

Submission by the Law Society of Ireland

to

The Joint Committee on Justice, Defence and Equality

Proposed Mental Capacity Legislation

August 2011

Introduction:

The Law Society notes that in the Government Legislation Programme Summer 2011 a Mental Capacity Bill is due for publication at the end of 2011. While the Law Society made a detailed submission in February 2009 to the then Minister for Justice, Equality and Law Reform, it is now making a further submission to both the Minister for Justice and Equality and the Minister for Health, taking account of issues the Law Society believes should be addressed in the detailed Mental Capacity Bill and which come within the functional responsibility of both Ministers. While the original submission made in 2009 was based on the Scheme of the Mental Capacity Bill published in 2008, this submission contains new points for consideration in addition to referring again to some of the provisions of the 2008 Bill.

1 Advance Care Directives:

The Scheme of the Mental Capacity Bill as published in 2008 did not contain any Heads dealing with *Advance Care Directives*. Since then the Council of Europe has issued *Recommendation CM/Rec (2009) 11* stating in Principle 1 that:

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

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

In addition, in 2009 the Law Reform Commission published a detailed report *Bioethics: Advance Care Directives* (LRC 94 2009) recommending that an appropriate legislative framework should be enacted for advance care directives, as part of the reform of the law on mental capacity.

The Law Society agrees with the proposal for such legislation. It believes it is important that the legislation, in addition to providing for the status and validity of such directives, makes it clear that a person has a right to refuse treatment. The right to refuse treatment should of course accord with the Council of Europe Recommendation on the promotion of self determination and therefore the right to refuse treatment in an advance directive must include the right to refuse life sustaining treatment. The Law Society also agrees with the Law Reform Commission's recommendation that additional formalities are necessary for advance care directives involving the refusal of life sustaining treatment. The Law Society of course recognises that, where there is no such clear direction from the individual then the issue of the refusal of life sustaining treatment should be a matter for the Court to decide.

The Law Society is also of the view that *treatment* for the purposes of advance directives should be defined as including provision for a person to indicate their wishes with regard to treatment for mental illness.

It would be important that the legislation for advance care directives also provides that the common law recognition of instructions about health care given by an adult that are not given in an advance care directive are not affected.¹

The Law Society notes that the Programme for Government states that it will legislate to change organ-donation to an opt-out system for organ transplantation. It would be important that specific reference to facilitate such opt-out is legislatively provided for in both enduring powers of attorney and advance care directives.

Recommendation:

The Law Society recommends that a legislative framework for ‘advance care directives’ should be included as part of the reform of the law on mental capacity. The right to refuse treatment in an advance directive should include the right to refuse life sustaining treatment.

2 Guiding Principles:

(i) Application to Legislation

The Law Society previously welcomed the inclusion of a statutory presumption of capacity and the setting out of guiding principles in the legislation to be adhered to in giving effect to the purposes of the Mental Capacity Act (the “Act”). The Law Society also recommended that:

- the provisions of Section 9 of the Health (Repayments Scheme) Act 2006 and the Nursing Home Support Act 2009 should be made subject to the guiding principles in relevant circumstances and
- the Public Guardian should be given a supervisory role in relation to the operation of Patient Private Property Accounts for persons who lack capacity to operate the accounts and in relation to the Nursing Home Support Act 2009 where relevant to decision making capacity.

The Law Society now further recommends that the statutory presumption of capacity, the guiding principles and the best interest provisions should not be limited ‘for the purposes of the Act’ but **should apply to any legislation where a determination is being made in relation to a person’s decision making capacity**. Legislation enacted since the original recommendation includes, for example, Social Welfare Regulations (see SI No 378 of 2009 Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No 6) (Nominated Persons) Regulations 2009).

(ii) Application to Common Law rules

In addition, the Law Society endorses Head 20 of the Scheme of the Mental Capacity Bill 2008 which provides that ‘[u]nless otherwise provided under this Act, nothing in this Act affects the law, which exists at the time this Act comes into force, concerning the capacity and consent required of a person in certain contexts’. This is recognising that the issues that are set out in Head 20 are already governed by the functional approach to capacity and the jurisprudence that has been established in this regard will prevail. The Law Society however, would like to see these specific areas enhanced further by the application to them of the presumption of capacity, the guiding principles and the best interest provisions without limiting the existing common law rules that apply to them.

¹ See Powers of Attorney Act 1998 Queensland Australia

Recommendation:

The Law Society recommends that the statutory presumption of capacity, the guiding principles and the best interest provisions should apply to any legislation and to common law rules where a determination is being made in relation to a person's decision making capacity.

