

Submission by Law Society
to
The Department of Justice, Equality and Law Reform
on
Scheme of Mental Capacity Bill 2008

Introduction

The Law Society welcomes the publication of the Scheme of Mental Capacity Bill, the main purpose of which is to introduce a modern statutory framework governing decision making on behalf of persons who lack capacity.

It is not intended to comment on each Head of the proposed Scheme but rather to comment on some of the main points to which the Law Society wishes the Department of Justice, Equality and Law Reform to have regard in drafting the detail of the legislation. Some of the comments are by way of highlighting what should be included in the detailed provision of a Mental Capacity Bill which is not clear at present from the Scheme of the Bill which is effectively in summary format.

Comments on specific issues that arise in the context of capacity legislation with regard to the Health (Repayments Scheme) Act 2006 and the Nursing Home Support Scheme Bill 2008 are also included.

Part 1: Capacity, formal and informal decision-making

1.1 Presumption of capacity and guiding principles:

The Law Society welcomes the provision of a statutory presumption of capacity and also very much welcomes the setting out of the Guiding Principles in legislation which must be adhered to by all persons in giving effect to the purposes of the Mental Capacity Act. It also welcomes the provision that the assessment of capacity will be time-specific and issue-specific, in other words the legislation will provide for a functional approach to the assessment of capacity. It is noted that under Head 6, which provides for the appointment of personal guardians, regard must be had to the guiding principles and the best interests of the person who lacks capacity. The necessity to have due regard to these principles is repeated in Head 47 which specifies the duties of attorneys under an enduring power of attorney. The Law Society is of the view that Head 5, which spells out the power of the Court, should also be specifically made subject to the guiding principles and best interest principle.

Recommendation: *The Law Society recommends that the powers of the Court as specified in Head 5 be specifically subject to the guiding principles in Head 1 and the best interest principle in Head 3.*

1.2 Jurisdiction as respects decisions on capacity:

Given the approach stated in the guiding principles in the **Scheme of Mental Capacity Bill** and the policy context set out in the **Overview of Scheme of Mental Capacity Bill**, to replace the current Wards of Court Scheme with a modern statutory framework governing decision-making on behalf of persons who lack capacity, the Law Society is disappointed in the provisions giving jurisdiction to the Courts (High and Circuit) based on the valuation of property. Framing the jurisdiction as respects decisions on capacity in this manner fails to take account of the purpose of the proposed legislation which is to give due regard to the dignity and autonomy of the person who lacks capacity. The dominant emphasis should be the protection of the person and welfare of the person who lacks capacity.

Recommendation: *The Law Society recommends that Head 4 be amended so that jurisdiction as respects decisions on capacity is not aligned to rateable valuation of any land owned by the person the subject of the application.*

1.3 Specialist Tribunal/Court

It is notable that most of the common law jurisdictions that have modern capacity legislation provide for a Guardianship Board/Tribunal system which is more flexible in enabling an assessment based on the functional approach to capacity to be carried out. This would include a panel of experienced assessors – people with expertise based on the decision to be made and lay persons who have ‘living’ experience with people who lack capacity.

Where the jurisdiction is given to a Court (for example in England and Wales under the Mental Capacity Act 2005), a specialist court (The Court of Protection) with specialist judges has been set up and ‘may sit at any place in England and Wales, on any day and at any time.’ In addition the Court has its own rules – *The Court of Protection Rules 2007* (2007 No 1744(L.12)) and the specialist President of the Court can give directions as to the practice and procedure of the specialist Court. The proposed legislation under the Scheme of Mental Capacity Bill does not appear to provide for a specialist court but merely states that the relevant courts when exercising jurisdiction under the Act shall be known as the ‘Court of Care and Protection.’ The Scheme of the Bill does not provide for specialist judges.

Due to current demographic trends in Ireland, there will be a significant increase in the number of persons who will be unable to make decisions for themselves. A specialist court/tribunal is required to properly address this situation. A fundamental issue that requires legislative safeguards is the review of any decisions with regard to persons who lack capacity. A specialist court/tribunal would be the more appropriate body to carry out such reviews.

