

Guardianship: A New Structure for Vulnerable Adults Law Reform Commission's Recommendations

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A Introduction

In June 2003 the Commission published a *Consultation Paper on Law and the Elderly*¹ which made provisional recommendations in relation to legal mechanisms for the protection of older people. It also set out the Commission's proposed framework for a new decision-making structure whose central administration would be found in a new independent Office of Public Guardian. The focus of the *Consultation Paper on Law and the Elderly* was to make recommendations in relation to older persons. But the Commission also acknowledged that:

“while the improvements we recommend are made with elderly people in mind, they are also relevant to other adults with decision making disabilities or who otherwise need protection”.

Following the publication of the *Consultation Paper on Law and the Elderly*, the Commission held a public seminar in November 2003. On the basis of the views expressed at the seminar and submission received, the Commission made a decision to prepare and publish a second Consultation Paper which would focus on legal capacity issues relevant to all adults with limited decision-making capacity, not just older adults. This second *Consultation Paper on Vulnerable Adults and the Law: Capacity*² was published in May this year.

In line with the Commission's practice, the recommendations in both Consultation Papers are provisional. The Commission has already begun work on a *Report on Vulnerable Adults and the Law* which will incorporate the issues discussed in both Consultation Papers. The Report will contain the Commission's final recommendations, together with draft legislation. The Commission hopes to publish this Report in 2006.

In this paper, I will examine two central elements which will form the basis for the Commission's Report: 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?

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

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

B Capacity

(1) Vulnerable Adults

Issues of legal capacity have far-reaching practical consequences in everyday life. They are therefore of immediate concern for adults with limited decision-making ability, for their carers and for other people with whom they come into contact.

A finding that a person lacks legal capacity results in the restriction or removal of fundamental human rights at the most practical level – where you live, having money in your pocket or purse to buy things, who you live with.

(2) Move from a Medical Model to a Social Model

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 emphasis on autonomy, capacity and empowerment.³ There is also a need to reflect the fact that individuals may have the capacity to make some decisions but not others.

A fundamental shift has been taking place away from a medical model of disability towards a social and rights-based model.⁴ The medical model of disability focuses on impairment from a medical perspective.⁵ 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.*

The Commission has stated⁶ that the enactment of capacity legislation would serve to promote the interests of vulnerable adults and would assist in shifting from a medical 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. This approach is captured in the Commission's key recommendation that:

³ 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.

⁴ 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 *Comhairle (Amendment) Bill 2004*.

⁵ 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.

⁶ Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) paragraph 3.10.

*the law on capacity should reflect 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.*⁷

(3) Capacity Models

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.

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.

Outcome Approach

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 those of the assessor) might be deemed to be evidence of incapacity.⁸ In England a number of respondents to the Law Commission’s *Consultation Paper on Capacity*⁹ 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.¹⁰ The Law Commission concluded that the ‘outcome’ approach “penalises individuality and demands conformity at the expense of personal autonomy”.¹¹

Status approach

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 on 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

⁷ *Ibid* at paragraph 1.47.

⁸ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23 -2003) paragraph 1.20.

⁹ Law Commission of England and Wales *Mentally Incapacitated Adults and Decision-Making: An Overview* Consultation Paper No 119.

¹⁰ 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.

¹¹ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) paragraph 3.4.

Powers of Attorney Act 1996, both of which make a broad assessment of general legal capacity which amounts to making a status decision on capacity.

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,’¹² 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 with intellectual disability who clearly have the capacity to make *some* decisions.

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.”¹³

Functional approach

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.

The Commission has noted in its Consultation Paper on Capacity that a ‘functional’ model of capacity is now the most widely accepted.¹⁴ 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.

(4) Towards a Predominately Functional Approach

The Commission accepted 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)¹⁵ or a coma, or where dementia has advanced to such an extent that their decision-

¹² Section 9 of the *Powers of Attorney Act 1996*.

¹³ Law Commission of England and Wales *Mental Incapacity* (No. 231 1995) paragraph 3.3.

¹⁴ Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005).

¹⁵ See *Re A Ward of Court (No.2)* [1996] 2 IR 79.

making ability is minimal and there is no prospect of regaining lost capacity.¹⁶ So, any new scheme would need to acknowledge these realities.

The Commission therefore recommends that a *predominately 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*.

(5) A Statutory Definition of Capacity

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.

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.

The Commission also noted in the *Consultation Paper on Capacity*¹⁷ that capacity cannot be simply captured in an all-embracing test. Instead, the Commission recommended that any proposed legislation would provide a broad definition of capacity in the form of guiding principles which assist determining an adult's capacity to make a particular decision. The English *Mental Capacity Act 2005* provides a general statutory definition in the form of guiding principles.

