



Law Society of Ireland

SUBMISSION OF THE
Law Society of Ireland

ASSISTED DECISION-MAKING (CAPACITY) BILL 2013

to include the

**DRAFT GENERAL SCHEME OF LEGISLATIVE PROVISIONS TO PROVIDE FOR THE
MAKING OF ADVANCE HEALTHCARE DIRECTIVES**

4th April 2014
To the Joint Oireachtas Committee on Justice, Defence and Equality

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Introduction

The Law Society welcomes the opportunity to make a submission to the Oireachtas Committee on Justice, Defence and Equality on the *Assisted Decision-Making (Capacity) Bill 2013* to include submissions on the *Draft General Scheme of Legislative Provisions to provide for the Making of Advance Healthcare Directives* which it is understood will be incorporated into the Bill.

Outlined within the substantive document are the detailed amendments recommended by the Law Society and, as requested by the Committee, the format used gives the rationale for each submission being made. The following is a brief summary of the main reasons for the suggested amendments.

Executive Summary

1 Regard for the Right to Autonomy and Self-Determination

With some exceptions (Head 6(2) of the Scheme for Advance Healthcare Directive), the *Assisted Decision-Making (Capacity) Bill 2013* as currently drafted simply undermines or is not robust enough, particularly in Parts 3, 4 or 5, fails to give full effect to the Principles set out in the *Council of Europe Recommendation CM/Rec (2009)11 on Principles concerning continuing Powers of Attorney and Advance Directives for Incapacity*. Pursuant to the *Council of Europe Recommendation*, the right to autonomy and self-determination must take precedence over all other measures. In other words, where a person who has capacity makes either an enduring power of attorney or an advance healthcare directive to provide for the event of incapacity, such provision must take precedence over measures such as the court measures as provided for in the Bill.

Council of Europe Recommendation CM/Rec (2014)2 on the Promotion of Human Rights of Older Persons provides that Member States should provide for legislation which allows older persons to regulate their affairs in the event that they are unable to express their instructions at a later stage. The Bill must give due recognition to this requirement given the ageing profile of the Irish population. The need to promote the human rights of older persons as provided for in the Council Recommendation must also be accommodated within the Bill.

This right to autonomy and self-determination is also required for the purposes of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in achieving the 'least restrictive' approach as regards any intervention.

2 Equal Treatment

While the *Assisted Decision-Making (Capacity) Bill 2013* incorporates many of the necessary requirements of the UNCRPD, in providing for the recognition that all people are entitled to equal protection and equal benefit of the law, gaps remain to be addressed. Article 5 of the UNCRPD provides that State Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

The Law Society acknowledges that while there are particular challenges with regard to some issues, the legislation must address them in the spirit of the Convention. For example:

Mental Health: Head 5(7) of the Scheme for Advance Healthcare Directives which provides for the exclusion of patients being treated under Part 4 of the *Mental Health Act 2001* and the *Criminal Law (Insanity) Act 2006* need to be recast. The Law Society suggests at least equality of treatment to that afforded to those coming within the terms of Head 5(6) so rather than providing for a total exclusion there is a review by a court or tribunal.

Wards of Court: Section 35 provides for the review of existing Wards of Court. The initial review period being provided for those who come within the provisions of the Act when enacted is more favourable than the review of existing wards who are at the most vulnerable end of the spectrum.

Research and Clinical Trials: Section 103 provides for a blanket exclusion of a person who lacks capacity to be a participant in a clinical trial. This would exclude, for example, people with dementia who might be able to benefit from such participation. Of course detailed safeguards are necessary but equal treatment must be afforded to all persons who lack capacity. In this respect, the proposed legislation needs to take account of the European Directives 2001/20/EC and 2005/28/EC.

3 Safeguards

Article 12 of the UNCRPD provides that State Parties reaffirm that persons with disabilities

- have the right to recognition everywhere as person before the law,
- enjoy legal capacity on an equal basis with others in all aspects of life and
- shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

In so providing Article 12.4 also states that:

State Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free from conflict of interest and undue influence.....

The Law Society therefore recommends a number of amendments to the Bill to ensure that such safeguards are in place to prevent or reduce conflicts of interest and undue influence.

The Law Society is very aware of both international research and research done by the National Centre for the Protection of Older People at University College Dublin which indicates that abuse of older people in particular is prevalent and increasing.

4 Interface between Assisted Decision-Making (Capacity) Act and Mental Health Act 2001

The Law Society understands that a review of the *Mental Health Act 2001* is taking place. However, while the Law Society agrees that the treatment provisions for patients who suffer from a 'mental disorder' are governed by Part 4 of the *Mental Health Act 2001*, the *Assisted Decision-Making (Capacity) Bill* is the appropriate piece of legislation to deal with consent issues for those who lack decision-making capacity. The proposed legislation must therefore contain detailed provisions with regard to patients who suffer from a mental disorder but also lack decision-making capacity.

The Law Society would very much welcome answering any questions on the attached submission which the Committee may wish to ask at its public session.

Assisted Decision-Making (Capacity) Bill 2013

(Note: The word 'court' in this document is used as meaning the Circuit Court as provided for in Section 4 as being given exclusive jurisdiction in this Act save for some exceptions)

Part 1 Preliminary and General Sections 1 - 7

Comment:

The proposed legislation should implement Principle 1 of the Council of Europe's Recommendation CM/REC (2009)¹¹ on Principles concerning continuing Powers of Attorney and Advance Directive for Incapacity which provides:

1. *States should promote self-determination for capable adults in the event of their further incapacity, by means of continuing powers of attorney and advance directives.*

2. *In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other measures of protection.*

Accordingly, the jurisdiction of the High Court should be where a default application is made, where the relevant person has not made provision when they have capacity for the eventuality of not having capacity. The legislation must also be in compliance with the United Nations Convention on the Rights of Persons with Disabilities (2006) which provides at Article 12.2 that:

State Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

Head 8(1) of the *Draft General Scheme of Legislative Provisions to provide for the making of Advance Healthcare Directives* does provide that a person may confer the power to make personal welfare decisions regarding all forms of treatment, including life-sustaining treatment on a Power of Attorney and notes that the inclusion of Subhead (1) will require some modification of the *Assisted Decision-Making (Capacity) Bill 2013*.

Currently both the Medical Council's *Guide to Professional Conduct and Ethics* (7th edition 2009 paragraph 41) and the *HSE National Consent Policy* (QPSD-D-026-1 2013) recognise the patient's right to advance refusal of treatment.

Section 4(2) amend:

Section 4(2) Notwithstanding any other provision in this Act, the High Court, and not the court, shall have jurisdiction relating to every matter in connection with—

- (a) non-therapeutic sterilisation,
- (b) withdrawal of artificial life-sustaining treatment, ~~or~~
- (c) the donation of an organ, **or**
- (d) being a participant in a clinical trial**

where the matter concerns a relevant person who lacks capacity and in relation to the matter the relevant person has not made any provision in an Enduring Power of Attorney or

in an Advance Healthcare Directive or in any form of statement made by the relevant person and not subsequently withdrawn.

Comment:

The proposed legislation needs to take account of the provisions of the European Directives 2001/20/EC and 2005/28/EC as implemented in Ireland in 2004 and 2006 by the European Communities (*Clinical Trials on Medicines Products for Human Use*) Regulation S.I. 190 of 2004 and S.I. 374 of 2006 and the HSE National Consent Policy with regard to clinical trials and research. The European Directives and the HSE Consent Policy state that where a person lacks capacity consent shall be obtained from the person's legal representative. The Law Society is proposing that consent to participation in a clinical trial of a person who lacks capacity to consent should be a reserved function of the High Court. Participation in a clinical trial may be for the benefit of the relevant person who should not be denied such access on the basis that they lack the capacity to consent. See also suggested amendment to Section 103.

More detailed provisions are required to provide for matters such as the following:

- The research must have the potential to benefit the relevant person;
- The requirement for approval of a research project involving a relevant person;
- The requirement in situations, for example, where a person has consented to be a participant in a clinical trial while they have capacity but during the process of a research project loses the capacity to consent to continue to take part in it.

Part 2 Principles that apply before and during intervention in respect of Relevant Persons

Section 8

Section 8(6) amend:

Section 8(6) An intervention in respect of a relevant person shall—

- (a) be made in a manner that minimises—
 - (i) the restriction of the relevant person's rights, and
 - (ii) the restriction of the relevant person's freedom of action, and
- (b) have due regard to the need to respect the right of the relevant person to his or her dignity, bodily integrity, privacy and autonomy and
- (c) be for the benefit of the relevant person.**

Comment:

It is suggested that any intervention should have an element of 'benefit' for the relevant person.

