 2005 – Draft Code of Practice for Consultation* (2006) at paragraph 4.12 ff.

⁸⁹ Department for Constitutional Affairs (UK) *Mental Capacity Act 2005 – Draft Code of Practice for Consultation* (2006) at paragraph 3.25.

⁹⁰ [2006] EWCA Civ 51.

⁹¹ [2006] EWCA Civ 51 at paragraph 122.

⁹² [2006] EWCA Civ 51 at paragraph 123.

Paper on Capacity, within the context of recommending the adoption of a predominantly functional approach to capacity, the Commission recognised that in exceptional circumstances where an adult's lack of capacity is profound and likely to endure, a new functional determination may be unnecessary in every situation in which a decision has to be made.⁹³

2.69 Apart from being concerned to ensure that individual decision-making capacity is recognised, the Commission also recognises that in certain situations a person is unlikely to recover lost capacity.⁹⁴ Therefore the Commission believes that to make this approach workable in practice, some leeway is needed. In some individual situations it will be necessary to recognise that where an adult profoundly lacks or has lost decision-making capacity in a particular sphere, or generally, and is unlikely to regain it, the need to carry out a capacity assessment every time a decision requires to be made may be reduced. The Commission does not believe that it is necessary to enshrine this in legislation but rather it will be a matter of degree for consideration in each individual case. This will not rule out the requirement to monitor and periodically review an individual's capacity.

2.70 In summary, the Commission believes that a common sense approach is apposite when applying the proposed legislative rules on capacity and assisted decision-making.

2.71 *The Commission recommends that a common sense approach be taken to assessing capacity including determining when a separate functional assessment of capacity is merited.*

F General Principles for Assisting and Substitute Decision-Makers

(I) Acts Done to Assist Adults Considered to Lack Capacity

2.72 Carers often assist a person who lacks capacity with matters such as dressing, washing, and paying bills where the individual lacks the capacity to take care of these matters unaided. This is commendable and undoubtedly necessary. However, the law presents a difficulty in this area which requires resolution in order to facilitate such activities. The problem arises because the law provides that it is unlawful to touch a person or to interfere with a person's property if they have not consented to it or do not have the capacity to consent.⁹⁵ Therefore it is necessary to provide a

⁹³ Consultation Paper on Capacity paragraph 2.39-2.40.

⁹⁴ See *Simpson v Simpson* [1989] Fam Law 20, 21.

⁹⁵ A touching without consent may amount to the tort of trespass to the person or may constitute a criminal assault offence under sections 2 to 4 of the *Non-Fatal Offences Against the Person Act 1997* and may breach the constitutional right to bodily integrity: see further Consultation Paper on Capacity at paragraph 7.08 ff.

statutory mechanism which will allow such acts of care to be carried out on behalf of an adult who lacks capacity and exclude the possibility of civil or criminal liability.

2.73 The Law Commission of England and Wales has considered this issue and concluded that there should remain scope for caring actions to take place, and for some informal decision-making “without certificates, documentation or judicial determinations”.⁹⁶ The Law Commission further concluded that it was not helpful to identify any one person as the holder of this authority. Consequently, a number of people may have the power to act on any one day. The Law Commission’s recommendations have been incorporated into the England and Wales *Mental Capacity Act 2005*.

2.74 The Commission is of the view that much assistance can be gleaned from section 5 of the English *Mental Capacity Act 2005* which deals with this issue by analogy with the common law doctrine of necessity.⁹⁷ Section 5 of 2005 Act makes provision for carers (both family members and paid carers) and health and social care professionals, amongst others, to receive statutory protection from liability for certain acts performed in connection with the personal care, healthcare or treatment of a person lacking capacity to consent to those acts.

2.75 Section 5 provides that reasonable steps must be taken to establish whether the person lacks capacity in relation to the matter in question and when doing the act, the actor must reasonably believe that the person lacks capacity in relation to the matter, and that it will be in the person’s best interests for the act to be done. Hence, section 5 does not provide carers or professionals with any specific powers or authority to make decisions on behalf of people lacking capacity to make their own decisions. Rather, section 5 provides them with protection from liability if their actions were to be challenged, so long as they can show that the action taken was in the best interests of the person lacking capacity and carried out in accordance with the principles set out in section 1 of the Act. It is worth noting that section 5 offers no protection in cases of negligence. In fact, section 5(3) clarifies that protection from liability does not extend to situations where the person taking the action has acted negligently, whether in carrying out the act or by failing to act in breach of duty.

2.76 Section 5 of the *Mental Capacity Act 2005* ensures that family and professional carers and other professionals are protected from civil and criminal liability in respect of acts concerned with the personal care, healthcare or treatment of a person who lacks capacity to give the

⁹⁶ See Law Commission Report No 231 *Mental Incapacity* at paragraph 4.1.

⁹⁷ On the doctrine of necessity see further Consultation Paper on Capacity paragraph 7.38 - 7.51; 7.93 - 7.95.

appropriate consent. A key concept behind the provision is what is often referred to as “general authority”.⁹⁸ The concept of general authority inherent in the provision enables carers to carry out acts of care and treatment without consent and without the need to obtain any formal approvals or decision-making authority prior to doing so. Two preconditions to the application of the section are:

- before doing the act “reasonable steps” must have been taken to ascertain that the person does not have capacity in relation to action; and
- when doing the act, the actor must reasonably believe that the person lacks capacity and that what is being done is in the best interests of the person lacking capacity (in accordance with the statutory guiding principles).

2.77 The *Mental Capacity Act 2005-Draft Code of Practice* provides illustrative examples of the types of acts which may attract protection from liability under section 5 of the 2005 Act. As a general rule, a ‘section 5 act’ is one where consent would normally be required from a person of full capacity for the particular act to be carried out.⁹⁹ Such acts might include acts of physical assistance with washing, dressing or attending to personal hygiene; help with eating and drinking; help with mobility; doing the shopping or buying essential goods; and acts performed in relation to household services or community care services. Section 5 of the Act also covers acts in connection with healthcare and treatment which may include diagnostic examinations and tests; medical and dental treatment provided by health professionals; admission to hospital for assessment or treatment; nursing care; any other necessary medical procedures or therapies; emergency procedures; and significant medical treatment such as major surgery or some forms of life-sustaining treatment.

2.78 Reasonable steps must be taken to determine that the individual cannot make a decision on the choice because if a person does have the requisite decision-making capacity then section 5 will not apply and the person’s consent would be required in relation to any assistance given. The use of the word “reasonable” implies that the skill of an expert on capacity is not required.¹⁰⁰ The effect of relying on the section is to remove liability which would arise by virtue of the fact that the person in fact had capacity and did not consent to the act.

⁹⁸ See Consultation Paper on Capacity paragraph 7.70.

⁹⁹ See Department for Constitutional Affairs *Mental Capacity Act 2005-Draft Code of Practice for Consultation* (2006) at paragraph 5.8.

¹⁰⁰ See further Department for Constitutional Affairs *Mental Capacity Act 2005 – Draft Code of Practice for Consultation* 2006 at paragraph 5.28 ff.

2.79 It is expressly stated that section will not provide a defence against negligent acts or omissions. Section 5(3) provides that “[n]othing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act.” Therefore, for example, not checking the temperature of the water when bathing may be considered negligent if scalding results, and the carer may be liable for this negligence.

2.80 Section 6 of the *Mental Capacity Act 2005* goes on to rule out the application of section 5's general authority where restraint of the person considered to lack capacity is involved in carrying out the act of care or treatment except in very specific circumstances where restraint is necessary to prevent harm to the person and is proportionate in nature.¹⁰¹ The definition of ‘restrain’ includes the use of force or a threat to use force in order to secure the doing of an act or the restriction of liberty.¹⁰² However, section 6 of the 2005 Act specifies certain strict conditions which, if satisfied, will serve to provide protection from liability for someone who uses restraint to prevent harm to the person who lacks capacity.¹⁰³ Section 6(5) expressly confirms that someone carrying out an act under section 5 will do more than ‘merely restrain’ a person lacking capacity if he or she deprives that person of liberty within the meaning of Article 5(1) of the European Convention on Human Rights.¹⁰⁴ Therefore, the defence against liability provided by section 5 is not available to anyone whose actions result in the deprivation of liberty of a person lacking capacity. Furthermore, section 6 rules out protection from liability where a carer acts in a manner which conflicts with a decision of a formally appointed substitute decision-maker.

2.81 Although not specified in the *Mental Capacity Act 2005*, the draft Code confirms that cases involving particularly serious forms of medical

¹⁰¹ It is apparent that the unlawful deprivation of liberty will not meet this test: see *HL v The United Kingdom* (2005) 40 EHRR 32; Department for Constitutional Affairs (UK) *Mental Capacity Act 2005 – Draft Code of Practice for Consultation* (2006) at paragraph 5.45 ff.

¹⁰² See section 6(4) *Mental Capacity Act 2005*.

¹⁰³ The actor must reasonably believe that restraint is necessary in order to prevent harm to the person lacking capacity. This restraint must be a proportionate response to the likelihood of harm and the seriousness of that harm.

¹⁰⁴ The difference between the restriction of liberty, permitted under the definition of restraint, and deprivation of liberty under Article 5(1) was considered by the European Court of Human Rights in *HL v The United Kingdom (Application no 45508/99)*, *Judgment 5 October 2004* (2005) 40 EHRR 32 (the Bournemouth case).

treatment will require a declaration from the court.¹⁰⁵ It is expected that the following types of cases should continue to be brought before a court:

- i) withholding or withdrawal of artificial nutrition and hydration from patients in a permanent vegetative state;
- ii) cases involving organ or bone marrow donation by a person lacking the capacity to consent;
- iii) non-therapeutic sterilisation of a person lacking capacity to consent to this (eg for contraceptive purposes);
- iv) some termination of pregnancy cases;
- v) other cases where there is doubt or dispute about whether a particular treatment will be in a person's best interests.¹⁰⁶

2.82 In summary, section 5 of the *Mental Capacity Act 2005* provides protection from liability to carers and professionals in circumstances where no formal powers are required. However, where formal decision-making powers already exist these powers will take precedence. Attorneys or deputies acting within the scope of their authority can give or refuse consent on behalf of the person who lacks capacity. Anyone acting contrary to a decision of an attorney or a deputy acting within the scope of his or her powers will not therefore have protection from liability.¹⁰⁷

2.83 New South Wales operates a different form of informal substitute decision-making scheme which is limited to medical and dental treatment.¹⁰⁸ When a person is unable to give valid consent to treatment, medical and dental practitioners have a responsibility to obtain consent from the patient's "person responsible". The "person responsible" is either:

- A guardian who has the function of consenting to medical, dental and healthcare treatments or, if there is no guardian;
- A spouse or de facto spouse with whom the person has a close, continuing relationship. 'De facto spouse' includes same sex partners or, if there is no spouse or de facto spouse;
- An unpaid carer who is now providing support to the person or who provided this support before the person entered residential care or, if there is no carer;

¹⁰⁵ Department for Constitutional Affairs (UK) *Mental Capacity Act 2005 – Draft Code of Practice for Consultation* (2006) at paragraph 5.18.

¹⁰⁶ *Ibid* at paragraph 5.18.

¹⁰⁷ See section 6(6) *Mental Capacity Act 2005*.

¹⁰⁸ See Part 5 of *Guardianship Act 1987*.

- A relative or friend who has a close personal relationship with the person.

It is up to the medical or dental practitioner to determine who is the “person responsible”. A person who is considered to be the “person responsible” can decline in writing, not to have the responsibility of consenting to a particular medical or dental treatment. The medical practitioner must then request consent from the next person down on the list of people who qualify to be “person responsible”. A “person responsible” cannot consent to special medical treatments including sterilisation operations, terminations of pregnancy and experimental treatments and cannot consent to treatment if the patient objects. Only the NSW Guardianship Tribunal can give consent in these circumstances.

2.84 In the *Consultation Paper on Law and the Elderly* the Commission acknowledged that “many people take decisions and actions on behalf of others without any formal legal authorisation and ... that this situation should be given a formal statutory basis”.¹⁰⁹ The Commission recognises that in practice, various decisions are made on behalf of adults who lack capacity by parents or other family members and by service providers. Family members, carers and service providers effectively make an informal assessment of capacity and then make the decisions which are needed. These decisions range from decisions about where a person is to live and what he or she is to wear and eat to, in some cases, decisions about medical treatment and decisions about the person’s social relationships.

2.85 Having regard to the above, the Commission acknowledges that this informal decision-making is undoubtedly necessary but that under current law it may sometimes be unlawful. The Commission recognises the advantages of the New South Wales informal substitute decision-making scheme but considers that the inclusion in Irish mental capacity and guardianship legislation of a provision analogous to that in section 5 of the *Mental Capacity Act 2005* would be more beneficial. The Commission considers that such a provision would provide a more comprehensive informal substitute decision-making process for persons who lack capacity. The inclusion in the proposed mental capacity legislation of a deemed consent provision analogous to that in section 5 of the *Mental Capacity Act 2005* would be beneficial so that it would not be necessary to be formally appointed as an assisting decision-maker in order for family members and other carers to carry out routine acts to enhance the welfare of an adult who lacks decision-making capacity. Furthermore, the provision would of benefit to professionals such as dentists and doctors.

¹⁰⁹ See *Consultation Paper on Law and the Elderly* at paragraph 6.92.

2.86 The purpose of the Commission's recommendations in this regard is to ensure that when people perform basic acts for a person who lacks capacity whilst following the principles to set out in legislation, they will be protected from liability. This would allow people to take certain decisions and actions on behalf of others without any formal authorisation. An important safeguard would be provided by inserting a proviso that the overriding statutory principles for assisting decision-makers¹¹⁰ must be complied with in order for deemed consent to apply. Furthermore, it is appropriate that where formal decision-making powers exist, for example under an Enduring Power of Attorney or under a Guardianship Order, these powers will take precedence.

2.87 Family members and service providers could continue to carry out routine acts to enhance the welfare of the person who lacks capacity without any formal authorisation process. Such a provision would be consistent with the Commission's preference for minimal intervention. This informal authorisation process would only apply to situations where a person does not have the capacity to make a particular decision and reasonable steps have been taken to establish this lack of capacity. In addition, it should be a prerequisite that the statutory principles set out in the next part of this chapter would have to be followed when acting on behalf of another.

2.88 *The Commission recommends that the proposed mental capacity and guardianship legislation should provide some protection from civil and criminal liability for carers and professionals who carry out routine acts in the interests of adults whom they reasonably believe to lack the capacity to consent, where such acts are carried out in accordance with the proposed statutory principles for decision-makers.*

2.89 *The Commission recommends that the Office of the Public Guardian should formulate a code of practice dealing with the circumstances when it is appropriate to rely on informal decision-making.*

2.90 A secondary issue arises when decisions and actions taken on behalf of others without any formal authorisation involve expenditure. The Commission recognises that people who care for others who lack capacity often have to spend money on their behalf in order to provide that care. In Chapter 3, the Commission discussed the necessities rule in the context of the capacity to contract and recommended an amendment to this rule so that an adult who lacks capacity to enter a contract for the sale of goods or supply of services will nonetheless be obliged to pay the supplier a reasonable sum for necessities supplied at his or her request.¹¹¹ Section 8 of the English *Mental Capacity Act 2005* takes this concept a step further by allowing a

¹¹⁰ See paragraph 2.106 below.

¹¹¹ See paragraphs 3.06-3.07 above.

carer who arranged for the goods and services in accordance with section 5 of that Act, also to arrange the settlement of the bill. The carer may pledge the credit of the person who lacks capacity or if the person lacking capacity has money in his or her possession, then the carer may use that money to pay for the goods or services. Alternatively, the carer may choose to pay for the goods or services with his or her own money and is then entitled to be reimbursed or indemnified from the money of the person lacking capacity. The draft Code of Practice draws a distinction between the use of available cash already in the possession of the person lacking capacity on the one hand and the removal of money from a bank account or selling valuable items of property on the other. The draft Code notes that formal steps (in the form of a Lasting Power of Attorney, a deputyship or a single order of the Court of Protection) would be required before carers could gain access to any money held by a third party such as a bank or building society.¹¹²

2.91 The Commission considers that a provision could usefully be included in Irish capacity and guardianship legislation to allow a carer to arrange for payment when acting on behalf of a person who does not have capacity. Such a provision should allow the carer to apply the money in the possession of the person concerned for meeting the expenditure; and if the carer bears the expenditure then he or she should be entitled to be reimbursed or otherwise indemnified from the money of the person concerned.

2.92 *The Commission recommends that the proposed mental capacity and guardianship legislation should provide that where a specific act, carried out in the interest of an adult who is reasonably believed to lack capacity to consent, involves expenditure, the person taking the action may lawfully apply the money in the possession of the person concerned for meeting the expenditure; and if the person taking the acting bears the expenditure then he or she is entitled to be reimbursed or otherwise indemnified from the money of the person concerned.*

(2) Statutory Principles

2.93 This Part formulates some overarching statutory principles to guide assisting decision-makers, the proposed Guardianship Board and the courts in their task and to ensure that the rights and freedoms of individuals who have limited capacity are upheld. In order to arrive at these, it is first necessary to give some consideration to the various approaches which have found favour with the courts and legislators.

¹¹² *Mental Capacity Act 2005-Draft Code of Practice* paragraphs 5.59-5.60.

(a) **Best Interests**

2.94 The concept of ‘best interests’ often appears in the debate on the rationale for the intervention in the life of another person. In the context of adults with a decision-making disability, the concept is one borrowed, perhaps not altogether appropriately, from child law. As such, ‘best interests’ as a basis for intervention is imbued with undertones of paternalism. Given the right of an adult to autonomy and self-determination, a best interests approach has been regarded in some jurisdictions as an inappropriate basis for adult decision-making.¹¹³ The Scottish Law Commission was of the view that adults with a limited decision-making capacity linked to a mental illness, head injury or dementia will previously have possessed full decision-making capacity and therefore it would be incongruous to extend child law concepts to them.¹¹⁴

2.95 Nevertheless, the requirement to act in the best interests of a person who lacks capacity is well-established at common law.¹¹⁵ While consideration of the best interests principle in relation to adults has not arisen in this jurisdiction in many written decisions, the Supreme Court in *Re A Ward of Court (No.2)*¹¹⁶ enshrined best interests principles in the context of decision-making on behalf of a person who was a Ward of Court. The English courts have experience of applying a best interests criterion in making declarations concerning adults who lack capacity.¹¹⁷ There has been some support in English decisions for a balance sheet approach whereby likely advantages and disadvantages are weighed against each other.¹¹⁸ This is reflected in the Official Solicitor’s Practice Note concerning medical and welfare decisions for adults who lack capacity.¹¹⁹ The Practice Note also refers to the need to have regard to the emotional, psychological and social benefit to the adult. In the context of medical treatment, there is evidence of

¹¹³ See South African Law Reform Commission *Assisted Decision-making: Adults with Impaired Decision-making Capacity* (Discussion Paper 105) (January 2004) at 21.

¹¹⁴ Scottish Law Commission *Report on Incapable Adults* (No 151) (1995) at 21.

¹¹⁵ See, for example, *Re MB (Medical Treatment)* [1997] 2 FLR 426; *Re a Ward of Court (No 2)* [1996] 2 IR 79. See also section 4(1) of the *Mental Health Act 2001*.

¹¹⁶ [1996] 2 IR 79. See further Consultation Paper on Capacity at paragraph 7.54 ff.

¹¹⁷ This jurisdiction derives from *Re F (Mental Patient: Sterilisation)* [1989] 2 All ER 545.

¹¹⁸ *Re A (Male Patient: Sterilisation)* [2001] 1 FLR 549, 560 per Thorpe LJ.. See further Consultation Paper on Capacity at paragraph 7.47.

¹¹⁹ *Practice Note* [2001] 2 FCR 569.

a retrenchment from reliance on the *Bolam*¹²⁰ principle that it is a doctor's duty to act in accordance with a responsible body of medical opinion, in favour of stressing the importance of considering the patient's wider interests.¹²¹

2.96 In the Commission's view, one of the major objections to a best interests test for intervention in the life of an adult who has been found to lack capacity is that its application may simply equate to what the decision-maker subjectively thinks is best for the person. This is the danger of importing tests such as that of "the prudent parent" from the law relating to minors.¹²² This may be countered to some extent through establishing objective legislative criteria against which to measure the concept of best interests.

(b) Substituted Judgment

2.97 An alternative approach to a best interest test in substitute decision-making is 'substituted judgment'. This proceeds on the basis that the decision made by a substitute decision-maker should be the one that a person without capacity would have made if they had the capacity to do so. In the Northwest Territories Canada, section 12(7) of the *Consolidation of Guardianship and Trusteeship Act* requires a guardian to take into consideration "the values and beliefs that the guardian knows the represented person held when capable and believes the person would still act on if capable." The principal advantage of this test is that it respects the autonomy of the individual and the right to self-determination. However, the overwhelming disadvantage of substituted judgment is the difficulty of applying such a test in the case of persons who have never had the requisite capacity to make the relevant decision or have never had the opportunity to participate in making life decisions. In such circumstances there may be little distinction in practice between 'best interests' and 'substituted judgment'.¹²³

(c) Maximum Preservation of Capacity

2.98 A functional approach encompasses a pro-capacity approach which embraces the principle of maximum preservation of capacity. A

¹²⁰ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

¹²¹ *Re A (Male Sterilisation)* [2000] 1 FLR 549; *Re S (Adult Patient: Sterilisation)* [2001] Fam 15; *Burke v The General Medical Council* [2004] EWHC 1879 (Admin). See also *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1998] 3 All ER 289; *HL v United Kingdom* (2005) 40 EHRR 32.

¹²² See Lynch J's adoption of the prudent parent test in *Re a Ward of Court (No. 2)* [1996] 2 IR 79, 99.

¹²³ See English Law Commission *Mentally Incapacitated Adults and Decision-Making: An Overview* (Consultation Paper No. 119 1991) at 107.

maximum preservation approach proceeds on the basis that where a person has a decision-making disability which impairs their capacity to make a decision for themselves it is important in so far as possible to assist the person in making the decision and allow their participation in making the decision. This was encapsulated by Arden LJ in *Bailey v Warren*¹²⁴ as follows:

“[I]f he were declared to be incapable for the purpose of any decision, his advisers could maximise his contribution to that decision-making process by seeking and taking into account his views so far as he was able to express them. It is surely necessary in a democratic society to maximise an individual’s contribution in this way, and the law should encourage this to be done.”¹²⁵

In that case Arden LJ emphasised the need to make an effort to maximise the contribution that an individual can make to decisions that affect him by, for example, explaining the matter to the person in simple terms including the considerations that they will need to take into account. She went on state “[t]here is nothing wrong in this. On the contrary, it is the appropriate way to help such individuals, consistently with their individual dignity. To help them in this way empowers them.”¹²⁶

(d) *Least Restrictive Intervention*

2.99 An allied principle to that of maximum preservation of capacity is the principle of least restrictive intervention. This involves choosing an option which represents the least interference with the individual’s autonomy. This principle represents proportionality and subsidiarity in the decision-making process and is a concept enshrined in the Council of Europe Recommendation on the principles governing the legal protection of incapable adults.¹²⁷ The principle of least restrictive intervention is reflected in section 1(2) and 1(3) of the *Adults with Incapacity (Scotland) Act 2000* and section 1(6) of the English *Mental Capacity Act 2005*. It is envisaged that this concept of favouring the least restrictive alternative would, however, be one part of the balancing exercise to comply with the overarching requirement to act in the person’s best interests.¹²⁸ In a case

¹²⁴ *Bailey v Warren* [2006] EWCA Civ 51.

¹²⁵ [2006] EWCA Civ 51, paragraph 105 *per* Arden LJ.

¹²⁶ *Bailey v Warren* [2006] EWCA Civ 51, paragraph 115 *per* Arden LJ.

¹²⁷ Committee of Ministers of the Council of Europe Recommendation on Principles Concerning the Legal Protection of Incapable Adults 1999, Recommendation No R (99) 4.

¹²⁸ See Department for Constitutional Affairs (UK) *Mental Capacity Act 2005 – Draft Code of Practice for Consultation* (2006) at paragraph 2.27.

concerning the desirability of a kidney transplant, Butler-Sloss P regarded it as necessary to assess:

“...the advantages and disadvantages of the various treatments and management options, the viability of each such option and the likely effect each would have on the patient’s best interests and, I would add, his enjoyment of life.”¹²⁹

(e) ***Composite Guiding Principles***

2.100 As discussed above, there are difficulties in relying on nebulous concepts of ‘best interests’ or ‘substituted judgment’ as a rationale for making decisions on behalf of another adult. To address this, the trend internationally in recent capacity and assisted decision-making legislation is towards the inclusion of a set of principles which will govern substitute decision-making on behalf of an adult who lacks capacity.

2.101 The Draft Code of Practice to accompany the English *Mental Capacity Act 2005* is correct in stating that “[i]t is not possible for statute to give a single all-encompassing definition of ‘best interests’ because what will be in a person’s best interests will depend on that particular individual and his/her personal circumstances.”¹³⁰ Consequently, section 1(5) of the *Mental Capacity Act 2005* provides: “An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests”; this is then subject to a series of guiding principles to be taken into account by any assisting decision-maker. It is instructive to give a brief overview of the approach to this task in New South Wales, England and Wales, Australia, and Scotland.

2.102 New South Wales’ *Guardianship Act 1987* contains a set of general principles to be observed by both the Guardianship Tribunal and everyone dealing with a person with a cognitive disability. Section 4 creates a duty to apply the following principles (and to encourage the wider community to apply and promote them):

- “give the person’s welfare and interests paramount consideration;
- restrict the person’s freedom of decision making and freedom of action as little as possible;
- encourage the person, as far as possible to live a normal life in the community;
- take the person’s views into consideration;

¹²⁹ *An Hospital NHS Trust v S* [2003] EWHC 365 (Fam), at paragraph 47.

¹³⁰ Department of Constitutional Affairs (UK) *Mental Capacity Act – Draft Code of Practice for Consultation* (2006) at paragraph 2.24.

recognise the importance of preserving family relationships and cultural and linguistic environments;

encourage the person, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs;

protect the person from neglect, abuse and exploitation.”

