Click here for Explanatory Memorandum

AN BILLE UM CHINNTEOIREACHT CHUIDITHE (CUMAS), 2013

ASSISTED DECISION-MAKING (CAPACITY) BILL 2013

Mar a tionscnaíodh
As initiated

ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY AND GENERAL

Section

1. Short title and commencement.
2. Interpretation — general.
3. Person's capacity to be construed functionally.
4. Circuit Court to have exclusive jurisdiction under this Act except for certain matters reserved for High Court, etc.
5. Laying of regulations.
6. Expenses.
7. Repeal of Marriage of Lunatics Act 1811.

PART 2

PRINCIPLES THAT APPLY BEFORE AND DURING INTERVENTION IN RESPECT OF RELEVANT PERSONS

8. Guiding principles.

PART 3

ASSISTED DECISION-MAKING

9. Definitions — *Part 3*.
10. Decision-making assistance agreement.
11. Functions and scope of authority of decision-making assistants.
12. Persons who shall not be appointed as decision-making assistants, etc.

PART 4

Applications to Court in respect of Relevant Persons and Related Matters

Chapter 1

Application of this Part

13. Application of this Part.

Chapter 2

Applications under this Part

14. Persons who may make applications to court under this Part, etc.

Chapter 3

Declarations as to capacity, etc., and matters following declarations

15. Power of court to make declarations as to capacity, etc.

Chapter 4

Co-decision-making

16. Definitions — *Chapter 4.*

17. Power of court to make co-decision-making order, etc.

18. Co-decision-making agreement.

19. Co-decision-maker shall acquiesce in relevant decision made by appointer where certain conditions are met.

20. Persons who shall not be appointed as co-decision-makers.

21. Functions and scope of authority of co-decision-makers.

22. Restrictions on co-decision-makers.

Chapter 5

Decisions by court or decision-making representative appointed by court

23. Power of court to make orders and appoint decision-making representative, etc.

24. Decision-making representatives — general.

25. Scope of decision-making order or decision-making representative order relating to personal welfare.

26. Scope of decision-making order or decision-making representative order relating to property and affairs.

27. Restrictions on decision-making representatives.

Chapter 6

Interim orders, reviews and expert reports

28. Interim orders.

29. Review of declaration as respects capacity.

30. Expert reports.

Chapter 7

Notification of Public Guardian of declarations, etc., under this Part

31. Notification of Public Guardian.

Chapter 8

Legal aid in respect of applications under this Part

32. Amendment of Act of 1995.

PART 5

Wards

33. Definitions — *Part 5*.

34. Application of this Act to wards.

35. Review of capacity of wards who are adults and discharge of wardship.

36. Public Guardian and wards who are adults.

37. Public Guardian and wards who are minors.

PART 6

Enduring Powers of Attorney

Chapter 1

Interpretation, application and characteristics of enduring power

38. Interpretation — *Part* 6.

39. Application of this Part, etc.

40. Characteristics of enduring power.

Chapter 2

Scope of authority of enduring power and coming into operation of enduring power, etc.

41. Scope of authority of attorneys under enduring power — personal welfare decisions.

42. Scope of authority of attorneys under enduring power — property and affairs of donor.

43. Coming into operation and survival of enduring power.

Chapter 3

Registration of enduring power and related matters

44. Functions of High Court prior to registration.

45. Application for registration.

46. Registration of enduring power.

47. Effect and proof of registration.

48. Register of enduring powers of attorney and reports following registration.

CHAPTER 4

Functions of High Court as respects enduring power of attorney and revocation of that power