Part 3 Assisted Decision-Making
Sections 9 – 12

Section 10(3) amend:

The Minister *shall* make regulations as respects decision-making assistance agreements,....

Comment:

To ensure appropriate safeguards, the Law Society submits that the word ‘may’ in this section be replaced by the word ‘shall.’

Section 10(3)(b): prescribing procedures and requirements relating to the execution, **revocation and variation** of a decision-making assistance agreement.

Section 10(3)(d): providing for the inclusion in a decision-making assistance agreement of the following statements:

- (i) by the appointer, that he or she has read and understands the information as to the effect of making the appointment or that such information has been explained to the appointer **by a person other than the decision-making assistant**; and
- (ii) by the decision-making assistant, that he or she understands the duties and obligations of a decision-making assistant, ~~including the duty to act in accordance with the guiding principles~~ **and to notify the Public Guardian of any change in circumstances of the appointer,**

Section 10(3)(f): providing for the attestation of the signatures of the appointer and decision-making assistant **by a person other than the appointer and decision-making assistant**, and

Section 10(3)(g): the giving, **revoking or varying** by the appointer of notice of the making....

Comment:

This part does not contain sufficient safeguards as contained in Article 12 of the UN Convention on the Rights of People with Disabilities (UNCPRD). Article 12.4 specifically provides that:

State Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures....are free of conflict of interest and undue influence.....

The deletion of the words - ‘including the duty to act in accordance with the guiding principles’ is necessary so as not to undermine the clear provision contained in Section 8(1) and in order to ensure consistency for all interveners. The Bill includes these words in individual sections for some interveners and not for others. It is necessary to be consistent and ensure that it is clear that the Guiding Principles set out in Section 8 applies to all.

Section 10(12) new:

Section 10(12) Nothing in this section authorises a decision-making assistant to assist the appointer in opting to becoming a voluntary patient for the purpose of Section 29 of the Mental Health Act 2001 without the notification of the wishes of the relevant person in this matter to the Public Guardian who may refer the matter to the court.

Comment:

It is presumed that the appointer as the person who is the decision-maker in this Part has the capacity to opt to be a voluntary patient for the purpose of Section 29 of the Mental Health Act 2001. However, it is suggested that if assistance is being given to the appointer with regard to this particular decision, the matter should be notified to the Public Guardian who may refer the matter to the court.

Section 11(3) amend:

Section 11(3): A decision-making assistant for an appointer shall take reasonable steps to ensure that relevant information –

- (a) is kept secure from unauthorized access, use or disclosure, and
- (b) is transferred to a co-decision-maker, a decision-making representative or attorney (under an enduring power of attorney registered under section 46) who is appointed subsequent to the appointment of the decision-making assistant and***
- (c) is safely disposed of when no longer required.

Comment:

The decision-making assistant should not dispose of relevant information which may be of assistance to co-decision-makers, decision-making representatives or attorneys in ascertaining for example the will and preferences of the relevant person.

Section 11(4) new:

Section 11(4) In accordance with the supervisory functions assigned to the Public Guardian in section 56(2)(a) –

- (a) A decision-making assistant for the appointer shall, on the first anniversary of the coming into effect of the decision-making-assistance agreement and thereafter at intervals as the Public Guardian will decide but so that there is no gap greater than 3 years, submit to the Public Guardian a report in writing as to the performance of his or her functions as a decision-making assistant and***
- (b) The details to be included in every such report to the Public Guardian shall be in a form set out in guidelines prepared by the Public Guardian.***

Comment:

This refers to the safeguarding provisions as set out above. In addition Section 56(2)(a) provides that the supervision of decision-making assistants is included in the functions of the Public Guardian yet there is no provision currently to obligate the decision-making assistant to file any report to enable the Public Guardian to carry out that function.

Section 12 (3) amend:

Section 12(3) Where, subsequent to the appointment of a decision-making assistant –

- (a) the decision-making assistant.....
- (b) a safety or barring order is made.....
- (c) a complaint is made to the Public Guardian that a decision-making assistant has unduly influenced or is unduly influencing or is not acting for the benefit of the appointer and the Public Guardian is satisfied that the complaint has substance**

the decision-making assistance agreement concerned shall be invalidated, to the extent that it relates to the appointment of that decision-making assistant, with effect from the day on which the decision-making assistant falls within **paragraph (a), (b) or (c)**

Comment:
This addition must be included otherwise there will be a lacuna in the legislation where a complaint has been made and substantiated.

Part 4 Applications to Court
Sections 13 - 32

Section 14(3)(j) new:

Section 14(3)(j) any person who has a bona fide interest in the welfare of a person who lacks capacity

Comment:
It may be necessary for a person having a bona fide interest in the welfare of a person, who lacks capacity and the person who lacks capacity is not a relevant person for the purpose of the Act, to make an application to court for an order.

Section 14(7)

Comment:
Manner and form of proceeding – will they be adversarial or inquisitorial? This should be clearly identified.

Section 14(10)(a)

Comment:
Rules of Court should provide for dress code (that tabs, wigs, robes and uniforms should not be worn in Court) and that the court can sit at any time and at any place in Ireland if required. From the outset the court must apply case management principles so that each case is dealt with fairly and expeditiously taking into account the importance and complexity of the issues involved.

Section 14(10)(b)

Comment:

This section should be extended to provide for the publication of the decisions of the court and subject to the safeguards as specified in the *Court and Civil Law (Miscellaneous Provisions) Act 2013* in relation to reporting on family law cases. It is important that the work of the court and the reasons for the decisions are understood by the public. The court itself should be enabled to decide what decisions would be in the category of 'public interest' to allow for publication. Any decisions published must be anonymised.

Section 14(11) new:

Section 14(11) The court, on hearing any application under this Part, shall have regard to any Codes of Practice prepared and published in accordance with section 63.

Comment:

This is to ensure that the court must have regard to such Codes of Practice.

Section 15(2) clarification:

Section 15(2) The court's jurisdiction under *subsection (1)* shall not extend to making a declaration (whether in whole or in part) as to whether the relevant person lacks capacity to create or revoke an enduring power of attorney.

Comment:

Given the clear jurisdiction being given to the court under this Act to make declarations as to capacity, it appears logical that decisions as to capacity to execute an enduring power of attorney should also be a matter for the court. If a person is found not to have the capacity to execute an enduring power of attorney, it would then be a matter for the court under this Act to make appropriate orders in relation to the relevant person and not the High Court.

(Initially this was interpreted as the court (Circuit Court) under this Act not making any retrospective decisions as to whether a person had capacity at the time of the execution of the enduring power of attorney but Section 15(2) uses the words 'lacks capacity to create or revoke'.) It is also noted that in the overview of the Department of Justice on the Bill issued on 20 September 2013 it states under the heading of the Role of the Court that '*The High Court will continue to have jurisdiction in relation to enduring powers of attorney*'. Section 4 does not state that this is a function reserved to the High Court.

The legislation should clarify as to what court has jurisdiction with regard to such matter as the retrospective assessment of whether a person had capacity at the time of the execution of an enduring power of attorney.

Section 15A new:

The court, on application to it in respect of a person to which section 104(3) applies shall make an order in respect of the matters specified in that section.

Comment:

This is to provide that the court under this Bill is the appropriate ‘intervener’ to make an order in relation to the giving of consents for a relevant person who lacks capacity for the purpose of treatment under the Mental Health Act 2001. Decisions as to involuntary detention are correctly provided to be made under the *Mental Health Act 2001* but the court dealing with matters of ‘capacity’ should have jurisdiction in relation to the matters set out in the new suggested Section 104(3) which are not dealt with in the Mental Health Act for those who lack capacity.

This clarification is extremely important as otherwise there are no safeguard provisions for persons who have a mental disorder but who also lack decision-making capacity.

Section 18 (4) amend:

Section 18(4) The Minister may make regulations as respects co-decision making agreements, including—

- (a) prescribing the form of a co-decision-making agreement,
- (b) prescribing procedures and requirements relating to the execution, ***revocation and variation*** of a co-decision-making agreement,
- (c) prescribing information to be included in or annexed to a co-decision-making agreement for the purpose of ensuring that any document purporting to create a co-decision making agreement incorporates adequate information as to the effect of making or accepting the appointment,
- (d) providing for the inclusion in a co-decision-making agreement of the following statements:
 - (i) by the appointer, that he or she has read and understands the information as to the effect of making the appointment or that such information has been explained to the appointer ***by a person other than the co-decision-maker***; and
 - (ii) by the co-decision-maker, that he or she understands the duties and obligations of a co-decision-maker, ~~including the duty to act in accordance with the guiding principles~~ ***and to notify the Public Guardian of any change in the circumstances of the appointer.***
- (e) specifying the personal welfare or property and affairs, or both, which may be specified in a co-decision-making agreement,
- (f) providing for the attestation of the signatures of the appointer and co-decision-maker ***by a person other than the appointer and co-decision-maker***, and
- (g) the giving by the appointer of notice of the making, ***revocation or variation*** of a co-decision-making agreement to specified persons, and whether or not by reference to persons who, under this Act, are required to be notified of an application made under this Act.