2.103 In Scotland section 5 of the *Adults with Incapacity (Scotland) Act 2000* sets out five general principles which govern all interventions in affairs of an adult under that legislation. The statutory principles which are broader than a ‘best interests’ test aim to ensure that the adult is consulted, as well as anyone else with an interest in the adult. The relevant principles which are to be respected can be summarised as:

- There is to be no intervention unless the intervention will benefit the adult and that benefit cannot reasonably be achieved by other means.¹³¹
- The intervention must be the option which is least restrictive of the person’s freedom, consistent with the purpose of the intervention.¹³²
- In deciding on any intervention, account must be taken of the adult’s past and present wishes, beliefs, values and feelings so far as they can be ascertained.¹³³
- Account must be taken of the views of the adult and relevant others (including the nearest relative and primary carer) where it is reasonable and practical to do so.¹³⁴
- Persons holding powers of attorney or acting as guardians must encourage the adult to use existing skills and to develop new skills concerning his or her property, financial affairs or personal welfare.¹³⁵

2.104 In developing the text which was to become the English *Mental Capacity Act 2005*, the thinking was that the incorporation of a statement of principles in the legislation would assist non-lawyers making decisions and

¹³¹ Section 1(2) of the *Adults with Incapacity (Scotland) Act 2000*. Thus there can be no intervention on the grounds of incapacity alone. The section emphasises the importance of taking informal steps to positively support capacity, for example, by explaining complicated matters using simple language, in order to remove the need for formal intervention.

¹³² Section 1(4)(a) of the *Adults with Incapacity (Scotland) Act 2000*.

¹³³ Section 1(4)(a) of the *Adults with Incapacity (Scotland) Act 2000*.

¹³⁴ Section 1(4)(b) of the *Adults with Incapacity (Scotland) Act 2000*.

¹³⁵ Section 1(5) of the *Adults with Incapacity (Scotland) Act 2000*.

would also be of assistance in the production of codes of practice under the legislation.¹³⁶ On the basis that no list could be regarded as comprehensive or applicable in all situations, a statutory checklist of factors to be considered in all cases is set out in the *Mental Capacity Act 2005*.¹³⁷ Section 1 states:

- “(1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”

2.105 Having regard to the experience in other jurisdictions, the Commission considers that a set of composite guiding principles could usefully be included in the proposed capacity legislation. This would address the difficulties associated with an unsubstantiated ‘best interests’ requirement in assisted decision-making. Such guidelines would provide a general, overarching framework for persons making a decision on behalf of an adult who lacks capacity to make the relevant decision.¹³⁸ In formulating such principles, the Commission is cognisant of the Disability Legislation Consultation Group’s statement (in relation to the then proposed rights-based disability legislation) that:

“[t]he principles underpinning the legislation include advancing the dignity, freedom and quality of life for people with

¹³⁶ Department for Constitutional Affairs *Government Response to The Scrutiny Committee’s Report on the Draft Mental Incapacity Bill* (February 2004) at 7; House of Lords and House of Commons Joint Committee *Report on the Draft Mental Incapacity Bill* (November 2003) (HL paper 189-1, HC 1083-1 The Stationery Office Limited) Chapter 4.

¹³⁷ See further Letts “Mental Capacity Act 2005: The Statutory Principles and Best Interests Test” (2005) *Journal of Mental Health Law*” 150.

¹³⁸ Earlier recommendations in this Report have addressed issues surrounding the assessment of capacity.

disabilities, maximum independence, autonomy, privacy, bodily integrity and dignity, and for realising her/his potential to the full.¹³⁹

This reflects the need for guiding principles to respect the individual's constitutional and human rights.

2.106 *The Commission recommends the inclusion of the following statutory guiding principles for assisting decision-makers, the proposed Guardianship Board and the courts:*

- (i) No intervention is to take place unless it is necessary having regard to the needs and individual circumstances of the person including whether the person is likely to increase or regain capacity;*
- (ii) Any intervention must be the method of achieving the purpose of the intervention which is least restrictive of the person's freedom;*
- (iii) Account must be taken of the person's past and present wishes where they are ascertainable;*
- (iv) Account must be taken of the views of the person's relatives, their primary care, the person with whom he or she resides, any person named as someone who should be consulted and any other person with an interest in the welfare of the person or the proposed decision where these views have been made known to the person responsible;*
- (v) Due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy.*

¹³⁹ Disability Legislation Consultation Group *Equal Citizens – Proposals for Core Elements of Disability Legislation* (Disability Legislation Consultation Group 2003) at 7. See further section 4(3) of the *Mental Health Act 2001*.

CHAPTER 3 ASPECTS OF LEGAL CAPACITY

A Introduction

3.01 This chapter revisits provisional recommendations made by the Commission on specific aspects of capacity discussed in some detail in the *Consultation Paper on Law and the Elderly*¹ and the *Consultation Paper on Vulnerable Adults and the Law: Capacity*.² Part B concerns capacity to contract; Part C, personal relationships and capacity and Part D, capacity to make healthcare decisions. Part E considers testamentary capacity including a discussion of the desirability of establishing a statutory wills procedure in respect of adults who lack testamentary capacity.

B Capacity to Contract

(1) *The Necessaries Rule*

(a) *Consultation Paper Recommendations*

3.02 In the Consultation Paper on Capacity, the Commission recommended that the proposed capacity legislation should provide that an adult who lacks the capacity to enter into a particular contract is nonetheless obliged to pay the supplier a reasonable amount for necessaries supplied.³ It was recommended that “necessaries” should be statutorily defined as goods and services which are suitable to the person’s reasonable living requirements but excluding goods and services which could be classed as luxury in nature.⁴

(b) *Discussion*

3.03 Section 2 of the *Sale of Goods Act 1893* provides:

“... where necessaries are sold and delivered to ... a person who by reason of mental incapacity ... is not competent to contract, he

¹ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) (hereafter “Consultation Paper on Law and the Elderly”).

² Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) (hereafter “Consultation Paper on Capacity”).

³ Consultation Paper on Capacity paragraph 5.43.

⁴ Consultation Paper on Capacity paragraph 5.44.

must pay a reasonable price therefor. Necessaries in this section means goods suitable to the condition in life of such ... person, and to his actual requirements at the time of the sale and delivery.”

A similar rule exists at common law in relation to the provision of services.⁵

3.04 The Commission considers that the necessities rule in relation to the provision of goods or services to person who lack contractual capacity has a useful dual function in relation to adults with limited decision-making capacity. On the one hand, it has an enabling role in facilitating items of an everyday nature to be purchased by such adults and ensuring that they are paid for. This is important in encouraging independent living. However, the rule also has protective functions. Its application is limited to the purchases of items which can be regarded as necessary having regard to the individual’s actual requirements. Furthermore, the price which must be paid is limited to a reasonable price thereby preventing claims for exorbitant sums.

3.05 The Commission sees no reason to depart from its provisional recommendations in this area which were designed to update the understanding of the term “necessaries” and related terminology. An express exclusion of luxury goods from the understanding of “necessaries” reflects the role of this provision which is to enable day to day living not to provide an across the board solution where contractual capacity is not present. The understanding of “luxury” will vary according to the individual’s living circumstances. Legislative clarification of the exclusion of purely executory contracts (where no delivery of goods or supply of services has yet occurred) is sensible given the uncertainty which has existed concerning this point. Furthermore, it is considered appropriate that this quasi-contractual rule be included in the proposed capacity and decision-making legislation.⁶

(c) Report Recommendations

3.06 *The Commission recommends that the proposed mental capacity legislation will make provision for an amended necessities rule whereby an adult who lacks capacity to enter a contract for the sale of goods or supply of services will nonetheless be obliged to pay the supplier a reasonable sum for necessities supplied at his or request.*

3.07 *“Necessaries” should be defined as goods or services supplied which are suitable to the individual’s personal reasonable living*

⁵ See *Re Rhodes* (1890) 44 Ch D 94.

⁶ A similar step was taken in section 7 of the English *Mental Capacity Act 2005*.

requirements but excluding goods and services which could be classed as luxury in nature in all the circumstances.

C Personal Relationships and Capacity

(1) Sexual Relationships

(a) Consultation Paper

3.08 The subject of the capacity of adults with limited decision-making ability to enter into a sexual relationship is a difficult one which has yet to be widely explored in Irish society. Accordingly, in the Consultation Paper on Capacity, the Commission invited views in relation to the reform of section 5 of the *Criminal Law (Sexual Offences) Act 1993* which makes it an offence to engage in acts of sexual intercourse or buggery with a person who is “mentally impaired”⁷ unless this occurs within marriage. Views were invited as to whether the offence should be remodelled so that it would be an offence to have or attempt to have sexual intercourse or buggery with a person who lacked capacity to consent to the relevant act at the time because they did not understand the nature or reasonably foreseeable consequences of the act or could not communicate their consent or lack of consent.⁸

(b) Discussion

3.09 In both the Consultation Paper on Capacity⁹ and earlier reports,¹⁰ the Commission set out difficulties associated with section 5 of the *Criminal Law (Sexual Offences) Act 1993* and preceding legislation. Clearly, the term “mentally impaired” is out of step with contemporary terminology used to describe persons with a disability. However, at a more fundamental level, the Commission noted in the Consultation Paper on Capacity that:

“a regrettable effect of section 5 of the 1993 Act is that outside a marriage context a sexual relationship between two ‘mentally impaired’ persons may constitute a criminal offence because there is no provision for consent as a defence in respect of a relationship

⁷ A defence is available where the defendant had no reason to suspect that the person was “mentally impaired”: section 5(3) of the *Criminal Law (Sexual Offences) Act 1993*.

⁸ Consultation Paper on Capacity paragraph 6.28.

⁹ Paragraph 6.08 ff.

¹⁰ See Law Reform Commission *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990); *Consultation Paper on Rape* (1987); *Report on Rape and Allied Offences* (LRC 24-1988).

between adults who were both capable of giving a real consent to sexual intercourse.”¹¹

The Commission identified concerns in relation to a potential breach of Article 8 of the European Convention on Human Rights in relation to respect for private life. It was suggested that it would be possible to replace section 5 with an offence based on the absence of a functional capacity to consent along the lines of section 30 of the United Kingdom’s *Sexual Offences Act 2003*. Section 30 defines lack of capacity in functional terms of the person lacking the ability to choose whether to agree to the touching because of an absence of understanding of what is being done or for any other reason or because the person is unable to communicate their choice.

3.10 Submissions received by the Commission indicate that this is an area in which many different perspectives need to be taken into account. There was some support for the approach taken in section 30 of the UK’s *Sexual Offences Act 2003* which contains a number of sexual offences in relation to a person who lacks functional capacity to consent or is unable to communicate their choice.¹² However, a strong theme in the submissions was the need to provide appropriate protection for vulnerable members of society. Submissions have emphasised the vulnerability of adults with limited decision-making ability to exploitation and manipulation. There was also a perceived need to consider how the law in this area should fit together with the Trust in Care policy¹³ and developing elder abuse policies.¹⁴ Indeed, there was support in the submissions for a specific offence in this area to be formulated to cover circumstances where there is an imbalance in power between the parties *eg* where a person is in a position of authority over a person with an intellectual disability.¹⁵ It also is evident from submissions received that there is support for the extension of section 5 of the *Criminal Law (Sexual Offences) Act 1993* to include all forms of

¹¹ Consultation Paper on Capacity paragraph 6.20.

¹² See further Consultation Paper on Capacity paragraph 6.23.

¹³ Health Services Executive *Trust in Care: Policy for Health Service Employers on Upholding the Dignity and Welfare of Patients/Clients and the Procedure for Managing Allegations of Abuse against Staff Members* (2005).

¹⁴ The Elder Abuse National Implementation Group was established in 2003 following the recommendations of the Working Group on Elder Abuse in its report *Protecting Our Future* (2002).

¹⁵ The possibility of increased sanctions for abuse by an institutional carer was mooted by the Department of Justice in its Discussion Paper *The Law on Sexual Offences* (The Stationery Office 1998) at paragraph 9.5.2. This was previously recommended by the Law Reform Commission: *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990) at paragraph 36.

unwanted sexual contact rather than being confined to attempted and actual sexual intercourse, buggery and acts of gross indecency between males.

3.11 The Commission is conscious that this is a complex area where many different aspects need to be accommodated. Sexual offences, particularly against vulnerable persons such as minors and adults with limited decision-making ability give rise to calls to ensure that a sufficiently protective regime is in place. In this respect the Commission is acutely aware of the strength of public sentiment demonstrated when constitutional difficulties led to section 1(i) of the *Criminal Law (Amendment) Act 1935* (concerning unlawful carnal knowledge of a girl under 15) being declared unconstitutional and to the subsequent enactment of the *Criminal Law (Sexual) Offences Act 2006*.¹⁶ That episode highlighted the importance of an offence being appropriately defined in order to prevent persons escaping punishment for the mischief the offence is designed to catch. There is a need to proceed with caution in relation to reforming the criminal law in order to ensure that the criminal law can be relied on to achieve the aims of the legislators.¹⁷ Given that the focus of this Report is on the establishment of a guardianship system rather than reform of the criminal law, the Commission does not propose to formulate recommendations for reform of section 5 of the *Criminal Law (Sexual Offences) Act 1993* at this time.

(2) Sterilisation

(a) Consultation Paper Recommendation

3.12 The Commission recommended that the proposed capacity legislation should provide that any proposed non-consensual sterilisation of a person with limited decision-making ability would require an application to court where there is no serious malfunction or disease of the reproductive organs.¹⁸

(b) Discussion

3.13 Sterilisation is a surgical method of rendering a male or female incapable of reproduction. A distinction is usually drawn between therapeutic and non-therapeutic sterilisation in relation to adults with limited decision-making capacity. Therapeutic sterilisation is regarded as necessary for the adult in question's mental or physical health. The primary aim of non-therapeutic sterilisation is to prevent reproduction. In the Consultation

¹⁶ See *CC v Ireland* [2006] IESC 33, [2006] 2 ILRM 161; *A v The Governor of Arbour Hill Prison* [2006] IEHC 169 High Court (Laffoy J) 30 May 2006, [2006] IESC 45, [2006] 2 ILRM 481 (Supreme Court).

¹⁷ See generally Oireachtas Joint Committee on Child Protection *Report on Child Protection* (2006) PRN A6/2024 available on www.oireachtas.ie.

¹⁸ Consultation Paper on Capacity paragraph 6.62.

Paper on Capacity, the Commission highlighted that the incidence of non-therapeutic sterilisation of persons with an intellectual disability is undocumented in Ireland. The irreversible non-therapeutic sterilisation of adults without their informed consent raises serious constitutional and human rights considerations.¹⁹ The Commission is deeply aware that this subject is a difficult and sensitive one. Nevertheless, given the human rights context, the Commission believes that it is appropriate to take the step of enshrining the need for court intervention in legislation so that a decision can be made in each case which reflects the particular factual matrix within which such a decision is to be considered. As in the Consultation Paper, the Commission believes it is appropriate to endorse the approach recommended by the Commission on the Status of People with Disabilities. This would require prior court approval for the non-therapeutic sterilisation of an adult who lacks capacity to make a decision to consent to or to decline such a procedure.

(c) Report Recommendation

3.14 *The Commission recommends that any proposed sterilisation of an adult where there is no serious malfunction or disease of the reproductive organs would require the prior consent of the High Court where the adult lacks the capacity to make a decision to consent to or to decline such a procedure.*

(3) Marriage

(a) Consultation Paper Recommendation

3.15 The Commission recommended that the *Marriage of Lunatics Act 1811* be repealed.²⁰

(b) Discussion

3.16 The *Marriage of Lunatics Act 1811* remains on the statute book. The effect of this legislation is to render void a purported marriage by a person who has been made a Ward of Court.²¹ The blanket ban and terminology used are anachronistic and inconsistent with ECHR jurisprudence concerning the right to marry.²² As the Commission is recommending the replacement of the adult wardship regime with new mental capacity legislation based on a functional understanding of capacity, the *Marriage of Lunatics Act 1811* ought to be repealed.

¹⁹ See Consultation Paper on Capacity paragraph 6.59.

²⁰ Consultation Paper on Capacity paragraph 6.51.

²¹ For a discussion on the confusion surrounding the contemporary application of this legislation see Consultation Paper on Capacity at paragraph 6.48.

²² See *Hamer v United Kingdom* (1982) 4 EHRR 139.

3.17 In the Consultation Paper on Capacity, the Commission concluded that the law of nullity contains well-established jurisprudence on capacity to marry. Accordingly, it was not proposed to interfere with this.²³ The Commission affirms this view and notes the emergence of case law specifically dealing with capacity to marry in relation to persons with intellectual disability²⁴ and dementia.²⁵ Furthermore, section 58 of the *Civil Registration Act 2004* provides a mechanism for lodging an objection with the Registrar where it is considered that a person lacks capacity to marry. However, for the avoidance of doubt, and to reflect the repeal of the *Marriage of Lunatics Act 1811*, the proposed mental capacity legislation should provide that a presumption of capacity will operate in relation to capacity to marry.

(c) Report Recommendation

3.18 *The Commission recommends that the proposed mental capacity legislation will provide for the repeal of the Marriage of Lunatics Act 1811.*

3.19 *The Commission recommends that the law on capacity to marry will continue to be governed by the common law and that the proposed mental capacity legislation will specifically exclude the law relating to capacity to marry in relation to the test of capacity. However, it should be provided that a presumption of capacity will operate in relation to capacity to marry.*

D Capacity to Make Healthcare Decisions

(1) Capacity to Make Healthcare Decisions

(a) Consultation Paper Recommendation

3.20 The Commission recommended that capacity to make a healthcare decisions should be assessed on the basis of the proposed statutory functional test of capacity.²⁶

(b) Discussion

3.21 At common law the giving of informed consent is a prerequisite to the carrying out of medical treatment. There is no generally applicable statutory definition of informed consent in Irish law. However, section 56 of

²³ Consultation Paper on Capacity paragraph 6.49.

²⁴ *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326.

²⁵ See the Australian case of *AK v NC* (2004) FLC 93; Bates “Capacity to Enter into Marriage: A New Australian Perspective” (2005) IFLJ 28. On the protection of vulnerable adults from being forced into marriage see *M v B* [2006] 1 FLR 117.

²⁶ Consultation Paper on Capacity paragraph 7.84.

the *Mental Health Act 2001* sets out a useful statutory definition of consent in the specific context of treatment of a ‘mental disorder’ of a patient covered by the legislation:

“... ‘consent’, in relation to a patient, means consent obtained freely without threats or inducement, where –

- (a) the consultant psychiatrist responsible for the care and treatment of the patient is satisfied that the patient is capable of understanding the nature, purpose and likely effects of the proposed treatment; and
- (b) the consultant psychiatrist has given the patient adequate information, in a form and language that the patient can understand, on the nature, purpose and likely effects of the proposed treatment.”

3.22 An element of the concept of informed consent at common law is the requirement that the patient has the necessary capacity to decide whether or not to have the proposed medical treatment.²⁷ It is the responsibility of the relevant medical practitioner to ensure that a person has capacity to make the contemplated healthcare decision. This places a heavy onus of responsibility on them given the grave legal and ethical implications of treatment without consent.²⁸ Despite this, traditionally there has been little guidance in this jurisdiction on how capacity (often referred to as ‘competence’) in the context of consent to medical should be understood and how it should be assessed. There is no obvious reason why capacity to make a healthcare decision should not be covered by the statutory test of capacity proposed in this report. Indeed, the inclusion of capacity to make healthcare decisions within the capacity and substitute decision-making framework proposed in this Report would have the benefit of bringing some certainty to an area in which many medical practitioners are working without clear legal guidance. Accordingly, the Commission believes that it is appropriate to bring this aspect within the proposed statutory definition of capacity.²⁹

(c) ***Report Recommendation***

3.23 *The Commission recommends that capacity to make healthcare decisions should be included within the proposed statutory definition of capacity.*

²⁷ Consultation Paper on Capacity paragraph 7.05.

²⁸ See further Consultation Paper on Capacity paragraph 7.08 ff.

²⁹ See paragraph 2.45 above.

(2) *Next of Kin Substitute Decision-making*

3.24 In the Consultation Paper on Capacity, the Commission highlighted the difficulties associated with the informal system of obtaining substitute consent from next of kin which operates in this jurisdiction. In healthcare practice, this system is difficult to administer where no near relative can be traced. Even where a blood relative is available, there may be other persons with a greater de facto interest in the welfare of the adult lacking capacity to make the healthcare decision. In addition, medical practitioners have to consider how best to proceed where there is disagreement between close relatives. Apart from these practical limitations, the informal practice of obtaining consent from next of kin does not rest on a sound legal basis. In the Consultation Paper on Capacity, this situation was characterised as involving “a considerable but entrenched divergence between the letter of the law and healthcare practice”.³⁰

3.25 The Commission considers that these problems will be addressed by a combination of elements of the proposed assisted decision-making scheme, namely:

- statutory provisions removing liability for care acts which will enable medical professionals to carry out routine treatment without incurring liability;³¹
- the continued operation of the common law doctrine of necessity in emergency, urgent treatment without consent;³² and
- the formal mechanisms recommended in this report for the appointment of assisting decision makers and obtaining ancillary orders.³³

(3) *Working Group on Capacity to Make Healthcare Decisions*

(a) *Consultation Paper Recommendations*

3.26 The Commission recommended that the proposed mental capacity legislation would give the Minister for Health the power to appoint a Working Group on Capacity to Make Healthcare Decisions.³⁴ It recommended that the Group would formulate a code of practice in this area

³⁰ Consultation Paper on Capacity paragraph 7.34.

³¹ See paragraph 2.72 ff above.

³² See further Consultation Paper on Capacity paragraphs 7.38-7.51; 7.93-7.95.

³³ See Chapter 6(E) below.

³⁴ Consultation Paper on Capacity paragraph 7.88.

for healthcare professionals which would provide guidelines on the assessment of capacity to make a healthcare decision. It was considered that such guidelines should take account of factors such as whether after a discussion in relation to the healthcare decision (pitched at a level appropriate to the adult's individual level of cognitive functioning), the adult

- understands in broad terms the reasons for and nature of the healthcare decision to be made;
- has sufficient understanding of the principal benefits and risks involved in the treatment option being presented and relevant alternative options after these have been explained to them in a manner and in language appropriate to their individual level of cognitive functioning;
- understands the personal relevance of the decision;
- appreciates the advantages and disadvantages in relation to the choices open to them;
- makes a voluntary choice.³⁵

3.27 The Commission also recommended that the code of practice for healthcare professionals should provide guidance concerning the type of urgent situations in which treatment may be carried out without the consent of the adult concerned and what type of treatment can be given if it is likely that the adult concerned will imminently recover capacity.³⁶ The Commission recommended that the code of practice for healthcare professionals would provide guidance concerning healthcare decisions which would require an application to court. The Commission invited views on the type of decisions which should be included.³⁷

(b) Discussion

(i) The Utility of Codes of Practice for Healthcare Decisions

3.28 Noting the utility of a code-based approach in other jurisdictions such as Scotland and England and Wales in fleshing out the detail of how legislative provisions on capacity should operate in practice, the Commission believes that it is appropriate to make provision for the development of codes of practice in the healthcare field. Making such codes extra-statutory in nature would enable them to be reviewed and to be responsive to changes in practice. In this respect, codes of practice would be less cumbersome to amend than including similar provisions within primary

³⁵ Consultation Paper on Capacity paragraph 7.92.

³⁶ Consultation Paper on Capacity paragraph 7.95.

³⁷ Consultation Paper on Capacity paragraph 7.100.

or secondary legislation, which would in any case be less principle-based and more rule-based than a code.

3.29 The development of codes would be facilitated by the establishment of a Working Group on Capacity to Make Healthcare Decisions appointed by the Minister for Health made up of multi-disciplinary healthcare professionals and lay persons. This Working Group would work on the formulation of such codes. Through making legislative provision for the establishment of the Working Group and its function in relation to codes, such codes would thereby have statutory backing.

3.30 Making provision for codes of practice would facilitate the adoption of best practice recommendations for healthcare professionals concerning the assessment of capacity,³⁸ the provision of treatment where a patient lacks the requisite capacity and the categories of decision which will need to be referred to the proposed Guardianship Board.³⁹

(ii) Content of Codes of Practice

3.31 The Commission believes that the Working Group on Capacity to Make Healthcare Decisions should have the power to make codes of practice dealing with matters relevant to healthcare practice concerning capacity and decision-making. The subject-matter of such codes would usefully include (but not be limited to) matters such as:

- the assessment of capacity;
- the circumstances in which urgent treatment may be carried out without the consent of the adult concerned and what type of treatment can be provided if it is likely that the adult concerned will imminently recover capacity.
- the categories of decision which require to be adjudicated upon by a court or specialist board.

3.32 In relation to the type of healthcare decision which would require guardianship approval from a court or board,⁴⁰ the Consultation Paper listed as possible examples of the type of qualifying decisions:

- non-therapeutic sterilisation;
- surgical implantation of hormones for the purposes of reducing sex-drive;

³⁸ See further Consultation Paper on Capacity paragraph 7.90 ff.

³⁹ On the role of the High Court as arbiter on reserved decisions, see further paragraph 6.71 below.

⁴⁰ For an example of a developed scheme, see that in operation in New South Wales, Australia pursuant to the *Guardianship Act 1987*.

- withdrawal of artificial life-sustaining treatment;
- psychosurgery;⁴¹
- electro-convulsive therapy;⁴²
- the donation of non-regenerative tissue (organ donation) and regenerative tissue (for example, bone marrow);
- experimental treatment of a medical condition outside the context of a clinical trial.⁴³

A submission received by the Commission suggested that surgery which is potentially life altering (defined as surgery carrying a risk of loss of a faculty) should be included in any such list.

3.33 It is envisaged that the proposed statutory Working Group on Capacity would formulate and, where appropriate, revise this aspect of the proposed code of practice for healthcare professionals. Given the role which the Working Group will have in this area, the ultimate choice of decisions of this type will be a matter for consideration by the Working Group and the Commission has therefore not adopted any substantive recommendations in this area.

(c) Report Recommendations

3.34 *The Commission recommends that the proposed mental capacity legislation make provision for the Minister for Health to appoint a Working Group on Capacity to make Healthcare Decisions comprising representatives of professional bodies in the healthcare sector, healthcare professionals and lay persons.*

3.35 *The Commission recommends that the role of the Working Group on Capacity to Make Healthcare Decisions will be to formulate codes of practice for healthcare professionals in relation to capacity and decision-making in the healthcare arena. The subject-matter of such codes is to include (but not be limited to):*

- *the assessment of capacity; and*
- *the circumstances in which urgent treatment may be carried out without the consent of the adult concerned and what type of*

⁴¹ This will exclude consideration of persons involuntarily admitted for treatment under the *Mental Health Act 2001*. As to psychosurgery and persons admitted under that legislation, see section 58 of the *Mental Health Act 2001*.