49. Functions of court as respects registered enduring power of attorney.

50. Revocation of enduring power of attorney.

CHAPTER 5

Miscellaneous

51. Protection of attorney and third person where registered power invalid.

52. Joint and several attorneys.

PART 7

INFORMAL DECISION-MAKING ON PERSONAL WELFARE MATTERS

53. Informal decision-making on personal welfare of relevant person.

54. Limitations to informal decision-making.

PART 8

PUBLIC GUARDIAN

CHAPTER 1

Appointment, functions and terms and conditions of Public Guardian

55. Appointment of Public Guardian.

56. Functions of Public Guardian.

57. Terms and conditions of Public Guardian.

CHAPTER 2

Staff of Office of Public Guardian

58. Staff of Office of Public Guardian.

CHAPTER 3

Special visitors, general visitors, court friends and panels

59. Special visitors and general visitors.

60. Court friends.

61. Panels to be established by Public Guardian.

CHAPTER 4

Reports by Public Guardian and codes of practice

62. Reports by Public Guardian.

63. Codes of practice.

CHAPTER 5

Courts Service to manage Office of Public Guardian

64. Amendment of section 5 of Act of 1998.

PART 9

DETENTION MATTERS

65. Definitions — *Part 9*.

66. Panel of independent consultant psychiatrists to be established by Courts Service.

67. Detention-related safeguards.

68. Review of detention orders in certain circumstances (approved centres).

69. Review of detention orders in certain circumstances (non-approved centres).

PART 10

CONVENTION ON INTERNATIONAL PROTECTION OF ADULTS

CHAPTER 1

Preliminary

70. Interpretation — *Part 10*.

71. Convention given effect.

72. Countries, territories and nationals.

73. Protective measures.

74. Central Authority.

CHAPTER 2

Jurisdiction of competent authority

75. Scope of jurisdiction.

76. Provisions supplementary to *ssection 75*.

77. Exercise of jurisdiction.

78. Provisions supplementary to *section 77*.

CHAPTER 3

Applicable law

79. Applicable law.

80. Provisions supplementary to *section 79*.

81. Enduring powers of attorney, etc.

82. Disapplication or modification of enduring power of attorney, etc.

83. Drawing up of enduring power of attorney which falls within *section 81(6)(b)*.

84. Protection of third parties.

85. Mandatory rules.

86. Public policy.

CHAPTER 4

Recognition and enforcement

87. Recognition.

88. Application to High Court for declaration on protective measure.

89. Provisions supplementary to *sections 87* and *88*.

90. Enforcement.

91. Measures taken in relation to those aged under 18.

92. Review of measures taken outside State.

93. Rules of court.

CHAPTER 5

Co-operation

94. Proposal for cross-border placement.

95. Proposal received by Central Authority under Article 33.

96. Adults in danger, etc.

97. Circumstances in which co-operation is prohibited.

CHAPTER 6

Miscellaneous

98. Certificates.

99. Powers to make further provision as to private international law.

100. Exceptions.

101. Regulations.

102. Commencement.

PART 11

MISCELLANEOUS

103. Clinical trials.

104. Patients whose treatment is regulated by Part 4 of Act of 2001.

105. Payment for necessary goods and services.

106. Consent and capacity in specific matters.

107. Application under *Part 4*, *6* or *9* to be heard in presence of relevant person or person concerned.

108. Wills.

109. Appeals.

110. Lunacy Regulation (Ireland) Act 1871 to cease to have effect.

111. Amendment of section 26A of Courts (Supplemental Provisions) Act 1961.

112. Amendment of Civil Registration Act 2004.

113. Offences.

114. Review of this Act.

SCHEDULE 1

PART 1

Duty to give notice to donor and other persons

PART 2

Contents of notices

PART 3

Duty to give notice to other attorneys

PART 4

Supplementary

SCHEDULE 2

Joint Attorneys

SCHEDULE 3

Convention on the International Protection of Adults

Civil Legal Aid Act 1995	1995, No. 32
Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010	2010, No. 24
Civil Registration Act 2004	2004, No. 3
Civil Service Regulation Acts 1956 to 2005	
Companies Act 1990	1990, No. 33
Courts (Supplemental Provisions) Act 1961	1961, No. 39
Courts Service Act 1998	1998, No. 8
Domestic Violence Act 1996	1996, No. 1
Health Act 2007	2007, No. 23
Health and Social Care Professionals Act 2005	2005, No. 27
Local Government Act 2001	2001, No. 37
Lunacy Regulation (Ireland) Act 1871	34 & 35 Vict., c. 22
Marriage of Lunatics Act 1811	51 Geo. 3, c. 66
Mental Health Act 2001	2001, No. 25
Nursing Homes Support Scheme Act 2009	2009, No. 15
Personal Insolvency Act 2012	2012, No. 44
Powers of Attorney Act 1996	1996, No. 12
Public Service Management (Recruitment and Appointments) Act 2004	2004, No. 33
Sale of Goods Act 1893	56 & 57 Vict., c. 71
Sex Offenders Act 2001	2001, No. 18
Succession Act 1965	1965, No. 27

AN BILLE UM CHINNTEOIREACHT CHUIDITHE (CUMAS), 2013

ASSISTED DECISION-MAKING (CAPACITY) BILL 2013

BILL

entitled

AN ACT TO PROVIDE FOR THE REFORM OF THE LAW RELATING TO PERSONS WHO REQUIRE OR MAY REQUIRE ASSISTANCE IN EXERCISING THEIR DECISION-MAKING CAPACITY, WHETHER IMMEDIATELY OR IN THE FUTURE; TO PROVIDE FOR THE APPOINTMENT BY SUCH PERSONS OF OTHER PERSONS TO ASSIST THEM IN DECISION-MAKING OR (SUBJECT TO THE APPROVAL OF THE CIRCUIT COURT) TO MAKE DECISIONS JOINTLY WITH SUCH PERSONS; TO PROVIDE FOR THE MAKING OF APPLICATIONS TO THE CIRCUIT COURT OR HIGH COURT IN RESPECT OF SUCH PERSONS, INCLUDING SEEKING THE APPROVAL BY THE CIRCUIT COURT OF CO-DECISION-MAKING AGREEMENTS OR THE APPOINTMENT BY THE CIRCUIT COURT OF DECISION-MAKING REPRESENTATIVES FOR SUCH PERSONS; TO ENABLE, IN SPECIFIED CIRCUMSTANCES, INFORMAL DECISION-MAKING TO BE DONE IN RESPECT OF SUCH PERSONS BY OTHER PERSONS WHO ARE NOT DECISION-MAKING ASSISTANTS, CO-DECISION-MAKERS, DECISION-MAKING REPRESENTATIVES OR ATTORNEYS FOR SUCH PERSONS; TO PROVIDE FOR THE APPOINTMENT AND FUNCTIONS OF THE PUBLIC GUARDIAN IN RESPECT OF PERSONS WHO REQUIRE OR MAY SHORTLY REQUIRE ASSISTANCE IN EXERCISING THEIR DECISION-MAKING CAPACITY; TO PROVIDE FOR THE AMENDMENT OF THE LAW RELATING TO ENDURING POWERS OF ATTORNEY; TO PROVIDE FOR THE RATIFICATION BY THE STATE OF THE CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS; AND TO PROVIDE FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

Preliminary and General

Short title and commencement.

1.—(1) This Act may be cited as the Assisted Decision-Making (Capacity) Act 2013.

(2) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes and different provisions.

Interpretation — general.