Recommendation: *The Law Society recommends that a specialist court/tribunal either a Guardianship Board or Specialist Court of Care and Protection should be provided for and not simply the renaming of the Circuit and High Court when sitting for the purpose of hearing capacity cases.*

1.4 Rules of Evidence

A Court structure requires formalised rules of evidence. A specialist court/tribunal would avoid the need to have formalised rules of evidence as for a general court. It is noted that Head 9(6) (d)

provides for rules of court ‘as to what may be received as evidence and the manner in which it is to be presented.’ The Law Society would wish to ensure that procedural and evidential rules for the purposes of the Mental Capacity Act are as flexible as possible and balanced with the need to protect persons who lack capacity. Rules should provide for oral in addition to written evidence and also a relaxation on the need for sworn documentation. A specialist court/tribunal would also allow for more flexibility in this regard. It would of course be necessary to ensure the protection of the rights of persons who lack capacity including the right to challenge any report that may be presented. The need for detailed legislative safeguards is particularly necessary since applications under the Mental Capacity legislation will be heard in private. (An example of evidential rules for specific types of hearings is provided for in S49 of the Mental Health Act 2001).

Recommendation: *The Law Society recommends that the rules of evidence should be relaxed in dealing with applications where issues of capacity are assessed but that any flexibility in this regard must be balanced with detailed legislative safeguards particularly since applications under the Mental Capacity legislation will be heard in private.*

1.5 Where will applications be heard?

It is not clear where the Court of Care and Protection will sit. Head 4 provides that the President of the High Court will decide ‘where in the State such applications may be heard’. Does this mean that the High Court will sit in any part of the country when the property value of the person the subject of the application exceeds the Circuit Court jurisdiction or does it mean that the High Court will, for example, hear applications where a person is physically residing say, for example, in a nursing home? There is no similar provision (where applications will be heard) with regard to the Circuit Court except to state that the circuit court jurisdiction will be exercised by the judge of the circuit in which the person resides, or carries on any business, profession or occupation. It appears from the document **Screening Regulatory Impact Assessment** referring to the fact that the Circuit Court has 26 offices around the country that the hearing of applications will be at the Court venue. The Law Society’s view is that a Court room is not a suitable venue for an elderly vulnerable person whose capacity is being assessed on a functional basis.

There is no provision in the Scheme for an application to be heard at any time. Does this mean that applications under the Mental Capacity Act will be listed in the ordinary court list and must await being set down for hearing in normal course? This would be most inappropriate as it would not reflect the assessment of capacity based on a functional approach, i.e. time specific and issue specific. Many decisions with regard to people who lack capacity must be made as soon as an issue arises in the interest of their physical care and protection. Apart from the need to deal with applications in relation to issues of capacity as soon as they arise, if such cases were to receive priority in the normal court listing this would have a detrimental effect on other cases such as family law cases that at present are already at an unacceptable level of delay for hearing in many Circuit Court areas.

Recommendation: *The Law Society recommends that the Mental Capacity Bill should provide that the specialist court/tribunal may sit at any place, on any day and at any time.*

1.6 Expense of ongoing Court applications

Applications to Court are expensive. Head 12 provides for interim orders – if the guiding principles of the Act are to be followed, i.e. a least restrictive, functional approach to capacity, then the Law

Society envisages that the majority of applications under the new Mental Capacity legislation will fall to be made under this Head and be limited in time and subject to review. Many of the provisions of the Scheme of the Bill do not reflect this fact. If all such applications require application to a non-specialist court/tribunal, not only will it increase expense but will also lead to a similar avoidance of the use of the procedure as occurs under the present wardship system. This would again raise the issue as to whether Ireland has met its international obligation to have appropriate modern capacity legislation which should include easy access for a determination of capacity in relation to decisions which are time specific and issue specific.

One of the many criticisms of the current Wards of Court system is that too many decisions have to be referred to the High Court. The proposed scheme (expanded to include circuit court jurisdiction) which concentrates on a court application will not obviate that criticism particularly in the light of the predicted increase in numbers. The court has, on a number of occasions, confirmed that many of the applications in wardship proceedings relate to administrative matters. The Law Society is of the view that some low level applications should be dealt with by the Office of the Public Guardian and not by a court or tribunal. There is a provision for an appeal against any decision of the Public Guardian in appropriate cases.

A further issue that may add to the expense of applications as provided for in the Scheme of the Bill is the administrative cost associated with jurisdiction being spread to High Court and 26 Circuit Court offices. The document *Screening Regulatory Impact Assessment*, which states that the ‘costs for the individuals concerned will be reduced as the expenses attached to a Circuit Court action are less than that of a High Court action’ ignores the costs associated with the duplication of administration and the requirement for expertise in each of the court areas. A specialist court/tribunal with a single administration would be able to operate in a more cost effective manner and have a more integrated approach to the issues to be decided upon.