⁴² This will exclude consideration of persons involuntarily admitted for treatment under the *Mental Health Act 2001*. As to electro-convulsive treatment and persons admitted under that legislation, see further section 59 of the *Mental Health Act 2001*.

⁴³ Consultation Paper on Capacity paragraph 7.98.

treatment can be provided if it is likely that the adult concerned will imminently recover capacity.

(4) Advance Care Directives

3.36 While earlier discussion in this Part focused on capacity to make healthcare decisions on a current basis when they arise, an advance care directive involves an individual making a decision or series of decisions on future medical treatment which is designed to take effect should the person lack the requisite capacity to make the relevant decision at a future date. In the Consultation Paper on Capacity, the Commission adverted to the issue of advance care directives⁴⁴ and noted that this is an important and complex issue which requires detailed consideration. In 2006, the Irish Council for Bioethics conducted a public consultation on the legal and ethical issues surrounding advance care directives with a view to publishing a report on the subject in early 2007. Accordingly, it is not proposed at this time to make recommendations in this area other than in the limited context of certain healthcare decisions which might be conferred using an enduring power of attorney.⁴⁵

E Testamentary Capacity

(1) Exclusion from Mental Capacity Legislation

3.37 In the Consultation Paper on Law and the Elderly, the Commission discussed the well-established common law principle that a duly executed will carries both a presumption of due execution and a presumption of testamentary capacity.⁴⁶ In ruling on testamentary capacity which requires the testator to be of “sound disposing mind”,⁴⁷ the courts have applied a presumption of testamentary capacity.⁴⁸ The test for determining testamentary capacity was set as follows in *Richards v Allan*:

“The testatrix must be shown to have capacity in the sense of understanding the nature of the act of execution and its effect, the

⁴⁴ Consultation Paper on Capacity paragraph 7.63 – 7.64.

⁴⁵ See Chapter 4, below.

⁴⁶ *Re Glynn deceased* [1990] 2 IR 326; *Blackall v Blackall* Supreme Court 1 April 1998 unrep. See generally Consultation Paper on Law and the Elderly Chapter 2.

⁴⁷ Section 77(1)(b) of the *Succession Act 1965*. See further Sperins “A Checklist of Instructions for a Will” (1999) 4(3) CPLJ 47; Hourican “Testamentary Capacity” (2000) 5(4) CPLJ 95.

⁴⁸ See *Bird v Luckie* (1850) 8 Hare 301; *Sefton v Hopwood* (1955) 1 Fos & F 578; *Banks v Goodfellow* [1870] LR 5 QB 549; *Re Corboy (deceased)* [1969] IR 148; *Re Glynn (deceased)* [1990] 2 IR 326; *Re O'Donnell (deceased)* High Court (Judge Kelly) 24 March 1999 [1999] IEHC 139; *Richards v Allan* [2001] WTLR 1031.

claims to which she ought to give effect, the property she is disposing of and not be affected by disorders of the mind which might pervert her sense of right.”⁴⁹

3.38 In line with the functional approach to capacity, an unexpected choice in relation to the disposition of assets will not in itself constitute evidence of lack of testamentary capacity.⁵⁰ Nor will the presence of a mental illness in itself rule out testamentary capacity.⁵¹ In *Re O'Donnell (deceased)* Kelly J stated of a testator who had schizophrenia:

“I am satisfied that the deceased was a reserved and withdrawn man. He was not a great conversationalist and he displayed odd features in his behaviour. However, I am not satisfied that any of those things, taken individually or in combination, demonstrate that he was lacking in testamentary capacity at the time when he made the will.”⁵²

3.39 Where the deceased had testamentary capacity when giving instructions for the drawing of a will, it is sufficient if, at the time of execution, the deceased has sufficient understanding to understand that they are executing a will for which they have previously given instructions even if at that time the person is not capable of understanding the provisions of the will if read clause by clause. Thus the level of capacity required for execution is of a lesser degree where previous instructions have been given.⁵³ It is also clear that a decline in capacity including the advent of deficiencies of memory will not rule out testamentary capacity.⁵⁴

3.40 There is, however, an argument for not assimilating the common law on testamentary capacity into the legislative capacity test in the mental capacity legislation proposed in this report. This is on the basis that account needs to be taken of a number of subtle differences of approach between the

⁴⁹ [2001] WTLR 1031, paragraph 23(a) *per* Anthony Mann QC. This derives from the classic test enunciated by Cockburn LJ in *Banks v Goodfellow* [1870] LR 5 QB 549, 565.

⁵⁰ *Bird v Luckie* (1850) 8 Hare 301, 306 *per* Wigram VC; *Re Glynn (deceased)* [1990] 2 IR 326, 340 *per* McCarthy J; *Re Potter (deceased)* [2003] NI Fam 2, paragraph 10 *per* Gillen J.

⁵¹ See *Re O'Donnell (deceased)* [1999] IEHC 139, High Court (Judge Kelly) 24 March 1999.

⁵² *Re O'Donnell (deceased)* High Court (Judge Kelly) 24 March 1999 [1999] IEHC 139 at paragraph 142.

⁵³ See *eg Re Flynn (deceased)* [1982] 1 All ER 882; *Richards v Allan* [2001] WTLR 1031.

⁵⁴ *Cattermole v Prisk* [2006] 1 FLR 693.

application of the uniform legislative understanding of capacity proposed in this report and the common law position concerning testamentary capacity.

3.41 The common law requires “the clearest and most satisfactory evidence”⁵⁵ in order to rebut the presumption of testamentary capacity. This is arguably a higher standard than the balance of probabilities approach which operates in relation to the displacement of the presumption of capacity which applies in other areas of civil law.⁵⁶ In addition, the common law on wills accommodates a reversal of the presumption of capacity where the circumstances surrounding the execution of the will are such as to excite suspicion.⁵⁷ In such circumstance the onus of proving validity will fall on the person asserting it. This reversal of the onus of proof of capacity may occur if a Death Certificate states the cause of death as “senile dementia” or “Alzheimer’s disease”. It may also apply if a will was executed by the testator during a ‘lucid interval’,⁵⁸ or if the testator resided in a psychiatric facility or facility for persons with mental disabilities when the will was executed.⁵⁹

3.42 Given the specific public policy considerations which apply in relation to making a will, the Commission considers that it is appropriate to exclude wills from both the scope of the statutory test of capacity and the presumption of capacity which will operate under the proposed capacity and assisted decision-making legislation. Therefore on the enactment of the proposed capacity and assisted decision-making regime, the existing legislation and judicial decisions concerning testamentary capacity would continue to apply.

3.43 *The Commission recommends that capacity to make a will should be excluded from the capacity provisions of the proposed mental capacity legislation.*

(2) Assessment of Testamentary Capacity

(a) Consultation Paper Recommendations

3.44 In the Consultation Paper on Law and the Elderly, the Commission recommended against the imposition of additional formal requirements for the execution of a will on testators generally or on

⁵⁵ *Re Glynn (deceased)* [1990] 2 IR 326, 300 per Hamilton P.

⁵⁶ See further paragraph 2.34 ff above.

⁵⁷ *Parker v Felgate* (1883) 8 PD 171; *Re Begley* [1939] IR 479; *Re Wallace* [1952] 2 TLR 925; *Re Corboy (deceased)* [1969] IR 150; *Blackall v Blackall* High Court (McCracken J) 28 June 1996; *Richards v Allan* [2001] WTLR 1031.

⁵⁸ *Re Corboy (deceased)* [1969] IR 148.

⁵⁹ Many of these issues would be addressed by the adoption of a practice of obtaining contemporaneous medical evidence of capacity. See further 3.44 ff below.

particular categories of testator.⁶⁰ Instead, contemporaneous certification of capacity by a medical practitioner was recommended as a precaution in cases of doubtful capacity and cases where a later challenge to a will appears likely.⁶¹ It was recommended that this would include a situation where a donor of a registered power of attorney wishes to execute a will.⁶²

3.45 The Commission recommended that guidelines on the assessment of testamentary capacity should be drawn up by the Law Society and the Medical Council for the assistance of solicitors and medical practitioners.⁶³ It was further recommended that the guidelines for solicitors should note that contemporaneous notes should be made by solicitors regarding the details of a meeting with a client when testamentary capacity is an issue.⁶⁴

(b) Discussion

3.46 In the Consultation Paper on Law and the Elderly, the Commission considered that it would be inappropriate and discriminatory to introduce a maximum age at which a will could be made.⁶⁵ It is appropriate to affirm this thinking. Rather than making arbitrary assumptions based on age, as noted above,⁶⁶ the existing position is that a reverse onus of proof applies in relation to a will where the circumstances are such as to raise doubts as to testamentary capacity.⁶⁷ However, there is no statutory requirement in the *Succession Act 1965* for the contemporaneous assessment and certification of the mental capacity of testators.⁶⁸ The Commission is cognisant that the question of whether a person was of “sound disposing mind” as required by section 77(1)(B) of the *Succession Act 1965* is an issue which generally surfaces after the death of the testator, necessitating the difficult task of engaging in a retrospective assessment of capacity.

3.47 The Commission considers it desirable to make legislative provision for solicitors to refer a client for a contemporaneous assessment of capacity by a medical practitioner in cases where doubts as to a client’s testamentary capacity arise or may arise at a future date. This would operate to reduce the chances of a will being open to challenge after the testator’s

⁶⁰ Consultation Paper on Law and the Elderly paragraph 2.36.

⁶¹ *Ibid* at paragraph 2.36.

⁶² *Ibid* at paragraph 3.46-3.47.

⁶³ *Ibid* at paragraph 2.37.

⁶⁴ *Ibid* at paragraph 2.38.

⁶⁵ *Ibid* at paragraph 2.03.

⁶⁶ Paragraph 3.41 above.

⁶⁷ See paragraph 3.41 above.

⁶⁸ Consultation Paper on Law and the Elderly paragraph 2.23-2.35.

death. An Affidavit of Capacity would also reflect practice in the Probate Office where a doctor's certificate is considered to be the best evidence of testamentary capacity. The Commission notes, however, that in deciding the question of sound disposing mind, although the courts will take medical evidence into account, the courts are deciding a matter of law and not of medicine.⁶⁹

3.48 The Commission considers that it would be desirable for the Law Society to produce guidelines for solicitors in this area which would recommend that solicitors take the precaution of obtaining a certificate of capacity in cases where capacity is in doubt or a future challenge to testamentary capacity is likely, for example, because the will is made during a lucid interval by a person with dementia or the testator is resident in a psychiatric facility. This reflects the so-called 'golden rule' established by the English courts that a will should be approved or witnessed by a medical practitioner where it is executed by an elderly person or a person who is seriously ill.⁷⁰ However, the 'golden rule' that the making of a will by an old and infirm testator ought to be witnessed and approved by a medical practitioner who is satisfied as to the capacity and the understanding of the testator has been categorised as guidance rather than being "itself a touchstone of validity."⁷¹ This reflects the fact that the onus is on both legal professionals and courts to make a legal assessment of capacity rather than simply deferring to any medical assessment which may have been made. Thus in *Richmond v Richmond*⁷² Neville J emphasised that "... although the court must have the evidence of experts in the medical profession who can indicate the meaning of any symptoms and give some general idea of the mental deterioration which takes place in cases of this kind",⁷³ the court must make its own legal assessment of testamentary capacity.

3.49 In formulating any such guidelines, the guidelines on assessing testamentary capacity adopted by the British Medical Association and the Law Society⁷⁴ are instructive. They focus on the following areas:

- The person's understanding of the nature of the act of making a will;

⁶⁹ *Twomey v O'Shea* Circuit Court (Judge McCartan) 20 May 1999.

⁷⁰ *Kenward v Adams* [1975] CLY 3591; *Re Simpson Deceased*; *Schaniel v Simpson* (1977) 121 SJ 224; *Buckenham v Dickinson* (1997) CLY 661.

⁷¹ *Cattermole v Prisk* [2006] 1 FLR 694 at paragraph 12 *per* Norris QC. See also *Buckenham v Dickinson* [1997] CLY 4733; *Re Potter (deceased)* [2003] NI Fam 2.

⁷² (1914) LT 273.

⁷³ *Ibid* at 274.

⁷⁴ British Medical Association and The Law Society *Assessment of Mental Capacity* (2nd ed 2004) at 66-67.

- The person’s understanding of the effects of making a will;
- The person’s understanding of the extent of property covered by a will;
- The person’s understanding of the relative merits of choosing potential beneficiaries.

3.50 Finally, the Commission considers that existence of contemporaneous notes of a meeting between a solicitor and a client in relation to the execution of a will or codicil greatly assists in the event of any later challenge to testamentary capacity. The same applies in relation to medical assessments of testamentary capacity. The desirability of solicitors maintaining full contemporaneous attendance notes was emphasised by Smyth J in *Moyles v Mahon*⁷⁵ in relation to an issue of undue influence where a solicitor had not maintained a note of his meeting with his 80 year old client.

(c) Report Recommendations

3.51 *The Commission recommends that the Law Society and the Medical Council produce guidelines on the assessment of testamentary capacity for the benefit of their members. These guidelines should indicate the importance of contemporaneous note-taking in relation to the assessment of testamentary capacity.*

(3) Statutory Wills

(a) Discussion

3.52 In some jurisdictions⁷⁶ legislation provides for the making of a statutory will on behalf of a person who lacks the requisite testamentary capacity. This process permits a substitute decision-maker to make a will on the person’s behalf or to alter the provisions of an existing will. Amending an existing will on behalf of a person who lacks capacity may allow alteration to reflect a significant change in circumstances.

3.53 Under the current regime in England and Wales, the Court of Protection can approve the making of a will on behalf of a person (termed a “patient” in the *Mental Health Act 1983*) who is incapable, by reason of mental disorder, of managing and administering their property and affairs.

⁷⁵ High Court (Judge Smyth) 6 October 2000 at 19. See also *Blackall v Blackall* Supreme Court 1 April 1998.

⁷⁶ See eg in the UK, section 96(e) of the *Mental Health Act 1983* and section 18(1)(i) and Schedule 2 of the English *Mental Capacity Act 2005* (not yet commenced).

The limitations of this approach are illustrated by Ferris J's comments in *Re R*:⁷⁷

“The court needs to have a fair degree of assurance that what it proposes to do does indeed represent the wishes of the patient and that it is what she would decide for herself if she were temporarily to recover her capacity and to receive proper advice as to her position.”

3.54 Principles to be observed in relation to the making of a statutory will were set out by Megarry VC in *Re D(J)* in the context of a woman who had lost capacity through the onset of senility:

- The court will proceed on the basis of a notional assumption that the patient is having a brief lucid interval at the time the will is made;
- During that brief lucid interval the patient is treated as having a full knowledge of the past, and a full realisation that as soon as the will is executed he or she will relapse into the pre-existing mental state;
- The court must consider the actual patient's likely wishes not those of a hypothetical person in that situation. This includes taking account of idiosyncratic views and strong likes and dislikes of other persons and causes. In doing so the court must take the patient as he or she was before losing testamentary capacity, with some allowance made for the passage of time since the loss of capacity;
- The patient is to be envisaged as being advised by competent solicitors;
- The approach to be taken is not one of balance sheet or profit and loss account in relation to moral indebtedness.⁷⁸

3.55 In contrast with the position prevailing under the *Mental Health Act 1983*, when operational, section 16 and Schedule 2 of the English *Mental Capacity Act 2005* will permit a formally appointed deputy decision-maker to make a will on behalf of another person who lacks testamentary capacity.⁷⁹ Such a will is to be treated as though it was executed personally by the adult to whose affairs it relates and that they had legal capacity to make the will.

⁷⁷ English Chancery Division 11 December 1998.

⁷⁸ [1982] 2 All ER 37.

⁷⁹ This builds on the basis provided in section 96(e) of the *Mental Health Act 1983* under which the Court of Protection has jurisdiction to make statutory wills on behalf of persons lacking capacity.

3.56 It would appear that in the UK applications to the Court of Protection concerning statutory wills have been rare. Terrell describes the nature of the application as follows:

“An application needs to show the patient's family and interests, character and history of generosity, the patient's testamentary history and the relationship to his proposed beneficiaries, the size of the estate and the likely size of the estate at the date of death. The application must then apply all these factors to the present situation and show why the present dispositions under an existing will or intestacy are inappropriate, and why the patient would wish to change those present dispositions. The burden of proof is on the applicant to justify the change to the current dispositions.”⁸⁰

3.57 It has been said that making a statutory will entails a “conceptual barrier” on the basis that “[i]t seems fundamentally incongruous that a person who cannot make a will, which is a very personal and subjective document, somehow makes a will.”⁸¹ However, notional capacity is not unknown Irish law. Section 4(3) of the *Enduring Powers of Attorney Act 1996* provides the following guidance for an attorney under an EPA in making decisions: “If any question arises ... as to what the donor of the enduring power might at any time be expected to do it shall be assumed that the donor had the mental capacity to do so.”

3.58 The Commission appreciates that in certain circumstances it may be appropriate to vary an existing will on behalf of a person who lacks capacity. However, as a matter of policy it is not considered appropriate to intervene where no will is in existence. In accepting the utility of a statutory wills procedure, the Commission is conscious of the need to consider a countervailing policy objective of ensuring that vulnerable adults are not open to abuse. Having regard to this, the Commission has reservations concerning the scope for abuse which a statutory wills procedure would involve. There is a strong possibility that assisting decision-makers may be inclined to unfairly favour their own interests in making applications under a statutory will procedure. The Commission is therefore against assisting decision-makers such as personal guardians being given the power to make or alter wills on behalf of an adult who lacks testamentary capacity. The Commission is not satisfied that adequate checks and balances could be imposed to prevent the possibility of abuse of a statutory wills procedure and to detect the existence of such abuse. Accordingly, on balance, the

⁸⁰ Terrell “Wills for Persons Without Capacity” (2004) 154 (7314) NLJ 968 at 968-969.

⁸¹ Terrell “Wills for Persons Without Capacity” (2004) 154 (7314) NLJ 968 at 968. See also Rich “Statutory wills in practice: a difficult exercise” (2003) 1(3) TQR 5.

Commission recommends against the delegation of testamentary dispositive powers to assisting decision-makers.

3.59 Instead, the Commission's preference is that the alteration of a statutory will on behalf of an adult who lacks capacity will be at the discretion of the High Court acting on its own initiative or on application being made to it by any third party including the proposed Guardianship Board.⁸² It is anticipated that this power would only be exercised in exceptional circumstances where the justice of the case demands it *eg* where there has been a considerable change in circumstances since the execution of the will which ought to be reflected. In making provision for the alteration of a will in exceptional circumstances, the Commission is not in favour of making provision for a will to be executed in circumstances where no will is in existence.

(b) Report Recommendation

3.60 *The Commission recommends that in exceptional circumstances, the High Court should be given the discretionary power to order that the alteration of a will of an adult who lacks testamentary capacity. The Court, acting on its initiative or on an application being made to it by any third party including the proposed Guardianship Board, would exercise these powers in exceptional circumstances where the justice of the case demands it.*

(4) Application of the Doctrine of Ademption where Property Subject of Specific Devise is Sold to Fund Care

3.61 A further issue merits consideration which has not been examined in the earlier Consultation Papers. Under the doctrine of ademption, where property the subject of a specific legacy or devise is disposed of in the testator's lifetime, the legacy will be adeemed and the beneficiary will take no benefit and no other benefit will be substituted.⁸³ In the Commission's view the issue of ademption is a general one for all testators and their beneficiaries. However, there is one aspect which has particular resonance in relation to adults who, having made a will, have subsequently experienced a decline in capacity which has resulted in them entering long-term care.

3.62 Where an adult's property is sold to fund care arrangements, there is a particular issue as to the effect of the doctrine of ademption where the person no longer has testamentary capacity to alter their will to anticipate the failure of an effected specific devise. In the UK, section 101 of the *Mental*

⁸² In relation to the proposed role of the Guardianship Board and the High Court see Chapter 6 below.

⁸³ See further *Keating on Probate* (2nd ed Round Hall Sweet & Maxwell 2002) at paragraph 6-27 ff.

Health Act 1983 provides (in relation to “patients” covered by the legislation) that the net proceeds of the sale of an asset will still pass to the legatee on the death of the testator, even though the asset itself has been sold “if and so far as circumstances allow”.⁸⁴ However, this is not without difficulties. First and foremost, on the testator’s death it may prove difficult to identify what constitutes the remaining replacement property when funds have been depleted and perhaps mixed with other funds. Additional conceptual difficulties arise if there has been a significant alteration in the person’s relationship with the beneficiaries named in his/her will or those who would take on intestacy.

3.63 Section 67 of the *Lunacy Regulation (Ireland) Act 1871* provides that if land owned by a Ward of Court is sold, the persons who would have been entitled to the land on the death of the Ward of Court will have the same interest in the surplus monies. This prevents ademption occurring.⁸⁵

3.64 The concept of rights attaching to proceeds of sale also exists in the separate context of section 121 of the *Succession Act 1965* which relates to dispositions made by the testator in his lifetime with the intended purpose of disinheriting a spouse or child. Under section 121(8), the court can deem the proceeds of sale to form part of the deceased’s estate.

3.65 Some additional protection is made in Irish law for spouses and children. Under section 111 of the *Succession Act 1965* a spouse is entitled to a legal right share where a will was made.⁸⁶ In relation to children, section 117 of the *Succession Act 1965* provides a mechanism for children of a testator who feel that they have not been adequately provided for under a will to seek judicial assistance. Under section 117(1), where the court is of opinion “that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.” However, it would appear that rather than having carte blanche to redistribute the estate to take account of the interests of a child, a positive failure in moral duty must be established,⁸⁷ a test which is unlikely to be satisfied on the basis of failure of a testamentary gift alone. While some protection is available under the legal right share provisions, this is not all-embracing and is fixed both in its proportions and its application to spouses and children.

⁸⁴ Section 101(1)(a) of the *Mental Health Act 1983*.

⁸⁵ See further O’Neill *Wards of Court in Ireland* (First Law 2004) at paragraph 5.26.

⁸⁶ See further *Keating on Probate* (2nd ed Round Hall Sweet & Maxwell 2002) at paragraph 6-84 ff.

⁸⁷ *In the Goods of GM: FM v TAM* 106 ILTR 82.

3.66 The Commission regards the issue of the application of the doctrine of ademption to the sale of assets to fund residential care as a complex area which must be looked at through a lens which takes account of wider policy implications. Ademption may occur where a testator has capacity yet disposes of an asset. Arguably, there is a “voluntariness” to this scenario which is lacking when the disposition occurs at a third party’s instigation in circumstances where the testator has lost testamentary capacity. On this basis, it is perhaps not inequitable for the law to reflect the distinction.

3.67 Where a testator lacks capacity to make a will and property is disposed of by court order on the application of an assisting decision-maker, it should be open to the court to take this into account on a case by case basis in making an order pursuant to the proposed statutory wills procedure recommended above.⁸⁸ In such a situation, the court would be expected to be cognisant of any previous orders made by the Guardianship Board. If this was provided for, the Commission does not believe there would be a need for the enactment of a specific provision of the type contained in section 101 of the UK’s *Mental Health Act 1983*.

3.68 *The Commission recommends that it be provided that if land owned by a person who is the subject of a guardianship order is sold to fund their long-term care, the persons who would otherwise have been entitled to the land on the death of the original owner will be deemed to have the same proportionate interest in any surplus monies from the proceeds of sale which remain after the relevant care needs have been provided for.*

3.69 *The Commission recommends that the discretion afforded to the courts under the proposed statutory will procedure should be capable of accommodating ademption in appropriate circumstances*

⁸⁸ Obviously, this necessitates the relevant procedures being completed within the lifetime of the testator.

CHAPTER 4 ENDURING POWERS OF ATTORNEY

A Introduction

4.01 An enduring power of attorney is a legal mechanism established by the *Powers of Attorney Act 1996*¹ for granting certain decision-making powers to a nominated attorney in the event that the person loses capacity.² Enduring powers of attorney (“EPAs”) are an excellent way to preserve the autonomy of the decision-maker in setting out their own choice of alternate decision-maker in the event of loss of capacity. In the Consultation Paper on Law and the Elderly, the Commission concluded that the EPA system “has the potential to be a very useful mechanism as it facilitates the retention of as much autonomy as possible for vulnerable adults.”³ However, the utility of the device depends on the individual having both the capacity and the foresight to execute an EPA.

4.02 In the Commission’s view, while in general the EPA regime is working well, it is appropriate to make some amendments to the EPA regime to ensure its continuing relevance within the decision-making framework set out in this report. The recommendations in this chapter build on territory covered in the Consultation Paper on Law and the Elderly which proposed a number of reforms to the law on EPAs.⁴ This chapter also revisits concerns raised in the more recent Consultation Paper on Capacity.⁵ The application

¹ The 1996 Act was based on the Commission’s Report on *Land Law and Conveyancing Law: (2)* (advising powers of attorney) (LRC 31- 1989). See also the *Enduring Powers of Attorney Regulations 1996* (S.I. No. 196 of 1996); the *Enduring Powers of Attorney (Personal Care) Regulations* (S.I. No. 287 of 1996); Law Society of Ireland *Enduring Powers of Attorney – Guidelines for Solicitors* (2004).

² See generally Gallagher *Powers of Attorney Act 1996* (Round Hall Sweet & Maxwell 1998); O’Neill *Wards of Court in Ireland* (First Law 2004) Chapter 8. Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) (hereafter “Consultation Paper on Law and the Elderly”) Chapter 3; Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) (hereafter “Consultation Paper on Capacity”) paragraph 4.37-4.47; 4.57-4.60.

³ Consultation Paper on Law and the Elderly paragraph 6.01.

⁴ Consultation Paper on Law and the Elderly Chapter 3.

⁵ Consultation Paper on Capacity paragraph 4.37 ff.

of the EPA regime has been dealt with in more detail in the Consultation Paper on Law and the Elderly⁶ and this chapter simply focuses on changes to the regime which are considered desirable. Part B discusses the desirability of relocating the EPA regime within the proposed mental capacity legislation. Part C gives consideration to the need to amend the EPA regime to accommodate the functional approach to capacity. Part D deals with notification of the execution of an EPA and of intention to register an EPA. Part E covers an issue in relation to the revocation of EPAs. Part F discusses the need to extend the scope of EPAs to cover healthcare decision-making. Part G considers principles governing attorneys appointed under an EPA while Part H considers supervisory structures. Part I considers the interface between EPAs and other forms of assisted decision-making.