2.—(1) In this Act—

"act" includes a decision (howsoever described), an omission and a course of conduct;

"Act of 1965" means the Succession Act 1965;

"Act of 1990" means the Companies Act 1990;

"Act of 1995" means the Civil Legal Aid Act 1995;

"Act of 1996" means the Powers of Attorney Act 1996;

"Act of 1998" means the Courts Service Act 1998;

"Act of 2001" means the Mental Health Act 2001;

"appointer" means—

(*a*) a decision-making assistant appointer, or

(*b*) a co-decision-maker appointer;

"approved nursing home" has the meaning assigned to it by section 3 of the Nursing Homes Support Scheme Act 2009;

"attorney", in relation to a relevant person, means attorney within the meaning of *section 38* where the relevant person is the donor of the enduring power of attorney;

"Board" means Board of the Courts Service;

"capacity" means mental capacity and shall be construed in accordance with *section 3*;

"care services" has the meaning assigned to it by section 3 of the Nursing Homes Support Scheme Act 2009;

"co-decision-maker" has the meaning assigned to it by *section 16*;

"co-decision-making agreement" has the meaning assigned to it by *section 16*;

"co-decision-maker appointer" has the meaning assigned to it by *section 16*;

"co-decision-making order" means an order under *section 17(2)* as the order is in force from time to time;

"cohabitant" means cohabitant within the meaning of section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010;

"court" means Circuit Court;

"court friend", in relation to a relevant person, means a person appointed by the Public Guardian pursuant to *section 60(1)*to be a court friend for the relevant person;

"decision" includes a class of decisions;

"decision-making assistant" has the meaning assigned to it by *section 9*;

"decision-making assistance agreement" has the meaning assigned to it by *section 9*;

"decision-making assistant appointer" has the meaning assigned to it by *section 9*;

"decision-making order" means an order under *section 23(2)(a)* as the order is in force from time to time;

"decision-making representative", in relation to a relevant person, means a person appointed pursuant to a decision-making representative order to make one or more than one decision specified in the order on behalf of the relevant person;

"decision-making representative order" means an order under *section 23(2)(b)* as the order is in force from time to time;

"enduring power of attorney" means—

(*a*) an enduring power of attorney created under *Part 6*, or

(*b*) an enduring power of attorney created under Part II of the Act of 1996 to which *Part 6* applies by virtue of *section 39(1)*;

"European Convention on Human Rights" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as it has effect for the time being in relation to the State;

"general visitor" means a person appointed to be a general visitor by the Public Guardian pursuant to *section 59(1)*;

"guiding principles" means the principles set out in *section 8(2)* to *(9)*;

"healthcare professional" means a member of any health or social care profession whether or not the profession is a designated profession within the meaning of section 3 of the Health and Social Care Professionals Act 2005;

"informal decision-maker" shall be construed in accordance with *section 53(1)*;

"intervener", in relation to an intervention in respect of a relevant person, means the person referred to in *paragraph (a)*, *(b)*, *(c)*, *(d)*, *(e)* or *(f)* of the definition of "intervention" making the intervention;

"intervention", in relation to a relevant person, means an action taken under this Act (including regulations made under this Act, orders made under this Act, directions given under this Act or rules of court made for the purposes of this Act) in respect of the relevant person by—

(*a*) the court or High Court,

(*b*) a decision-making assistant, co-decision-maker, decision-making representative, attorney or informal decision-maker for the relevant person,

(*c*) the Public Guardian,

(*d*) a special visitor or general visitor,

(*e*) a healthcare professional, or

(*f*) a committee of the relevant person or a committee of the estate of the relevant person;

"legal practitioner" means a person who is a practising barrister or practising solicitor;

"matter concerned", in relation to a relevant person, means—

(*a*) in the case of a relevant person who falls within *paragraph (a)* of the definition of "relevant person", the matter or matters in respect of which the person's capacity is being called into question or may shortly be called into question, and

(*b*) in the case of a relevant person who falls within *paragraph (b)* of the definition of "relevant person", the matter or matters in respect of which the person lacks capacity;

"Minister" means the Minister for Justice and Equality;

"person who lacks capacity" means a relevant person who falls within *paragraph (b)* of the definition of "relevant person" but only in relation to the matter or matters by virtue of which he or she falls within that paragraph;

"Public Guardian" means the person appointed pursuant to *section 55* to perform the functions conferred on the Public Guardian by this Act;

"registered provider" has the meaning assigned to it by section 2 of the Health Act 2007;

"relevant decision"—

(*a*) in relation to a decision made, or to be made, by a decision-making assistant appointer with the assistance of a decision-making assistant for that appointer, means a decision on a matter the subject of the decision-making assistance agreement which appointed that decision-making assistant and which falls within the scope of that agreement as a decision on which that decision-making assistant may assist the appointer,

(*b*) in relation to a decision made, or to be made, jointly by a co-decision-maker appointer and a co-decision-maker for that appointer, means a decision on a matter the subject of the co-decision-making agreement which appointed that co-decision-maker and which, subject to *section 17(3)*, falls within the scope of that agreement as a decision to be made jointly by the appointer and the co-decision-maker,

(*c*) in relation to a decision made, or to be made, by a decision-making representative on behalf of a relevant person, means a decision on a matter the subject of the decision-making representative order which appointed that decision-making representative and which falls within the scope of that order as a decision to be made by the decision-making representative on behalf of the relevant person, and

(*d*) in relation to a decision made, or to be made, by an attorney on behalf of a relevant person, means a decision on a matter the subject of the enduring power of attorney which appointed that attorney and which falls within the scope of that power as a decision to be made by the attorney on behalf of the relevant person;

"relevant facility" has the meaning assigned to it by section 3 of the Nursing Homes Support Scheme Act 2009;

"relevant person" means—

(*a*) a person whose capacity is being called into question or may shortly be called into question in respect of one or more than one matter, and includes such a person who is—

(i) an appointer, or

(ii) the donor of an enduring power of attorney,

(*b*) a person who lacks capacity in respect of one or more than one matter in accordance with the provisions of this Act, or

(*c*) a person who falls within *paragraphs (a)* and *(b)* at the same time but in respect of different matters,

as the case requires;

"safety or barring order" means a safety order or barring order under the Domestic Violence Act 1996;

"special visitor" means a person appointed to be a special visitor by the Public Guardian pursuant to *section 59(1)*;

"suitable"—

(*a*) in relation to the appointment of a co-decision-maker for a relevant person, shall be construed in accordance with *section 18(2)*, and

(*b*) in relation to the appointment of a decision-making representative for a relevant person, shall be construed in accordance with *section 24(1)*;

"wardship court" has the meaning assigned to it by *section 33*.