3 Enduring Powers of Attorney:

(i) Joint and Several Attorneys and disqualification

The Law Society endorses the provisions of Head 56 of the Scheme of the Mental Capacity Bill 2008 in relation to joint and several attorneys but is aware of some further difficulties that have arisen in this area. Many donors do not fully understand the implications of attorneys being appointed jointly and severally and the concepts should be more fully explained in the explanatory memorandum. In addition donors should be given the option of providing that their attorneys act jointly in relation to some decisions (such as the sale of property) but jointly and severally in relation to other matters (such as administrative matters). It would also be important for attorneys to understand the concepts and the "information for attorneys" in the explanatory memorandum should also include clear explanations.

(ii) Conflicts of Interest

There are often situations where the attorney acting under a registered enduring power of attorney is in some way put in a position of potential conflict of interest through no fault of their own and perhaps due to close family connections. It is a fundamental principle of law that a person who acts in a fiduciary capacity is not permitted to take advantage or benefit from his or her position as a fiduciary. In the context of an attorney's role under an enduring power, an attorney can be put in extremely difficult positions of conflict where their own personal interest and those of a donor conflict. The Law Society recommends that attorneys should, in those circumstances, have recourse to the Public Guardian so that the advice of the Public Guardian may be sought in relation to any decision or application of any property of the donor where a potential conflict arises. Where the attorney acts on or in accordance with the advice of the Public Guardian, the attorney should be deemed to have acted appropriately.

(iii) Relief from Personal Liability

Attorneys under an enduring power of attorney take on a high level of responsibility and may be exposed to liability in relation to decisions that they make. Where an attorney acts reasonably and honestly and believes they are acting in the best interests of the donor of the power of attorney, the legislation should provide that such an attorney should have the facility to apply to Court to be relieved from personal liability in whole or in part, on such terms as a Court deems appropriate in the circumstances.

(iv) Disqualification of Attorneys

The Law Society is of the view that there should not be an absolute disqualification from acting as an attorney in the event of bankruptcy, particularly in relation to care decisions.

Recommendation:

The Law Society recommends that:

- *There should be options for attorneys to be appointed jointly or jointly and severally in relation to specified matters only and the explanatory memorandum should more fully explain the concepts.*
- *Where a conflict of interest arises for an attorney under an Enduring Power of Attorney between an attorney's own personal interests and the best interests of the donor, an*

attorney should have recourse to the Public Guardian for advice in relation to any decision or application of property of the donor and where the attorney acts on or in accordance with that advice the attorney should be deemed to have acted appropriately.

- *The Law Society recommends that there should be a provision in the legislation enabling an attorney under a registered enduring power of attorney who has acted reasonably and honestly and in the best interests of the donor of the power of attorney to apply to Court to be relieved from personal liability in whole or in part on such terms as a Court deems appropriate in the circumstances.*
- *There should not be an absolute disqualification from acting as an attorney in the event of bankruptcy, particularly in relation to care decisions.*

4 Public Guardian and Public Trustee:

The functions of the Public Guardian as set out in the Scheme of the Mental Capacity Bill 2008 are mainly confined to the supervision of attorneys under an enduring power of attorney and personal guardians who are appointed by the Court. One of the principal gaps (short of reporting a crime) for the reporting of complaints or possible worries about the safety and protection of adults with impaired capacity is that there is no current framework for doing so in Ireland. Most jurisdictions with developed modern guardianship structures have, in addition to a Public Guardian, a Public Advocate, a Public Trustee (for financial management) or an Ombudsman and, while it is recognised that the functions of such offices are different, it is necessary to provide (pending a more developed guardianship system in this jurisdiction) for a wider remit for the proposed office of Public Guardian and perhaps the development of a function of a Public Trustee.

(i) Power to investigate complaints

The Law Society suggests that the functions of the Public Guardian be extended to include a role to protect the person of adults who have diminished or limited decision making capacity and their rights and interests. The Public Guardian should also have the power to investigate any complaints or allegations that an adult with diminished or limited decision making capacity (a) is being or has been neglected, exploited or abused, or (b) has inappropriate or inadequate decision-making arrangements. The Public Guardian should have power to delegate the function of investigation of such complaints to an appropriately qualified person.² To enable the Public Guardian to investigate complaints, the legislation should also provide that the Public Guardian has a right to all information necessary to investigate a complaint or allegation or to carry out an audit.