B Legislative Reform and Restatement

4.03 One of the Commission's central recommendations in this report is the enactment of specialist mental capacity legislation.⁷ In this context it is considered appropriate to relocate a reformed enduring powers of attorney regime within this comprehensive legislative framework. It makes sense to place the provisions governing EPAs within a statute dealing with capacity and assisted decision-making. A unified legislative structure will help to ensure that the law relating to civil legal capacity and assisted decision-making is easily accessible. The inclusion of EPAs within the legislation would also pave the way for including attorneys within the supervisory net of the proposed Public Guardian which the legislation will also establish and would enable attorneys to be subject to the principles for assisting and substitute decision-makers to be included in mental capacity legislation.⁸

4.04 *The Commission recommends that the primary legislative regime governing enduring powers of attorney be included in the proposed mental capacity legislation.*

C Approach to Capacity

(1) Consultation Paper Recommendation

4.05 In the Consultation Paper on Capacity, the Commission recommended that the approach to capacity in the *Powers of Attorney Act*

⁶ Consultation Paper on Law and the Elderly Chapter 3.

⁷ See paragraph 2.20 above.

⁸ See paragraph 2.72 ff above. On the eligibility of persons to be appointed as attorneys under an EPA or as personal guardians see further paragraph 6.53ff below.

1996 should be reviewed in the light of the recommended functional approach to capacity.⁹

(2) **Discussion**

4.06 The understanding of capacity under the EPA regime is somewhat removed from the predominantly functional approach to capacity endorsed in this report. This issue was highlighted as requiring further consideration in the Consultation Paper on Capacity. The issue impacts on two main areas considered below:- capacity to execute an EPA and registration of an EPA.

4.07 The Commission has given some consideration to the issue. Undeniably there is an argument to be made that capacity to execute an EPA, the test for registration and the operation of an EPA should be assessed in an issue-specific, time-specific manner. However, on balance, the Commission is persuaded that a fundamental re-working of the EPA system to incorporate a fully functional approach to capacity is not warranted. The primary reason for this lies in the distinction between legal capacity issues which are issues of public law and the nature of an EPA which is a private law arrangement entered into voluntarily by a person with capacity setting out their wishes as to what is to occur if and when they lose capacity. In other words, an EPA is an option freely availed of or not availed of by an adult with the requisite capacity.

4.08 The Commission's view is supported by the availability of the functional approach in relation to the appointment of a Personal Guardian where an EPA is not entered into. Furthermore, from a policy perspective, many persons would be happy to know that on registration of an EPA authority over all the affairs which they have designated passes to their attorney at that point. It should be remembered in this context that, in practice, EPAs typically serve to address the immediate or gradual cognitive decline of the donor from a form of dementia from which there is unlikely to be a lasting return to former levels of capacity. In such a situation, many persons would be reassured to know that their designated affairs would then be handled by their attorney.

4.09 In making the decision not to radically overhaul the EPA system, some other brief observations are pertinent. The EPA regime gives a number of choices to a potential donor apart from the preliminary decision as to whether or not to avail of the opportunity to execute an EPA. A donor may choose to execute a general or limited EPA. A general EPA will give the attorney power to make decisions generally in relation to the property, financial and business affairs and personal care decisions concerning the donor.¹⁰ Alternatively, a donor may make an EPA covering property and

⁹ Consultation Paper on Capacity paragraph 4.60.

¹⁰ Section 6 of the *Enduring Powers of Attorney Act 1996*.

financial affairs or personal welfare decisions. Within each of these categories it is open to the donor to delimit the nature of decisions covered and the attorney or attorneys chosen. In effect this means that it is open to the donor to choose how much autonomy they wish to cede on the EPA coming into effect upon registration.

(a) Capacity to Execute an EPA

4.10 The First and Second Schedule to the *Enduring Powers of Attorney Regulations 1996*¹¹ set out the form which an EPA instrument must take. As part of the execution of an EPA, a solicitor is required to certify that the donor understood the effect of the execution of the EPA¹² and that they are satisfied that there is no reason to believe that the document is being executed by the donor as a result of fraud or undue pressure.¹³ They require a registered medical practitioner to certify capacity to execute an EPA. No time-frame for such certification is specified but the Law Society Guidelines recommend that the statement of capacity of the medical practitioner and the certificate of the solicitor “should ideally be completed within 30 days of the signing of the donor”.¹⁴

4.11 The requirement for capacity certification may appear to go against the tenor of the presumption of capacity embraced in this report. However, significant consequences follow from the registration of an executed EPA in terms of granting substitute decision-making ability to the attorney in relation to personal welfare and financial matters. Therefore the Commission believes that contemporaneous capacity certification is an important safeguard against the possibility of an EPA being executed by a person who lacks the relevant capacity, possibly at the instigation of an interested third party. In this respect the requirement of contemporaneous capacity certification may be regarded, not as negating the presumption of capacity, but rather as an additional safeguard against abuse of the EPA regime. The contemporaneous certification of capacity to execute an EPA is in line with the Commission’s best practice recommendations in relation to wills where similar policy considerations arise.¹⁵

¹¹ S.I. No. 196 of 1996.

¹² In *In Re K (Enduring Powers of Attorney), In re F* [1988] Ch 310 Hoffmann J treated the relevant test as being whether the person understands that the attorney would be able to assume control over their affairs.

¹³ On this duty see further Law Society *Enduring Powers of Attorney: Guidelines for Solicitors* (2004) paragraphs 1.1-1.2 (dealing with capacity to execute an EPA and recommending keeping an attendance note demonstrating the client’s understanding where the client is elderly).

¹⁴ Law Society *Enduring Powers of Attorney: Guidelines for Solicitors* (2004) paragraph 1.9.

¹⁵ See paragraph 3.44 ff above.

4.12 *The Commission recommends that the requirement for a donor's capacity to execute an enduring power of attorney to be attested to by a registered medical practitioner should continue to apply.*

(b) Loss of Capacity Required for Registration of an EPA

4.13 Section 9(1) of the *Powers of Attorney Act 1996* provides: "If the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable, the attorney shall, as soon as practicable, make application to the court for the registration of the instrument creating the power." In order to reflect a more functional approach, it is considered appropriate to replace references to general loss of mental capacity with a reference to the donor losing capacity to make decisions in an area covered by the particular EPA.

4.14 It is envisaged that, where no objections arise, registration of EPAs will take place through the Office of the Public Guardian. Where an objection is made to the registration of an EPA, under the new regime recommended in this Report, the issue will be dealt with by the Guardianship Board. It is proposed that the Guardianship Board will have the same discretion as to whether to permit an EPA to be registered as the High Court currently possesses.¹⁶

4.15 *The Commission recommends that an EPA be capable of registration on the grounds that the donor has lost capacity or is losing capacity in an area covered by the EPA.*

4.16 *The Commission recommends that notice parties will be able to object to registration on the grounds that the donor has not lost capacity or is not losing capacity to make decisions in an area covered by the EPA.*

4.17 *The Commission recommends that where no objections are received, it would be the role of the proposed Office of the Public Guardian to register an EPA.*

4.18 *The Commission recommends that the proposed Guardianship Board be given the role of making decisions on applications to permit registration of an enduring power of attorney where an objection has been received.*

D Notice Requirements

(I) Consultation Paper Recommendations

4.19 In the Consultation Paper on Law and the Elderly, the Commission recommended that the requirement under Regulation 7 of the

¹⁶ Section 10(2) of the *Powers of Attorney Act 1996*.

Enduring Power of Attorney Regulations 1996 to notify various parties, including spouse and family members, of the execution and intended registration of an EPA be amended so that a cohabitant would come within the class of persons who must be notified.¹⁷ It was also recommended that the donor would have the power to exclude a named individual from receiving notice.¹⁸

(2) Discussion

4.20 The Commission affirms the importance of the notice requirement as part of the system of checks and balances in connection with EPAs. Under section 10 of the *Powers of Attorney Act 1996*, those given notice may make a formal objection to the registration of an EPA which the court must take into account. In line with the tenor of recommendations in the Commission's *Report on the Rights and Duties of Cohabitants*,¹⁹ it is appropriate to extend the notice parties to include cohabitants.

4.21 While it would go against the public policy rationale of the notification requirement to allow its wholesale exclusion, the Commission recognises that provision should be made for exclusion of one named individual from notice. This should be permissible where this option is freely chosen by the donor provided that at the time notice is to be given there is at least one other notice party within that particular class of persons (the classes are currently listed in sub-paragraph 2(2) of the First Schedule to the *Powers of Attorney Act 1996*) who can receive notification and who is not the attorney appointed by the enduring power of attorney.

(3) Report Recommendations

4.22 *The Commission recommends that cohabitants be added to the list of notice parties in respect of the execution and the registration of an EPA.*

4.23 *The Commission recommends that provision should be made for exclusion of a named individual from entitlement to EPA notifications where this option is freely chosen by the donor and there is at least one other notice party within that particular class of persons who is not the attorney appointed by the enduring power of attorney.*

¹⁷ Consultation Paper on Law and the Elderly paragraph 3.31.

¹⁸ *Ibid.*

¹⁹ Law Reform Commission *Report on the Rights and Duties of Cohabitants* (LRC 82-2006).

E Revocation

(1) Consultation Paper Recommendations

4.24 In the Consultation Paper on Law and the Elderly the Commission recommended that prior to the registration of an EPA, its revocation should be governed by the same formal requirements as its execution.²⁰ It was also recommended that solicitors be obliged at the time of the execution of an EPA to inform clients of their right to revoke an EPA before its registration.²¹

(2) Discussion

4.25 Where an EPA has been registered on the basis that the donor is or is becoming mentally incapable, a purported revocation will not be effective unless it has been confirmed by the High Court.²² The law on undue influence²³ and the statutory notice and objection provisions which operate prior to the registration of an EPA provide a safeguard against improper registration of an EPA. However, the Act does not expressly deal with the revocation of an EPA before its registration.

4.26 The Commission believes that it is important that this lacuna is addressed. Provided that the donor of an EPA which has not been registered retains the requisite capacity, there should be a mechanism for revocation set out in legislation. Most appropriately, revocation could be achieved through contacting a solicitor to arrange for the signing of an instrument of revocation in order to revoke the enduring power of attorney and prevent its future registration. Given that an EPA is not required to be executed under seal,²⁴ the Commission believes that it is not appropriate to impose this requirement in respect of revocation. The instrument should state the donor's intention to revoke and it should be signed in the presence of a witness who is not the attorney under the EPA. As with the execution of an EPA, there should also be a requirement that the instrument of revocation includes a statement from a solicitor to the effect that they are satisfied that the donor of the EPA understands the effect of revocation and has no reason

²⁰ Consultation Paper on Law and the Elderly paragraph 3.25.

²¹ *Ibid.*

²² Sections 11(1) and 12(3) of the *Powers of Attorney Act 1996*. Under the new scheme proposed in this Report, the Guardianship Board will assume this role.

²³ See also section 5(2)(d)(ii)(II) of the *Powers of Attorney Act 1996* and Law Society of Ireland *Enduring Powers of Attorney: Guidelines for Solicitors* (2004) paragraph 1.1.

²⁴ Section 15(2) of the *Powers of Attorney Act 1996*.

to believe that this document is being executed as a result of fraud or undue influence. In some cases it may also be prudent to obtain a statement of capacity from a medical practitioner.

4.27 The Commission notes that the recommendation in the Consultation Paper on Law and the Elderly that solicitors should inform their clients of their right of revocation was subsequently provided for in the Law Society's guidelines concerning EPAs.²⁵ These guidelines are for solicitors advising clients who wish to execute an EPA.

(3) Report Recommendations

4.28 *The Commission recommends making legislative provision for the formalities concerning the revocation of an EPA where the donor has the requisite capacity to do so as follows:*

- *Whether an EPA has been registered or not, in order to revoke it, the donor of an enduring power of attorney should be required to sign an instrument of revocation in the presence of a witness who is not the attorney. This instrument should contain a statement from a solicitor that they are satisfied that the donor of the EPA understands the effect of revocation and has no reason to believe that this document is being executed as a result of fraud or undue influence.*
- *Notice of the revocation concerning an EPA which has not been registered should be given to the same persons as on execution of an EPA as well as to the attorney whose authority is thereby revoked. Where the Guardianship Board has affirmed revocation following registration, the same procedure should apply.*

F Extension of Authority to Healthcare Decisions

(1) Consultation Paper Recommendation

4.29 In the Consultation Paper on Law and the Elderly, the Commission recommended that attorneys appointed under EPAs should have the same powers as personal guardians in relation to healthcare decisions unless this is specifically excluded by the donor.²⁶

(2) Discussion

4.30 The above provisional recommendation reflects the fact that at present EPAs can only give attorneys the power to make property, financial

²⁵ Law Society of Ireland *Enduring Powers of Attorney – Guidelines for Solicitors* (2004) at paragraph 1.10.

²⁶ Consultation Paper on Law and the Elderly paragraph 3.15.

and business affairs and personal care decisions on behalf of the donor. As currently defined, personal care decisions cover matters such as where the donor is to live and day to day matters but do not encompass healthcare decisions. Under the equivalent lasting powers of attorney (“LPA”) regime which will come into effect under the English *Mental Capacity Act 2005*, the welfare decisions which an attorney will be permitted to make include decisions on the carrying out or continuation of medical treatment.²⁷

4.31 The Commission believes that to ensure a congruence of approach in decision-making structures and to avoid a decision-making vacuum occurring in the important area of healthcare, the potential remit of EPAs should be extended. The envisaged extension would allow an EPA donor to choose to give an attorney the power to make certain healthcare decisions on their behalf which would also be available to personal guardians appointed under the proposed new regime. This would involve the attorney having the ability to make certain healthcare decisions on the EPA being operative²⁸ provided that the donor lacks capacity or the attorney reasonably believes that the donor lacks capacity to make the relevant decision. Essentially this range of decisions would be on a par with those which could be made by personal guardians appointed under the proposed mental capacity and guardianship legislation.²⁹

(3) Commission Recommendation

4.32 *The Commission recommends that an enduring power of attorney should be capable of permitting an attorney to make certain healthcare decisions on behalf of the donor where the donor lacks capacity to make the decision.*

G Principles Governing Attorneys

4.33 The Commission considers that attorneys appointed pursuant to an EPA should be bound by the principles for assisting decision-makers which the Commission recommended in Chapter 2. The Commission also considers that persons who are eligible to be appointed as personal guardians should also be eligible to be appointed as an attorney under an EPA.

4.34 *The Commission recommends that attorneys should be bound by the principles for assisted decision-making recommended for inclusion in mental capacity legislation.*

²⁷ Section 11(7) (c) of the *Mental Capacity Act 2005*.

²⁸ Consultation Paper on Law and the Elderly paragraph 3.13-3.14.

²⁹ See further paragraph 6.50ff below.

4.35 *The Commission recommends that the list of qualifying persons who may be appointed as an attorney under an EPA be amended to coincide with those who may be appointed personal guardians.*

H Supervisory Structures

(I) Consultation Paper Recommendations

4.36 In the Consultation Paper on Law and the Elderly the Commission recommended that the functions currently exercised by the Registrar of Wards of Court would be exercised by the Public Guardian.³⁰ The Commission also considered that attorneys appointed under EPAs should be subject to the overall supervision of the proposed Office of the Public Guardian.³¹ This would involve providing the Public Guardian with the power to call for periodic reports if there are concerns about the need to protect the donor of an EPA.³² It was considered that on request by the Office of the Public Guardian, attorneys should be required to submit accounts of the donor's affairs to the Office or to a person nominated by the donor or the Public Guardian.

4.37 The Commission recommended that the Office of the Public Guardian should give directions and guidance on the requirement on attorneys to provide "adequate accounts".³³ Furthermore, it was recommended that generally there should be a requirement that the property and assets of the donor should be kept separate and clearly distinguishable from other property and assets and lists of all transactions should be maintained.³⁴

4.38 The Commission recommended that the Law Society's guidelines to solicitors might include specific advices to be given to donors at the time of execution of an EPA and to attorneys at the time of registration of an EPA.³⁵

4.39 The Commission recommended that the Financial Regulator should promote awareness among financial institutions of the status of accounts in the name of donors of registered EPAs.³⁶

³⁰ Consultation Paper on Law and the Elderly paragraph 3.45.

³¹ Consultation Paper on Law and the Elderly paragraph 3.41.

³² *Ibid* at paragraph 3.38.

³³ *Ibid* at paragraph 3.45.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

(2) **Discussion**

4.40 At present the role of the Registrar of Wards of Court comes into play when it is sought to register an EPA which has been previously executed.³⁷ An application for registration of an EPA by the High Court is made to the Registrar of Wards of Court.³⁸ The High Court then registers the instrument where appropriate to do so. Under the new scheme proposed in this report, an application to register an EPA would be made to the Office of the Public Guardian who will register an EPA save where an objection is received, in which case the Guardianship Board would decide on whether or not to register it.

4.41 It is envisaged that the supervision of attorneys under EPAs will be one strand of the supervisory functions of the Public Guardian.³⁹ In giving supervisory powers to the Public Guardian, this provides an opportunity to extend the supervisory net beyond financial decisions so as to include all areas of decision-making. This will remedy the gap which currently exists in relation to monitoring of personal care decisions by an attorney acting under the authority of an EPA.

4.42 In particular, the Public Guardian should have power to:

- give directions to the attorney under an EPA in relation to the maintenance and production of accounts and records;
- request the attorney to supply oral and written information in relation to the carrying out of his or her duties;
- give directions with respect to the remuneration or expenses of the attorney;
- authorise the making of gifts;
- request the Guardianship Board to revoke an EPA.

4.43 It is envisaged that the proposed Guardianship Board would have the power to give directions in relation to the interpretation of EPA instruments and the role of attorneys. In line with the functional approach, the Guardianship Board should be given the power to cancel an EPA in

³⁷ Section 7(1) of the *Powers of Attorney Act 1996*. On the limited functions of the attorney and the High Court prior to registration of an EPA see section 7(2) and 8 of the *Powers of Attorney Act 1996*; Consultation Paper on Law and the Elderly paragraph 3.04 fn 6.

³⁸ Section 9(6) of the *Powers of Attorney Act 1996*.

³⁹ See Chapter 7 below.

whole or in part including where it is demonstrated that the donor has capacity to handle certain matters within its scope.⁴⁰

4.44 The Commission made the recommendation in the Consultation Paper on Law and the Elderly that guidelines for solicitors be produced which would advise on information to be given to donor and attorneys at the time of registration of an EPA. Since then the Law Society published guidelines which address this matter.⁴¹

4.45 Noting the Financial Regulator's adoption of a Consumer Protection Code,⁴² the Commission sees no reason to depart from its earlier recommendation that the Financial Regulator play an educative role in promoting awareness among financial institutions in relation to EPAs.

(3) Report Recommendations

4.46 *The Commission recommends that the Public Guardian will have a supervisory role in relation to attorneys acting pursuant to an enduring power of attorney. In particular, the Public Guardian should have power to:*

- *give directions to the attorney under an enduring power of attorney in relation to the maintenance and production of accounts and records;*
- *request the attorney to supply oral and written information in relation to the carrying out of his or her duties;*
- *give directions with respect to the remuneration or expenses of the attorney;*
- *authorise the making of gifts;*
- *request the Guardianship Board to revoke an enduring power of attorney.*

4.47 *The Commission recommends that the proposed Guardianship Board should have the power to:*

- *permit at its discretion the registration of an enduring power of attorney on application being made to it;*
- *give directions in relation to the interpretation of enduring power of attorney instruments and the role of attorney;*

⁴⁰ This reflects section 12(4) of the *Powers of Attorney Act 1996*.

⁴¹ Law Society of Ireland *Enduring Powers of Attorney – Guidelines for Solicitors* (2004) paragraph 1.1-1.3.

⁴² Financial Regulator *Consumer Protection Code* (2006).

- *cancel an enduring power of attorney in whole or in part on its own initiative or on application being made to it.*

4.48 *The Commission recommends that the Financial Regulator play a role in promoting awareness among financial institutions of the status of accounts in the name of donors of registered EPAs.*

I Interface between Enduring Powers of Attorney and Other Forms of Assisted Decision-Making

(1) Consultation Paper Recommendation

4.49 In the Consultation Paper on Law and the Elderly, the Commission recommended that EPAs should only be replaced by Guardianship Orders where absolutely necessary.⁴³

(2) Discussion

4.50 Section 5(9) of the *Powers of Attorney Act 1996* provides that:

“An enduring power shall be invalidated or, as the case may be, shall cease to be in force on the exercise by the court of any of its powers under the Lunacy Regulation (Ireland) Act, 1871, if the court so directs.”

In the new scheme, wardship will be replaced by other forms of assisted decision-making. The Commission envisages that if an assisting decision-maker has been appointed and an EPA is subsequently registered (irrespective of when initially executed), the EPA will take precedence on registration. In such a scenario, any overlapping powers of an assisting decision-maker will cease on registration of the EPA unless the Guardianship Board determines otherwise. In cases where an EPA does not give sufficient powers to the attorney, it may prove necessary to appoint a personal guardian.

(3) Report Recommendation

4.51 *The Commission recommends that on registration of an EPA any powers of an assisting decision-maker which conflict with those of an attorney will cease to have effect unless the Guardianship Board determines otherwise.*

⁴³ Consultation Paper on Law and the Elderly paragraph 3.45.

CHAPTER 5 **DECISION – MAKING FOR ADULTS WHO LACK CAPACITY**

A Introduction

5.01 In the *Consultation Paper on Law and the Elderly*¹ and the *Consultation Paper on Vulnerable Adults and the Law: Capacity*² the Commission provisionally recommended the establishment of a new comprehensive statutory framework specifically tailored for the legal protection and empowerment of vulnerable adults. This statutory framework included the replacement of the Wards of Court system with a new substitute decision-making system called Guardianship. Modern systems for substitute decision-making and protection for vulnerable people have been introduced in a number of jurisdictions including Scotland, England and Wales, New Zealand, Australia and Canada. The Commission has drawn from these jurisdictions when formulating its proposals for a new substitute decision-making system for Ireland.

5.02 This chapter outlines some of the essential elements of the Commission’s proposed decision-making structure, which are further detailed in Chapters 6 and 7 below. The Commission begins by reviewing its analysis of the current Wards of Court system.

B Current Wards of Court System

(1) *Overview of Wardship and Committees*

5.03 The Wards of Court system is a substitute decision-making regime available for adults under Irish law.³ It owes its origins to the notion of the monarch as the “*parens patriae*” or guardian of the people. The responsibility for the operation of the Wards of Court system rests with the President of the High Court and is administered by the Registrar and staff of

¹ LRC CP 23-2003 (hereafter “*Consultation Paper on Law and the Elderly*”).

² LRC CP 37-2005 (hereafter “*Consultation Paper on Capacity*”).

³ For a detailed consideration of the wardship jurisdiction in Ireland see Chapter 4 of the *Consultation Paper on Law and the Elderly* and O’Neill *Wards of Court in Ireland* (First Law 2004). See generally Courts Service *Office of Wards of Court – An Information Booklet* (May 2003).

the Office of Wards of Court. The criteria for wardship and the procedure for bringing a person into wardship are set out in the *Lunacy Regulation (Ireland) Act 1871* (“the 1871 Act”) and Order 67 of the *Rules of the Superior Courts 1986*. Most commonly, wardship proceedings are taken by a family member in the High Court under section 15 of the 1871 Act. This involves petitioning the court to conduct an inquiry into whether to admit a person to wardship. The petition is accompanied by supporting affidavits from 2 medical practitioners attesting that the person is of unsound mind and unable to manage their affairs. If the President of the High Court is satisfied with the medical evidence, an inquiry order is made and a Medical Visitor is sent to examine the person and report back to the court. Notice must be personally served on the person in respect of whom the wardship application is made (“the respondent”) so that they may submit any objections to the Registrar. A wardship inquiry is held and if a wardship order is made, the court appoints a Committee of the Estate and a Committee of the Person to take charge of the day to day affairs of the person under the supervision of the President of the High Court. The legal effect of a person being made a Ward of Court is that the court is vested with jurisdiction over all matters relating to their person and estate. In other words, a person who has been made a Ward of Court loses the right to make any decisions about their person or property. The Court makes decisions based on the criterion of the ‘best interests’ of the Ward.

(2) Consultation Paper

5.04 The Wards of Court system was considered in some detail by the Commission in both the *Consultation Paper on Law and the Elderly*⁴ and the *Consultation Paper on Vulnerable Adults and the Law: Capacity*⁵ and was found unsatisfactory on numerous grounds. The Commission considered that:

- The criteria for wardship and the procedure for bringing a person into wardship are archaic and complex;
- The paternalistic concepts which are at the heart of the wardship system sit somewhat uncomfortably with the more recent social and human rights models which emphasise ability over disability and the conception of capacity in functional terms;
- Aspects of the wardship procedure do not contain adequate procedural safeguards designed to protect human rights;

⁴ See Consultation Paper on Law and the Elderly at Chapter 4 The Wards of Court System.

⁵ See Consultation Paper on Capacity at paragraphs 4.02-4.36.

- While there is provision for the estate and person of the ward to be protected, it is normally only when the protection of assets are at issue that a person is taken into wardship and the main focus of wardship administration is on the protection of those assets;
- The wardship inquiry would appear to be more inquisitorial than adversarial in nature and the rules of evidence are therefore relaxed unless the person has sought to have the inquiry heard before a jury. This has relevance in the assessment of capacity because a clearly adversarial system would allow for cross-examination by the respondent in relation to medical evidence on capacity which is required as a matter of fair procedures under the Constitution or the European Convention on Human Rights.

5.05 For these reasons, the Commission recommended the establishment of a new substitute decision-making system called Guardianship to replace the Wards of Court system.

(3) *Discussion*

5.06 Submissions received by the Commission during the consultation process broadly welcomed these proposals and the Commission continues to recognise the necessity of establishing a new substitute decision-making system for persons who lack capacity. The Commission proposes that this new system would embrace a functional, issue specific understanding of capacity with a greater emphasis on procedural safeguards and periodic review. The Commission considers that the objectionable terminology associated with the present wardship regime must be eliminated and a modern, comprehensive substitute decision-making scheme established which will balance the rights of self determination and autonomy with the need for protection.