(2) For the purposes of this Act, persons (howsoever described in this Act) shall not be considered to have ceased cohabiting by reason only of—

(*a*) either of them residing in or entering a relevant facility or approved nursing home for the purposes of being provided with care services,

(*b*) both of them residing in or entering a relevant facility or approved nursing home for the purposes of being provided with care services,

(*c*) either of them residing in or entering an institution (of whatever kind) for purposes relating to—

(i) a physical or mental condition of the person concerned, or

(ii) the imprisonment, or the taking into lawful custody, of the person concerned,

or

(*d*) both of them residing in or entering an institution (of whatever kind) for purposes relating to—

(i) a physical or mental condition of the person concerned, or

(ii) the imprisonment, or the taking into lawful custody, of the person concerned.

Person's capacity to be construed functionally.

3.—(1) Subject to *subsections (2)* to *(6)*, for the purposes of this Act (including for the purposes of creating a decision-making assistance agreement, co-decision-making agreement or enduring power of attorney), a person's capacity shall be assessed on the basis of his or her ability to understand the nature and consequences of a decision to be made by him or her in the context of the available choices at the time the decision is made.

(2) A person lacks the capacity to make a decision if he or she is unable—

(*a*) to understand the information relevant to the decision,

(*b*) to retain that information,

(*c*) to use or weigh that information as part of the process of making the decision, or

(*d*) to communicate his or her decision (whether by talking, writing, using sign language, assisted technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party.

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

(4) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him or her from being regarded as having the capacity to make the decision.

(5) For the purposes of this section, information relevant to a decision shall be construed as including information about the reasonably foreseeable consequences of—

(*a*) each of the available choices at the time the decision is made, or

(*b*) failing to make the decision.

(6) Any question as to whether a person lacks capacity shall be decided on the balance of probabilities.

Circuit Court to have exclusive jurisdiction under this Act except for certain matters reserved for High Court, etc.

4.—(1) Subject to *subsection (2)*, *sections 15* and *110*, *Parts 5*, *6*, *9* and *10* and *Schedules 1* and *2*, the Circuit Court shall have exclusive jurisdiction under this Act and the performance of the functions of that court conferred by this section shall be within the jurisdiction of the circuit of the Circuit Court and such jurisdiction shall be exercised by the circuit of the Circuit Court in which—

(*a*) the relevant person the subject of an application under this Act is residing or carrying on business at the time the application is made, or

(*b*) the relevant person the subject of an application under this Act has resided at any time during the period of 3 years immediately prior to the making of the application.

(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,

where the matter concerns a relevant person who lacks capacity.

Laying of regulations.

5.—Every regulation made under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Expenses.

6.—The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Public Expenditure and Reform, be paid out of moneys provided by the Oireachtas.

Repeal of Marriage of Lunatics Act 1811.

7.—The Marriage of Lunatics Act 1811 is repealed.

Guiding principles.

8.—(1) The principles set out in *subsections (2)* to *(9)* shall apply for the purposes of an intervention in respect of a relevant person, and the intervener shall give effect to those principles accordingly.

(2) It shall be presumed that a relevant person who falls within *paragraph (a)* of the definition of "relevant person" in *section 2(1)* has capacity in respect of the matter concerned unless the contrary is shown in accordance with the provisions of this Act.

(3) A relevant person who falls within *paragraph (a)* of the definition of "relevant person" in *section 2(1)* shall not be considered as unable to make a decision in respect of the matter concerned unless all practicable steps have been taken, without success, to help him or her to do so.

(4) A relevant person who falls within *paragraph (a)* of the definition of "relevant person" in *section 2(1)* shall not be considered as unable to make a decision in respect of the matter concerned merely by reason of making, having made, or being likely to make, an unwise decision.

(5) There shall be no intervention in respect of a relevant person unless it is necessary to do so having regard to the individual circumstances of the relevant person.

(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.

(7) The intervener, in making an intervention in respect of a relevant person, shall—

(*a*) permit, encourage and facilitate, in so far as is practicable, the relevant person to participate, or to improve his or her ability to participate, as fully as possible, in the intervention,

(*b*) give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable,

(*c*) take into account—

(i) the beliefs and values of the relevant person (in particular those expressed in writing), in so far as those beliefs and values are reasonably ascertainable, and

(ii) any other factors which the relevant person would be likely to consider if he or she were able to do so, in so far as those other factors are reasonably ascertainable,

(*d*) unless the intervener reasonably considers that it is not appropriate or practicable to do so, consider the views of—

(i) any person named by the relevant person as a person to be consulted on the matter concerned or any similar matter, and

(ii) any decision-making assistant, co-decision-maker, decision-making representative or attorney for the relevant person,

and

(*e*) consider all other circumstances of which he or she is aware and which it would be reasonable to regard as relevant.

(8) The intervener, in making an intervention in respect of a relevant person, may consider the views of—

(*a*) any person engaged in caring for the relevant person,

(*b*) any person who has a *bona fide* interest in the welfare of the relevant person, or

(*c*) healthcare professionals.

(9) In the case of an intervention in respect of a relevant person who lacks capacity, regard shall be had to—

(*a*) the likelihood of the recovery of the relevant person's capacity in respect of the matter concerned, and

(*b*) the urgency of making the intervention prior to such recovery.

PART 3

Assisted Decision-Making

Definitions — *Part 3*.

9.—In this Part—

"appointer" means a decision-making assistant appointer;

"decision-making assistant", in relation to an appointer, means the person who the appointer has, under *section 10(1)*, appointed to assist the appointer in making decisions on the appointer's personal welfare or property and affairs, or both, in compliance with regulations made under *section 10(3)*;

"decision-making assistance agreement" means a decision-making assistance agreement referred to in *section 10(2)* as such agreement is in force from time to time;

"decision-making assistant appointer" means a person who has, under *section 10(1)*, appointed another person to assist the first-mentioned person in making decisions on the first-mentioned person's personal welfare or property and affairs, or both, in compliance with regulations made under *section 10(3)*;

"personal welfare" means any one or more than one of the matters referred to in *section 25(a)*;

"property and affairs" means any one or more than one of the matters referred to in *section 26(1)(a)*.