(ii) Public Trustee

There is provision in the Scheme of the Mental Capacity Bill 2008 for the Public Guardian to nominate a person to be a personal guardian in circumstances where there is no other person willing or able to act. Such appointments will be limited to those cases where the person lacks capacity and it is necessary to appoint a personal guardian. In such cases the Office of Public Guardian will provide a financial management service.

For many older people who have capacity but may be frail and vulnerable, they have need for a secure public financial management service and this should be available to them through a Public Trustee service. Such a service is available in many jurisdictions and is financed by fees earned for services rendered. The Law Society suggests that the Mental Capacity legislation provide for an Office of Public Trustee to provide a financial management service to older people who have need for such services.

² See Guardianship and Administration Act 2000, Queensland Australia

Recommendation:

The Law Society recommends that functions of the Public Guardian be expanded to include a general remit to protect the person of adults who have diminished or limited decision making capacity and their rights and interests. Further, the Public Guardian should have the power to investigate any complaints or allegations that an adult with diminished or limited decision making capacity

- *Is being, or has been, neglected, exploited or abused or*
- *Has inappropriate or inadequate decision-making arrangements*

The Public Guardian should have power to delegate its investigative function to an appropriately qualified person and should have a right of access to the necessary information to investigate a complaint or allegation.

The Law Society recommends that an Office of Public Trustee be established to provide financial management services to vulnerable people who have need of that service, such service to be funded by the charging of management fees for the service.

5 Ill Treatment and Neglect:

The Scheme of the Mental Capacity Bill 2008 provides in Head 27 for new offences of ‘ill treatment or neglect’ but these terms have not been defined. It is the Law Society’s view that the offences against the elderly and vulnerable can take many different forms, including for example financial abuse. The detail of such offences should be clearly defined in a wide format to include all forms of abuse including financial abuse. In addition, the legislation should apply to any person who ill treats or neglects a vulnerable person and not simply be confined to donees under an enduring power of attorney or a personal guardian.³

Recommendation:

The Law Society recommends that the offences of ill treatment and neglect should be clearly defined in legislation to include all forms of abuse including financial abuse. The legislation should also apply to any person who ill treats or neglects a vulnerable person and not simply be confined to donees under an enduring power of attorney or a personal guardian.

6 Restraint:

The Law Society recommends that the Mental Capacity legislation contains specific provision on the use of restraint - both physical and chemical - on people who have limited or diminished decision making capacity. The legislation should include the limited circumstances in which restraint may be used. This provision should have broad application - the Scheme of the Mental Capacity Bill 2008 restricts the power to determine the use of restraint to attorneys under an enduring power of attorney and personal guardians only.

Recommendation:

The Law Society recommends that the Mental Capacity legislation include specific provision on the use of physical and chemical restraint on people who have limited or diminished decision making capacity.

7 Reporting Information and Disclosure of Personal Data:

(i) Whistleblower Protection

³ NCPOP Report October 2010

In the submission of February 2009 the Law Society recommended that the Mental Capacity legislation should include provision for the protection of people who report abuse of vulnerable people.

The Law Society notes the Government's intention to introduce a Whistleblowers Bill and notes the provisions contained in the Criminal Justice Act 2011. The Law Society understands that the format of the Whistleblowers Bill is likely to be along the lines of the UK's *Public Interest Disclosure Act 1998*⁴ which is limited to protection for whistleblowers in the employment context. It would be important that protection for whistleblowers in the context of reporting allegations or suspicions of abuse of vulnerable adults is not so limited to an employment context.⁵ Protection should be given to any person who has a reasonable suspicion that abuse is being perpetrated on a vulnerable adult and reports such conduct. The legislation should provide that a person should not be liable, civilly, criminally or under an administrative process for such disclosure with provision for a defence of absolute privilege in proceedings for defamation, subject to the normal safeguards against dishonesty and negligence.

(ii) Disclosure of Personal Data

There is a need for clarity of the circumstances in which personal data can be disclosed and to whom it should be disclosed. The Law Society notes the provisions of Section 8 of the Data Protection Act 1988 as amended by the Data Protection Act 2003 which allows for the disclosure of personal data in certain cases. However, to allay any confusion as to the circumstances in which such data should be disclosed, it is suggested that the Mental Capacity legislation include provision in relation to the:

- Disclosure of data in the circumstances where there is a reasonable belief of suspected abuse of a person who has limited or diminished decision making capacity and
- The relevant authority to which disclosure of personal data should be made.