Comment:

Same reason for inclusion of these amendments as set out for Section 10(3) above. The Act must provide for adequate safeguards in accordance with Article 12 of the UNCRPD.

The deletion of the words are necessary for the reason set out for Section 10(3) above – the principles are clearly set out in Section 8.

Section 18(14) new

Section 18(14) new: Nothing in this section authorises a co-decision-maker to assist the appointer in opting to becoming a voluntary patient for the purpose of Section 29 of the Mental Health Act 2001 without first referring the matter to the court who shall make an order approving a co-decision-making agreement with regard to such matter or may make an interim order in relation to such matter under the provisions of Section 28 of this Act where the court has reason to believe that the relevant person lacks capacity in relation to the matter.

Comment:

This is providing that the court shall decide whether the person has the capacity to enter into a co-decision-making agreement in relation to opting to be a voluntary patient for the purpose of Section 29 of the Mental Health Act 2001 or, if not, the court itself will make the relevant order under Section 28 of this Act.

Section 20(1) new:

Section 20(1)(h) the proposed appointee is or who has been a decision-making assistant who is or was the subject of a complaint to the Public Guardian which the Public Guardian is satisfied had substance and acted on such finding.

Comment:

The relevant person may have reached the stage where they are moving from the first level of assisted decision-making to the second level. A decision-making-assistant who has been the subject of a complaint which has been substantiated, should not be regarded as a suitable person.

Section 21(5) amend:

Section 21(5) A co-decision-maker for the appointer shall take reasonable steps to ensure that relevant information—

(a) is kept secure from unauthorised access, use or disclosure,

(b) is transferred to a decision-making representative or attorney (under an enduring power of attorney registered under section 46) who is appointed subsequent to the appointment of the co-decision-maker and

(c) is safely disposed of when no longer required.

Comment:

Same reason to including this provision as was made under Section 11(3) above.

Section 21(6) amend:

Section 21(6) Except where the court otherwise orders a co-decision-maker for the appointer shall be entitled –

(a) to be reimbursed out of the assets of the appointer in respect of his or her fair and reasonable expenses which are reasonably incurred in performing his or her functions as such co-decision-maker and

(b) to be provided for to the extent that the relevant person might have been expected to do so, for the needs of the co-decision-maker.

Comment:

The co-decision-maker may be a dependant and this should be recognised in the legislation. Also given that a co-decision-maker will be co-signing all documentation it would be important that the co-decision-maker does not benefit from any decisions unless this is clearly provided for.

Regulations will be required as to what is ‘fair and reasonable expenses which are reasonably incurred’.

Section 21(7)(b)

Comment – rules of court must provide for the type of accounts to be filed.

Section 21(7)(b) amend:

Section 21(7)(b) Every such report submitted to the Public Guardian shall be in such form as may be determined by rules of court and shall in particular include details of –

(i) all expenses paid or reimbursed to the co-decision-maker concerned for the relevant person concerned and

(ii) disposals of the relevant person’s property by way of gift in accordance with section 21(8)

Comment:

This is to comply with necessary safeguarding requirements.

Section 21(8) amend:

Section 21(8) Subject to *section 17(3)*, if a co-decision-maker for the appointer is empowered by the co-decision-making agreement appointing him or her as such co-decision-maker to make decisions jointly with the relevant person in relation to disposals of the relevant person's property by way of gift, then, the power to make such a gift shall be limited to—

(a) gifts to other persons (including the co-decision-maker) who are related to or connected to the appointer, and which gifts are—

- (i) of a seasonal nature or made on customary occasions,
- (ii) made to such other person on the occasion of the birth of a child to such other person,
- (iii) made to such other person on the occasion of the marriage of such other person,
- (iv) made to such other person on the occasion of the registration of a civil partnership in respect of which such other person is a civil partner, or
- (v) made to such other person on the occasion of the anniversary of his or her birth, marriage or civil partnership, and

(b) gifts to any charity to which the appointer made or might reasonably be expected to make gifts,

provided that the value of the gift is reasonable having regard to all the circumstances and in particular ~~the extent of the appointer's assets~~ ***having regard to the guidelines published by the Public Guardian in accordance with section 63 for the guidance of co-decision-makers.***

Comment:

Gifting is an area wide open to potential abuse. It should not be left to the co-decision-maker to take a subjective view as to the extent of the appointer's assets. Detailed guidelines are necessary to set out the parameters of such gifting. Such guidelines will also be of assistance to the court in relation to any application that comes before it in relation to questions of abuse.

Section 24(2)(h) new:

Section 24(2)(h) the proposed appointee is or who has been a decision-making assistant or a co-decision-maker who is or has been the subject of a complaint to the Public Guardian which the Public Guardian is satisfied had substance and acted on such finding.

Comment:

Same reason as given for Section 12(3) above.

Section 24(7)(b) amend:

Section 24(7)(b) Every such report submitted to the Public Guardian shall be in such form as may be determined by rules of court and shall in particular include details of –

(i) all expenses and remuneration paid or reimbursed to the decision-making representative concerned for the relevant person concerned

(ii) any benefit received by the co-decision-maker as provided for in section 21(6)(b) and

(iii) disposals of the relevant person's property by way of gift in accordance with section 26(2)

Comment:

These amendments are necessary to comply with safeguarding requirements.

Section 26(2) amend:

Section 26(2) Subject to *section 27*, if a decision-making representative for a relevant person is empowered by the decision-making representative order appointing him or her as such decision-making representative to dispose of the relevant person's property by way of gift, then, without the specific approval of the court, the power to make such a gift shall be limited to—

(a) gifts to other persons (including the decision-making representative) who are related to or connected to the relevant person, and which gifts are—

(i) of a seasonal nature or made on customary occasions,

(ii) made to such other person on the occasion of the birth of a child to such other person,

(iii) made to such other person on the occasion of the marriage of such other person,

(iv) made to such other person on the occasion of the registration of a civil partnership in respect of which such other person is a civil partner, or

(v) made to such other person on the occasion of the anniversary of his or her birth, marriage or civil partnership, and

(b) gifts to any charity to which the relevant person made or might reasonably be expected to make gifts,

provided that the value of the gift is reasonable having regard to all the circumstances and in particular ~~the extent of the relevant person's assets~~ **having regard to guidelines published by the Public Guardian in accordance with section 63 for the guidance of decision-making representatives.**

Comment:

Same reason as given for Section 21(8) and for consistency.

Section 26(4)

Section 26(2) provides that: Where a court proposes to make an order...the Public Guardian shall consult with and have regard to the views of one or more than one of the members of the family of the relevant person and such other persons as the court may direct be consulted in relation.....

Comment:

This section needs to be recast to take account of the need to respect the privacy and confidentiality of the relevant person. In some circumstances the relevant person does not wish consultation with or regard to be had to the views of family members. The Act must include a definition which includes not only 'family members' but also civil partners, cohabitants and other individuals, named as persons to be consulted by the relevant person when they had capacity to do so.

For those who have not so specified then any consultation must be limited to the ascertainment of the possible 'will and preferences' of the relevant person.

Section 27(2) amend:

Section (2) A decision-making representative for a relevant person shall not, without the express approval of the court—

(a) exercise any powers in relation to the settlement of any part of the property of the relevant person, whether for the relevant person's benefit or for the benefit of others, or

(b) exercise any power (including the power to consent) vested in the relevant person, whether beneficially or as trustee or otherwise or

(c) exercise any power of appropriation or rights of election for the purposes of the Succession Act 1965

Comment:

Suggested amendment is mutatis mutandis with (a) and (b) above.

Section 27(8) amend:

Section 27(8) ~~Subsections (5) to (7) shall not be construed to prejudice the generality of section 69 of the Mental Health Act 2001 or of rules 40 made under that section~~ be construed in accordance with a Code of Practice prepared and published under Section 63 of this Act.

Comment:

There should be no conflation between mental health matters and mental capacity matters. It would not be appropriate to interpose guidelines for a very different set of circumstances into this Act. In practice, this will give rise to lack of clarity and confusion.

Section 27(9) new:

A person who contravenes this section or the Code of Practice referred to in subsection (8) shall be guilty of an offence and shall be liable on summary conviction to a class [?] fine.