Recommendation: *The Law Society recommends that the Mental Capacity legislation must reflect the changed approach to the assessment of decision-making and provide for an appropriate specialist court or tribunal for such decisions to be made in a cost- effective manner. The Law Society also sees a role for the Public Guardian in relation to certain low level decisions.*

1.7 Dispensing with need for hearing and for the presence of person at a hearing

Head 9(6) (c) provides that applications to court can be disposed of without a hearing and Head 9(6) (d) provides that rules of court shall make provision ‘for enabling the court to proceed with, or with any part of, a hearing in the absence of the person to whom the proceedings relate.’ These provisions must only be used in exceptional cases and in very limited circumstances which should be clearly stated in legislation. One of the major defects of the current Wards of Court scheme is that the majority of cases are heard in the absence of the person who is the subject of the application for wardship which does not comply with human rights requirements. A hearing which takes away the right of a person to make decisions must have regard to ‘due process’ principles.

The assessment of capacity on the basis of a functional approach can only be made by ascertaining the understanding by the person of the information relevant to the decision to be made. This requires the presence of the person for the purpose of the assessment and should only be dispensed with if prejudicial to the person concerned. (See for example S.49 of the Mental Health Act 2001).

Recommendation: *The Law Society recommends that an application to court cannot be disposed of without a hearing except in very exceptional and limited circumstances which should be clearly set out in the legislation. Similarly, a court should not be enabled to proceed with, or with any part of, a hearing in the absence of a person the subject of the application except in exceptional circumstances.*

1.8 Regular review

Head 14 provides that decisions on capacity are to be subject to review at regular intervals. This Head further provides that ‘the court shall review the decision at intervals of such length, not being more than 36 months, as the court considers appropriate.’ Statistical information available from a number of studies indicate that the 5% of older people who move from acute hospital care to nursing home care die within a period of two years. In the Law Society’s view this provision does not adequately reflect the functional approach to capacity which is time specific and issue specific. In this regard and as already stated above, most of the applications will be for an interim order which will necessarily be of limited duration and must therefore provide for the appropriate review based on the order being made.

On the other hand where a declaration of capacity or incapacity is being made (and a personal guardian is being appointed) which may be of more long term duration the criteria for review must be determined by a court/tribunal having regard to the individual circumstances. Studies in other jurisdictions indicate that considerations such as risk of abuse should be a factor in determining the frequency of reviews. Regulations should provide that a risk analysis by the Public Guardian should be one of the criteria necessary to determine the frequency and type of review.

Recommendation: *The Law Society recommends that the section of the legislation providing for review be amended to take account of the functional approach to capacity and regard be had to the different types of application being provided for - an interim order or for a declaration of capacity. The circumstances of each case must also dictate the frequency of review.*

1.9 Review of existing Wards of Court

Head 41 provides for an optional arrangement for existing Wards of Court to make an application for a review of a declaration that a person lacks capacity to make decisions. The Law Society’s view is that a review of existing Wards of Court must be mandatory. The legislation must provide that this review should take place within a specified period (say 6 months) of the coming into force of the Mental Capacity Act. This is to ensure that all persons, where a declaration has been made that they lack capacity, receive the benefit of legislation that complies with constitutional and human rights requirements. It will also enable Ireland to honour its obligations under the United Nations Convention on the Rights of Persons with Disabilities.

Recommendation: *The Law Society recommends that legislation specifically provide for a mandatory review, within a specified period, of all persons who are currently wards of court.*

1.10 Review of persons who lack capacity and the interaction with the Mental Health Act 2001.

The Scheme of Mental Capacity Bill does not deal with the glaring gap that currently exists, i.e. the issue of people who are being involuntarily detained within the terms of the Mental Health Act 2001 and lack capacity. If an application is made by such a person to a tribunal under the Mental Health Act 2001 and the tribunal determines that that person should not be involuntarily detained then a further application (if no determination has already been made as to capacity) to another court/tribunal is necessary for a consent for 'voluntary' treatment under the Mental Health Act. Legislation is required to deal with persons who need treatment for mental illness but because of their lack of capacity are unable to consent to being admitted as a voluntary patient

Recommendation: *The Law Society recommends that the Mental Capacity legislation make specific provision for persons who lack capacity and who may come within the provisions of the Mental Health Act 2001.*