5.07 *The Commission recommends that the current Wards of Court system, based primarily on the Lunacy Regulation (Ireland) Act 1871, should be replaced with a new Guardianship system.*

C Vulnerable Adults and Protective Measures

5.08 The Commission's guardianship proposals, outlined in the Consultation Paper on Law and the Elderly combined a substitute decision-making model with a care model to cater for a wide variety of needs. The Commission was anxious that the system be capable of meeting the needs of all vulnerable adults in the most appropriate manner. The Commission noted that a vulnerable person may require help to carry out decisions or to deal with everyday activities but may not need help with making decisions; may need services, support and assistance but may not need a guardian; may need to have one substitute decision but may not need a general substitute

decision-making mechanism; may need protection but not the transfer of decision-making powers which is inherent in guardianship.⁶ Such a person may be at considerable risk of abuse but may be perfectly capable of making decisions, if the environment is such as to enable those decisions to be made without fear or intimidation. Therefore, the Consultation Paper on Law and the Elderly provisionally recommended that the proposed system should cater for “Protected Adults”, that is “adults who may be in need of protection”. An adult may be in need of protection even if legally capable. In other words, the Commission suggested that the proposed new legal framework would apply to:

- adults who have general legal capacity but who are vulnerable to being abused or neglected and are unable to access remedies; and
- adults who do not have general legal capacity

5.09 The Commission’s Consultation Paper on Capacity expanded the focus to include the issue of legal capacity in general for all vulnerable adults, in particular, the presumption of capacity and the concept of ‘least intervention’. The guardianship structure proposed in this Report reflects these considerations and does not impose formal legal intervention where this is not necessary. The Commission is also conscious that there have been a number of significant developments since 2003 which have a direct impact on vulnerable adults. These have been discussed in detail in Chapter 1 above.

5.10 The Commission is confident that the proposed Office of Public Guardian will complement this progress by co-ordinating and over-seeing various codes of practice and by highlighting problem areas and suggesting possible reforms. The Commission considers that this informal method of protection of vulnerable adults is more appropriate and more consistent with the Commission’s policy of ‘least intervention’. Hence, the Commission supports the various informal methods mentioned above of assisting vulnerable adults who have legal capacity in particular, advocacy services that will be provided by the Citizens Information Board (the proposed new name for Comhairle) when the *Citizens Information Bill 2006*, currently before the Oireachtas, is enacted. Consequently, the Commission considers that the proposed new structure to replace the Wards of Court system should not have jurisdiction over vulnerable adults with legal capacity. This is supported by the views expressed by the Commission in Chapter 2 concerning the limit of the law’s intervention in relation to poor decision-making by an adult.⁷ Therefore, substitute decision-making in the form of

⁶ See *Consultation Paper on Law and the Elderly* at paragraph 6.05.

⁷ See further paragraph 2.61-2.62 above.

guardianship and intervention orders will be limited to adults who lack capacity as opposed to all vulnerable adults.

D Overview of New Decision-Making Structures

5.11 Having set out a legislative framework for the assessment of legal capacity, the chapters which follow are concerned with the establishment of a formal substitute decision-making and supervisory framework to support adults who lack decision-making capacity which respects their autonomy and dignity but also gives a measure of protection. Accordingly, the Commission's aim is to recommend a system of empowerment which maximises personal autonomy insofar as is possible and ensures that the degree of intervention in each case is the minimum necessary to achieve the required purpose.

5.12 Consequently, the Commission's proposed substitute decision-making system set out in this Report consists of five separate limbs:

- the general authority/deemed consent of informal substitute decision-making;
- decision-making by a formally appointed personal guardian;
- the general role of the Public Guardian in relation to vulnerable adults;
- the decision-making powers of the proposed Guardianship Board;
- the role of the High Court in relation to certain matters and as an appeals body.

All such persons and bodies would be required to have regard to the same general guiding principles for decision-makers which the Commission has recommended should be included in mental capacity and guardianship legislation.⁸ This structure will allow for different situations to be catered for. For example, the limited informal substitute decision-making process recommended earlier in this Report⁹ will meet the needs of people who do not require an elaborate substitute decision-making system but whose carers need legal protection for decisions and actions made in the interests of the person lacking capacity. This recognises and preserves the role of families and carers in the lives of adults who lack capacity by giving a statutory basis to informal decision-making.

5.13 The Personal Guardian, under the supervision of the Public Guardian, would have a variety of powers to deal with the property, financial

⁸ See paragraph 2.106 above.

⁹ See paragraph 2.92 above.

affairs and personal welfare of the adult who lacks capacity. The Commission considers that formal intervention in the form of a guardianship order appointing a Personal Guardian as a substitute decision-maker for a person who lacks legal capacity should only be considered where necessary. The role of the Personal Guardian proposed by the Commission may be likened to the role of the current Committee of the Estate and Committee of the Person under the present wardship system.

5.14 It is envisaged that the Office of Public Guardian could take over many of the functions of the Office of Wards of Court. Its primary role will be to oversee and supervise personal guardians and attorneys operating under enduring powers of attorney. However, it will also play a wide ranging advice, support and educational role for vulnerable people and their families. The Guardianship Board will make guardianship orders appointing personal guardians and once-off orders known as intervention orders rather than the traditional wardship orders made by the President of the High Court. However, the High Court will be the ultimate appeal body from any decision made by the Guardianship Board. Certain major healthcare decisions will also be reserved for the High Court. Each element of this proposed guardianship system will be examined in more detail in the following chapters.

CHAPTER 6 THE GUARDIANSHIP BOARD

A Introduction

6.01 At present, decisions on legal capacity in Ireland are made by the courts – mainly the High Court in the context of the Wards of Court system. Decisions on issue specific capacity are made by the court in which the issue arises. In the *Consultation Paper on Law and the Elderly* the Commission provisionally recommended that a decision-making body other than a court should make the decision about the legal capacity of an individual.¹

6.02 The bulk of submissions received by the Commission during the consultation process broadly welcome the establishment of a multi-disciplinary body to decide capacity and substitute decision-making matters. However, some concern was expressed about the constitutionality of establishing such a body. These concerns are considered in Part D below. First, Part B outlines the Commission’s general approach in the Consultation Paper on Law and the Elderly. Part C examines the various substitute decision-making systems in place in a number of jurisdictions worldwide. Part E describes the Commission’s proposals for the establishment of a Guardianship Board in Ireland. Finally, Part F sets out the role of the courts in this new substitute decision-making scheme.

B Consultation Paper

6.03 In the *Consultation Paper on Law and the Elderly*² the Commission provisionally recommended the establishment of a tribunal in Ireland to determine legal capacity issues. The Commission set out a number of possible advantages of a tribunal over a traditional court setting. These included:

- the potential for a multi-disciplinary composition *eg* the inclusion of doctors, psychiatrists, psychologists, social workers, occupational therapists, lawyers and lay persons;

¹ See *Consultation Paper on Law and the Elderly* (LRC CP 23-2005) (hereafter “Consultation Paper on Law and the Elderly”) at paragraphs 1.43-1.54. The Commission confirmed that decisions on issue specific capacity should continue to be made by the court in which the issue arises.

² See Consultation Paper on Law and the Elderly at paragraph 1.54.

- the composition of the tribunal can vary depending on the needs of the particular case;
- flexibility of sitting arrangements and location;
- less strict rules of procedure and evidence than those of a court;
- less formality – less intimidating for those attending before it;
- potential for greater speed in hearing cases and making determinations compared with courts.³

C Other Jurisdictions

6.04 The Commission turns to examine the decision-making structure that applies in a number of other jurisdictions.

(1) *United Kingdom*

6.05 Decisions on capacity and the appointment of deputies are made by the courts in England and Wales. Section 45 of the *Mental Capacity Act 2005* establishes a specialised court known as the Court of Protection. This new court replaces the previous Court of Protection which was an office of the Supreme Court. It will have the same powers and privileges as the High Court and will be able to deal with all areas of decision-making for people who lack capacity. The new Court of Protection will consist of a president, vice-president and judges nominated from various levels of the judiciary. The court will be able to sit anywhere in England and Wales at any date and time. Similarly, in Scotland the *Adults with Incapacity (Scotland) Act 2000* provides the Sheriff Court with the power to make decisions on capacity and the appointment of substitute decision-makers known as guardians.

(2) *British Columbia*

6.06 The *Patients Property Act 1996* gives the Supreme Court of British Columbia the authority to appoint Committees, as substitute decision-makers for adults who lack capacity. The Supreme Court of British Columbia is the province's superior trial court. The Act sets out the procedure for applying for a Committee order and defines the authority of the Committee. It also gives the court the power to put restrictions on that authority.

(3) *Australia*

6.07 In contrast, various Australian jurisdictions have adopted the tribunal model to determine capacity issues. The New South Wales (NSW)

³ See *Consultation Paper on Law and the Elderly* at paragraphs 1.47 – 1.49.

Guardianship Act 1987 established the Guardianship Tribunal.⁴ This Guardianship Tribunal is a specialist disability tribunal for people with cognitive disabilities. The tribunal appoints guardians and financial managers as substitute decision-makers, consents to medical treatment and reviews private arrangements about enduring guardianship and enduring powers of attorney. The tribunal operates under an inquisitorial model which means it is not reliant on the information presented by parties to the hearing, but can inform itself about matters relevant to the welfare and best interests of the person with the disability. Legal representation is not the norm although it may be allowed if necessary to safeguard and support the person with the disability. The welfare of the person is the paramount concern and the views and wishes of that person are sought and taken into account. Natural justice is a crucial consideration but the strict rules of evidence do not apply. Safeguards are provided by the independence of the tribunal, the three member tribunal system, the expertise and experience of tribunal members and the production of written 'Reasons for Decision' for each determination of the Tribunal.

6.08 This NSW Guardianship Tribunal consists of two separate groups of people. The first group, the tribunal staff, are full-time and part-time public service employees who manage the day-to-day administration of the tribunal.⁵ The second group, the tribunal members, are appointed by the Governor on recommendation of the Minister for Disability Services to make decisions at hearings.⁶ These tribunal members conduct the hearings and make the determinations. They are appointed on the basis of their significant professional and personal experience with people who have disabilities or on the basis of their legal skills and experience. The tribunal sits as a three member panel and consists of a legal member who presides, a professional member and a community member. The professional member has experience in the assessment or treatment of adults with disabilities and the community member has experience, usually familial, with people with disabilities. The composition of the tribunal enables it to take a holistic approach to its decision making. Furthermore, the Guardianship Tribunal's premises are designed to accommodate the special needs of the tribunal's clientele. The design and décor of the reception area and hearing rooms has been carefully planned to provide a calm and reassuring atmosphere. People

⁴ See generally www.gt.nsw.gov.au/about/ for information on the Guardianship Tribunal in New South Wales.

⁵ The tribunal has approximately 66 staff; the senior staff person is the Executive Officer/Registrar. The staff and their work are organised into the Executive Unit, Business Services Unit, Coordination and Investigation Unit, Client Information Services Unit and Hearing Services Unit.

⁶ During 2004/2005 there were 78 tribunal members most of whom were available on a part-time basis to attend hearings.

attending Guardianship Tribunal hearings sit around oval tables and talk to tribunal members without the trappings of a formal courtroom.

6.09 Applications may be made to the NSW Guardianship Tribunal by anyone with a genuine concern for the welfare of a person with a disability. Before making an application, service providers, professionals, family members or friends of the person are encouraged to telephone the Tribunal's enquiry service. The service offers advice about whether there is a need to make an application and provides information on informal arrangements to assist the person rather than having a hearing. When an application is received, it is registered by tribunal staff. All applications are assessed for urgency. An investigation process will commence whereby a staff member of the Tribunal's Coordination and Investigation Unit will contact the applicant, family members and service providers and wherever possible, the person who is the subject of the application. The investigation process also requires the submission of medical reports. The staff member will then write a report outlining the background to the application, any major issues and the views of all the people involved. This report provides a summary for the tribunal members at the hearing. During the investigation process, staff may explore any informal alternatives to formal guardianship or financial management. The application can be discontinued in these circumstances. Otherwise, a hearing will be organised and people will be notified of the time, date and place of the hearing.

6.10 During a hearing, the Tribunal considers the written evidence. It also takes evidence from the person the hearing is about and other parties and witnesses at the hearing and may take evidence by telephone or video conference. At the end of the hearing, the panel assesses the evidence and decides if there is a need to appoint or reappoint a guardian or financial manager. The tribunal members usually announce their decision at the end of the hearing and provide written orders and written reasons for their decision within 12 working days. If necessary a hearing can be set up within hours or days of receiving the application. In extremely urgent situations, matters may be dealt with by telephone.

6.11 The Guardianship and Administration Tribunal in Queensland was established under the *Guardianship and Administration Act 2000*. It has the power to make decisions about capacity; appoint guardians and administrators and review these appointments; make declarations, orders and recommendations to guardians, administrators and attorneys; and consent to certain healthcare decisions. The Tribunal is headed by a President, who is a lawyer and one or more Deputy Presidents. There are approximately 38 tribunal members, all either lawyers and/or people with extensive professional or personal experience with people with limited decision-making capacity. All of these positions are part-time, and the President determines which tribunal members will hear a particular matter. Usually a

panel of three members conducts the tribunal hearing, but a single member can hear some matters.⁷ Similar to New South Wales, Queensland's Tribunal is non adversarial and lawyers require leave to appear. The Tribunal is not bound by the rules of evidence and is required to hear matters as simply and quickly as possible.⁸ However, rules of procedural fairness must be observed.⁹ The Queensland *Guardianship and Administration Act 2000* also provides for a Tribunal Registry. The registry support is provided by the Department of Justice and the Attorney General. The Registrar is responsible for the overall leadership and management of the registry and also has other specific powers under the legislation including making interim orders.

6.12 In Victoria, under the *Guardianship and Administration Act 1986*, an individual can apply to the Victorian Civil and Administrative Tribunal (VCAT) for an order appointing a guardian or an administrator. The VCAT hearings are not as formal as a court hearing, legal representation is not necessary but the hearing must be fair and unbiased. Similarly in Western Australia, the State Administrative Tribunal makes orders for the appointment of guardians and administrators, reviews orders which have been made previously and considers applications for intervention into enduring powers of attorney.

(4) Discussion

6.13 It is clear from the above analysis that some jurisdictions continue to use a court model for determining issues of capacity whilst others have adopted an alternative multi-disciplinary model.

D Constitutionality of a Guardianship Board

6.14 A key issue which arises when considering the prospect of an alternative multi-disciplinary body for Ireland is whether the Constitution of Ireland 1937 precludes the establishment of a non-judicial body with adjudicative and other functions in the area of guardianship and capacity. This issue was considered by the Commission in the Consultation Paper on Law and the Elderly¹⁰ and in view of its importance is discussed in some further detail here.

⁷ A significant number of single member hearings are for non-contentious reviews of existing appointments, for example where there is no dispute about the issues of capacity and need, where an administrator has been managing the adult's finances for some time and all the relevant and contactable people are happy with this arrangement.

⁸ See section 107 *Guardianship and Administration Act 2000*.

⁹ See section 108 *Guardianship and Administration Act 2000*.

¹⁰ See paragraphs 1.50-1.53.

(I) Administration of Justice

6.15 The relevant provisions of the Constitution are Articles 34.1 and 37.1. Article 34.1 states

“Justice shall be administered in courts established by law by judges appointed in the manner provided by the Constitution....”

However, Article 37.1 provides

“Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution”.

The question arises as to whether the assessment of capacity and the appointment of personal guardians might be regarded as an ‘administration of justice’ in the language of Article 34.1. In the *Consultation Paper on Law and the Elderly* the Commission acknowledged that a decision on legal capacity has far reaching effects and it is therefore difficult to argue that it could be described as a ‘limited function’ in the words of Article 37.1.¹¹ Consequently, this discussion focuses on whether this function involves the administration of justice.

6.16 The Commission acknowledges that the limits of the separation of judicial powers and administration functions as required by Article 34.1 and 37.1 of the Constitution have not been comprehensively pronounced upon by the courts. Rather where an issue has arisen under Article 34, the courts have largely considered the issue on a case-specific basis rather than giving generally applicable criteria which have been consistently applied. The complexity of this area of law is heightened by the lack of a cohesive approach by the courts to making an assessment of permissible quasi-judicial decision-making. Indeed, in many decisions, a clear distinction is not drawn between the separate requirements of Article 34.1 and Article 37.

6.17 Nevertheless, in *McDonald v Bord na gCon (No.2)*¹² Kenny J formulated five criteria for deciding whether a power is judicial in nature. These criteria have been applied in a number of subsequent cases,¹³ and they were approved by the Supreme Court more recently in *Keady v*

¹¹ See Consultation Paper on Law and the Elderly at paragraph 1.50.

¹² [1965] IR 217.

¹³ For example *Application of Neilan* [1990] 2 IR 267 and *Wheeler v Culligan* [1989] IR 344.

*Commissioner of An Garda Síochána*¹⁴ and *Goodman International v Hamilton (No.1)*.¹⁵ These five criteria are:

- i) A dispute or controversy as to the existence of legal rights or a violation of the law;
- ii) The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
- iii) The final determination (subject to an appeal) of legal rights or liabilities or the imposition of penalties;
- iv) The enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the state which is called in by the court to enforce its judgment;
- v) The making of an order by the court which as a matter of history is an order characteristic of courts in this country.¹⁶

Hence, the orthodox test for deciding whether a function amounts to an administration of justice consists of assessing the function in question against this check-list of characteristics regarded as typical of the judicial function. One of these characteristics consists of the conventional trappings and procedures of a court including the configuration of parties.

6.18 Professor Casey has noted that the five criteria formulated by Kenny J in *McDonald v Bord na gCon (No.2)*¹⁷ have proved a “useful test for deciding whether a power is judicial”.¹⁸ However, he notes that the fifth criteria – “...the making of an order...which as a matter of history is characteristics of courts in this country” – may be somewhat misleading.¹⁹ Casey observes that many orders traditionally made by the Irish courts do not result from the exercise of judicial power in the strictest sense. He explains that certain jurisdictions were originally given to the courts for reasons simply of convenience and that “no one, presumably, would wish to freeze historical accident into constitutional dogma”.²⁰ Indeed, there has been an acknowledgment by the courts that not everything done by the

¹⁴ [1992] 2 IR 197.

¹⁵ [1992] 2 IR 542.

¹⁶ Academic commentators have noted that the test provided by these criteria is far from infallible. See JP Casey “The Judicial Power under Irish Constitutional Law” (1975) *ICLQ* 305 at 319.

¹⁷ [1965] IR 217.

¹⁸ Casey *Constitutional Law in Ireland* (Roundhall Sweet & Maxwell 2000) at 260.

¹⁹ *Ibid.*

²⁰ Casey “The Judicial Power under Irish Constitutional Law” (1975) *ICLQ* 305 at 319.

courts is itself the administration of justice. In both *McDonald v Bord na gCon (No 2)*²¹ and *Deaton v Attorney General*²² Kenny J gave the specific example of the wardship jurisdiction as the exercise of a statutory jurisdiction conferred upon courts which did not constitute the administration of justice. Similarly, Walsh J in *Re R Ltd*²³ adverted to the fact that “many matters which come under the heading ‘lunacy and minor matters’ probably do not constitute the administration of justice but simply the administration of the estates and affairs of the wards of court.”²⁴

6.19 On balance, the Commission considers that the proposed decision-making regime put forward in this Report would not constitute the administration of justice and that there is no constitutional impediment to conferring this role on a body other than a court. Nonetheless, the Commission is equally conscious that the long standing role of the High Court in this area should not be lightly replaced. In this respect the Commission notes that where recent legislation has established adjudicative bodies exercising functions formerly carried out by the courts, the need to ensure continued recourse to the courts is evident.²⁵ The Commission now turns to discuss the detailed nature of such adjudicative bodies by way of statutory precedents for the type of decision-making body being proposed by the Commission.

(2) *Legislative Designation of Quasi-Judicial Functions*

6.20 The Commission considers that statutory bodies exercising quasi-judicial functions have a distinct role to play in Ireland. The Commission agrees with the view that “...it would be extravagant to contend that Article 34.1 constitutes a time-bomb ticking away under the Tribunals of Ireland.”²⁶

(a) *Mental Health Tribunals*

6.21 Under the *Mental Treatment Act 1945* no provision was included for formal independent review of detention of persons involuntarily committed to a psychiatric hospital. In *Croke v Ireland*²⁷ the Irish

²¹ [1965] IR 217 at 230.

²² [1963] IR 170 at 174.

²³ [1989] IR 126 at 135.

²⁴ However, some matters may be regarded differently: see *FD v Registrar of Wards of Court* [2005] 3 IR 95 (order directing a medical visitor to carry out an examination in connection with wardship proceedings).

²⁵ See for example the *Residential Tenancies Act 2004*, discussed below.

²⁶ Gwynn Morgan *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell 1997) at 102.

²⁷ 33267/96 [2000] ECHR 680.

Government entered into a ‘friendly settlement’ under the European Convention on Human Rights, which in effect accepted that such a review process was required and indeed the ‘friendly settlement’ referred expressly to the provisions for such review contained in the *Mental Health Bill 1999*, which was enacted as the *Mental Health Act 2001*.

6.22 Section 48 of the *Mental Health Act 2001* provided for the appointment of Mental Health Tribunals by the Mental Health Commission. The tribunals consist of three members including a consultant psychiatrist, a practising barrister or solicitor and one other person.²⁸ At a sitting of a tribunal each member of the tribunal has a vote and every question is determined by a majority of the votes of the members.²⁹ The Mental Health Tribunals have been given a variety of powers including the automatic review of detention of those patients detained involuntarily,³⁰ although they also have a role in decisions concerning psycho-surgery³¹ and transfers to the Central Mental Hospital.³² Tribunal sittings for the purpose of a review must be held in private and submissions and evidence may be received.³³ The patient is not be required to attend a tribunal sitting if, in the Mental Health Tribunal’s opinion, such attendance might prejudice his/her health.³⁴ The 2001 Act provides that, within certain limits, a Mental Health Tribunal can determine its own procedure.³⁵

6.23 The Mental Health Tribunals have extensive powers to facilitate their work. A Mental Health Tribunal may direct the psychiatrist responsible for the care and treatment of the patient to attend before the tribunal; direct any person whose evidence is required to attend and/or produce documents or things; and give any other reasonable and just directions.³⁶ Mental Health Tribunals must also make provision for the following:

- Notifying various people of the date, time and place of the hearing;
- Giving the patient or his/her legal representative a copy of the independent psychiatrist’s report;

²⁸ See section 48(3) of the *Mental Health Act 2001*.

²⁹ Section 48(4) of the *Mental Health Act 2001*.

³⁰ Section 18 of the *Mental Health Act 2001*.

³¹ Section 58 of the *Mental Health Act 2001*.

³² Section 21(2) of the *Mental Health Act 2001*.

³³ Section 49(1) of the *Mental Health Act 2001*.

³⁴ Section 49(11) of the *Mental Health Act 2001*.

³⁵ Section 49(6) of the *Mental Health Act 2001*.

³⁶ Section 49(2) of the *Mental Health Act 2001*.

- Enabling the patient and his/her legal representative to be present at the relevant sitting and to present their case;
- Enabling written statements to be admissible as evidence with the consent of the patient or his/her legal representative;
- Enabling any signature appearing on a document produced before the tribunal to be taken, in the absence of evidence to the contrary, to be that of the person whose signature it purports to be;
- Enabling examination and cross-examination of witnesses;
- Determination whether evidence should be given on oath;
- Administration of the oath to witnesses;
- Making a sufficient record of the proceedings.³⁷

6.24 Section 19 of the 2001 Act provides for an appeal to the Circuit Court against a decision of a tribunal to affirm an order on the limited grounds that the person is not suffering from a mental disorder. An appeal under this section must be brought by the patient within 14 days of receipt of notice of the decision concerned. The Circuit Court may affirm or revoke the order and make such consequential or supplementary provisions as the court considers appropriate. No appeal lies against an order of the Circuit Court under section 19 other than an appeal on a point of law to the High Court.³⁸

(b) *Mental Health (Criminal Law) Review Board*

6.25 Until recently, where a person was found guilty but insane under the provisions of the *Trial of Lunatics Act 1883* the court was obliged to commit the defendant to the Central Mental Hospital. In *In re Gallagher's Application*³⁹ the applicant argued that the release of a person in such circumstances was part of the administration of justice and could, therefore, only be carried out by a court. This argument was rejected by the Supreme Court. In 1991 an ad hoc Advisory Committee was set up to consider whether a person still suffered from a mental disorder and might be a danger to himself or others. This Committee reported to the Minister for Justice, Equality and Law Reform but its findings were not binding on the Minister. This procedure was replaced by the *Criminal Law (Insanity) Act 2006*.

6.26 The *Criminal Law (Insanity) Act 2006* provides for the establishment of a Mental Health (Criminal Law) Review Board to review

³⁷ Section 49(6) of the *Mental Health Act 2001*.

³⁸ Section 19(16) of the *Mental Health Act 2001*.

³⁹ [1991] 1 IR 31.

the cases of those persons committed to designated centres following findings of unfitness to be tried or verdicts of not guilty by reason of insanity. These reviews must be undertaken at least every 6 months,⁴⁰ or on application by the detained person⁴¹ or on the Review Board's own initiative.⁴² The Board will be entitled to "make such order as it thinks proper in relation to the patient" whether for further detention, care or treatment, or for the discharge of the patient whether unconditionally or subject to conditions for out-patient treatment or supervision or both.

6.27 The Board will consist of a number of persons and will be chaired by a practicing barrister or solicitor of not less than 10 years experience or a serving or former judge of the Supreme Court, High Court or Circuit Court. It will also have at least one consultant psychiatrist as an ordinary member. The Board will determine, to a large extent, its own procedure, and will be obliged to assign a legal representative⁴³ and establish a legal aid scheme for the purpose of facilitating legal representation.⁴⁴ The Board is entitled to summon witnesses and take evidence on oath. Sittings will be in private⁴⁵ and the Minister for Justice, Equality and Law Reform, the Director of Public Prosecutions and, where appropriate, the Minister for Defence may be heard or represented at its sittings.⁴⁶

(c) Private Residential Tenancies Board

6.28 The Private Residential Tenancies Board (PRTB) was established by the *Residential Tenancies Act 2004*. The 2004 Act includes provisions for a new dispute resolution service through the PRTB, involving mediation or adjudication and tenancy tribunal hearings. This replaces the role formerly exercised by the Circuit Court in such matters. Section 151 of the *Residential Tenancies Act 2004* lists the functions of the PRTB, which include the resolution of disputes, the registration of tenancies, the provision of policy advice and recommendations for revision of the legislation, the development of good practice guidelines and the collection and provision of information and the carrying out of research in relation to the private rented sector. The 15 members of the Board of the PRTB are professional and experienced individuals with expertise in the legal, arbitration, valuation or social policy fields.

⁴⁰ See section 13(2) of the *Criminal Law (Insanity) Act 2006*.

⁴¹ Sections 13(8) and 13(9) of the *Criminal Law (Insanity) Act 2006*.