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

¹⁶ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) paragraph 1.22 and Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP37-2005).

¹⁷ Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP37-2005).

C The Existing Structure

(1) Wards of Court System

The Wards of Court system, which is centered 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*.....”¹⁸

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 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.

(2) The Commission's analysis

In both Consultation Papers,¹⁹ the Commission makes a number of comments on aspects of the Wards of Court system.

- 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 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.

¹⁸ *Re A Ward of Court (No.2)* [1996] 2 IR 79.

¹⁹ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) and Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP37-2005).

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. *Accordingly, the Commission's aim (which is echoed in very many of the submission 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.

D The Proposed Framework

I can now turn to outline the essential elements of the Commission's proposed structure.

(1) Limited scope of the proposed structure

In recommending a structure, the Commission would be keen to emphasise 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 - *and 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.

(2) Informal authorisation process - General Authority

The Commission has recommended that the proposed legislation should also 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,²⁰ 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

²⁰ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) paragraphs 6.92-6.93.

scope of this general authority. The concept of general authority is provided for in legislation in a number of other jurisdictions.²¹

(3) Protected Adult

The Commission has 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

(4) Incremental Orders

Central to the proposed framework is to make statutory provision for a series of orders where these are necessary. The Commission has provisionally recommended that these should comprise: a Services Order, an Intervention Order, an Adult Care Order or a Guardianship Order.

The first three orders would be relevant where a person continues to have capacity – perhaps limited in some way – and therefore only limited intervention is required. A Guardianship Order would be relevant where the person requires the assistance of another person to make decisions, or else lacks legal capacity.

Services, Intervention and Adult Care Orders

In brief, Service Orders, Intervention Orders and Adult Care Orders would apply in the following way:

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

Guardianship Order

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 their property and affairs, or in relation to their personal and healthcare decisions.

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.

When a Guardianship Order is made a ‘Personal Guardian’ would be appointed to make day-to-day decisions.

²¹ See section 5 of the *Mental Capacity Act 2005* (England and Wales).

E The Proposed Decision-making Structure

The Commission has recommended a new decision-making structure with a number of elements:

(1) Office of Public Guardian

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.

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 powers.²² 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.

Functions, including guidance

The Office of Public Guardian would have a range of powers which would include the power to make Service Orders and Intervention Orders (but not Adult Care Orders or Guardianship Orders). It would issue codes of practice and guidelines for persons dealing with vulnerable adults. The powers would include:

- to require the appropriate service provider to provide a specific service where a Protected Adult is assessed as being in need of that service
- to protect assets of a Protected Adult where there is suspicion of physical or financial abuse
- to approve certain healthcare decisions
- to apply for Adult Care Orders or Guardianship Orders
- to approve the disposal or acquisition of property and the active management of assets in accordance with the terms of a Guardianship Order.

The Public Guardian should take many of the routine decisions which are currently made by the Registrar of Wards of Court or the President of the High Court in wardship cases, and will also take decisions that have not been delegated to the Personal Guardian or reserved to any designated decision-making body established by the proposed legislation. It should also be possible to appeal any of the decisions of the Public Guardian.

The Consultation Paper states that the “Public Guardian should have a panel of medical, psychiatric, geriatric, legal and financial or other experts to provide relevant advice on any issues which arise.”²³ In the light of the recent development by the Health Service Executive to appoint a National Care Group Manager for Older People

²² Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) paragraph 6.34.

²³ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) paragraph 6.42.

Services it will be necessary to ensure that there is no duplication of functions but rather to have a mechanism for the independent assessment and monitoring of services in relation to vulnerable adults.

(2) Personal Guardian

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, key issues which must be resolved concern the eligibility criteria for appointment as Personal Guardians and their accountability.

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

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

(3) Supervisory Role of Public Guardian

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.

(4) Interaction with Service Providers

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

(5) General Educational Role

The Public Guardian should have a general educative 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.

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 in relation to consent to medical treatment, health care decisions, contractual arrangements and others which will also facilitate the functional approach to decision-making.

(6) Appropriate Decision-Making Body

The Commission has provisionally recommended that a tribunal 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 welcomed submissions on this matter.

In its Report, the Commission will examine this in greater detail. One of the advantages of a tribunal model would be the possibility of including medical, health and social care professionals (who are distinctly absent from the present system), and the relevant mix could be varied according to the needs of the particular case. This would also allow for greater flexibility to meet diverse circumstances, and a tribunal could sit in any part of the country, or any location. The proposed Mental Health Tribunals are an example of this. Another possible model is the reformed English Court of Protection, with specialised judges who will sit at regional level. This has a particular appeal, especially where (as the Commission has emphasised) a determination of legal capacity has major consequences for the person affected.