Comment:

Some sanction is necessary for a person who contravenes the Code of Practice.

Section 32 amend

(iii) by inserting, after paragraph (b), the following:

“(c) an application under ~~Part~~ **Parts 4, 9 and Part 12(?)** of the ***Assisted Decision-Making (Capacity) Act 2013*** relating to the matters referred to in sections 15(1) and sections (??Heads 5(6) and 5(7) of that Act”

Comment:

Sections 68 and 69 of Part 9 of the Bill relate to a requirement by the wardship court to review wards who are detained in an approved centre at the time of the commencement of the Act. It must be provided that such a person is entitled to legal representation.

The Heads for the Advance Healthcare Directives currently provide that an application should be made to the High Court in certain circumstances that arise in Head 5(6). The Law Society is recommending that an application also be made to court in the circumstances provided under Head 5(7). This amendment is to provide for equality of treatment for all such applications under the Act. (Note: The Law Society is regarding the Part of the Bill dealing with Advanced Healthcare Directive as being in a new Part 12)

Part 5

Wards

Sections 33 - 37

Section 35(2) amend:

Section 35(2) Notwithstanding *subsection (1)*, the wardship court shall review the capacity of wards who have attained the age of 18 years (whether before, on or after being taken into wardship) on or before the ~~third~~ **first** anniversary of the commencement of this section.

Comment:

Existing wards must be treated equally with all others. The initial review period must comply with the initial review periods being provided for others under this Bill. The priority on the enactment of the Bill must be the review of existing wards in a timely manner. Those who have the capacity to can make the application and those who have a person with an interest in them will be able to make a speedy application. However, it appears that the most vulnerable wards will be left to the end of the queue for review.

Part 6 Enduring Powers of Attorney
Sections 38 – 52

Section 40(3)

Comment:

The regulations which prescribe the form of an enduring power of attorney should differentiate between the provisions of section 25(a)(vii) and other personal welfare decisions.

This amendment is suggested in the interest of clarity.

Section 40(3)(j) amend:

Section 40(3)(j): prescribing the forms of notices required to be given in compliance with the provisions of *Schedule 1*, ~~and~~ the information to be included in such notices or a class of such notices and the dispensing with notice to specified person or persons on the execution of an enduring power of attorney.

Comment:

While a person has the capacity, they should have the right to apply for dispensing with notice for legitimate reasons to specific persons. The will and preferences of the person must take precedence over procedures prescribed by legislation.

Section 40(6) and (7)

Comment:

Subsection 40(6) provides that a person who is an undischarged bankrupt or currently in a debt settlement arrangement is debarred from being an attorney under an enduring power of attorney. Subsection 40(7) provides that such persons i.e. an undischarged bankrupt or a person currently in a debt settlement arrangement or a personal insolvency arrangement, can be an attorney for personal welfare decisions.

It is suggested that such persons should not be automatically debarred from being an attorney for property and affairs. If such persons are close family members and the donor wishes to appoint such a person then consideration should be given in the legislation to their appointment but perhaps with a requirement that they be appointed jointly with another person. This should be a matter for the Public Guardian.

Section 40(13)(b) amend:

Section 40(13)(b) provides: An enduring power which has not been registered shall be invalidated on the exercise by the court of any of its powers under section 17(2) or 23(2) in respect of the donor concerned.

Comment:

This provision requires clarification. As drafted, and given the transition provisions of Section 39 (of the Bill) in relation to enduring powers created under the 1996 Act, it appears to be in conflict with the right of autonomy and the right of self-determination as provided by the various Council of Europe Recommendations and indeed the need to have regard to the 'will and preferences' of the relevant person as provided by the UNCRPD.

However, if it is intended to state, that the court is obliged to exercise its jurisdiction under section 17(2) or 23(2) in circumstances where the unregistered power is invalid or cannot be registered for stated reasons, then the section as drafted is not successful in stating this.

Section 41(2)(b) amend:

Section 41(2)(b) extends to giving or refusing treatment by a person providing healthcare for the donor ~~other than refusing~~ **including the refusal of** life-sustaining treatment.

Comment:

The legislation must comply with the right to autonomy and self-determination as provided for in the international conventions. The recently concluded Council of Europe Recommendation CDDH-AGE (2013)¹³ on Human Rights of Older Persons at paragraph 9 states:

'Older persons enjoy inherent dignity. They are entitled to lead their lives independently, in a self-determined and autonomous manner. This encompasses inter alia the taking of independent decisions with regard to all issues which concern them.....'

Head 8(1) of provisions for Advance Healthcare Directives is now in conflict with this provision and needs to be modified. See comment under Section 4(2) above.

Section 41(7) amend:

Section 41(7) *Subsections (4) to (6)* shall ~~not be construed to prejudice the generality of section 69 of the Mental Health Act 2001 or of rules made under that section~~ **be construed in accordance with a Code of Practice prepared and published by the Public Guardian under Section 63 of the Act.**

Comment:

For reasons stated for Section 27(8) ; There should be no conflation between mental health matters and mental capacity matters. It would not be appropriate to interpose guidelines for a very different set of circumstances into this Act. In practice, this will only give rise to lack of clarity and confusion.

It is necessary to have detailed Regulations/Codes of Practice governing the issue of restraint or deprivation of liberty for the purpose of the capacity legislation.

Section 41(8) new:

A person who contravenes this section or the Code of Practice referred to in subsection (7) shall be guilty of an offence and shall be liable on summary conviction to a class [?] fine.

Comment:

A sanction is necessary for contravention of a statutory Code of Practice.

Section 42(4) amend:

Section 42(4) Without prejudice to *subsection (3)* but subject to any conditions or restrictions contained in the instrument, an attorney for a donor under an enduring power, whether general or limited, may, if specific provision to that effect is made in the instrument, dispose of the property of the donor by way of gift, ~~to the following extent but no further:~~ save that, without the specific approval of the court, the power to make such a gift shall be limited to –

(a) gifts to other persons (including the attorney) who are related to or connected to the donor, and which gifts are—

- (i) of a seasonal nature or made on customary occasions,
- (ii) made to such other person on the occasion of the birth of a child to such other person,
- (iii) made to such other person on the occasion of the marriage of such other person,
- (iv) made to such other person on the occasion of the registration of a civil partnership in respect of which such other person is a civil partner, or
- (v) made to such other person on the occasion of the anniversary of his or her birth, marriage or civil partnership; and

(b) gifts to any charity to which the donor made or might reasonably be expected to make gifts,

provided that the value of the gift is reasonable having regard to all the circumstances and in particular ~~the extent of the donor's assets~~ ***having regard to guidelines published by the Public Guardian in accordance with section 63 for the guidance of attorneys.***

Comment:

These amendments are suggested in the interest of limiting opportunities for financial abuse of the relevant person.

Section 42(5) new:

Section 42(5) Notwithstanding any of the provisions of this section, an attorney shall disclose to the Public Guardian any matter which the attorney reasonably believes may give rise to a conflict of interest between the donor's interest and that of the attorney.

Comment:

This is a necessary provision to avoid possible abuse by attorneys. There should be specific provision in the Bill to address the issue of a conflict of interest.

Section 42(6) new:

A person who contravenes this section shall be guilty of an offence and shall be liable on summary conviction to a class [?] fine.

Comment:

A sanction is necessary to indicate the seriousness of a default under this section.

Section 44

Comment:

This section appears to be drafted on the basis of the *Powers of Attorney Act 1996* giving jurisdiction in such cases to the High Court. See comments made above under Section 15(2).

Section 48(4)(b) amend:

Section 48(4)(b) Every such report submitted to the Public Guardian shall be in such form as may be determined by rules of court and shall in particular include details of –

(i) all expenses and remuneration paid or reimbursed to the attorney concerned for the donor concerned

(ii) any benefit received by the attorney or by other persons as provided for in section 42(3) and (iii) disposal of the donor's property by way of gift in accordance with section 42(4)

Comment:

These amendments are necessary to comply with safeguarding requirements and are consistent with the suggested amendment for Section 24(7)(b).

Section 52 (1) amend:

Section 52.—(1) An instrument which appoints more than one person to be an attorney under an enduring power of attorney may specify—

(a) that the attorneys are appointed to act jointly, or

(b) that the attorneys are appointed to act jointly and severally or

(c) that the attorneys are appointed to act jointly as respects some decisions and jointly and severally as respects other decisions,

and, in default of the power so specifying, the attorneys shall be deemed to have been appointed to act jointly.

Comment:

This amendment is made in the interest of clarity. See also Section 23(7).