Recommendation:

The Law Society recommends that legislation:

- *Should provide that protection be given to a person for reporting information about a person's conduct where there is a reasonable suspicion that abuse is being perpetrated on a vulnerable adult and that such protection should not be limited to a person who is a whistleblower in an employment context.*
- *Clarifies that the provisions of the Data Protection Act which allows disclosure of personal data in certain cases includes disclosure where there is a reasonable belief of suspected abuse of a person with limited or diminished decision making capacity.*

8 Interface of Mental Capacity legislation and Mental Health Act 2001:

(i) Person suffering from a Mental Disorder who also lacks the capacity to make a decision.

The Mental Capacity legislation should state clearly that, when a person has a 'mental disorder', as defined in the Mental Health Act 2001, and is subject to an admission order involving involuntary detention, but who also lacks capacity, the provisions of the Mental Health Act 2001 will prevail. All the safeguards of a review by a mental health tribunal should also be available to such a person. The legislation should also provide that when a review is carried out by the mental health tribunal in

⁴ Speech by Minister for Public Expenditure and Reform Mr Brendan Howlin T.D at the Launch of the 'Speak Up' Helpline at the Transparency Resource Advice Centre on 26 May 2011

⁵ See NCPOP Report October 2010

respect of a person who lacks capacity, the Public Guardian should be notified of the decision of the tribunal.

(ii) Repeal of Sections 241, 276, 283 and 284 of the Mental Treatment Act 1945

In line with the recommendation at 8(i) above, the Law Society recommends the repeal of sections 241, 276, 283 and 284 of the Mental Treatment Act 1945 which provides for the wardship jurisdiction to prevail for those persons who are found to be *'idiots or of unsound mind'* but also have a mental disorder. Any person (whether a Ward of Court or not) who is suffering from a mental disorder and is being involuntarily detained under the provisions of the Mental Health Act 2001 should be entitled to review by a mental health tribunal and to all safeguards contained in the Mental Health Act 2001 as if they were not a Ward of Court.

(iii) A person who lacks capacity is unable to give consent to treatment or medication

Where a person lacks capacity to give consent to:

- treatment for the purposes of Section 57 of the Mental Health Act 2001
- psycho-surgery for the purposes of Section 58 of the Mental Health Act 2001
- electro-convulsive therapy for the purposes of Section 59 of the Mental Health Act 2001
- medication for the purposes of Section 60 of Mental Health Act 2001

the Mental Capacity legislation should provide a structured decision making process as to who has the authority to give consent in such circumstances.

(iv) A person who lacks capacity cannot be deemed a voluntary patient

The Law Society recommends that specific provision be included in the Mental Capacity legislation to provide that a person who lacks capacity to make a decision cannot be deemed a voluntary patient for the purposes of the Mental Health Act 2001. The legislation should further specify who has the authority to make decisions for a person who lacks capacity and requires mental health treatment but who **does not have** a 'mental disorder'. In such circumstances the provisions of the Mental Health Act 2001 will not apply.

In relation to points (iii) and (iv) above, the Law Society recommends that, in the first instance, in recognition of a person's right to self determination, it should be established if the person who lacks capacity has made an advance care directive (which include directions as to mental health treatment) or appointed an attorney under an enduring power of attorney (with specific authority to make decisions in relation to mental health treatment) before any other person is appointed to give such consents under a statutory provision. The legislation should also impose an obligation on any person consenting to mental health treatment on behalf of a person who lacks capacity, to report to the Public Guardian with regard to the giving of such consents.

Recommendation:

The Law Society recommends that:

1 *Specific provision should be included in the Mental Capacity legislation to provide that a person who lacks capacity to make a decision cannot be deemed a voluntary patient for the purposes of the Mental Health Act 2001.*

2 *Where a person is suffering from a mental disorder but also lacks capacity, the provisions of the Mental Health Act 2001 will prevail, including the provision of a review by a mental health tribunal.*

3 *In relation to any consent to treatment or medication that is required for a person who is suffering from a mental disorder and who lacks capacity, the Mental Capacity legislation should provide for a structured decision making process which should be additional to any safeguards contained in the Mental Health Act 2001.*

4 *In relation to any consent to treatment or medication that is required for a person who requires treatment for a mental illness and who lacks capacity but who does not have a mental disorder, the Mental Capacity legislation should provide a structured decision making process.*

5 *Any structured decision making process should first take account of any advance care directive or authority in an enduring power of attorney to give such consents before any other person is appointed under a statutory provision.*

6 *The legislation should provide that a report be given to the Public Guardian on consents given in respect of a person who lacks capacity to (i) treatment and medication for a person suffering from a mental disorder and (ii) treatment for a mental illness.*