Whatever model is ultimately proposed, detailed procedural safeguards will be part of the system. Any person in respect of whom a proposed order might 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.

Any Order should set out precisely its terms and duration, including the authority of the assisted or substitute decision-maker.

(7) The President of the High Court

The President of the High Court will be the ultimate appeal body in respect of any Order made, or from any decision of the Public Guardian. 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.

F Other Issues

In the time available today, I will mention very briefly some other important matters which the Commission will also address in formulating its final proposals for reform.

(1) Health Care

The area of assessment of capacity to make healthcare decisions is fraught with uncertainty.²⁴ 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 judgments in assessing capacity and how to proceed if an adult is assessed as lacking 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.²⁵ In non-emergency situations (where the doctrine of necessity is not applicable) healthcare professionals find themselves in an invidious 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:

- 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.

(2) Enduring Powers of Attorney (EPA)

The Commission acknowledges that the EPA system has the potential to be a very useful mechanism.²⁶ While safeguards have been provided for *at the time of the execution of an EPA* in the *Powers of Attorney Act 1996*, the Commission²⁷ identified issues that gave cause for concern *particularly after the EPA is registered*.

The Commission made a number of recommendations in this area. These included proposals for increased supervision by the proposed Office of Public Guardian, and that the Irish Financial Regulator should promote awareness amongst financial institutions as to the agency nature of accounts held by attorneys and what is best practice in dealing with such accounts.²⁸ The Commission also suggested what

²⁴ Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP37-2005) Chapter 7.

²⁵ Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP37-2005) paragraph 7.80.

²⁶ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) Chapter 3.

²⁷ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) paragraphs 3.32-3.45.

²⁸ The Commission also highlighted products aimed at older people such as equity release schemes and problems in relation to joint accounts. These are also matters which have been considered by the Financial Regulator, IFSRA.

additional Guidelines might be published by the Law Society of Ireland for solicitors in relation to enduring powers of attorney. A solicitor is in a particularly good position to assess the risks to their clients of creating an EPA and should be very frank about giving advice to clients about those risks.²⁹

Under current EPA legislation 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.³⁰

The House of Commons 2004 *Report on Elder Abuse*³¹ recommended that an express duty of care should be incorporated into the equivalent legislation in England and Wales. In particular, the report stated that specific requirements in the form of a standard of conduct should be included in Codes of Practice, aimed at those exercising these powers. It also recommended that the regulatory bodies for health and social care services increase their surveillance of financial systems, including the use of powers of attorney. Clearly these suggestions could minimise the opportunities for abuse in this area.

G Conclusion

Since the publication of the Commission’s *Consultation Paper on Law and the Elderly* in 2003 the issue of vulnerable adults, particularly very vulnerable older people, has been catapulted centre stage. Apart from Ireland’s need to meet its human rights obligations, recent events have demonstrated the need to put in place a modern legal and health care system for vulnerable adults.

The Commission is happy to have been to the forefront of this debate, and especially pleased to note that in the past two years some progress has been made directly following its provisional recommendations. For example:

- The Irish Financial Regulator, IFSRA, has issued its draft Consumer Protection Code,³² which incorporates provisions which will assist in addressing some of the issues raised by the Commission. The final Code is expected to come into effect in July 2006.

²⁹ Society of Trust and Estate Practitioners *Finance and Law for the Older Client* (Tolley’s at H2.20).

³⁰ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) paragraph 3.15.

³¹ *Elder Abuse* House of Commons Health Committee Second Report of Session 2003-2004 HC 111-1 p25.

³² Irish Financial Services Regulatory Authority *Consumer Protection Code Consultation Paper CP10*.

- The Law Society has issued Guidelines for Solicitors in respect of Enduring Powers of Attorney,³³ which incorporates points raised by the Commission.
- The Courts Service, as will be clear from Noel Rubotham's paper this afternoon, has been active in looking at where improvements can be made in the current system.
- The President of the Medical Council has announced publicly that it is considering new ethical guidelines on capacity for the medical profession.

In preparation for the Commission's Report, it has set up a small working group to assist it in devising the detail of the new structure that it is proposing. The Commission is only too conscious of the need for a structure that is both attainable and workable while at the same time protecting the needs of vulnerable adults in an appropriate manner.

Finally, I would like to thank all of the very many individuals and groups who either made submissions to the Commission or who have engaged with us in this debate - and continue to do so - to enable the Commission to 'formulate proposals for law reform'³⁴ in this extremely important area of law.

2 December 2005

³³ Law Society of Ireland *Enduring Powers of Attorney: Guidelines for Solicitors* May 2004.

³⁴ Section 4 of the *Law Reform Commission Act 1975*.