Part 7 Informal Decision-Making on Personal Welfare Matters

Sections 53 - 54

Section 53(1) clarify:

Section 53(1) Subject to *section 54*, notwithstanding that a person (in this section and *section 53* referred to as an “informal decision-maker”) is not a decision-making assistant, co-decision-maker, decision-making representative or attorney for a relevant person, the informal decision-maker may take or authorise the taking of an action in respect of the personal welfare (including healthcare and treatment) of the relevant person where the provisions of this section are complied with and the action is neither a matter referred to in *section 4(2)* nor a matter closely connected with a matter referred to in *section 4(2)*.

Comment:

This section gives very wide power to a ‘person’ who will be known as an informal-decision-maker. As drafted it appears to undermine the other provisions with regard to decision-makers. While the purpose of the provision is not to exclude a person caring for person at home from making decisions for everyday matters in relation to personal welfare but some guidelines must be provided for. The provision as it stands in effect allows the current very ad hoc arrangements to continue which gives rise to the possibility for abuse.

It is recognised that provision should be made to allow healthcare professionals to take an action with regard to care and treatment of a relevant person where it is urgent and necessary to do so and there are no appropriate decision-making arrangements in place to assist with consent or to consent to the taking of such action.

Section 54(2) amend:

Section 54(2) Subject to *subsection (3)*, nothing in *section 53* shall be construed as authorising an informal decision-maker to take an action or authorise the taking of an action in respect of a relevant person which conflicts with—

- (a) if the relevant person is an appointer, a relevant decision made by the relevant person with the assistance of a decision-making assistant for the relevant person,
- (b) a relevant decision made by the relevant person jointly with a co-decision-maker for the relevant person, or
- (c) a relevant decision made by a decision-making representative or attorney for the relevant person, **or**
- (d) there is subsisting a valid advance healthcare directive giving a direction about the matter or appointing a patient-designated healthcare representative

where the informal decision-maker has knowledge of, or ought reasonably to have knowledge of, that relevant decision **or advance healthcare directive**.

Comment:

It is important that this Part of the Bill, provides for guidelines as to the circumstances in which such informal decision-making can be taken, the limitations on such decisions and for the necessary monitoring and reporting requirements. A Code of Practice is absolutely essential.

Part 8 Public Guardian

Sections 55 – 64

Section 56(2) after (e) and before (f) insert:

- **to establish and maintain a register of advance healthcare directives**

Section 56(2)(g) amend:

Section 56(2) (g) to direct a special visitor or general visitor to visit –

- (i) a decision-making assistant, co-decision-maker, decision-making representative, attorney or patient-designated healthcare representative for a relevant person, or
- (ii) a relevant person for whom there is a decision-making assistant, co-decision-maker, decision-making representative, attorney or patient-designated healthcare representative or in respect of whom an order has been made under section 28,

and, subsequent to the visit, to submit to the Public Guardian a report on such matters concerning the person visited as the Public Guardian may specify in the direction.

Comment:

This is to take account of the possible appointment of a patient-designated healthcare representative as provided for in Head 7 of the *Draft General Scheme of Legislative Provisions for Advance Healthcare Directives*.

Section 56(2)(j) amend:

Section 56 (2)(j) to receive and consider reports from—

- (i) **decision-making assistants**, co-decision-makers, decision-making representatives or attorneys for relevant persons, and
- (ii) special visitors and general visitors,

Comment:

This amendment is in line with the suggested amendment to Section 11(4) above.

Section 56(2)(l) amend:

Section 56(2)(l) -

(i) to receive and consider representations, including complaints, in relation to the way in which a decision-making assistant, co-decision-maker, decision-making representative, ~~or~~ attorney or patient-designated healthcare representative for a relevant person is performing his or her functions as decision-making assistant, co-decision maker, decision-making representative, ~~or~~ attorney or patient-designated healthcare representative, as the case may be,

(ii) to receive and consider representations, including complaints, in relation to the way in which a person who may lack capacity or whose capacity may shortly be called into question is being mistreated, neglected, exploited or abused by any other person.

Comment:

This is to provide for the protection of a person who does not come within the provisions of the Act.

The provisions in respect of advance healthcare directives provide for an application to the High Court in certain circumstances but it is silent as to what is to happen if the patient-designated healthcare representative is not carrying out his or her function correctly. Section 56 should be amended to provide for the Public Guardian to make an enquiry if representations are made to him or her.

Section 56(2)(m) amend:

Section 56(2)(m) to act on complaints referred to in *paragraph (l) (i) and (ii)* which the Public Guardian is satisfied have substance, including acting on by way of making an application to the court or High Court under this Act ***and to investigate any matter which gives rise to concern that a person who may lack capacity or whose capacity may shortly be called into question has inappropriate or inadequate decision-making arrangements.***

Comment:

This is to provide for a person who does not come within the provisions of the Act but some action is necessary to put decision-making arrangements in place for such a person.

Section 56(3) amend:

Section 56(3) In carrying out his or her functions under this section, the Public Guardian may consult with any person who has any functions in relation to the –

- (a) care or treatment of a relevant person or***
- (b) property and affairs of a relevant person.***

Comment:

This is to provide for an obvious gap in relation to property and affairs.

Section 56(4) amend:

Section 56(4) The Public Guardian may request a person referred to in *subsection (3)* to give to him or her all information, reports and assistance relating to the care or treatment ***or property and affairs*** of a relevant person as may reasonably be so requested and which the Public Guardian considers necessary to carry out his or her functions under this Act, and any such person so requested shall comply with the request ***notwithstanding anything contained in any statutory provision or rules of law.***

Comment:

This amendment is again to provide for obvious gaps in the current Bill.

Section 56(8) new:

Section 56(8) For the purposes of enabling the Public Guardian to carry out his or her functions under this Act, he or she may direct a special or general visitor to, at any reasonable time, examine and take copies of any records in connection with the property and affairs of a relevant person.

Comment:

This is a logical amendment following those suggested above.

Section 63(1)(xii) new:

Section 63(1)(xii) with respect to matters arising in respect of the restraint of a relevant person under section 27(5) to (7) or a donor of an enduring power of attorney under section 41(4) to (6) or with respect to the restraint of a person who lacks capacity or whose capacity may shortly be called into question.

Comment:

This is to provide for Guidelines on circumstances in which restraint can be used as suggested for Sections 27(8) and 41(7).

Section 63(2)(vi)(A) new:

Section 63(2)(vi)(A) insert: the guidance of patient-designated healthcare representatives.

Comment:

This to take account of the provision for the appointment of a patient-designated healthcare representative in the *Draft General Scheme of Legislative Provisions for Advance Healthcare Directives*.

Section 63(3) amend:

Section 63(3) Where the Public Guardian is minded to exercise his or her power under *subsection (2)(a) or (b)*, he or she shall consult with such persons as the Public Guardian considers appropriate having regard to the matters to which it is intended that the code, when it is prepared, will relate and such persons may include any of the following:

- (a) the Health Service Executive;
- (b) the Mental Health Commission;
- (c) the Health Information and Quality Authority;
- (d) representatives of professional bodies in the healthcare sector;
- (e) representatives of healthcare professionals
- (f) representatives of professionals other than healthcare professionals***

Comment:

It will be necessary for the Public Guardian to consult with bodies such as Law Society, Irish Banking Federation and others in relation to Codes of Practice with regard to property and affairs. Evidence from this and many other jurisdictions indicate a high level of abuse with regard to property and affairs. Codes of Practice will assist all in understanding the requirements of the legislation.

Part 9 Detention Matters

Sections 65 – 69

Section 66 amend:

Section 66—The Courts Service shall establish a panel of suitable consultant psychiatrists willing and able to carry out independent medical examinations for the purposes of this Part **and Part 11**.

Comment:

This is to provide that independent consultant psychiatrists will have a role with respect to those patients under the Mental Health Act 2001 who lack capacity to consent to treatment under that Act for which provision must be made in this Act.

Section 68(1) amend:

Section 68(1)-

(i) Where, immediately before the commencement of this section, a person is detained (within the meaning of the European Convention on Human Rights) in an approved centre on the order of a wardship court and, from that commencement, continues to be so detained, that order shall, ~~as soon as possible~~ **not later than a period of 3 months of the commencement of this section**, be reviewed by the wardship court in accordance with subsection (2).

(ii) a person whose detention is subject to a review under subsection (i) shall be entitled to legal representation.

Comment:

The persons to which this subsection applies have not had their detention reviewed as they were excluded from the provisions of the Mental Health Act 2001. Therefore, it is necessary that the review takes place within a stated period consistent with periods that apply to persons that do come within the provisions of the Act of 2001.