Decision-making assistance agreement.

10.—(1) Subject to *section 12*, a person who has attained the age of 18 years and who considers that his or her capacity is in question or may shortly be in question may appoint another person who has also attained that age to assist the first-mentioned person in making one or more than one decision on the first-mentioned person's personal welfare or property and affairs, or both, in compliance with regulations made under *subsection (3)*.

(2) An appointment as a decision-making assistant shall be made in a decision-making assistance agreement which is in compliance with regulations made under *subsection (3)*.

(3) The Minister may make regulations as respects decision-making assistance agreements, including—

(*a*) prescribing the form of a decision-making assistance agreement,

(*b*) prescribing procedures and requirements relating to the execution of a decision-making assistance agreement,

(*c*) prescribing information to be included in or annexed to a decision-making assistance agreement for the purpose of ensuring that any document purporting to create a decision-making assistance agreement incorporates adequate information as to the effect of making or accepting the appointment,

(*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; 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,

(*e*) specifying the personal welfare or property and affairs, or both, which may be specified in a decision-making assistance agreement,

(*f*) providing for the attestation of the signatures of the appointer and decision-making assistant, and

(*g*) the giving by the appointer of notice of the making of a decision-making assistance agreement—

(i) to the Public Guardian, and

(ii) to other 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.

(4) (*a*) The appointer may, in the decision-making assistance agreement, appoint more than one person as a decision-making assistant but may not appoint more than one decision-making assistant in respect of the same relevant decision.

(*b*) The appointer of a decision-making assistant may, in the decision-making assistance agreement, appoint one or more than one person to act as a decision-making assistant if the decision-making assistant appointed in the agreement dies or becomes disqualified to be such decision-making assistant by virtue of the operation of *section 12*.

(5) A decision-making assistance agreement shall be invalidated, to the extent that it relates to any relevant decision, where there is, in respect of that relevant decision and subsequent to the appointment of the decision-making assistant concerned, a co-decision-maker, decision-making representative or attorney (under an enduring power of attorney registered under *section 46*) for the appointer, and whether or not the decision-making assistant is that co-decision-maker, decision-making representative or attorney, as the case may be.

(6) A decision-making assistance agreement shall be invalidated where there is, in respect of all relevant decisions and subsequent to the appointment of the decision-making assistant or decision-making assistants concerned, a co-decision-maker, decision-making representative or attorney (under an enduring power of attorney registered under *section 46*) for the appointer, and whether or not any such decision-making assistant is that co-decision-maker, decision-making representative or attorney, as the case may be.

(7) A decision-making assistance agreement shall, unless it provides otherwise, be invalidated to the extent that it relates to a decision-making assistant who is the spouse of the appointer and subsequently—

(*a*) the marriage is annulled or dissolved either—

(i) under the law of the State, or

(ii) under the law of another state and is, by reason of that annulment or dissolution, not or no longer a subsisting valid marriage under the law of the State,

(*b*) either a decree of judicial separation is granted to either spouse by a court in the State or any decree is so granted by a court outside the State and is recognised in the State as having like effect,

(*c*) a written agreement to separate is entered into between the spouses, or

(*d*) subject to *section 2(2)*, the spouses separate and cease to cohabit for a continuous period of 12 months.

(8) A decision-making assistance agreement shall, unless it provides otherwise, be invalidated to the extent that it relates to a decision-making assistant who is the civil partner of the appointer and subsequently—

(*a*) the civil partnership is dissolved,

(*b*) a written agreement to separate is entered into between the civil partners, or

(*c*) subject to *section 2(2)*, the civil partners separate and cease to cohabit for a continuous period of 12 months.

(9) Subject to *section 2(2)*, a decision-making assistance agreement shall, unless it provides otherwise, be invalidated to the extent that it relates to a decision-making assistant who is the cohabitant of the appointer and subsequently the cohabitants separate and cease to cohabit for a continuous period of 12 months.

(10) The invalidation of all or part of a decision-making assistance agreement under any of *subsections (5)* to *(9)* shall not affect a relevant decision made by the appointer with the assistance of the decision-making assistant concerned for the appointer prior to the occurrence of the event which caused such invalidation.

(11) Nothing in this section shall be construed to prevent the appointer of a decision-making assistant from revoking or varying the decision-making assistance agreement which appointed the decision-making assistant.

Functions and scope of authority of decision-making assistants.

11.—(1) The functions of a decision-making assistant for an appointer shall be—

(*a*) to advise the appointer by explaining relevant information and considerations relating to a relevant decision,

(*b*) to ascertain the will and preferences of the appointer on a matter the subject or to be the subject of a relevant decision and to assist the appointer to communicate them,

(*c*) to assist the appointer to obtain any information or personal records (in this section referred to as "relevant information") that the appointer is entitled to and that is or are required in relation to a relevant decision,

(*d*) to assist the appointer to make and express a relevant decision, and

(*e*) to endeavour to ensure that the appointer's relevant decisions are implemented.

(2) A decision-making assistant for an appointer shall not, without the consent of the appointer—

(*a*) attempt to obtain information that is not reasonably required for making a relevant decision, or

(*b*) use relevant information for a purpose other than in relation to a relevant decision.

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

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

(*b*) is safely disposed of when no longer required.

Persons who shall not be appointed as decision-making assistants, etc.

12.—(1) A person shall not be appointed as a decision-making assistant if—

(*a*) the person has been convicted of an offence in relation to the person or property of the proposed appointer or the person or property of a child of the proposed appointer, or

(*b*) a safety or barring order has been made against the person in relation to the proposed appointer or a child of the proposed appointer.