1.11 Possible expansion of the role of the Mental Health Commission

The Law Society is aware of the Law Reform Commission's recommendation for a Guardianship Board as a suitable body to hear applications with regard to the capacity decisions and endorses such a proposal for a specialist tribunal. The Society also notes the comment contained in the **Mental Capacity Bill, 2008 Screening Regulatory Impact Assessment** issued by the Department of Justice, Equality and Law Reform stating that significant cost would be incurred by the creation of 'two' new bodies (office of Public Guardian being one which is provided for). The Law Society, for the reasons already stated, is of the view that a specialist court or tribunal to make such decisions is absolutely necessary. The Law Society's preference would be for a specialist court or tribunal. However, as an alternative, consideration should be given to extending the functions of the Mental Health Commission to have responsibility both for the setting up of tribunals for the purpose of the Mental Health Act 2001 (to deal with mental health issues) and tribunals for the purpose of the Mental Capacity Act (to deal with decisions on mental capacity). The Mental Health Commission is an existing body with an existing structure in place and has experience in setting up tribunal hearings of a specialist nature which concern vulnerable people. Its role could be expanded to take account of extended functions to deal with capacity decisions. The Mental Health Commission has in place a legal aid scheme for people who appear before the specialist tribunals. This scheme could be adapted for people who lack capacity.

Recommendation: *The Law Society recommends that, failing the setting up of a specialist court or tribunal, consideration be given to extending the remit of the Mental Health Commission to operate as a specialist tribunal for the purpose of mental capacity legislation.*

Part 2: Public Guardian

2.1 Role of Public Guardian

The Law Society very much welcomes the establishment of Office of Public Guardian and is of the view that the role of the Public Guardian will be crucial in ensuring that the Mental Capacity legislation will work in practice. The supervisory role of the office holder will be a key feature in safeguarding the interests of persons who lack capacity and in ensuring that abuse of such persons is minimised. The Law Society is of the view that the Public Guardian's educative role in preventing abuse of those who lack capacity should be clearly stated in the legislation.

The Law Society is also of the view that the functions of the Public Guardian should include a role to be a first ‘port of call’ for people who have concerns about people who may lack capacity. At present apart from the obligation of reporting crime there is no overarching official body to which concerns can be reported.

Recommendation: *The Law Society recommends that the Public Guardian’s educative role in preventing abuse of those who lack capacity should be clearly stated in legislation.*

2.2 Staff of the Office of Public Guardian

Head 31 provides that the staff of the office of Public Guardian shall be civil servants in the Civil Service of the State. Given the remit of the office of Public Guardian, it will require some permanent core specialist staff for example social workers and accountants. The Law Society is of the view that the legislation should provide for direct employment by the office of the Public Guardian which would allow for more flexible contractual arrangements depending on the requirements of the office from time to time. The Law Society agrees fully with the approach to provide for contracting with specialist advisors but these will be independent contractors.

Recommendation: *The Law Society recommends that the office of Public Guardian should have authority to employ staff directly to enable it to contract directly for specialist staff.*

2.3 Functions of the Office of Public Guardian

Head 32 provides for the objectives and functions of the Office of Public Guardian. The functions include the maintenance of a register of enduring powers of attorney, the supervision of donees appointed under an enduring power of attorney and personal guardians and the directing ‘visitors.’ It also provides for regulations in particular circumstances. The list covered by regulation should be expanded to include the requirement by donees of enduring powers of attorney to file accounts and report on the welfare of a person who lacks capacity. This is additional to the requirement to the keeping of accounts as provided for in Head 46(2) (e) and will assist in preventing abuse. Different levels of supervision should be provided for, based on a risk analysis. The role of the Public Guardian should also extend, in addition to appointing visitors to having a general review role, to making visits personally and having access to examine and take copies of records provided for under Head 32(6).

It is the view of the Law Society that Head 35(2) should be expanded and the following words added: ‘...but does not preclude the Public Guardian from publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions.’

Recommendation: *The Law Society recommends that regulations must provide that there is a requirement of donees of enduring powers of attorney to file accounts and report on the welfare of the person who lacks capacity. There should also be a requirement that the Public Guardian report on the discharge of his functions.*

2.4 Visitors

Head 38 provides that the Public Guardian will draw up a panel of special and general Visitors. Consideration should be given to use the word ‘reviewer’ rather than ‘visitor’ for a number of reasons. Visitor has an association with the Lunacy Regulations and also portrays a negative message, for

example, in academic institutions where matters of discipline are at issue. The purpose of the visit is to have a review carried out, so the use of the term ‘reviewer’ appears appropriate.