The provision for legal representation is consistent with the rights of people who are involuntarily detained under the provisions of the Mental Health Act 2001 and should equally apply to this category of person.

Section 68(4) amend:

Section 68(4) Where the wardship court determines that the person concerned is no longer suffering from a mental disorder, it shall order the discharge of the person concerned from detention **and direct the Public Guardian to exercise his or her functions in relation to the person and give such other directions as it thinks appropriate having regard to the circumstances of the person.**

Comment:

This person may no longer be suffering from a mental disorder but may lack capacity and may require appropriate provision to be put in place.

Section 69(1) amend:

Section 69(1)-

(i) Where, immediately before the commencement of this section, a person is detained (within the meaning of the European Convention on Human Rights) in an institution other than an approved centre on the order of a wardship court and, from that commencement, continues to be so detained, that order shall, ~~as soon as possible~~ **not later than a period of 3 months of the commencement of this section**, be reviewed by the wardship court in accordance with *subsection (2)*.

(ii) a person whose detention is subject to a review under subsection (i) shall be entitled to legal representation.

Comment:

Suggested amendment for same reason as for Section 68(1) above.

Section 69(4) amend:

Section 69(4) Where the wardship court determines that the person concerned is no longer suffering from a mental disorder, it shall order the discharge of the person concerned from detention ***and direct the Public Guardian to exercise his or her functions in relation to the person and give such other directions as it thinks appropriate having regard to the circumstances of the person.***

Comment:

This person may no longer be suffering from a mental disorder but may lack capacity and may require appropriate provision to be made for him or her. Same rationale as for Section 68(4) above.

Section 69A new:

(1) Nothing in this Act shall be construed as authorising any person to deprive any person who lacks capacity of his or her liberty or to consent to such deprivation of liberty.

(2) Regulations shall provide for the circumstances in which a person who lacks capacity can be deprived of his or her liberty within the meaning of the European Convention of Human Rights.

(3) If a person who is deprived of his or her liberty in accordance with subsection (2) or a person having an interest in the welfare of that person object to any matter in relation to the deprivation of liberty, the matter shall be referred to the court for consideration.

Comment:

The Bill does not make any provision for 'deprivation of liberty' issues.

The Law Society is of the view that the Bill should provide a general principle on this matter. Regulations should detail the circumstances when a person who lacks capacity may be deprived of liberty in accordance with the European Convention of Human Rights. The person themselves, or a person having an interest in that person, should have the right to make an application to the court in the matter.

Part 10

Convention on International Protection of Adults

Sections 70 – 102

Comment:

This Part of the Bill gives effect to the Hague Convention on the International Protection of Adults.

The Hague Convention makes a distinction between ‘measures of protection’ (which will be subject to the jurisdiction of the High Court as provided for in the Bill) and ‘powers of representation’ (which are arrangements made by an individual in advance such as Enduring Powers of Attorney and Advance Healthcare Directives). The following points need to be addressed:

- The current draft deals with the applicable law for both protective measures and powers of representation. However, provision also needs to be made for the applicable law in relation to Advance Healthcare Directives.
- As currently drafted Chapter 4 of Part 10 under ‘Recognition and Enforcement’ only deals with protective measures and does not include the recognition and enforcement of powers of representation or advance healthcare directives. This is a gap that needs to be addressed.

Part 11

Miscellaneous

Sections 103 – 118

Section 103 amend:

Section 103 - Nothing in this Act shall be construed as authorising any person to give consent on behalf of a person who lacks capacity to be a participant in a clinical trial. ***Consent with regard to such matters shall be a reserved function of the High Court under Section 4.***

Comment:

See comments for Section 4 above.

This section will also have to take account of any Advance Care Directive of the relevant person in this matter.

Section 104(1) limited:

Section 104(1) Nothing in this Act authorises a person—

- (a) to give a patient treatment for mental disorder, or
- (b) to consent to a patient being given treatment for mental disorder,

if, at the time when it is proposed to treat the patient, his or her treatment is regulated by Part 4 of the Act of 2001

Section 104(2) In this section “mental disorder”, “patient” and “treatment” have the same meaning as in the Act of 2001.

Comment:

This section is limited to a person suffering from a 'mental disorder'. It does not include a person who lacks capacity but who requires treatment for a mental illness. Regulations should provide that decisions with regard to treatment for mental illness are included in personal welfare decisions.

Section 104(3) new:

Where the consent of a patient is required for the purposes of Sections 56, 57, 58, 59 and 60 of the Act of 2001 and the patient is a relevant person, the court shall-

(a) hear evidence from an independent consultant psychiatrist selected by the court as to the matters at issue or

(b) appoint a special visitor to report to the court in relation to the matters arising under these sections.

Comment:

This amendment is suggested to provide for appropriate safeguards for a person who is suffering from a 'mental disorder' and who also lacks capacity.

Clarification on the relationship and interface between the *Assisted Decision-Making (Capacity) Act* (which will relate to decision-making capacity issues) and the *Mental Health Act 2001* (which is limited to governing the procedures for the involuntary detention of a person suffering from a 'mental disorder') is required. The *Mental Health Act 2001* rightly makes no provision for any decisions to be made on behalf of a person who lacks capacity. This must be provided for in the *Assisted Decision-Making (Capacity) Act* with appropriate provision where both pieces of legislation intersect.

Section 113 amend:

Section 113-

(i)A decision-making assistant, co-decision-maker, decision-making representative, attorney, ~~or~~ informal decision-maker ***or patient-designated healthcare representative*** for a relevant person who ill-treats or wilfully neglects the relevant person ***or***
(ii) any person who ill-treats or wilfully neglects a person who lacks capacity or whose capacity may shortly be called into question

shall be guilty of an offence and shall be liable—

(a) on summary conviction, to a class A fine and imprisonment for a term not exceeding 12 months, or both, or

(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years, or both.

Comment:

This amendment is being suggested so as to provide that it shall be an offence to ill-treat or wilfully neglect **any** person who lacks capacity.

In light of the comments contained in the House of Lords Select Committee on the Mental Capacity Act 2005 Report of session 2013 -2014 *Mental Capacity Act 2015: post legislative scrutiny* on Section 44 of the Mental Capacity Act 2005 which has similar wording to what is proposed in Section 113, it is suggested that the proposed wording be re-examined to ensure that it is not so vague '*that it fails the test of sufficient certainty.*'

Section 114 new:

Section 114 - For the purposes of Section 9 of the Health (Repayment Scheme) Act of 2006, the court shall be the court specified in this Act.

Comment:

In the interest of consistency and good management, it is appropriate that decisions in relation to this matter be brought within the remit of the court under this Act.

Section 115 new:

Section 115 – The court to which an application shall be made under Section 21 of the Nursing Homes Support Scheme Act of 2009 shall be the court specified in this Act

Comment:

The court under this Act is being given jurisdiction with regard to persons who lack capacity and it is appropriate that applications under the Nursing Home Support Scheme Act 2009 be brought within the jurisdiction of the court.

The Act should also provide for the transition from 'care representative' to the status of decision-making assistant, co-decision-maker or decision-making representative as appropriate in relation to this matter otherwise it is possible continuing with a 'care representative' will not be in compliance with the requirements of the UNCRPD.

Section 116 new:

Section 116 - In the voluntary transfer of property (whether to a transferee or jointly to the transferor and transferee) a resulting trust in favour of the transferor shall be presumed unless there is express evidence that the property is intended as a gift to the transferee

Comment:

One of the most prevalent types of financial abuse of older people is the device where property is transferred into joint names 'for the convenience' of the older person. In such circumstances the transferee (the joint account holder) merely becomes an agent for the older person.

In practice, the intention of the transferor as to the nature of the account is rarely sought and the abuse occurs when the transferee assumes ownership of the account by using the account for the transferee's own benefit or by claiming ownership by survivorship on the death of the transferor which was not the intention of the transferor. The result is that, in many cases, the Will of the transferor is frustrated.

The Law Society is suggesting that unless there is a clear intention by the transferor to make a gift, a resulting trust should automatically apply.

Section 117 new:

Section 117 – The rule known as the presumption of advancement which applies to voluntary transfers of property is abolished.

Comment:

In Ireland the presumption of advancement applies in transfers from husband to wife and from father to child but not from wife to husband or from mother to child which is in conflict with equality requirements. It is also used as a tool to perpetrate abuse by a child on an older parent. In many jurisdictions the presumption of advancement has been abolished as being out of step with current social conditions.

~~Section 114.~~ **Section 118**—The Minister shall cause a review of the functioning of this Act to be carried out before the 5th anniversary of the date of enactment of this Act.

Comment:

Renumbered.