⁴² Section 13(10) of the *Criminal Law (Insanity) Act 2006*.

⁴³ Section 12(1)(c) of the *Criminal Law (Insanity) Act 2006*.

⁴⁴ Section 12(6)(a) of the *Criminal Law (Insanity) Act 2006*.

⁴⁵ Section 12(8) of the *Criminal Law (Insanity) Act 2006*.

⁴⁶ Section 12(6)(e) of the *Criminal Law (Insanity) Act 2006*.

6.29 As mentioned above, the principal function assigned to the PRTB is the resolution of all disputes arising between landlords and tenants of dwellings to which the 2004 Act applies. The PRTB'S dispute resolution function replaces the role of the courts, principally the Circuit Court, in relation to such matters for these tenancies. The Board deals with, for example, disputes about the refund of deposits, breaches of tenancy obligations, the termination of tenancies and rent arrears. The dispute resolution process consists of two-stages. Stage 1 consists of either mediation or adjudication and is confidential. Stage 2 is a hearing by a tenancy tribunal. If both parties agree to mediation, a PRTB mediator will be appointed to assist the parties to resolve the dispute. If either of the parties decides not to use the services of a PRTB mediator or if the PRTB considers that the case is not suitable for mediation, a PRTB adjudicator will be appointed to examine the evidence of the parties and investigate the dispute fully. The adjudicator will decide how the dispute is to be resolved. Either party may appeal the adjudicator's decision within 21 days. This appeal will be heard by the tenancy tribunal. A matter may also go directly to the tenancy tribunal in the event that mediation is unsuccessful and any of the parties request a tribunal hearing. Furthermore, in certain exceptional cases the PRTB may refer a dispute directly to the tribunal where, for example, there appears to be imminent risk of damage to the dwelling or danger to one of the parties.

6.30 Each tenancy tribunal consists of 3 persons, drawn from the Board's Dispute Resolution Committee, who have relevant professional knowledge and experience. Hearings are in public and procedures are relatively informal. Parties may be represented at the tribunal and bring their own witnesses. Where appropriate, the tribunal may summon witnesses, require the production of any document and take evidence under oath. The tribunal's determination of the dispute will be issued to the parties as a determination order of the PRTB and is binding unless appealed, within 21 days, to the High Court on a point of law. Failure to comply with a determination order of the PRTB is an offence. The affected party or the PRTB, if notified and satisfied that an order has not been complied with, may apply to the Circuit Court for an Order directing the party concerned to comply.

(d) *Garda Síochána Ombudsman Commission*

6.31 The *Garda Síochána Act 2005* provides for the establishment of the Garda Síochána Ombudsman Commission. The Ombudsman Commission consists of 3 members, all of whom are appointed by the President on the nomination of the Government and the passage of resolutions by Dáil Éireann and Seanad Éireann recommending their appointment. Section 65(5) of the 2005 Act provides that a person who holds judicial office in a superior court may, without relinquishing that

office, be appointed as the chairperson of the Ombudsman Commission and unless otherwise provided by the terms of the appointment, he or she will not, while a member, be required to carry out duties under statute as the holder of that judicial office.

6.32 The functions of the Ombudsman Commission are set out in section 67(2) of the 2005 Act. These include receiving and investigating complaints made by members of the public concerning the conduct of members of the Garda Síochána; issuing guidelines for the informal resolution of certain categories of complaints; reporting the results of its investigations to the Garda Commissioner or the Director of Public Prosecutions; examining practices, policies and procedures of the Garda Síochána and drawing up with the Garda Commissioner various protocols. The Ombudsman Commission may regulate its own procedures and appoint Officers of the Ombudsman Commission, who will be civil servants in the Civil Service of the State.

(e) Discussion

6.33 These existing decision-making bodies include a number of significant elements relevant to the Commission's Report. Among these are:

- they exercise extensive investigatory and adjudicative roles across a wide spectrum of areas;
- where relevant, they include membership from a diverse range of disciplines;
- membership may be on a part-time or full-time basis;
- many are chaired by a qualified lawyer or judge;
- a judge may be appointed to them and relieved of other judicial functions for this purpose;
- appeals to the courts are generally provided for where they make determinations affecting rights or interests.

The Commission will use these general features in the context of its approach to the design of a new adjudicative body to replace the current Wards of Court system.

(3) Guardianship Board

6.34 The Commission has considered various options for a decision-making body for the new guardianship regime. The numerous submissions received by the Commission during the consultative process on this issue highlight the necessity of choosing an appropriate decision-making body. In the *Consultation Paper on Law and the Elderly*, the Commission examined 2 options for a decision-making body. The first suggestion relies on the courts

system. At present, decisions on general legal capacity in Ireland are made by the courts, mainly the High Court in the context of the Wards of Court system. Similarly, decisions on general legal capacity continue to be made by the courts in England and Wales and Scotland. The Commission acknowledges that there are a number of arguments in favour of having a determination of legal capacity made by a court. The courts have expertise in weighing evidence and balancing the rights of parties who are in dispute, and are perceived as independent, fair and impartial. The courts in Ireland have a long tradition of capacity determinations in wardship matters and are sensitive to the needs of vulnerable adults. Hearings for wardship matters are of an inquisitorial, rather than adversarial nature and the rules of evidence are generally also relaxed.⁴⁷

6.35 However, in the Consultation Paper on Law and the Elderly the Commission considered that an appropriately composed decision-making body could maintain these important characteristics whilst offering a number of further benefits.⁴⁸ Such a body does not have to be composed exclusively of a judge or judges but may include doctors, psychiatrists, psychologists, occupational therapists, social workers and various other health and social care professionals. Lay people who have experience of dealing with vulnerable adults could also be included. This decision-making body offers more flexibility and less formality than a court, and is a more appropriate forum for an inquisitorial method of decision-making. Consequently, in the Consultation Paper on Law and the Elderly the Commission considered that a body similar to those outlined above, rather than a court, was more appropriate for determinations of general legal capacity, under the proposed guardianship scheme.⁴⁹

6.36 The Commission's principal motivation for recommending this body was to promote a multi-disciplinary approach to capacity issues. Currently, the decision to take a person into wardship is normally made by the President of the High Court. In general, a petitioner (usually a family member) asks the court to carry out an inquiry into whether or not the respondent is of unsound mind and capable or incapable of managing their person and property. Reports from medical practitioners are considered,⁵⁰ but the wardship declaration is made by the Judge. Submissions received by

⁴⁷ See *Eastern Health Board v MK and MK* [1999] 2 IR 99.

⁴⁸ See Consultation Paper on Law and the Elderly at paragraphs 1.46-1.47.

⁴⁹ See Consultation Paper on Law and the Elderly at paragraphs 1.43-1.54.

⁵⁰ The standard procedure for taking a person into wardship (section 15 of the *Lunacy Regulation (Ireland) Act 1871*) requires that the original petition be accompanied by the supporting affidavits of 2 registered medical practitioners. Furthermore, if an inquiry order is made, one of the medical visitors of the President of the High Court examines the respondent and reports to the President of the High Court.

the Commission during the consultative process broadly welcomed the Commission's promotion of a multi-disciplinary approach. In particular, submissions highlighted the advantages of providing a broad range of expertise when considering general capacity issues. In addition, numerous submissions promoted the benefits of conducting guardianship proceedings in a reasonably informal and non-intimidating way. However, the importance of procedural safeguards were also emphasised. All these factors have been carefully considered by the Commission in determining an appropriate model of guardianship in Ireland.

(4) *General Features of the Decision-Making Body*

6.37 A decision-making body similar to the Mental Health Tribunals could be established. As discussed above, these tribunals consist of 3 members including a consultant psychiatrist, a practicing barrister or solicitor and one other person. The Mental Health Tribunals Division of the Mental Health Commission is responsible for organising Mental Health Tribunals and members are chosen from a panel for each sitting of the tribunal. The Private Residential Tenancies Board is similar in that 3 members are drawn from a group for each hearing. This is the guardianship tribunal model used in New South Wales. It provides great flexibility and permits the composition of the tribunal to vary depending on the needs of each individual case.

6.38 Alternatively, the Consultation Paper on Law and the Elderly envisaged a body composed of a Judge as chairman with appropriate medical and lay personnel, and with an appeal to court.⁵¹ The composition of this decision-making body could be likened to the composition of the Garda Síochána Ombudsman Commission where the chairperson is also a Judge. As discussed above, the Garda Síochána Ombudsman Commission comprises 3 members with the appropriate experience, qualifications, training or expertise for appointment to a body having the functions of the Commission. A member of the Ombudsman Commission holds office for a period of between 3 years and 6 years. However, a member is eligible for reappointment. Similarly, the Commission's proposed Guardianship Board could consist of 3 members including a Judge as chairperson and 2 other members with appropriate experience, qualifications, training or expertise. Each member would sit on a full time basis. The Commission considers that such a model would provide a multi-disciplinary approach along with consistency in decision-making.

6.39 The Commission considers that either of these two models could provide the multi-disciplinary approach favoured by the Commission. Furthermore, both models provide an informal, non-intimidating approach to

⁵¹ See Consultation Paper on Law and the Elderly at paragraph 1.54.

decision-making whilst maintaining procedural safeguards. However, the Commission considers that a Guardianship Board composed of 3 full time members along the lines of the Garda Síochána Ombudsman Commission offers both reliability and flexibility. Such a body has the potential for greater speed in hearing cases and making determinations whilst maintaining the flexibility of sitting at different locations around the country. In addition, the Commission considers that the importance of the matters determined by the Board would be reflected in the appointment of a High Court judge as chairperson; this would also reflect the long-established High Court role in the wardship jurisdiction. The Commission recommends that the 2 other members be constituted by a registered medical doctor with expertise in this area and another health professional who has the expertise and training to assess functional capacity such as an occupational therapist or clinical psychologist. Such a model would provide a clear assessment of capacity in mental and functional areas.

6.40 *The Commission recommends the establishment of a Guardianship Board. This Board would consist of a High Court judge as chairperson, along with a registered medical doctor with expertise in this area and a health professional who has the expertise and training to assess functional capacity such as an occupational therapist or clinical psychologist. The appointment of members should be based on those for the Garda Síochána Ombudsman Commission.*

(5) *Independence and Impartiality of a Guardianship Board*

6.41 Article 6(1) of the European Convention on Human Rights provides that

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”

It is clear from *Winterwerp v The Netherlands*⁵² that the capacity to deal with one’s affairs and property affects civil rights and obligations within the meaning of Article 6(1). Consequently, provision must be made to guarantee the impartiality and independence of a Guardianship Board. Legislation establishing the Board should specify that the Board shall be independent in the exercise of its functions. A member of the Office of the Public Guardian should be disqualified from membership of the Board.⁵³ A decision-making body must be completely impartial; therefore, a Board

⁵² (1979-80) 2 EHRR 387.

⁵³ Similarly section 48(5) of the *Mental Health Act 2001* provides that a member of the Mental Health Commission shall be disqualified for membership of a Mental Health Tribunal.

member should not deal with a particular case if he or she knows the subject of a proposed order personally. The Board's procedure, as set out below, will also assist in guaranteeing the independence and impartiality of this quasi-judicial body.

6.42 *The Commission recommends that legislation should provide for the independence and impartiality of the Guardianship Board.*

(6) Procedure

6.43 Any person, including the person lacking capacity, the Health Service Executive, the Public Guardian or a body with specific responsibilities such as the Mental Health Commission should have the right to apply to the Guardianship Board for an order that the person in question should be taken into guardianship and/or be the subject of an intervention order. Notification of the application should be sent to a number of people on the same basis as notification of the registration of an Enduring Power of Attorney. The Board would then conduct an inquiry including, if considered appropriate, getting a relevant assessment of need. In making its decision, the Board must follow the general principles for substitute decision-making set out in Chapter 1.⁵⁴ The Board may consider all the options available and not just the one requested and make an order accordingly.

6.44 Quasi-judicial bodies are not required to follow the same strict rules of evidence and procedure as a court, provided the procedures actually adopted are not in themselves unfair. As Henchy J pointed out in *Kiely v Minister for Social Welfare (No.2)*⁵⁵

“Tribunals exercising quasi-judicial functions are frequently allowed to act informally – to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like – but they may not act in such a way as to imperil a fair hearing or a fair result.”

Similar to the Mental Health Tribunals, the Commission considers that a Guardianship Board should determine its own procedure. This procedure should be as informal as possible. However, in line with the general law of administrative procedure, the rules of constitutional justice⁵⁶ as these operate to protect the person who may be the subject of an order, as well as, where appropriate, third parties such as family members, must be observed. The Board should make provision for the following:

⁵⁴ See paragraph 2.106 above.

⁵⁵ [1977] IR 267 at 281.

⁵⁶ Hogan and Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet and Maxwell 1998) Chapter 9.

- Notifying various people, including the subject of the proposed order, of the date, time and place of the hearing;
- Assigning legal representation where necessary;
- Notifying the subject of the proposed order of his/her right to object to an application, to produce witnesses, to question all participants, to have legal representation, to review documents, to be given reasons for a decision and to appeal against any decision.

6.45 The Commission considers that any person in respect of whom a proposed Order is to be made must have the following rights:

- to be informed of the application and the right to object
- to be represented and to have the issues explained
- to be notified of any hearing at which capacity, needs or decision making abilities are being assessed
- to be informed of the criteria for the assessment of capacity
- to be heard, to produce witnesses and to ask questions
- to review documents
- to be given the reasons for a decision
- to appeal against any decision.

6.46 Any Order should set out precisely its terms and duration, including the authority of the Personal Guardian. These procedural protections are intended to ensure that, whatever detailed rules of evidence and procedure are applied, the requirements under the Constitution or the European Convention on Human Rights are observed.

6.47 *The Commission recommends that the Guardianship Board procedure be as informal as possible whilst protecting the rights of the subject of any proposed order, along with third parties.*

(7) *Functions of the Guardianship Board*

6.48 The main functions of the Guardianship Board will be to determine issues of legal capacity, make guardianship orders and intervention orders and supervise enduring powers of attorney. The Board will have the power to act on its own motion to make whatever order it considers appropriate regardless of the nature of the application. It will also have wide powers to extend, review, vary or discharge existing orders. The Commission has already recommended in Chapter 4 that the Guardianship Board will have certain powers in relation to enduring powers of attorney.

(8) ***Expert Reports***

6.49 The Commission recognises that, in exercising its powers, the Guardianship Board must be enabled to call on a wide range of professional disciplines in making any Order which it would be empowered to make. While the members of the Guardianship Board will themselves be drawn from diverse fields of expertise, specific decisions they are required to make will involve the need to obtain expert reports from different disciplines. Thus, in making a specific decision on the mental capacity of a particular person, the Board might be required to obtain a report from a consultant gerontologist, or from a clinical psychologist or a behavioural psychologist, to name just some examples. Similarly, in the context of a decision as to whether a personal guardian should be appointed to deal with the financial affairs of a person who lacks capacity, the Board may be required to obtain an expert report on the value and valuation of property, shares or other investments and the likely approach that might be taken concerning whether the sale or retention of any such items would be in the interests of the person who lacks capacity. The Commission does not intend in this outline discussion to be prescriptive or exhaustive in connection with the extent or range of the Board's needs in this respect. Rather, the Commission intends this to be illustrative of the differing issues in the area. In that respect, the Commission recommend that the Board should have wide powers in connection with obtaining relevant expert reports and that this should be incorporated into the legislative scheme.

E Appointment of personal guardians

6.50 The Guardianship Board may make a guardianship order and appoint a personal guardian where appropriate. The adult must lack legal capacity and the appointment of a substitute decision-maker must be necessary.⁵⁷ The statutory principles set out in Chapter 1 must be followed when determining whether a guardianship order is necessary. The Commission notes that when assessing whether or not a person is unable to make a decision, account should be taken of any assessment of need and the possibility that a person's decision-making needs could be met by the provision of health care or social services. If no substitute decision is necessary, then guardianship is not necessary. Similarly, if it is likely that the person will recover capacity and a decision can be postponed, then perhaps no guardianship order should be made for the time being and this can be kept under review should circumstances change.

⁵⁷ A guardianship order is the modern equivalent of a wardship order. A personal guardian is appointed under a guardianship order rather than a committee.

6.51 *The Commission recommends that the Guardianship Board may make a guardianship order and appoint personal guardians where necessary.*

6.52 When a guardianship order is made a personal guardian may be appointed.⁵⁸ The Board must set out precisely what the terms of the guardianship order are, including the decision-making authority of the personal guardian and the necessary supervision and review required. Each guardianship order will be based on a functional understanding of capacity and consequently will vary depending on the particular circumstances of each individual case. However, the Commission considers that the powers conferred on the personal guardian should be as limited in scope and duration as is reasonable practicable in the circumstances.

(1) *Persons Eligible for Appointment*

6.53 The Guardianship Board will decide who to appoint as personal guardian in each individual case. However, the Commission considers that personal guardians should be individuals of at least 18 years of age who have consented to becoming a personal guardian. Before appointment, the Guardianship Board must be satisfied that the proposed personal guardian is a fit and proper person to act as personal guardian and that there is no conflict of interest. The Board must also consider whether the proposed personal guardian has an appropriate level of skill and competence to carry out the necessary tasks. Different skills may be required according to whether the personal guardian is appointed to make welfare decisions or financial decisions or both.

6.54 The Commission considers that it should be possible to appoint more than one personal guardian if the Guardianship Board considers it necessary.⁵⁹ Section 19(4) of the *Mental Capacity Act 2005* in England and Wales provides that the court may appoint 2 or more deputies to act ‘jointly’ or ‘jointly and severally’. Joint deputies must always act together and the agreement of all deputies must be obtained before a decision can be made or an act carried out. Joint and several deputies can act together but may also act independently if they wish, so that any action taken by any deputy alone would be as valid as if he or she was the sole deputy. Deputies could also be appointed jointly in respect of some matters and jointly and severally in respect of others. The Draft Code of Practice provides an example of two deputies appointed jointly and severally but the order appointing them specifies that in respect of any sale of the house of the person lacking

⁵⁸ The Public Guardian may act as a personal guardian of last resort. See Chapter 7 (D)(4) below.

⁵⁹ Similarly, more than one attorney may be appointed under an Enduring Power of Attorney. See section 14 of the *Powers of Attorney Act 1996*.

capacity, the deputies are required to act jointly.⁶⁰ The Commission proposes to give the Guardianship Board the same flexibility when appointing personal guardians.

6.55 The Commission considers that certain people should be debarred from being appointed personal guardians; broadly the same people as are prevented from being attorneys under an Enduring Power of Attorney.⁶¹ Experience built up in the context of the wards of court system should be drawn upon in operating the proposed guardianship system. Consequently, the Commission considers that paid carers should not usually be appointed as personal guardians because of the possible conflict of interest. In addition, the Commission considers that if the spouse of the person who lacks capacity is willing and capable of being appointed personal guardian then they should be appointed unless the Board is aware of a reason not to do so. If the spouse is not appointed because the spouse is unwilling or considered unsuitable by the Guardianship Board, the appointed personal guardian should be obliged to keep the spouse informed of decisions as they are being made. While the personal guardian need not be living in Ireland, in many cases this may be considered to be essential.⁶² If there is no one who is willing and qualified to act as personal guardian, the Public Guardian may be the appointed to act.⁶³ The Guardianship Board should have the power to discharge personal guardians if they are unable to act or if they are acting inappropriately, and to appoint another person or the Public Guardian as personal guardian. Furthermore, the Commission considers that a personal guardian should be entitled to be reimbursed out of the adult's property for reasonable expenses in discharging his or her functions.

6.56 *The Commission recommends that personal guardians should be individuals of at least 18 years of age who have consented to becoming a personal guardian. Before appointment, the Guardianship Board must be satisfied that the proposed personal guardian is a fit and proper person to act as personal guardian.*

⁶⁰ See *Mental Capacity Act 2005-Draft Code of Practice* at paragraph 7.43.

⁶¹ Under an Enduring Power of Attorney, the attorney may be an individual or a trust corporation within the meaning of section 30 of the *Succession Act 1965* but may not be one of the following: a person aged under 18 at the time the EPA is executed; a person who has been declared a bankrupt; a person convicted of an offence involving fraud or dishonesty or an offence against the person or property of the donor; a person disqualified under the *Companies Act 1990*; a person who is the owner of a nursing home in which the donor resides, or a person residing with or an employee or agent of the owner, unless the attorney is a spouse, parent, child or sibling of the donor. (See section 5(4) of the *Powers of Attorney Act 1996*)

⁶² Obviously the appointed attorney can only live in another jurisdiction if the terms of the guardianship order are limited in nature.

⁶³ See Chapter 7, D(4) below.

(2) Powers of Personal Guardians

6.57 The Guardianship Board, when making a guardianship order and appointing a personal guardian, will decide the extent of powers it wishes to confer on the personal guardian and will specify the particular decisions or actions the personal guardian will be authorised to take. If any matter arises which is not dealt with in the guardianship order, the personal guardian may receive guidance from the Office of Public Guardian and directions may be obtained from the Guardianship Board if necessary. In any event, the personal guardian will be bound by the principles set out in Chapter 1 when acting for a person who lacks capacity. In addition, it is worth noting that a personal guardian has no authority to make a substitute decision where the personal guardian knows or has reason to believe that the person concerned has capacity to make the decision or to do the act in question. Similarly, a personal guardian has no authority to make decisions which are inconsistent with a decision made by an attorney operating under an enduring power of attorney granted by the person before he or she lost capacity.

6.58 The Commission considers that a guardianship order could authorise a personal guardian to deal with the property, financial affairs and personal welfare of the adult who lacks capacity, depending on the circumstances of each individual case. These powers could extend to deciding where the adult lives; day to day decisions including diet, dress and social activities; giving or refusing consent to the carrying out or continuation of medical treatment; the control and management of the adult's property and financial affairs including the sale or acquisition of property, the discharge of debts and the conduct of legal proceedings in the adult's name. It is important that the personal guardian be empowered to apply to the Public Guardian if guidance in exercising or carrying out any of these powers is needed.

6.59 *The Commission recommends that a personal guardian may, depending on the scope of the guardianship order, make substitute decisions regarding the property, financial affairs and personal welfare of the adult who lacks capacity.*

(3) Supervision of Personal Guardians

6.60 The Public Guardian is responsible for the supervision of personal guardians appointed by the Guardianship Board and for supporting personal guardians in their role. The Commission considers that it is the responsibility of the Public Guardian to put mechanisms in place which would ensure that the personal guardian carries out his or her duties in the best interests of the adult who lacks capacity and does not use any of the powers inappropriately. The Commission has already discussed the personal guardian's obligation to give a report on the welfare of the person who lacks capacity and an account of the profit, income and expenditure, to the Office

of the Public Guardian.⁶⁴ These reports should be made at regular intervals, as determined by the Public Guardian based on the details of each individual case.

(4) Management of Funds

6.61 Currently, when a person is made a ward of court, his or her assets are brought under the control of the court so that they may be used for his or her maintenance and benefit. Money lodged in court is invested by the Office of Wards of Court on behalf of the ward. Bank, building society and post office accounts are usually closed and the proceeds lodged in court. Similarly investments such as shares and endowment policies, or the cash received for them, are usually lodged in court. Pension income is usually directed to be paid to the residential care home or hospital in which the ward resides. However, in some instances, the court may direct that pension, letting or trust income be paid to the committee on the ward's behalf. The court may permit the committee either to sell or to let the ward's property where it is necessary to meet nursing home expenses or other debts of the ward. Where the property is sold, the net proceeds are lodged in court, invested and used for the ward's benefit. Where the property is let, the court would usually permit the committee to receive the letting income and to use it for the ward's benefit. In the majority of cases, residential care home maintenance accounts are paid directly by the Office of the Wards of Court from the funds in court.

6.62 Where the ward is living at home, regular payments can be made to the committee or other person looking after the ward to meet the ward's living expenses. The committee must obtain court approval before incurring any expenditure which is not covered by the regular payments received.⁶⁵ A committee who is in receipt of the ward's income may be required to give security. This usually arises if the ward has substantial income and is usually done by entering a bond with an insurance company for twice the annual income of the ward. This is to provide cover against the possible failure of the Committee to account for the ward's money. In the *Consultation Paper on Law and the Elderly* the Commission acknowledged that there are problems in getting such bond from insurance companies.⁶⁶

⁶⁴ See paragraph 7.17 above.

⁶⁵ See Courts Service *Office of Wards of Court – An Information Booklet* (May 2003) pages 9–11, for information on property and finance in Wardship.

⁶⁶ See *Consultation Paper on Law and the Elderly* at paragraph 4.42. Most deputies in England and Wales are required to take out a form of insurance called a security or guarantee bond. This covers loss to a client in case a deputy fails in their duties. HSBC Insurance Brokers have been providing this service in England and Wales since 1984. Their service includes the administration, arrangement, renewal, security amendments and lapsing of guarantee bonds where appropriate. A sum insured,

6.63 The Commission considers that the role of the personal guardian in the new Guardianship system to be far greater than the role of the committee under the wardship system. Personal guardians will be given greater powers to make a variety of substitute-decisions in relation to welfare and financial affairs subject to the supervision of the Public Guardian. Consequently, the Commission considers that the practice whereby the money of the adult lacking capacity is routinely collected and lodged in the Wards of Court system should be ended, and a decision on the financial arrangements of the adult lacking capacity should be made in light of the persons specific circumstances. The money and assets could be held by the Office of the Public Guardian or remain in the specific adult's name in a bank account *etc* and the personal guardian would be authorised to have access to money to the extent necessary to fulfil the obligations of guardianship. The Commission acknowledges that the power of the personal guardian to have access to funds could be open to abuse and recommends that the question of how the assets should be held should be at the discretion and direction of the Public Guardian. It may be that the Public Guardian should have to be informed about decisions in relation to money and property involving an amount above a threshold figure and should have to give consent to any decisions to sell property. In addition, the Public Guardian could insist on the preparation of a management plan for the property and financial affairs of the adult, which would be binding on the personal guardian.

(5) Intervention Orders

6.64 In the *Consultation Paper on Law and the Elderly* the Commission provisionally recommended that specific orders such as service orders, intervention orders and adult care orders should be available.⁶⁷ However, after further consultation, the Commission considers it more appropriate that the Guardianship Board be empowered to make an intervention order in cases where a once-off decision is needed. These intervention orders will incorporate the 3 types of orders mentioned in the

known as the level of security, is fixed by the Court of Protection. It will cover the amount of the client's funds that the deputy might be expected to handle every year, with an extra 'cushion'. This figure will be the same as either the client's yearly income or their yearly spending, whichever is higher, plus 50%. The entire estate is not protected just the yearly income or expenditure. The minimum amount of security is £5000, increasing in steps of £2,500. This is reviewed and amended by the Public Guardianship Office as the client's circumstances change and annual accounts are vetted. The insurer promises to pay up to a previously fixed amount of security if the deputy fails to account or deliver accounts when requested, maintain the clients property, safeguard deeds documents of title or other valuable items, deal with the clients tax affairs, claim entitlements and benefits and act as a careful and faithful deputy.