The definition of specialist visitor/reviewer should not be confined to a registered medical practitioner but should include persons with other suitable qualifications. For the most part in dealing with people who have an intellectual disability, the appropriate expert might be a clinical psychologist.

Recommendation: *The Law Society recommends that the name of the persons carrying out review should be change to ‘reviewer’. Specialist reviewer should be expanded to include persons with suitable qualifications other than medical practitioners.*

2.5. Whistleblower protection

The Law Society is of the view that there is need for specific provision to be made in legislation for the protection of people who report abuse of vulnerable persons.

Recommendation: *The Law Society recommends that the Mental Capacity legislation make specific provision for the protection of people who report abuse of vulnerable persons.*

Part 3 Enduring Powers of Attorney

3.1 Expansion of powers to include donor’s personal welfare

The Law Society welcomes the expansion of the scope of authority of attorneys under enduring powers of attorney from *personal care decisions* to *personal welfare decisions* that include decisions on health care. However it is the Law Society’s view that the donor of an Enduring Power of Attorney should have to include specific provision in relation to health care decisions separately from general provisions on authority to be given to the attorneys. In other words, the donor should specifically opt-in so that any provision in this regard is given careful and deliberate consideration by the donor. There should also be scope to appoint different attorneys in relation to decisions such as personal welfare decisions as the donor may well consider that those decisions would be best made by different persons.

Recommendation: *A donor of an Enduring Power of Attorney should have to specifically include authority in relation to health care decisions and it should be possible to appoint different attorneys in relation to different authorities.*

3.2 Restrictions on personal welfare decisions

The Law Society notes the restrictions on health care decisions in the Scheme of Mental Capacity Bill. Head 48 provides for the scope of authority with regard to personal welfare decisions and states at subhead (3) (iii) that it is subject to Head 21, i.e. matters confined to the jurisdiction of the High Court (non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment or organ donation), and also does not authorise the refusing of consent to the carrying out of life-sustaining treatment. The donor of an enduring power of attorney must have capacity to execute an enduring power of attorney in the broadest possible manner. The Courts have consistently stated that regard

should be had to the wishes of a person with regard to health care decisions. It therefore appears to be inconsistent with the human right principles of privacy and autonomy as expressed in the guiding principles of the scheme to provide for a Court decision in such circumstances. The donor has of course the right to restrict personal welfare decisions in the instrument creating the power in which case an application to Court will be necessary. It is fully accepted that an application to Court is necessary where the person lacks capacity and has not appointed a substitute decision-maker to make personal welfare decisions to come into effect at the time they lack capacity.

Recommendation: *There should be no statutory restriction on the right of the donor of an enduring power of attorney in relation to health care decisions.*

3.3 Accountability of Attorneys

The Society also believes that there should be additional statutory safeguards with regard to attorneys under enduring powers of attorney, in particular in relation to fully accounting for the property of the donor, and restrictions on the use of donor property for the personal benefit of the donee. The Law Society therefore suggests that the wording of Head 46(2) (d) (iv) be expanded to read:

‘...by the attorney, that the attorney understands the duties and obligations of an attorney, including the duty to act in accordance with the principles set out in Head 1, the best interests of the donor as defined in Head 3 and the duty to fully account for any of the property of the donor that comes into the hands of the attorney, the requirements of registration under Head 51 and reporting obligations under Head []’ (See 2.3 above)

and this would be in addition to the requirement to the keeping and filing of accounts. As indicated in 2.3 above, it should be necessary for attorneys to make reports to the Public Guardian the content of which would be determined on a case-by-case basis by the Public Guardian. This decision would be made by the Public Guardian within a specific timeframe from date of registration. The Law Society suggests that at a minimum a six-month review is carried out by the Public Guardian on all cases post registration and it is determined at that stage how regular and in what circumstances reports should be prepared and filed and what information the reports should contain. The type of information that should be included in such reports would include accounts in relation to the donor’s property; reports on the donor’s health and well being; significant personal welfare decisions made since the previous report and reasons for making those decisions and, where relevant, an updated report in relation to the donor’s capacity.

Recommendation: *The wording in Head 46(2) (d) (iv) should be expanded to include wording set out below:*

‘...by the attorney, that the attorney understands the duties and obligations of an attorney, including the duty to act in accordance with the principles set out in Head 1, the best interests of the donor as defined in Head 3 and the duty to fully account for any of the property of the donor that comes into the hands of the attorney, the requirements of registration under Head 51 and the reporting obligations in Head []’ (See 2.3 above).