Part 12

Advance Care Directives

Heads for Advance Healthcare Directives

Head 1

Comment:

To facilitate persons who have already made and continue to make advance healthcare directives it would be important that legal clarity be brought to their situation as soon as possible. The Law Society therefore urges that this part of the *Assisted Decision-Making (Capacity) Bill*, when enacted, be brought into operation immediately on enactment.

Head 2

‘Basic Care’

Comment:

The definition in the Scheme of these provisions is noted. The definition does not include ‘palliative care’ as recommended by the Law Reform Commission. However, it is noted that ‘palliative care’ is included in the definition of ‘treatment’.

While palliative care is not available countrywide at present, the Law Society wishes to emphasise the importance that such care be automatically available particularly for older persons if they wish to include palliative care as a treatment request in an advance healthcare directive. The Law Society notes in particular the Council of Europe Recommendation CM/Rec (2014)2 on the Promotion of Human Rights of Older Persons. This Recommendation states at paragraph 44: ‘Member States should offer palliative care for older persons who suffer from a life-threatening or life-limiting illness to ensure their well-being and allow them to live and die with dignity.’

‘*patient-designated healthcare representative*’ –

Comment:

This definition requires to be amended to take account of redefined powers suggested under Head 7(3) below. Suggested amendment:

‘patient-designated healthcare representative’ means a person appointed in an advance healthcare directive to clarify the terms of the directive, or to make specified treatment decisions or treatment decisions generally on behalf of the person who made the directive where he or she lacks capacity.

It is also suggested that perhaps the term should be amended from ‘*patient-designated healthcare representative*’ to the shorter ‘*healthcare representative*.’

‘writing’

Comment:

It would be important that the Code of Practice indicates a number of scenarios in which ‘writing’ would be interpreted to comply with this statutory requirement. Examples might be: where a person uses speech recognition technology or where a person attends at an A & E Department of a Hospital or at a Health Clinic and specific urgent treatment is suggested. Alternatively, the person in question has a verbal discussion with a healthcare professional who records the person’s wishes in file notes should be sufficient evidence of a valid advance healthcare directive. The statutory requirement should also be capable of being complied with if the person signs the recorded notes and the signature is witnessed as required. It may not necessarily be the case (as implied in the explanatory memorandum) that there will be a distance in time between a person having capacity and not having capacity. AHD must also accommodate situations where a person has capacity to consult with a healthcare professional and then undergoes a medical/surgical intervention and at that stage is then not capable to give or refuse consent which may arise during an urgent intervention.

The definition of ‘writing’ should also make it clear that it is signed by the person making the advance healthcare directive, witnessed in the presence of the maker of the advance healthcare directive or by the direction of the maker of the advance healthcare directive. (See Section 24(6) of the Mental Capacity Act 2005 [England and Wales]. See paragraph 4.4 below with regard to witnessing. The definition must fully accommodate people with disabilities.

Head 3(2) amend:

Head 3(2) be amended to read:

In addition to the guiding principles set out in Section 8, the following additional principles shall apply in the application of this Part of the Act -

Comment:

The Law Society agrees that the principles set out in Head 3 are necessary additional principles with regard to AHD. To avoid any ambiguity it is suggested that it be stated that they are in addition to the guiding principles set out in Section 8 of the *Assisted Decision-Making (Capacity) Bill 2013*.

Head 4

Head 4(2) (b)

Comment:

It is noted that the legislation will provide that the circumstances in which the treatment refusal is intended to apply must be clearly outlined in addition to specifying the treatment to be refused. It would be helpful if there were clear guidelines in the Code of Practice as to what the circumstances might be with regard to different illnesses. Example: Refuse chemotherapy treatment for cancer, or must the specific type of cancer be specified?

Head 4(4) (a)

Comment:

This head provides that an advance healthcare directive must be in writing. As indicated under Head 2 above it is important that a wide interpretation of 'in writing' be understood. Should this subsection not also provide that it be signed as is provided in Head 4(6)(b) for an alteration of an advance healthcare directive?

Head 4(4) (b) (ii)

Comment:

Given that many people no longer have a 'family doctor,' use 'walk in' medical centres and in the future will be visiting primary care centres, and having regard to the fact that the proposed legislation is not providing that it will be mandatory for the maker of an advance healthcare directive to obtain professional advice, the Law Society recommends that this subsection be deleted. It is of course recognised that the Code of Practice will encourage the seeking of professional advice.

Another reason for not making it mandatory to obtain medical advice is that the courts have always recognised the right of a person to refuse treatment for non-medical reasons. The principles outlined in Head 3 take account of this.

4.4 Head 4(5)

This head provides that an advance healthcare directive: must be witnessed by two persons who have reached the age of 18 years – one of whom may not be a member of the person’s family and must not be entitled to any part of the person’s estate.

Comment:

It is acknowledged that the legislation seeks to put in place safeguards in relation to the making of an advance healthcare directive including the avoidance of any influence being imposed on the maker of the advance healthcare directive. Once the advance healthcare directive is made, it is unlikely that the witnesses will have any further function with regard to the carrying out of the ‘will and preferences’ of the maker of the advance healthcare directive but clearly the patient-designated healthcare representative is the person who will have the authority to make critical decisions. The Law Society therefore recommends that this Head be amended to read:

Head 4(5) amend:

Head 4(5) An advance healthcare directive must be witnessed by two persons who have reached the age of 18 years – neither of whom is the nominated patient-designated healthcare representative and one of whom should not be a member of the person’s family.

Comment:

The Code of Practice should indicate the status of person who can be the ‘stranger’ witness. It is suggested that the list of appropriate witnesses should be similar to that required for the application for a passport which includes about 10 categories of who the witnesses might be.

Head 5

Head 5(5) (a) amend:

It is suggested that this Head be amended to read:

- (a) the healthcare professional concerned must consult with the person’s patient-designated healthcare representative or an attorney who has been conferred with the power to make personal welfare decisions under Section... [of the Assisted Decision-Making (Capacity) Act] ~~or with the person’s family and friends (if there is no nominated patient-designated representative or attorney with appropriate power to make personal welfare decisions)~~ and seek the opinion of a second healthcare professional in an effort to clarify any ambiguity.

Comment:

There appears to be an inadvertent omission of the attorney from this head. This Head should be amended to be consistent with both Head 6 and Head 8.

At the time an advance healthcare directive is to be followed the person who made the directive will lack capacity, therefore the inclusion of consultation with family and friends, who have not been nominated by the maker of the advance healthcare directive, does give rise to issues of confidentiality and the right to privacy for that person. Attention is drawn to Paragraph 26 of the Medical Council’s Guide to Professional Conduct and Ethics which states:

“26 Disclosure with patient’s consent to relatives and carers

26.1 *While the concern of the patient’s relatives and close friends is understandable, you must not disclose information to anyone without the patient’s consent. If the patient does not consent to disclosure, you should respect this except where failure to disclose would put others at risk of serious harm.*

26.2 *If the patient is considered to be incapable of giving or withholding consent to disclosure, you should consider whether disclosing the information to family and carers is in the best interests of the patient”.*

Head 5(6)

Comment:

Section 32 of the *Assisted Decision-Making (Capacity) Bill 2013* provides for legal aid in respect of an application to court under Part 4 of the Bill. It will also be necessary to provide for legal aid in respect of an application to the High Court under this section. See suggested amendment to Section 32 above.

Head 5(7)

Comment:

The Law Society very much welcomes the provisions in the Scheme for Advance Healthcare Directives that ‘treatment’ includes any intervention or procedure related to both physical and mental health. It notes however, that Head 5(7) is an exception to this where a person’s treatment is regulated by Part 4 of the *Mental Health Act 2001* and/or by the *Criminal Law (Insanity) Act 2006*, the advance healthcare directive does not have to be followed. The explanations given in the explanatory note are noted including the statement that *‘it must be recognised that an individual’s autonomy is not absolute and cannot be upheld to the fullest extent in every situation.’* The explanatory note also states that the State stemming from the responsibility to uphold the common good and to protect and maintain the rights and best interests of its citizens that, *‘there are specific limited circumstances where it would be permissible to override the individual’s valid and applicable advance healthcare directive.’*

Section 57 of the *Mental Health Act 2001* clearly provides that the *consent of the patient shall be required* but then provides for the circumstances in which such consent shall be overridden. Section 57 clearly envisages a patient who while suffering from a ‘mental disorder’ still has capacity. Section 56 of the 2001 Act provides safeguards for patients as he or she must be given full information on the treatment proposed including the likely effects of the proposed treatment. There is however **no accommodation** in either the *Mental Health Act 2001* or in the proposed provisions of the *Assisted Decision-Making (Capacity) Bill 2013* for a patient who may lack the capacity to either understand the information being given or the risks of the treatment or both.