⁶⁷ See Consultation Paper on Law and the Elderly at paragraph 6.07.

Consultation Paper on Law and the Elderly. However, in line with the Commission's 'least intervention' approach, intervention orders can only be made where an adult lacks the capacity to make a particular decision and guardianship is not necessary. It could be an order for the sale of property, consent to medical treatment or a change of residence. The Board would be required to follow the statutory principles set out in Chapter 2 when making such an order.

6.65 The Commission has noted that a similar order exists in various jurisdictions worldwide. Section 16 of the *Mental Capacity Act 2005* in England and Wales provides that if the court is satisfied that a person lacks capacity in relation to a particular matter concerning his or her personal welfare and/or property and affairs, the court has the power to make a substitute decision on the person's behalf in relation to those matters by making a single order. If there is a need for on-going decision-making powers the court may appoint a 'deputy' to make those decisions on the person's behalf. In fact, section 16(4)(a) of the 2005 Act provides that where possible a decision by the court should be made in preference to the appointment of a deputy.

6.66 Such an intervention order is also available in Scotland under section 53 of the *Adults with Incapacity (Scotland) Act 2000* which covers a situation where it is established that the adult is incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application for an intervention order relates. Section 53(5) of the 2000 Act provides that an intervention order may direct the taking of any action specified in the order and authorise a specific person to take such action or make such decision in relation to the property, financial affairs or personal welfare of the adult.

6.67 The Commission considers that intervention orders will allow for limited interference with the legal rights of adults. They permit the making of once-off decisions where guardianship and the appointment of a personal guardian are not necessary.

6.68 *The Commission recommends that where appropriate, the Guardianship Board may make an intervention order where an adult lacks the capacity to make a particular decision.*

F Role of the High Court

(1) Role as an Appeal Court

6.69 In the *Consultation Paper on Law and the Elderly* the Commission provisionally recommended that the High Court should be the

ultimate appeal body from any decision made by the Guardianship Board.⁶⁸ The Commission continues to support this recommendation. The Commission considers that the appeal should be modelled on that provided by section 19 of the *Mental Health Act 2001*. However, the exigencies which dictate such a short period under the 2001 Act⁶⁹ do not exist to the same degree in the situation under consideration here. Therefore, the Commission would prefer a period of 28 days. In addition, the Commission considers that, because other people's interests might be affected by the decision as to capacity, the right to appeal should not be confined to the person who is the subject of the capacity decision. It should be available to any interested party.

6.70 *The Commission recommends that the High Court should be the ultimate appeal body from any decision made by the Guardianship Board.*

(2) *Arbiter on Reserved Decisions*

6.71 The Commission has also made provisional recommendations with regard to the reservation of specific healthcare decisions for a court.⁷⁰ These healthcare decisions could include non-therapeutic sterilisation, the withdrawal of artificial life-sustaining treatment and organ donation. Submissions received by the Commission during the consultative process support this view and the Commission continues to recommend that certain major healthcare decisions should not be made by an attorney, public guardian or a Board but should be specifically reserved for the High Court. Healthcare decisions that should be reserved to the High Court could include non-therapeutic sterilisation, the withdrawal of artificial life-sustaining treatment and organ donation. In addition, the Commission has recommended that the execution of statutory wills on behalf of an adult that lacks testamentary capacity be reserved for the High Court.⁷¹

6.72 *The Commission recommends that certain major healthcare decisions such as non-therapeutic sterilisation, the withdrawal of artificial life-sustaining treatment and organ donation should be specifically reserved for the High Court.*

⁶⁸ See *Consultation Paper on Law and the Elderly* at paragraphs 6.57-6.58.

⁶⁹ Section 19(2) of the *Mental Health Act 2001* provides that an appeal must be brought by the patient within 14 days of receipt of notice of the decision concerned.

⁷⁰ See *Consultation Paper on Law and the Elderly* at paragraph 6.58 and *Consultation Paper on Vulnerable Adults and the Law: Capacity* at paragraphs 7.96-7.100.

⁷¹ See paragraph 3.60 above.

CHAPTER 7 OFFICE OF PUBLIC GUARDIAN

A Introduction

7.01 In the *Consultation Paper on Law and the Elderly*¹ the Commission made provisional recommendations for the establishment of a new independent Office of Public Guardian.² This Office would play a central role in the proposed substitute-decision making regime. It was envisaged that the Office of the Public Guardian would take over many of the functions currently exercised by the Registrar of Wards of Court. It would not, however, simply be the successor to the existing structure, but rather a new office with new functions and more extensive powers. The Commission recommended that the Office would be headed by the Public Guardian who would be an independent office holder. This chapter sets out the Commission's final views on this area, taking account of relevant developments since 2003 and submissions received on the Consultation Paper on Law and the Elderly and the Consultation Paper on Capacity.

7.02 Part B examines Public Guardians in various jurisdictions worldwide. Part C sets out the Commission's final recommendations on the role and functions of the proposed Office of Public Guardian.

B Other Jurisdictions

7.03 The Commission has noted that variations of the Office of Public Guardian exist in a number of jurisdictions worldwide.

(I) *England and Wales*

7.04 Section 57 of the *Mental Capacity Act 2005* provides for the establishment of a Public Guardian in England and Wales. Section 58 sets out the functions of the Public Guardian which include:

- supervising deputies appointed by the court;
- directing a Court of Protection Visitor to visit people lacking capacity and those who have formal powers to act on their behalf

¹ LRC CP23-2003 (hereafter "Consultation Paper on Law and the Elderly").

² Consultation Paper on Law and the Elderly at paragraphs 6.34-6.48.

and to make a report to the Public Guardian on such matters as he may direct;

- receiving security which the court requires a person to give for the discharge of his functions;
- receiving reports from attorneys acting under LPAs and from deputies appointed by the court;
- providing reports to the court as requested;
- dealing with representations (including complaints) about the way in which attorneys or deputies exercise their powers.
- publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions.

7.05 The way in which the Public Guardian carries out these functions is overseen and reviewed by the Public Guardian Board. The Board may make recommendations to the Lord Chancellor suggesting ways in which the work of the Office of the Public Guardian can be improved. The *Mental Capacity Act 2005* also makes provision for Court of Protection Visitors. The Court of Protection Visitors are individuals who have been appointed by the Lord Chancellor to a panel either of Special Visitors (approved healthcare practitioners with relevant expertise) or General Visitors. Their role is to provide independent advice to the court and the Public Guardian on matters relating to the exercise of powers under the Act.

(2) *Scotland*

7.06 Similarly, section 6 of the *Adults with Incapacity (Scotland) Act 2000* created a new office of Public Guardian in Scotland. The functions of the Scottish Public Guardian include:

- supervising any guardian or any intervener in the exercise of his or her functions relating to the property or financial affairs of the adult;
- establishing, maintaining and making available to the public, on payment of the prescribed fee, registers of all documents relating to powers of attorney, guardianship orders, intervention orders and use of funds;
- receiving and investigating any complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to guardians, attorneys or interveners;
- investigating any circumstances made known to him/her in which the property or financial affairs of an adult seem to be at risk;

- providing, when requested to do so, a guardian or intervener with information or advice about the performance of functions under the Act;
- consulting the Mental Welfare Commission and any local authority where there is a common interest.³

The Scottish Act also sets out a role for local authorities in looking after the welfare of adults with incapacity. Section 10(1)(a) of the 2000 Act gives a local authority the duty to supervise the actions of welfare guardians to ensure that they use their powers properly. The local authority must investigate complaints about the exercise of welfare powers and it must provide information and advice in connection with the performance of functions under the Act relating to personal welfare.

(3) *British Columbia*

7.07 The Public Guardian and Trustee (PGT) of British Columbia was established under the *Public Guardian and Trustee Act RSBC 1996*. The PGT provides services to clients through three broad operational programme areas: Child and Youth Services, Services to Adults, and Estate and Personal Trust Services. The Services to Adults Division provides a range of services for adults who need help managing their affairs as well as to their families, legal representatives, the courts and the general public. These services include assessments and investigations, health care decision-making, financial and personal care management and the review and monitoring of private committees appointed by the court to manage the affairs of adults who are unable to make their own financial, legal and/or personal and health care decisions.⁴

(4) *New South Wales*

7.08 The Office of the Public Guardian in New South Wales exists to promote the rights and interests of people with disabilities through the practice of guardianship, advocacy and education. The Guardianship Tribunal in New South Wales may appoint the Public Guardian as guardian of last resort when there is no other person suitable or able to be the guardian. The main roles of the Office of the Public Guardian are to make a particular lifestyle decision on behalf of a person under guardianship when given the authority to do so; to provide or withhold consent to medical and dental treatment on behalf of a person under guardianship when given the authority to do so; to advocate on behalf of the person under guardianship for services the person may need; to provide information and support to

³ See section 6 *Adults with Incapacity (Scotland) Act 2000*.

⁴ See www.trustee.bc.ca/ for further information on the Public Guardian and Trustee of British Columbia.

private and enduring guardians; and to provide information on the role and function of guardians to the general community. However, the Public Guardian does not make financial decisions on behalf of the person under guardianship; this function is carried out by the Office of the Protective Commissioner in New South Wales.

7.09 The Protective Commissioner in New South Wales can be appointed by a tribunal or court to provide financial management services for people who are not able to manage their own affairs. The Protective Commissioner is only appointed as the financial manager when no other suitable person is willing to be legally appointed as a private financial manager. The Protective Commissioner also provides authorisation and direction for people who have been appointed to manage the financial affairs of others. The Office of the Protective Commissioner and Office of the Public Guardian work together to promote and protect the human rights of people with disabilities. Both agencies are located in the same building, but they remain independent with separate staff and operate under different legislation.

7.10 Another office called the Public Trustee of New South Wales was established by an Act of Parliament in 1913 and acts as an independent and impartial Executor, Administrator, Attorney and Trustee. The Public Trustee is responsible for the making of wills, acting as executor in deceased estates, managing trusts and providing attorney services. An individual may appoint the Public Trustee as their attorney to manage their financial affairs. The individual may choose the level of financial assistance required. In addition, the Public Trustee may act as an attorney under an Enduring Power of Attorney.⁵

(5) Western Australia

7.11 The Public Advocate in Western Australia is an independent statutory officer appointed under the *Guardianship and Administration Act 1990* to promote and protect the rights, dignity and autonomy of people with decision-making disabilities and to reduce their risk of neglect, exploitation and abuse. The Public Advocate provides a range of services including:

- information, advice and training on how to protect the rights of people with decision-making disabilities;
- investigation of concerns about the well-being of a person with a disability and whether an administrator or guardian is required;

⁵ See www.pt.nsw.gov.au/ for further information on the Public Trustee of New South Wales.

- investigation of specified applications made to the State Administrative Tribunal (SAT) to assist the Tribunal to determine whether a guardian or administrator is required; and
- guardianship services (for medical and lifestyle related decisions) when the SAT determines that there is no one else suitable or willing to act as the person's guardian.

7.12 In Western Australia, guardianship applies to personal and lifestyle decision-making and administration applies to the management of the financial and legal affairs of the person with a disability. As mentioned above, the Public Advocate may be appointed guardian but the Public Trustee is appointed administrator of a person's financial affairs if there is no one else suitable or willing to take on the role. In addition, the Public Trustee is responsible for the examination of annual accounts prepared by other persons who have been appointed as administrator by the SAT. The Public Trustee offers a range of other services including the administration of deceased estates, acting as trustee for minors or trustee for court awarded compensation payments, preparation of wills, managing the financial and legal affairs for vulnerable people, and the preparation of Enduring Powers of Attorney.

(6) Discussion

7.13 The Commission recognises the Office of Public Guardian as a key feature of the proposed new guardianship system in Ireland. Its primary role would be to oversee and supervise the arrangements for substitute decision-making for adults who lack capacity. It would also have a wide ranging advice, support and educational role for vulnerable people and their families. In the Consultation Paper on Law and the Elderly the Commission provisionally recommended that the Office would be headed by the Public Guardian who would be an independent office holder. A panel of medical, psychiatric, geriatric, legal, financial and other experts would also be available to provide the Public Guardian with relevant advice on any issue which may arise. As mentioned above, the Office of Public Guardian would take over many of the functions currently exercised by the Office of Wards of Court and it would gradually take over responsibility for existing Wards.

7.14 *The Commission recommends the establishment of an Office of Public Guardian.*

C Role and Functions of the Public Guardian

7.15 The Commission now turns to discuss in more detail the precise role and functions of the Office of Public Guardian. It is clear that several different models of the Office of the Public Guardian exist in various jurisdictions worldwide. The Commission considers that the role of the

Public Guardian in Ireland should incorporate a number of the functions and powers exercised by these corresponding bodies. In this way the Office of Public Guardian in Ireland will offer a range of services specifically tailored for the needs of vulnerable adults.

(1) *Supervisory Role*

7.16 The Commission suggests that the Public Guardian play a supervisory and support role for all personal guardians appointed by a guardianship order and attorneys operating under enduring powers of attorney. The Public Guardian should be a source of advice and assistance to both personal guardians and attorneys to help them carry out their obligations.

7.17 The Commission considers that the Guardianship Board when making a guardianship order and appointing a personal guardian may require the personal guardian to submit reports and accounts to the Public Guardian as it sees fit. The personal guardian may be obliged to give a report on the welfare of the person lacking capacity and an account of the property, income and expenditure to the Office of the Public Guardian. This should be done as frequently as ordered by the board at the time of appointment but it is suggested that the filing of an annual report and account would be appropriate initially in most cases. As a safeguard, the Public Guardian should have the power to call for an account at any time.

7.18 The Commission has already recommended that the Public Guardian should have various powers in relation to the supervision and support of attorneys operating under enduring powers of attorneys, including the power to give directions to the attorney in relation to the maintenance and production of accounts and records and the power to request the attorney to supply oral and written information in relation to the carrying out of his or her duties.⁶ In place of the Registrar of Wards of Court, the Public Guardian will maintain the register of EPAs which will be open to public inspection.

7.19 Furthermore, the Commission considers that any person should be able to contact the Office of Public Guardian to express any concerns or suspicions about the possible abuse of a vulnerable adult by an attorney or personal guardian or about any perceived inadequacies. The Public Guardian may investigate any matter of concern and will have the power to request the Board to revoke or amend an enduring power of attorney or a guardianship order.

(2) *Educative Role.*

7.20 The Commission considers that the Public Guardian should play a pro-active role in educating the public about issues affecting vulnerable

⁶ See paragraph 4.46 above.

adults and be a central resource on all matters relating to the empowerment and protection of vulnerable people. This would involve the dissemination of information and the provision of advice to other bodies and members of the public. This should be done by using all the appropriate communications media including a website.

7.21 In particular, the Office of Public Guardian should promote the use of enduring powers of attorneys among the public by providing information that will help potential donors understand the impact of making an enduring power of attorney, what powers they should consider granting and what to consider when choosing who may act as attorney. It should also provide information and advice on the guardianship system, including the making of intervention orders and the appointment of personal guardians.

7.22 *The Commission recommends that the Public Guardian should have an educative role to raise awareness of capacity issues among the general public.*

(3) Codes, Standards and Interaction with Service Providers

7.23 The Commission considers that a mechanism for the interaction of the Public Guardian with other service providers is vital for any system for the empowerment and protection of vulnerable adults to be effective. This Report is primarily concerned with legal mechanisms and responses to the needs of people who lack capacity. These mechanisms are essential but they are not sufficient. It is important to place them in the context of health and social care services because the required protection cannot be guaranteed by legal mechanisms alone. Hence, the Commission considers that there should be arrangements for co-operation between the Office of Public Guardian and various bodies including the Health Service Executive, local authorities, the Mental Health Commission, the Health Information and Quality Authority, the National Disability Authority and the Financial Regulator. The Commission considers that positive co-operation between these bodies is fundamental in order to avoid the duplication of functions and the establishment of a comprehensive system for the empowerment and protection of vulnerable adults. The Commission considers that various notification requirements may be imposed on these bodies, including the possibility of requiring specific organisations to notify the Public Guardian of certain individuals or situations that have come to their attention. Optional notification requirements as opposed to compulsory would be preferable in these situations.

7.24 In addition, it is anticipated that the Office of Public Guardian will have a key role (by setting up specialist groups) in ensuring appropriate codes of practice are formulated for a range of people dealing with vulnerable adults, including medical, health and social care staff, financial institutions, legal professionals and others. The Commission considers that

the Public Guardian should be responsible for approving the codes of practice of various bodies and for keeping these codes under review.

7.25 *The Commission recommends that the Public Guardian should ensure appropriate codes of practices are formulated for a range of people dealing with vulnerable adults, including medical, health and social care staff, financial institutions, legal professionals and others.*

(4) *Personal Guardian of Last Resort*

7.26 In the *Consultation Paper on Law and the Elderly* the Commission suggested that the Public Guardian could be the personal guardian in cases where there is no one else willing or able to act.⁷ This function is carried out by Public Guardians in various jurisdictions worldwide, including Australia, Canada and England.

7.27 At present in Ireland, the General Solicitor for Minors and Wards of Court is appointed by the President of the High Court to act as the Committee for a Ward or Minor where there is no available relative or third party willing to do so or where there is a conflict of interest or other reason preventing a person from being appointed. In cases where the General Solicitor is appointed to act, she is appointed Committee of the Estate and generally appointed Committee of the Person. An investigative process must be carried out to establish the personal circumstances and the financial affairs of the Ward or Minor.

7.28 As Committee of the Estate, the General Solicitor manages the Ward's estate, which may involve the letting, purchase or sale of property, insuring property, arranging for repairs or refurbishment of property, discharging utility bills, collection of pensions, payment of income to a carer and assessing requests for expenditure. The General Solicitor will also play a role in the processing of legal proceedings on behalf of a Ward, which could include actions for the recovery of damages for negligence, actions to recover a Ward's money or land due to fraud, undue influence, improvident transactions or trespass, actions on behalf of the Ward under section 117 of the *Succession Act 1965* and family law proceedings. Where the General Solicitor is appointed Committee of the Person issues such as where the Ward should live, medical consents, permission to travel abroad or access by family members where there is a conflict may arise. The General Solicitor is often appointed because there is conflict amongst family members as to how a Ward's affairs, either property affairs or personal affairs, should be managed. In these cases there may be considerable issues to be resolved and often a significant element of hostility to contend with.

⁷ See Consultation Paper on Law and the Elderly at paragraph 6.42.

7.29 Submissions received by the Commission during the consultative process suggest that the function of the General Solicitor, as a decision-maker of last resort, should be subsumed within the functions of the Office of the Public Guardian. This would allow the Public Guardian to be appointed as a personal guardian where there is no available relative or third party willing or suitable for this appointment. However, this could lead to a possible conflict of interest as the Public Guardian is also responsible for the supervision of all personal guardians. The Commission acknowledges that this may give rise to difficulties but considers that 'Chinese walls' could be used to isolate this particular function of the Public Guardian from its other supervisory functions. A specialised department within the Office of the Public Guardian could be set up for this purpose and nominated individuals (case workers) could act as personal guardians in these circumstances.

7.30 Furthermore, submissions received by the Commission during the consultative process suggest that the guardian of last resort should be separate from those providing legal services within the office of Public Guardian. Under the new regime it is envisaged that the personal guardian will have a far greater degree of autonomy than the present Committee of the Estate or Committee of the Person. In so far as is possible, the guardian of last resort should have the same level of autonomy as the personal guardian. This may require regular personal contact with the vulnerable adult and a person with the requisite skills to manage this onerous responsibility. The Commission considers that the skill base of the case officers should not be limited to legal but should include a variety of backgrounds including health and social care. Of course, the guardian of last resort would liaise closely with the legal personnel within the Office of the Public Guardian.

7.31 *The Commission recommends that the Public Guardian should be appointed personal guardian in cases where there is no one else willing or able to act.*

CHAPTER 8 SUMMARY OF RECOMMENDATIONS

The recommendations in this Report may be summarised as follows:

8.01 The Commission recommends that equity release schemes not currently within the remit of the Financial Regulator should be regulated under the proposed new statutory regime for the financial services industry announced by the Minister for Finance in December 2006. [paragraph 1.27]

8.02 The Commission recommends that the law on capacity should promote capacity by having an emphasis which is enabling rather than restrictive in nature and should meet the requirements of constitutional and human rights law. [paragraph 2.11]

8.03 The Commission recommends the enactment of specialist mental capacity legislation which will contain provisions concerning the definition of legal capacity, assisted decision-making and will provide for appropriate regulatory mechanisms. [paragraph 2.20]

8.04 The Commission recommends that the proposed mental capacity legislation will provide for the development of codes of practice concerning the operation of the legislation in practice. [paragraph 2.21]

8.05 The Commission recommends a functional approach whereby an adult's legal capacity is assessed in relation to the particular decision to be made, at the time it is to be made. [paragraph 2.30]

8.06 The Commission recommends that the proposed mental capacity legislation is framed in terminology appropriate to a functional understanding of capacity which recognises the dignity of all human beings. [paragraph 2.32]

8.07 The Commission recommends that where inappropriate terminology is used in existing legislation in relation to persons who lack capacity, such as in the *Lunacy Regulation (Ireland) Act 1871*, this should be repealed and replaced. [paragraph 2.33]

8.08 The Commission recommends that the proposed capacity legislation should set out a rebuttable presumption of capacity to the effect that, unless the contrary is demonstrated, every adult is presumed to be capable of making a decision affecting them. [paragraph 2.39]

8.09 The Commission recommends that capacity will be understood in terms of an adult's cognitive ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made. [paragraph 2.45]

8.10 The Commission recommends that a person will not be regarded as lacking capacity if they have the ability to make a decision with the assistance of simple explanations or visual aids. [paragraph 2.46]

8.11 The Commission recommends that a person will not be regarded as lacking capacity simply on the basis of making a decision which appears unwise. [paragraph 2.47]

8.12 The Commission recommends that a person will lack capacity if they are unable to communicate their choices by any means where communication to a third party is required to implement the decision. [paragraph 2.51]

8.13 The Commission recommends that the codes of practice to be developed by the Office of the Public Guardian will give guidance on matters relating to the assessment of capacity. The type of situations in which it may be appropriate for a professional assessment of capacity be carried would include:

- Where the consequences of the decision to be made are serious or of lasting significance for the adult concerned;
- Where the adult concerned disputes a finding of a lack of capacity;
- Where there is disagreement between family members, carers and/or professionals as to the person's capacity;
- Where there are concerns as to an adult's testamentary capacity;
- Where there are concerns as to an adult's capacity to execute an enduring power of attorney;
- Where there are concerns as to an adult's capacity to marry;
- Where there are concerns as to an adult's capacity to institute and conduct legal proceedings. [paragraph 2.58]

8.14 The Commission recommends that guidelines on matters relating to the assessment of capacity be developed by professional bodies in association with the proposed Office of the Public Guardian. [paragraph 2.60]

8.15 The Commission recommends that professional bodies formulate guidelines in relation to intervention where an adult is at risk of serious neglect, harm or exploitation. [paragraph 2.63]

8.16 The Commission recommends that a common sense approach be taken to assessing capacity including determining when a separate functional assessment of capacity is merited. [paragraph 2.71]

8.17 The Commission recommends that the proposed mental capacity and guardianship legislation should provide some protection from civil and criminal liability for carers and professionals who carry out routine acts in the interests of adults whom they reasonably believe to lack the capacity to consent, where such acts are carried out in accordance with the proposed statutory principles for decision-makers.[paragraph 2.88]

8.18 The Commission recommends that the Office of the Public Guardian should formulate a code of practice dealing with the circumstances when it is appropriate to rely on informal decision-making. [paragraph 2.89]

8.19 The Commission recommends that the proposed mental capacity and guardianship legislation should provide that where a specific act, carried out in the interest of an adult who is reasonably believed to lack capacity to consent, involves expenditure, the person taking the action may lawfully apply the money in the possession of the person concerned for meeting the expenditure; and if the person taking the acting bears the expenditure then he or she is entitled to be reimbursed or otherwise indemnified from the money of the person concerned. [paragraph 2.92]

8.20 The Commission recommends the inclusion of the following statutory guiding principles for assisting decision-makers, the proposed Guardianship Board and the courts:

- No intervention is to take place unless it is necessary having regard to the needs and individual circumstances of the person including whether the person is likely to increase or regain capacity;
- Any intervention must be the method of achieving the purpose of the intervention which is least restrictive of the person's freedom;
- Account must be taken of the person's past and present wishes where they are ascertainable;
- Account must be taken of the views of the person's relatives, their primary care, the person with whom he or she resides, any person named as someone who should be consulted and any other person with an interest in the welfare of the person or the proposed decision where these views have been made known to the person responsible;

- Due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy. [paragraph 2.106]

8.21 The Commission recommends that the proposed mental capacity legislation will make provision for an amended necessities rule whereby an adult who lacks capacity to enter a contract for the sale of goods or supply of services will nonetheless be obliged to pay the supplier a reasonable sum for necessities supplied at his or request. [paragraph 3.06]

8.22 “Necessaries” should be defined as goods or services supplied which are suitable to the individual’s personal reasonable living requirements but excluding goods and services which could be classed as luxury in nature in all the circumstances.[paragraph 3.07]

8.23 The Commission recommends that any proposed sterilisation of an adult where there is no serious malfunction or disease of the reproductive organs would require the prior consent of the High Court where the adult lacks the capacity to make a decision to consent to or to decline such a procedure. [paragraph 3.14]

8.24 The Commission recommends that the proposed mental capacity legislation will provide for the repeal of the *Marriage of Lunatics Act 1811*. [paragraph 3.18]

8.25 The Commission recommends that the law on capacity to marry will continue to be governed by the common law and that the proposed mental capacity legislation will specifically exclude the law relating to capacity to marry in relation to the test of capacity. However, it should be provided that a presumption of capacity will operate in relation to capacity to marry. [paragraph 3.19]

8.26 The Commission recommends that capacity to make healthcare decisions should be included within the proposed statutory definition of capacity. [paragraph 3.23]