Attorneys should be obliged to keep and file reports, the content and regulation of which should be determined by the Public Guardian on a case-by-case basis.

3.4 Notice Parties

The Law Society welcomes the provision in the Second Schedule Part 1 Para 4(2) which provides that an application to be dispensed from the requirement to give a specified person notice can be made to the court. It is of the view, however, that the application for such dispensation should be made to the Public Guardian and not involve the expense of a court application.

Recommendation: *Any application for dispensation in relation to notice parties should be made to the Public Guardian.*

Part 4 Nursing Home Legislation

4.1 Section 9 of the Health (Repayment Scheme) Act 2006

Section 9 of the Health (Repayment Scheme) Act 2006 provides for the operation of patients' private property accounts generally and in the context of patients who lack capacity to manage their own funds. It is the Law Society's view that this legislation should be reviewed and amended as a result of the general review of Mental Capacity issues. At a minimum the functions of the Public Guardian should include supervising the HSE in its management of patients' private property accounts on behalf of persons who lack the capacity to manage accounts personally. Determinations in relation to the capacity to manage funds should be made under the provisions of the Mental Capacity legislation and the guiding principles as set out in Head 1 should apply to any use of accounts for the benefit of account-holders (section 9 (2) (b) of the Health (Repayment Scheme) Act 2006) where the account holder lacks capacity to manage the funds. The expertise of the Public Guardian should provide assistance to the HSE in dealing with complex issues on capacity and patients' best interests. Where Section 9 provides for applications to the Circuit Court the applications should instead be made to the Guardianship Board or Specialist Court of Care and Protection. These amendments would result in continuity of care and protection in relation to individuals within HSE care.

Recommendation: *The Health (Repayment Scheme) Act 2006 should be amended by the Mental Capacity legislation so that any determination on capacity in relation to patients' private property accounts is made under the provisions of the Mental Capacity legislation. The guiding principles as set out in Head 1 of the Scheme of the Mental Capacity Bill 2008 should apply to any decision in relation to the use of patients' property accounts funds for persons who lack capacity. The Public Guardian should be given a supervisory role in relation to the operation of patients' private property accounts for persons who lack capacity and where necessary applications in relation to the use of funds should be made to the Public Guardian or to the Guardianship Board or Specialist Court of Care and Protection as appropriate.*

4.2 Nursing Homes Support Scheme Bill 2008

The Nursing Homes Support Bill 2008 contains provisions which are relevant to issues of mental capacity. Determinations in relation to capacity should be made under the provisions of the Mental Capacity legislation and the guiding principles set out in Head 1 should also apply. Section 7 of the Nursing Homes Support Scheme Bill 2008 provides that certain specified persons may apply to the HSE for a care needs assessment on behalf of a person ordinarily resident in the State who by reason of ill health, a physical disability or a mental condition is unable to make an application for a care needs assessment personally. (Specified persons should include personal guardians and the public guardian where relevant. It is also questionable that specified persons should include relatives or attorneys of unregistered enduring powers of attorney. These broad provisions may lead to

inconsistencies in the care of the person where it is clear that, had the Mental Capacity legislation been in force, the matter would have been dealt with under the Mental Capacity legislation). Determinations under section 21 of the Nursing Homes Support Bill 2008 should be made under the provisions of the Mental Capacity legislation and references to court applications should be to applications to the Guardianship Board or Specialist Court of Care and Protection so that there is consistency of care and protection in relation to each person.

Recommendation: *The Nursing Home Support legislation should be amended to take account of the Mental Capacity legislation so that any determinations on capacity are made under the provisions of the Mental Capacity legislation. The guiding principles as provided for in the Scheme of the Mental Capacity Bill 2008 should also apply to any decisions in relation to persons that lack capacity to make relevant decisions. The Public Guardian should be given a supervisory role in relation to the operation of the Nursing Home Support legislation for persons who lack capacity and where necessary applications regarding capacity issues should be made to the Guardianship Board or Specialist Court of Care and Protection.*

5 Conclusion

The Law Society welcomes the opportunity to be part of the consultative process in the drafting of modern capacity legislation. It looks forward to the publication of the detail of the Mental Capacity Bill to include specific provisions to reflect the underlying principle of the functional approach to the assessment of capacity as set out in the Scheme of the Mental Capacity Bill 2008.