(2) A decision-making assistance agreement purporting to be made in contravention of *subsection (1)* shall be void to the extent that it purports to appoint a decision-making assistant who falls within *paragraph (a)* or *(b)* of that subsection.

(3) Where, subsequent to the appointment of a decision-making assistant—

(*a*) the decision-making assistant is convicted of an offence in relation to the person or property of the appointer or the person or property of a child of the appointer, or

(*b*) a safety or barring order is made against the decision-making assistant in relation to the appointer or a child of the appointer,

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)* or *(b)*.

(4) The invalidation of all or part of a decision-making assistance agreement under *subsection (3)* shall not of itself affect a relevant decision made by the appointer with the assistance of a decision-making assistant prior to the occurrence of the event which caused such invalidation.

PART 4

Applications to Court in respect of Relevant Persons and Related Matters

Chapter 1

Application of this Part

Application of this Part.

13.—This Part shall not apply to relevant persons who have not attained the age of 18 years.

Chapter 2

Applications under this Part

Persons who may make applications to court under this Part, etc.

14.—(1) An application to the court under this Part (other than an application by the relevant person) shall be made on notice to—

(*a*) the relevant person the subject of the application,

(*b*) the persons referred to in *paragraphs (c)* to *(h)* of *subsection (3)* (other than any such person who is the applicant),

(*c*) if the application relates, whether in whole or in part, to the relevant person's capacity to make a decision to consent to being married or to being in a civil partnership, the person referred to in *paragraph (i)* of *subsection (3)* (other than any such person who is the applicant), and

(*d*) such other persons as may be specified in rules of court.

(2) Subject to *subsection (3)*, an application to the court under this Part shall not be made unless the person making the application has received the consent of the court to the making of the application, which consent may be sought by way of an *ex parte* application.

(3) Subject to *section 29(1)*, *subsection (2)* shall not apply to an application to the court under this Part made by—

(*a*) the relevant person,

(*b*) the Public Guardian,

(*c*) the spouse or civil partner of the relevant person,

(*d*) a decision-making assistant for the relevant person,

(*e*) a co-decision-maker for the relevant person (and notwithstanding that the co-decision-making agreement which appointed the co-decision-maker is not the subject of a co-decision-making order),

(*f*) a decision-making representative for the relevant person,

(*g*) an attorney for the relevant person,

(*h*) a person specified for that purpose in an existing order of the court under this Part where the application relates to that order,

(*i*) if the application relates, whether in whole or in part, to the relevant person's capacity to make a decision to consent to being married or to being in a civil partnership—

(i) a registrar within the meaning of section 17 of the Civil Registration Act 2004, or

(ii) the other party to the proposed marriage or civil partnership (if any), as the case may be, of the relevant person.

(4) An application to the court under this Part (including an *ex parte* application under *subsection (2)*) shall state—

(*a*) the applicant's connection with the relevant person,

(*b*) the benefit to the relevant person sought to be achieved by the application, and

(*c*) the reasons why the application is being made, in particular—

(i) the reason why the benefit to the relevant person sought to be achieved has failed to be achieved in any other appropriate and practicable manner taken prior to the making of the application, and

(ii) the reason why, in the opinion of the applicant, no other appropriate and practicable manner to achieve that benefit remains to be taken prior to the making of the application.

(5) In every application to the court under this Part, the applicant shall inform the court of the existence of—

(*a*) any decision-making assistance agreement, co-decision-making agreement or power of attorney (whether an enduring power or otherwise and whether or not the power is registered under *section 46*) created by the relevant person, and

(*b*) any co-decision-making order or decision-making order made in respect of the relevant person,

and which, to the applicant's knowledge, still has any force or effect.

(6) (*a*) Subject to *paragraph (c)*, a party to proceedings under this Part before the court who retains legal representation for the purposes of the proceedings shall be liable for the costs of the legal representation.

(*b*) Section 28 of the Act of 1995 shall apply to proceedings or proposed proceedings under this section which relate to *section 15(1)*.

(*c*) Where—

(i) an application to the court is made under this Part, and

(ii) the applicant has been unsuccessful in obtaining legal aid in relation to the application because he or she

fails to satisfy the criteria in respect of financial eligibility specified in section 29 of the Act of 1995 as read with any regulations made under section 37 of that Act,

the court may, if it is satisfied that the interests of justice require it to do so, order that all or part of the legal costs (if any) incurred by the applicant in relation to the application be paid out of the assets (if any) of the relevant person who is the subject of the application.

(7) Rules of court shall make provision—

(*a*) as to the manner and form in which proceedings under this Part are to be commenced,

(*b*) as to the persons entitled to be notified of, and be made parties to, such proceedings, and

(*c*) as to what may be received as evidence in such proceedings and the manner in which it is to be presented.

(8) The court, on the hearing of an application under this Part, may allow the relevant person the subject of the application, if he or she has not instructed a legal practitioner, to be assisted in court by a court friend for the relevant person unless—

(*a*) there is a decision-making assistant, co-decision-maker (and notwithstanding that the co-decision-making agreement which appointed the co-decision-maker is not the subject of a co-decision-making order), decision-making representative or attorney for the relevant person and the decision-making assistant, co-decision-maker, decision-making representative or attorney, as the case may be, is willing to assist the relevant person during the course of the hearing, or

(*b*) subject to *sections 60(8)* and *63(15)*, there is another person, in respect of whom the court is satisfied that such person is suitable, willing and able to assist the relevant person during the course of the hearing.

(9) Where, on the hearing of an application under this Part—

(*a*) the relevant person the subject of the application has not instructed a legal practitioner,

(*b*) there is—

(i) no decision-making assistant, co-decision-maker, decision-making representative or attorney for the relevant person or, if there is a decision-making assistant, co-decision-maker, decision-making representative or attorney for the relevant person, he or she is not willing to assist the relevant person in the course of the hearing, and

(ii) no person who falls within *paragraph (b)* of *subsection (8)* in respect of the relevant person and the hearing,

and

(*c*) there is no court friend for the relevant person,

the court may direct the Public Guardian to appoint a court friend for the relevant person.