In accordance with Head 4(2) (c) an advance healthcare directive is only valid provided - at the time the advance healthcare directive is to be followed the person who made the directive lacks capacity to consent to the treatment in question. There is already an acknowledgment that there is a deficit in relation to the 2001 Act as there is no provision/accommodation for a person **who is suffering from a mental disorder but who also lacks mental capacity to consent to treatment**. As stated under Section 104 above, clarification is required as to the appropriate interface between these two pieces of legislation.

In order that the State complies with the UN Convention on the Rights of People with Disabilities, to enable a person with a mental disorder to exercise his or her legal capacity and while also acknowledging that there are limited circumstances where an individual's rights may be overridden, the Law Society suggests that, in the circumstances as outlined, the High Court should be the appropriate body to give consideration to an advance healthcare directive made by a person who comes under the provisions of Part IV of the *Mental Health Act 2001*. Therefore Head 5(7) should be amended to provide:

Head 5(7) amend:

A valid and applicable advance healthcare directive must be followed unless, at the time when it is proposed to treat the person, his/her treatment is regulated by Part 4 of the Mental Health Act 2001 and/or the Criminal Law (Insanity) Act 2006 in which case the matter should be referred to the High Court in accordance with Head 9 for a declaration as to whether the advance healthcare directive should be followed or not in the particular circumstances.

Comment:

This is to apply equality of treatment for those whose advance healthcare directive is not to be followed for stated reasons in the legislation.

As an alternative to referring the matter of an advance healthcare directive made by a person coming within the provisions of Part IV of the *Mental Capacity Act 2001* to the High Court consideration might be given as to whether it would be appropriate that it would be a matter to be referred to a Mental Health Tribunal.

It will also be necessary to provide for legal aid in respect to any application to the High Court under this amended section similar to that recommended at paragraph 5.3 above.

Head 6

Head 6(2)

Comment:

The Law Society very much welcomes this provision, that effect will be given to a valid and applicable advance healthcare directive as it relates to the appointment of a patient-designated healthcare representative in priority to the matter being referred to the High Court. This is, as is stated, to accord with the Council of Europe's Recommendation CM/REC (2009)¹¹ on Principles concerning continuing Powers of Attorney and Advance Directive for Incapacity.

Head 7

Head 7(1) be amended to provide:

A person may nominate, in his or her advance healthcare directive, another named person or other persons to act as his or her patient-designated healthcare representative or representatives.

Comment:

It is noted that there is provision for the appointment of another named representative to act as his or her patient-designated healthcare representative— the appointment of one person.

In order to provide for a person's choice, to cater for desired family involvement and to be consistent with the flexibility afforded under an enduring power of attorney of the ability to appoint more than one person, the Law Society submits that there should be provision for the maker of an advance healthcare directive to appoint more than one person to be his or her patient-designated healthcare representative.

In the alternative or in addition to appointing more than one person the maker of an advance healthcare directive may nominate one person to be the patient-designated healthcare representative and name others to be consulted by the patient-designated healthcare representative. This would deal with family situations and overcome the apparent problem that may arise as indicated at 5.2 above where there is no authority to consult family members who have not been given specific authority.

The legislation should also provide for the verbal appointment of a patient-designated healthcare representative in an emergency situation provided the appointer clearly communicates to a healthcare professional that he or she wishes to nominate a named person in such circumstances.

Head 7(3) (b)

It is suggested that Head 7(3) be amended to provide:

A person who makes an advance healthcare directive may confer on his or her patient-designated healthcare representative –

- (a) power limited to advise as to what the individual's will and preferences regarding treatment are likely to be, or*
- (b) power limited to ensuring that the terms of the advance healthcare directive are carried out, or*
- (c) specific power to consent to or refuse a specified treatment or treatments which may include life-sustaining treatment and/or*
- (d) general power to consent to or refuse treatment, up to and including life-sustaining treatment*

and any consent to or refusal of treatment shall be made by the patient-designated healthcare representative on the basis of informed decision-making.

Comment:

The Law Society fully agrees with this Head but notes that it deals with two extremes with no middle ground to provide for specific healthcare decisions/refusals. Nor is it consistent with similar provisions under Section 41(3) of the *Assisted Decision-Making (Capacity) Bill 2013* which provides: '...the authority to make personal welfare decisions is subject to any conditions or restrictions contained in the instrument'.

The Law Society also submits that any decision of the patient-designated healthcare representative be made on the basis of informed decision-making.

Head 8

Head 8(1)

Comment:

The Law Society very much welcomes the suggested modification to Section 41(2) (b) of the *Assisted Decision-Making (Capacity) Bill 2013*, as suggested in its submission to the Minister for Justice and Equality in October 2013, which acknowledges the right of a person to *confer on an attorney power to make personal welfare decisions regarding all forms of treatment, including life-sustaining treatment.*

Head 8(4)

Comment:

The Law Society agrees with this provision and as already stated under Head 6 (2) above – that effect shall be given to the authority of the attorney.

Head 8(5)

Comment:

The Law Society agrees that this is a very clear statutory restatement of the right of self-determination as contained in the Principles set out in the Council of Europe’s Recommendation CM/REC (2009)11 on Principles concerning continuing Powers of Attorney and Advance Directive for Incapacity and also the Council of Europe Recommendation CM/Rec (2014)2 on the Promotion of Human Rights of Older Persons. See comments below under ‘**Clarity required as to the status of an Enduring Power of Attorney.**’

Head 9

Comment:

It would be important that this section explicitly provides that, if the circumstances as outlined exist, then the person proposing to make the application should be obliged to initiate an immediate application to the court otherwise the situation would be open to possible abuse.

Head 10 (new)

10.1 Head 10(1) The Public Guardian shall establish and maintain a register of advance healthcare directives.

Head 10(2) The Public Guardian may make a copy of an advance care directive available to specified persons.

Comment:

The Law Society recommends that there be a public register of Advance Healthcare Directives and the person with the responsibility for establishing and maintaining that register should be the Public Guardian who already is being given a similar function in relation to a number of register under the provisions of the *Assisted Decision-Making (Capacity) Bill 2013*.

Reference should be made in this Part to Section 56(2) of the *Assisted Decision-Making (Capacity) Bill 2013* with regard to an obligation on the Public Guardian to establish a register with regard to advance healthcare directives.

For the purpose as stated, specified persons will normally be healthcare professionals and regulations will set out who are specified persons.

The Law Society further recommends that the **Health Identifiers Bill 2013** should make provision for the recording of the fact of the making by a person of an advance healthcare directive to be included in *such of the individual's other identifying particulars as are known* (as provided for in Section 6(1)9b)) without any necessity to record any of the content of the advance healthcare directive.

In due course accessibility to a person's advance healthcare directive should be achieved on the enactment of the **Health Information Bill** which has as one of its objectives the availability of a patient's health information in electronic format and to have that information accessible by the patient and to his or her healthcare professional. Access to an advance healthcare directive will be regulated by the governance provisions of the Health Information legislation.

The Code of Practice relevant to advance healthcare directives, the HSE *National Consent Policy* and the *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* should provide that a healthcare professional must ask a patient whether or not he or she has made an advance healthcare directive. (This may arise in the course of a consultation with a healthcare professional or when a person is being admitted to a healthcare facility.) In addition, when a patient is asked to sign a consent form to consent to or refuse treatment, the consent form should also include a question as to whether he or she has made an advance healthcare directive.

Obviously, training bodies for healthcare professionals should be alerted to the need for briefings and training on this important topic. The Public Guardian will have a role in this regard as he or she will be interacting with professional bodies in relation to Codes of Practice as provided for in Section 63(3) of the *Assisted Decision-Making (Capacity) Bill 2013*.

The Code of Practice relevant to advance healthcare directives, the HSE *National Consent Policy* and the *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* should provide that a healthcare professional, in compliance with the right of autonomy and self-determination of a person, must give adequate consideration to requests for treatment in so far as is clinically possible and practicable.

It is also recommended that all advance healthcare directives be contained in the public register (as recommended at 5 above) regardless of whether they are for treatment refusals or treatment requests.

Head 11 (new)

Comment:

Section 71 of the *Assisted Decision-Making (Capacity) Bill 2013* gives effect to the Hague Convention on International Protection of Adults and also makes *related provisions as to the private international law of the State*. In the context of related provisions as to private international law, Section 81 of the 2013 Bill sets out the applicable law for enduring powers of attorney. It would be important that the legislation also sets out what the applicable law is to be in the case of advance healthcare directives. See also comments for Part 10 above.

For further information please contact:

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