8.27 The Commission recommends that the proposed mental capacity legislation make provision for the Minister for Health to appoint a Working Group on Capacity to make Healthcare Decisions comprising representatives of professional bodies in the healthcare sector, healthcare professionals and lay persons. [paragraph 3.34]

8.28 The Commission recommends that the role of the Working Group on Capacity to Make Healthcare Decisions will be to formulate codes of practice for healthcare professionals in relation to capacity and decision-making in the healthcare arena. The subject-matter of such codes is to include (but not be limited to):

- the assessment of capacity;

- the circumstances in which urgent treatment may be carried out without the consent of the adult concerned and what type of treatment can be provided if it is likely that the adult concerned will imminently recover capacity.[paragraph 3.35]

8.29 The Commission recommends that capacity to make a will should be excluded from the capacity provisions of the proposed mental capacity legislation. [paragraph 3.43]

8.30 The Commission recommends that the Law Society and the Medical Council produce guidelines on the assessment of testamentary capacity for the benefit of their members. These guidelines should indicate the importance of contemporaneous note-taking in relation to the assessment of testamentary capacity. [paragraph 3.51]

8.31 The Commission recommends that in exceptional circumstances, the High Court should be given the discretionary power to order that the alteration of a will of an adult who lacks testamentary capacity. The Court, acting on its initiative or on an application being made to it by any third party including the proposed Guardianship Board, would exercise these powers in exceptional circumstances where the justice of the case demands it. [paragraph 3.60]

8.32 The Commission recommends that it be provided that if land owned by a person who is the subject of a guardianship order is sold to fund their long-term care, the persons who would otherwise have been entitled to the land on the death of the original owner will be deemed to have the same proportionate interest in any surplus monies from the proceeds of sale which remain after the relevant care needs have been provided for. [paragraph 3.68]

8.33 The Commission recommends that the discretion afforded to the courts under the proposed statutory will procedure be capable of accommodating ademption in appropriate circumstances. [paragraph 3.69]

8.34 The Commission recommends that the primary legislative regime governing enduring powers of attorney be included in the proposed mental capacity legislation. [paragraph 4.04]

8.35 The Commission recommends that the requirement for a donor's capacity to execute an enduring power of attorney to be attested to by a registered medical practitioner should continue to apply. [paragraph 4.12]

8.36 The Commission recommends that an EPA be capable of registration on the grounds that the donor has lost capacity or is losing capacity in an area covered by the EPA. [paragraph 4.15]

8.37 The Commission recommends that notice parties will be able to object to registration on the grounds that the donor has not lost capacity or is

not losing capacity to make decisions in an area covered by the EPA. [paragraph 4.16]

8.38 The Commission recommends that where no objections are received, it would be the role of the proposed Office of the Public Guardian to register an EPA. [paragraph 4.17]

8.39 The Commission recommends that the proposed Guardianship Board be given the role of making decisions on applications to permit registration of an enduring power of attorney where an objection has been received. [paragraph 4.18]

8.40 The Commission recommends that cohabitants be added to the list of notice parties in respect of the execution and the registration of an EPA. [paragraph 4.22]

8.41 The Commission recommends that provision should be made for exclusion of a named individual from entitlement to EPA notifications where this option is freely chosen by the donor and there is at least one other notice party within that particular class of persons who is not the attorney appointed by the enduring power of attorney. [paragraph 4.23]

8.42 The Commission recommends making legislative provision for the formalities concerning the revocation of an EPA where the donor has the requisite capacity to do so as follows:

- Whether an EPA has been registered or not, in order to revoke it, the donor of an enduring power of attorney should be required to sign an instrument of revocation in the presence of a witness who is not the attorney. This instrument should contain a statement from a solicitor that they are satisfied that the donor of the EPA understands the effect of revocation and has no reason to believe that this document is being executed as a result of fraud or undue influence.
- Notice of the revocation concerning an EPA which has not been registered should be given to the same persons as on execution of an EPA as well as to the attorney whose authority is thereby revoked. Where the Guardianship Board has affirmed revocation following registration, the same procedure should apply. [paragraph 4.28]

8.43 The Commission recommends that an enduring power of attorney should be capable of permitting an attorney to make certain healthcare decisions on behalf of the donor where the donor lacks capacity to make the decision. [paragraph 4.32]

8.44 The Commission recommends that attorneys should be bound by the principles for assisted decision-making recommended for inclusion in mental capacity legislation. [paragraph 4.34]

8.45 The Commission recommends that the list of qualifying persons who may be appointed as an attorney under an EPA be amended to coincide with those who may be appointed personal guardians. [paragraph 4.35]

8.46 The Commission recommends that the Public Guardian will have a supervisory role in relation to attorneys acting pursuant to an enduring power of attorney. In particular, the Public Guardian should have power to:

- give directions to the attorney under an enduring power of attorney in relation to the maintenance and production of accounts and records;
- request the attorney to supply oral and written information in relation to the carrying out of his or her duties;
- give directions with respect to the remuneration or expenses of the attorney;
- authorise the making of gifts;
- request the Guardianship Board to revoke an enduring power of attorney. [paragraph 4.46]

8.47 The Commission recommends that the proposed Guardianship Board should have the power to:

- permit at its discretion the registration of an enduring power of attorney on application being made to it;
- give directions in relation to the interpretation of enduring power of attorney instruments and the role of attorney;
- cancel an enduring power of attorney in whole or in part on its own initiative or on application being made to it. [paragraph 4.47]

8.48 The Commission recommends that the Financial Regulator play a role in promoting awareness among financial institutions of the status of accounts in the name of donors of registered EPAs. [paragraph 4.48]

8.49 The Commission recommends that on registration of an EPA any powers of an assisting decision-maker which conflict with those of an attorney will cease to have effect unless the Guardianship Board determines otherwise. [paragraph 4.51]

8.50 The Commission recommends that the current Wards of Court system, based primarily on the *Lunacy Regulation (Ireland) Act 1871*, should be replaced with a new Guardianship system.[paragraph 5.07]

8.51 The Commission recommends the establishment of a Guardianship Board. This Board would consist of a High Court judge as chairperson, along with a registered medical doctor with expertise in this

area and a health professional who has the expertise and training to assess functional capacity such as an occupational therapist or clinical psychologist. The appointment of members should be based on those for the Garda Síochána Ombudsman Commission..[paragraph 6.40]

8.52 The Commission recommends that legislation should provide for the independence and impartiality of the Guardianship Board. [paragraph 6.42]

8.53 The Commission recommends that the Guardianship Board procedure be as informal as possible whilst protecting the rights of the subject of any proposed order, along with third parties. [paragraph 6.47]

8.54 The Commission recommends that the Guardianship Board may make a guardianship order and appoint personal guardians where necessary. [paragraph 6.51]

8.55 The Commission recommends that personal guardians should be individuals of at least 18 years of age who have consented to becoming a personal guardian. Before appointment, the Guardianship Board must be satisfied that the proposed personal guardian is a fit and proper person to act as personal guardian. [paragraph 6.56]

8.56 The Commission recommends that a personal guardian may, depending on the scope of the guardianship order, make substitute decisions regarding the property, financial affairs and personal welfare of the adult who lacks capacity. [paragraph 6.59]

8.57 The Commission recommends that where appropriate, the Guardianship Board may make an intervention order where an adult lacks the capacity to make a particular decision.[paragraph 6.68]

8.58 The Commission recommends that the High Court should be the ultimate appeal body from any decision made by the Guardianship Board. [paragraph 6.70]

8.59 The Commission recommends that certain major healthcare decisions such as non-therapeutic sterilisation, the withdrawal of artificial life-sustaining treatment and organ donation should be specifically reserved for the High Court. [paragraph 6.72]

8.60 The Commission recommends the establishment of an Office of Public Guardian. [paragraph 7.14]

8.61 The Commission recommends that the Public Guardian should have an educational role to raise awareness of capacity issues among the general public. [paragraph 7.22]

8.62 The Commission recommends that the Public Guardian should ensure appropriate codes of practices are formulated for a range of people

dealing with vulnerable adults, including medical, health and social care staff, financial institutions, legal professionals and others. [paragraph 7.25]

8.63 The Commission recommends that the Public Guardian should be appointed personal guardian in cases where there is no one else willing or able to act. [paragraph 7.31]

DRAFT SCHEME OF MENTAL CAPACITY AND
GUARDIANSHIP BILL¹

¹ For the reasons given at the end of Chapter 1, above, the Commission is publishing a draft Scheme of a *Mental Capacity and Guardianship Bill*, which sets out the legislative changes recommended in this Report as they apply to persons over 18 years of age and which are intended to replace the provisions of the *Lunacy Regulation (Ireland) Act 1871*. Further consideration of the effects of reform of the wardship jurisdiction on persons under 18 would be required before a new and comprehensive legislative scheme could be enacted.

DRAFT SCHEME OF MENTAL CAPACITY AND GUARDIANSHIP BILL

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4. Guiding principles of Act
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ACTS REFERRED TO

Lunacy Regulation (Ireland) Act 1871	34 & 35 Vic. c.17
Marriage of Lunatics Act 1811	51 Geo 3, c.37
Powers of Attorney Act 1996	1996, No.12
Sale of Goods Act 1893	56 & 57 Vic. c.57

**DRAFT SCHEME OF MENTAL CAPACITY AND GUARDIANSHIP
BILL**

DRAFT SCHEME OF BILL

entitled

AN ACT TO REFORM THE LAW CONCERNING MENTAL CAPACITY, TO PROVIDE FOR INFORMAL DECISION-MAKING ON BEHALF OF ADULT PERSONS WHO LACK CAPACITY IN CERTAIN CIRCUMSTANCES, TO ESTABLISH A GUARDIANSHIP BOARD WHICH MAY APPOINT PERSONAL GUARDIANS TO DEAL WITH THE PROPERTY, FINANCIAL MATTERS AND WELFARE OF ADULT PERSONS WHO LACK CAPACITY, TO CONFER JURISDICTION ON THE HIGH COURT IN CERTAIN MATTERS, TO PROVIDE FOR THE ESTABLISHMENT OF THE OFFICE OF PUBLIC GUARDIAN AND TO SET OUT THE FUNCTIONS AND POWERS OF THE PUBLIC GUARDIAN, TO AMEND AND REPEAL VARIOUS ENACTMENTS FOR THIS PURPOSE, AND FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1
PRELIMINARY AND GENERAL

Short Title and commencement

1.- (1) This Act may be cited as the Mental Capacity and Guardianship Act 200-.

(2) This Act shall come into force on such day or days as the Minister shall by Order provide.

Interpretation

2.- In this Act, unless the context otherwise requires -

“the Act of 1871” means the *Lunacy Regulation (Ireland) Act 1871*;

“the Act of 1893” means the *Sale of Goods Act 1893*;

“the Act of 1996” means the *Powers of Attorney Act 1996*;

“age of majority” means 18 years of age;

“the Court” means the High Court;

“Guardianship Board” has the meaning assigned to it by *section 13*;

“Guardianship Order” means an Order made by the Guardianship Board under *section 16* which concerns the power to manage the property, financial affairs or personal welfare of a person who lacks capacity (whether in connection with a specific subject-matter or more than one such subject-matter), including conferring such power on a Personal Guardian;

“Intervention Order” means an Order made by the Guardianship Board under *section 16* which may direct a specified person to take the action or make a decision specified in the Order, in relation to the property, financial affairs or personal welfare of a person who lacks capacity and where the Board considers that the person who lacks capacity is incapable of taking the action or making the decision required;

“the Minister” means the Minister for Justice, Equality and Law Reform;

“Personal Guardian” has the meaning assigned to it by *section 21*;

“Public Guardian” has the meaning assigned to it by *section 24*;

Expenses

3.- The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

Guiding principles of Act

4.- Every person concerned in the implementation of this Act or in making any decision or Order under this Act shall have regard to the following principles:

- (a) No intervention is to take place unless it is necessary having regard to the needs and individual

- circumstances of the person including whether the person is likely to increase or regain capacity;
- (b) Any intervention must be the method of achieving the purpose of the intervention which is least restrictive of the person's freedom;
 - (c) Account must be taken of the person's past and present wishes where they are ascertainable;
 - (d) Account must be taken of the views of the person's relatives, primary carer, the person with whom he or she resides, any person named as someone who should be consulted and any other person with an interest in the welfare of the person or the proposed decision where these views have been made known to the person responsible;
 - (e) Due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy.

Explanatory Note

This section implements the recommendation that the legislative scheme be based on a set of guiding principles.

Application to persons who have reached majority

5.- (1) This Act applies to persons who have reached the age of majority.

(2) To the extent that this Act applies to persons who have reached the age of majority, the provisions of the 1871 Act, as amended, shall not apply to any such person.

Explanatory Note

This section reflects the limits of the draft scheme to persons over 18 years of age.

PART 2

CAPACITY AND INFORMAL DECISION-MAKING

Presumption of capacity

6.- It shall be presumed, until the contrary is established, that every person who has reached the age of majority has full capacity to make a decision affecting him or her.

Explanatory Note

This section implements the Commission's recommendation that there be a legislative presumption of capacity. It also reflects the functional approach to capacity endorsed by the Commission.

Definition of capacity

7.- (1) Subject to *subsection (2)*, “capacity” means the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made.

(2) Where a decision requires the act of a third party in order to be implemented, a person is to be treated as not having capacity if he or she is unable to communicate by any means.

(3) Any question as to whether a person has capacity shall be decided on the balance of probabilities.

Explanatory Note

This section reflects the recommendation of a functional understanding of capacity, based on an issue-specific and time-specific approach. The use of a positive definition of “capacity” rather than “incapacity” reflects the Commission's recommendations as to the use of appropriate terminology, as does the focus on cognitive ability.

Informal decision-making in connection with care or treatment

8.- (1) If an individual does an act in connection with the personal care, health care or treatment of another person whose decision-making capacity is in doubt (in this section referred to as “the other person”), and the individual complies with the requirements of *subsection (2)*, the issue of the individual's liability in respect of that act shall be determined in accordance with *subsection (3)*.

(2) The requirements which must be complied with by the individual are that:

- (a) before doing the act, the individual shall take reasonable steps to establish whether the other person lacks capacity in relation to the matter in question, and
- (b) when doing the act, the individual reasonably believes that the other person lacks capacity in relation to the matter in question and that the individual applies the principles set out in *section 4* when carrying out the act.

(3) The individual who does an act in accordance with *subsection (2)* shall not incur any liability in relation to the act that he or she would not have incurred if the other person:

- (a) had had the capacity to consent in relation to the matter, and
- (b) had consented to the individual doing the act.

(4) Where an act to which this section applies involves expenditure, it shall be lawful for the individual to apply money in the other person's possession for meeting the expenditure; and if the expenditure is borne by the individual for the other person, it shall be lawful for the individual to reimburse himself or herself out of money in the other person's possession, or to be otherwise indemnified by the other person.

(5) Nothing in this section excludes a person's civil liability for loss or damage, or his or her criminal liability, resulting from his or her negligence in doing the act.

Explanatory Note

This section implements the recommendation concerning informal authorisation, or "general authority" to act in certain circumstances.

Limits to section 8

9. (1) Nothing in *section 8* shall be taken to authorise an individual to do any act which would require the Guardianship Board to make an Order under this Act or which would require the Court to make an Order under this Act.

(2) Subject to subsection (3), nothing in section 8 shall be taken to authorise an individual to do an act which conflicts with a decision made, within the scope of his or her authority, by:

- (a) an attorney operating under an enduring power of attorney, or
- (b) a Personal Guardian appointed by the Guardianship Board.

(3) Nothing in subsection (1) prevents a person, pending a decision concerning any relevant issue by the Guardianship Board or the Court exercising their powers under this Act, from:

- (a) providing life-sustaining treatment, or
- (b) doing any act which he or she reasonably believes to be necessary to prevent a serious deterioration in a person's condition.

Explanatory Note

This section underlines that the informal authorisation does not extend, for example, to matters over which the Guardianship Board or Court have jurisdiction.

Payment for necessary goods and services

10.- (1) A person who lacks capacity to enter a contract for the sale of goods or supply of services must pay the supplier a reasonable sum for necessities supplied at his or her request and

(2) "Necessaries" means goods or services supplied which are suitable to the person's personal reasonable living requirements excluding goods and services which could be classed as luxury in nature in all the circumstances.

(3) Section 2 of the *Sale of Goods Act 1893* is amended by the deletion of the words "mental capacity or".

Explanatory Note

This section implements the recommendation concerning an amended necessities rule for 'necessary' goods and services supplied to persons who lack capacity.

Wills

11.- (1) The law concerning the capacity of a person to make a will which exists at the time this Act comes into force shall continue to apply and shall not be affected by this Act.

(2) Where a person who has made a valid will loses testamentary capacity, the High Court, acting on its own initiative or on an application to it from the Guardianship Board, may, in the exercise of its discretion, alter a will in exceptional circumstances where the justice of the case demands it.

(3) Where land owned by a deceased person who is the subject of a guardianship order is sold, the persons who would otherwise have been entitled under the terms of a valid testamentary disposition in a will on the death of the original owner to a share in the proceeds shall be deemed to have the same proportionate interest in any surplus monies from the proceeds of sale which remain.

Explanatory Note

Sub-section (1) retains the common law position in relation testamentary capacity to reflect specific public policy considerations concerning wills. Subsection (2) sets out the High Court statutory jurisdiction concerning wills, while subsection (3) deals with ademption, along the lines contained in section 67 of the 1871 Act.

Consent and capacity in specific contexts

12.- (1) The law concerning the consent and capacity required of a person in specific contexts which exists at the time this Act comes into force shall continue to apply and shall not be affected by this Act, in particular in the context of:

- (a) capacity and consent to marriage,
- (b) consent to divorce,
- (c) consent to adoption, and
- (d) voting at an election for any public office or at a referendum.

(2) The *Marriage of Lunatics Act 1811* is repealed.

Explanatory Note

This section retains existing common law rules concerning capacity and consent in certain contexts, and also provides for the repeal of the Marriage of Lunatics Act 1811.

PART 3

GUARDIANSHIP BOARD AND HIGH COURT

Establishment of Guardianship Board

13.- (1) On the establishment day, a body corporate to be known as the Guardianship Board stands established to perform the functions assigned to it by this Act.

(2) The Guardianship Board has, under its corporate name, perpetual succession and an official seal and may:

- (a) sue and be sued in its corporate name,
- (b) acquire, hold and dispose of land or an interest in land, and
- (c) acquire, hold and dispose of any other property.

(3) The Guardianship Board is, subject to this Act, independent in the performance of its functions.

Explanatory Note

This section provides for the establishment of the Guardianship Board.

Membership of the Guardianship Board

14. - (1) The Guardianship Board is to consist of 3 members, all of whom are to be appointed by the President on:

- (a) the nomination of the Government, and
- (b) the passage of resolutions by Dáil Éireann and Seanad Éireann recommending their appointment.

(2) One of the members shall be appointed as chairperson.

(3) In considering the nomination of a person to be a member of the Guardianship Board, the Government shall satisfy themselves that the person has the appropriate experience, qualifications, training or expertise for appointment to a body having the functions of the Guardianship Board.

(4) A person who holds judicial office in a superior court may, without relinquishing that office, be appointed, with his or her consent, as the chairperson of the Guardianship Board, but unless otherwise provided by the

terms of the appointment, he or she shall not, while a member, be required to carry out duties under statute as the holder of that judicial office.

Explanatory Note

This section provides for the membership of the Guardianship Board, based on the provisions for the Garda Síochána Ombudsman Commission.

Terms and conditions of office

15. - A member of the Guardianship Board holds office for a period of between 3 years and 6 years, which the Government shall determine at the time of the appointment, and which term may be renewed.

Explanatory Note

This section deals with the terms of appointment of members of the Guardianship Board, also based on the provisions for the Garda Síochána Ombudsman Commission.

Functions of Guardianship Board

16. - (1) The functions of the Guardianship Board shall be:

- (a) to make Guardianship Orders;
- (b) to appoint personal guardians pursuant to such Guardianship Orders;
- (c) to make Intervention Orders.

(2) In making any Order or appointment under this Act, the Guardianship Board shall have such powers as are required to carry out its function, including requiring the making of expert reports for the Board by such experts as it considers necessary, whether medical (including reports concerning cognitive ability), social and health care (including care in the community) or financial (including reports on valuation of property).

Explanatory Note

This section sets out the functions and related powers of the Board required to implement its functions.

Procedure

17. - (1) The procedure of the Guardianship Board shall, subject to the provisions of this Act, be determined by the Guardianship Board.

Explanatory Note

This section reflects the need to ensure that the Board follows appropriate fair procedures, in accordance with the requirements of the Constitution and the European Convention on Human Rights.

Officers of Guardianship Board

18. - (1) The Guardianship Board may appoint such numbers of persons as its officers as may be approved by the Minister with the consent of the Minister for Finance.

(2) Officers of the Guardianship Board are civil servants in the Civil Service of the State.

Explanatory Note

This section sets out in general the need to preserve the existing status of staff who might be engaged by the Guardianship Board. More detailed provisions on this would be required in the final legislative scheme.

Appeals

19. - (1) An interested party may appeal to the High Court against a decision of the Guardianship Board.

(2) An appeal under this section shall be brought by the patient by notice in writing within 28 days of the receipt by him or her or by his or her legal representative of notice of the decision concerned.

Explanatory Note

This section deals with the appeals process from any decision of the Guardianship Board.

Jurisdiction of High Court

20.- Notwithstanding any powers or functions conferred by this Act on the Guardianship Board, or on a personal guardian or under an enduring powers of attorney, the High Court shall have exclusive jurisdiction to determine any issues concerning a person who lacks decision-making capacity in connection with the following:

- (a) non-therapeutic sterilisation,
- (b) withdrawal of artificial life-sustaining treatment, or
- (c) organ donation.

Explanatory Note

This section deals with the reserved jurisdiction of the High Court.

PART 4

PERSONAL GUARDIANS

Appointment of personal guardians

21. - (1) A personal guardian appointed by the Guardianship Board shall be an individual who has reached 18 years of age and is otherwise deemed suitable by the Guardianship Board to be so appointed.

(2) A person may not be appointed as a personal guardian without his or her consent.

(3) The Guardianship Board may appoint 2 or more personal guardians to act:

- (a) jointly,
- (b) jointly and severally, or
- (c) jointly in respect of some matters and jointly and severally in respect of others.

Explanatory Note

This section deals with the appointment of personal guardians.

Functions and duties of personal guardians

22. - (1) A guardianship order appointing a personal guardian may confer on him or her power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the Order, and may be subject to such terms and conditions as the Guardianship Board shall consider appropriate, including supervision by the Public Guardian of defined matters.

Explanatory Note

This section deals with the conditions attaching to the appointment of a personal guardian.

Restrictions on personal guardians

23. - A personal guardian may not refuse consent to the carrying out or continuation of life-sustaining treatment.

Explanatory Note

This section sets out a specific restriction on the powers of a personal guardian.

PART 5

OFFICE OF PUBLIC GUARDIAN

Establishment of the Office of Public Guardian

24.- (1) On the establishment day, a body corporate to be known as the Office of Public Guardian stands established to perform the functions assigned to it by this Act.

(2) The Office of Public Guardian has, under its corporate name, perpetual succession and an official seal and may:

- (a) sue and be sued in its corporate name,
- (b) acquire, hold and dispose of land or an interest in land, and
- (c) acquire, hold and dispose of any other property.

(3) The Office of Public Guardian is, subject to this Act, independent in the performance of its functions.

Explanatory Note

This provides for the establishment of the Office of Public Guardian.

Functions of the Public Guardian

25. - The functions of the Office of Public Guardian shall be:

- (a) to supervise, where relevant, personal guardians appointed by the Guardianship Board;

- (b) to supervise attorneys operating under an enduring power of attorney;
- (c) to provide, when requested to do so, a guardian or an attorney information and advice about the performance of his functions under this Act;
- (d) to publish, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions;
- (e) to deal with representations (including complaints) about the way in which an attorney operating under an enduring power of attorney or a personal guardian appointed by the Guardianship Board is exercising his powers;
- (f) to act as personal guardian when appointed to do so by the Guardianship Board in circumstances where there is no other person willing or able to so act;
- (g) to exercise the functions conferred on it by or under this Act.

Explanatory Note

This section implements the Commission's recommendations that the Public Guardian would have a supervisory role in relation to personal guardians appointed by the Guardianship Board and attorneys operating under an enduring power of attorney. It also implements the recommendation that the Public Guardian would have an educative role to raise awareness of capacity issues among the general public. It also provides that the Public Guardian may be appointed as a personal guardian of last resort.

Officers of Public Guardian

26. - (1) The Public Guardian may appoint such numbers of persons as its officers as may be approved by the Minister with the consent of the Minister for Finance.

(2) Officers of the Public Guardian are civil servants in the Civil Service of the State.

Explanatory Note

This section sets out in general the need to preserve the existing status of staff who might be engaged by the Office of the Public Guardian. More detailed provisions on this would be required in the final legislative scheme.

Codes of practice

27. - (1) The Public Guardian may prepare and issue one or more codes of practice concerning the following:

- (a) for the guidance of persons assessing whether a person has capacity in relation to any matter,
- (b) for the guidance of persons acting in connection with the care or treatment of another person under *section 8*,
- (c) for the guidance of attorneys operating under enduring powers of attorneys,
- (d) with respect to such other matters concerned with this Act as he or she thinks fit.

(2) The Minister for Health and Children may appoint a Working Group on Capacity to make Healthcare Decisions comprising of representatives of professional bodies in the healthcare sector, healthcare professionals and lay persons.

(3) The Working Group on Capacity to make Healthcare Decisions appointed in accordance with *subsection (2)* may make codes of practice in relation to matters including but not limited to:

- (a) the assessment of capacity; and
- (b) the circumstances in which urgent treatment may be carried out without the consent of an adult patient and what type of treatment may be provided if it is likely that the person will imminently recover capacity.

(4) A code of practice made under this section shall be notified in *Iris Oifigiúil* by the Public Guardian and otherwise published in such form as the Public Guardian deems appropriate, including by means of the world wide web.

Explanatory Note

This section sets out the role of the Public Guardian and the proposed Working Group on Capacity to make Healthcare Decisions Working Group in ensuring the formulation of appropriate codes of practice.

PART 6
ENDURING POWERS OF ATTORNEY

Explanatory Note

In line with the Commission's recommendation at paragraph 4.04, this Part of the Bill would incorporate the specific amendments to the Powers of Attorney Act 1996 recommended in Chapter 4 of the Report in a consolidated form of the 1996 Act which would deal exclusively with those elements of the 1996 Act concerning enduring powers of attorney.