(10) Hearings of applications under this Part shall—

(*a*) be conducted with the least amount of formality consistent with the proper administration of justice, and

(*b*) be heard and determined otherwise than in public.

Chapter 3

Declarations as to capacity, etc., and matters following declarations

Power of court to make declarations as to capacity, etc.

15.—(1) Subject to *subsection (2)*, the court, on application to it by a person entitled by virtue of *section 14* to make the application, may make one or both of the following declarations:

(*a*) a declaration that the relevant person the subject of the application lacks capacity, unless the assistance of a suitable person as a co-decision-maker is made available to him or her, to make one or more than one decision specified in the application relating to his or her personal welfare or property or affairs, or both;

(*b*) a declaration that the relevant person the subject of the application lacks capacity, even if the assistance of a suitable person as a co-decision-maker were made available to him or her, to make one or more than one decision specified in the declaration relating to his or her personal welfare or property and affairs, or both.

(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.

(3) Subject to *subsection (4)*, the court, on application to it by a person entitled by virtue of *section 14* to make the application, may make a declaration as to the lawfulness of an intervention proposed to be made in respect of the relevant person the subject of the application.

(4) *Subsection (3)* shall not apply to an intervention where—

(*a*) the intervener is the court or High Court, or

(*b*) the intervention is being taken pursuant to an order made, or a direction given, under this Act by the court or High Court.

Chapter 4

Co-decision-making

Definitions — *Chapter 4.*

16.—In this Chapter—

"appointer" means a co-decision-maker appointer;

"co-decision-maker", in relation to an appointer, means the suitable person who the appointer has, under *section 18(1)*, appointed to jointly make with the appointer decisions on the appointer's personal

welfare or property and affairs, or both, in compliance with regulations made under *section 18(4)*;

"co-decision-making agreement" means a co-decision-making agreement referred to in *section 18(3)* as such agreement is in force from time to time;

"co-decision-maker appointer" means a person who has, under *section 18(1)*, appointed a suitable person to jointly make with the first-mentioned person decisions on the first-mentioned person's personal welfare or property and affairs, or both, in compliance with regulations made under *section 18(4)*;

"personal welfare" means any one or more than one of the matters referred to in *section 25(a)*;

"property and affairs" means any one or more than one of the matters referred to in *section 26(1)(a)*.

Power of court to make co-decision-making order, etc.

17.—(1) This section applies where the court has made a declaration in respect of a relevant person which falls within *paragraph (a)* of *section 15(1)*.

(2) The court, on application to it by a relevant person who has made a co-decision-making agreement, or by any other person entitled by virtue of *section 14* to make the application who has the consent of the relevant person to do so, may make an order approving the co-decision-making agreement if the court is satisfied that the agreement is made in accordance with—

(*a*) the provisions of this Chapter applicable to or in relation to it, and

(*b*) the will and preferences of the relevant person.

(3) (*a*) A co-decision-making agreement has no effect unless it is the subject of a co-decision-making order.

(*b*) A co-decision-making agreement the subject of a co-decision-making order shall not be revoked or varied except with the consent of the court upon application to it by a person entitled by virtue of *section 14* to make the application.

(4) Where the court makes a co-decision-making order in respect of a co-decision-making agreement, a relevant decision made otherwise than jointly by the relevant person and the co-decision-maker is void.

(5) The court shall not make a co-decision-making order in respect of a co-decision-making agreement unless the relevant person and the co-decision-maker consent to the making of the order or, if there is presently no co-decision-making agreement, the court is satisfied that—

(*a*) the relevant person has the capacity to appoint a co-decision-maker, and

(*b*) there is a suitable person who has indicated that he or she is willing to be appointed as such co-decision-maker.

(6) The court may vary or discharge a co-decision-making order (whether or not following a review under *subsection (7)*) whether of

its own motion or pursuant to an application to it under this Part by a person entitled by virtue of *section 14* to make the application.

(7) Subject to *subsection (8)*, the court shall review a co-decision-making order—

(*a*) not earlier than 3 months before and not later than 3 months after the first anniversary of the making of the order, and

(*b*) thereafter, at intervals such that there is no gap greater than 3 years between one review of the order and the next review of the order.

(8) The court may decline to carry out a particular review under *subsection (7)* of a co-decision-making order if the court is satisfied that the review is unnecessary because it has recently exercised, or has recently considered exercising, its power under *subsection (6)* in respect of the order.

(9) Where the court is satisfied that a co-decision-maker for a relevant person has behaved, is behaving or is proposing to behave in a manner outside the scope of the authority conferred on him or her by, subject to *subsection (3)*, the co-decision-making agreement which appointed the co-decision-maker, or in a manner that is not in the interests of the relevant person, the court may—

(*a*) revoke the co-decision-making order concerned, or

(*b*) vary the terms of the co-decision-making order relating to the appointment of the co-decision-maker under that agreement.

(10) *Subsection (11)* applies to a co-decision-maker for a relevant person where the court is satisfied that—

(*a*) the relevant person's capacity to make a relevant decision has improved to the extent that he or she no longer requires the assistance of the co-decision-maker for that relevant decision,

(*b*) the relevant person's capacity to make a relevant decision has deteriorated to the extent that he or she is unable to make that relevant decision even when assisted by the co-decision-maker,

(*c*) the relationship between the relevant person and the co-decision-maker has broken down,

(*d*) the relevant person is unable, unwilling or refusing to accept the assistance of the co-decision-maker, or

(*e*) the co-decision-maker is unable, unwilling or refusing to continue as such co-decision-maker.

(11) Where this subsection applies to a co-decision-maker for a relevant person by virtue of *subsection (10)*, the court may—

(*a*) revoke the co-decision-making order concerned, or

(*b*) vary the terms of the co-decision-making order relating to the appointment of the co-decision-maker under the co-decision-making agreement which appointed the co-decision-maker.

(12) The court, on making an order under this section which has the effect of revoking its approval of the appointment of a co-decision-maker for a relevant person under a co-decision-making agreement, shall, where the court considers it necessary, make further orders under this Part in respect of the relevant person.

Co-decision-making agreement.

18.—(1) Subject to *subsection (2)*, a person who has attained the age of 18 years and who considers that his or her capacity is in question or may shortly be in question may appoint a suitable person who has also attained that age to jointly make with the first-mentioned person one or more than one decision on the first-mentioned person's personal welfare or property and affairs, or both, in compliance with regulations made under *subsection (4)*.

(2) A person is suitable for appointment as a co-decision-maker for another person if—

(*a*) the first-mentioned person is a relative or friend of the proposed appointer who has had such personal contact with the proposed appointer over such period of time that a relationship of trust exists between them, and

(*b*) the first-mentioned person is capable of effectively performing the functions which it is proposed to give to the co-decision-maker for the proposed appointer.

(3) An appointment as a co-decision-maker shall be made in a co-decision-making agreement which is in compliance with regulations made under *subsection (4)*.

(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 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; 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,

(*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, and

(*g*) the giving by the appointer of notice of the making 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.

(5) (*a*) The appointer may, in the co-decision-making agreement, appoint more than one person as a co-decision-maker but may not appoint more than one co-decision-maker in respect of the same relevant decision.

(*b*) The appointer of a co-decision-maker may, in the co-decision-making agreement, appoint one or more than one person to act as a co-decision-maker if the co-decision-maker appointed in the agreement dies or becomes disqualified to be such co-decision-maker by virtue of the operation of *subsection (8)*, *(9)* or *(10)* or *section 20.*

(6) A co-decision-making agreement shall be invalidated, to the extent that it relates to any relevant decision, where there is, in respect of that relevant decision and subsequent to the appointment of the co-decision-maker concerned, a decision-making representative or attorney (under an enduring power of attorney registered under *section 46*) for the appointer, and whether or not the co-decision-maker is that decision-making representative or attorney, as the case may be.

(7) A co-decision-making agreement shall be invalidated where there is, in respect of all relevant decisions and subsequent to the appointment of the co-decision-maker or co-decision-makers concerned, a decision-making representative or attorney (under an enduring power of attorney registered under *section 46*) for the appointer, and whether or not any such co-decision-maker is that decision-making representative or attorney, as the case may be.

(8) A co-decision-making agreement shall, unless it provides otherwise, be invalidated to the extent that it relates to a co-decision-maker who is the spouse of the appointer and subsequently—

(*a*) the marriage is annulled or dissolved either—

(i) under the law of the State, or

(ii) under the law of another state and is, by reason of that annulment or dissolution, not or no longer a subsisting valid marriage under the law of the State,

(*b*) either a decree of judicial separation is granted to either spouse by a court in the State or any decree is so granted by a court outside the State and is recognised in the State as having like effect,

(*c*) a written agreement to separate is entered into between the spouses, or

(*d*) subject to *section 2(2)*, the spouses separate and cease to cohabit for a continuous period of 12 months.

(9) A co-decision-making agreement shall, unless it provides otherwise, be invalidated to the extent that it relates to a co-decision-maker who is the civil partner of the appointer and subsequently—

(*a*) the civil partnership is dissolved,

(*b*) a written agreement to separate is entered into between the civil partners, or

(*c*) subject to *section 2(2)*, the civil partners separate and cease to cohabit for a continuous period of 12 months.

(10) Subject to *section 2(2)*, a co-decision-making agreement shall, unless it provides otherwise, be invalidated to the extent that it relates to a co-decision-maker who is the cohabitant of the appointer and subsequently the cohabitants separate and cease to cohabit for a continuous period of 12 months.

(11) The invalidation of all or part of a co-decision-making agreement under any of *subsections (6)* to *(10)* shall not affect a relevant decision made by the appointer jointly with the co-decision-maker concerned for the appointer prior to the occurrence of the event which caused such invalidation.

(12) Nothing in this section shall be construed to prevent the appointer of a co-decision-maker from revoking or varying the co-decision-making agreement which appointed that co-decision-maker at any time before the agreement becomes subject to a co-decision-making order.

(13) A relevant decision made in good faith jointly by the appointer and the co-decision-maker for the appointer shall be considered to have been made by the appointer.

Co-decision-maker shall acquiesce in relevant decision made by appointer where certain conditions are met.

19.—A co-decision-maker for the appointer shall acquiesce in a relevant decision made by the appointer and shall not refuse to sign a document referred to in *section 21(2)* if the following 2 conditions are met:

(*a*) a reasonable person could have made that relevant decision; and

(*b*) no harm to the appointer or any other person is likely to result from that relevant decision.

Persons who shall not be appointed as co-decision-makers.

20.—(1) Subject to *subsection (3)*, a person (in this subsection referred to as the "proposed appointee") shall not be appointed as a co-decision-maker if—

(*a*) the proposed appointee has not attained the age of 18 years,

(*b*) the proposed appointee has been convicted of an offence in relation to the person or property of the proposed appointer or the person or property of a child of the proposed appointer,

(*c*) a safety or barring order has been made against the proposed appointee in relation to the proposed appointer or a child of the proposed appointer,

(*d*) the proposed appointee is an undischarged bankrupt or currently in a debt settlement arrangement or personal insolvency arrangement or has been convicted of an offence involving fraud or dishonesty,

(*e*) the proposed appointee is a person in respect of whom a declaration has been made under section 150 of the Act of 1990,

(*f*) the proposed appointee is a person who is or was the subject of a disqualification order by virtue of Part VII of the Act of 1990, or

(*g*) the proposed appointee is the owner, or the registered provider, of a nursing home (whether or not it is a nursing home registered under the Health Act 2007), a mental health facility, or a residential facility for persons with disabilities, in which the relevant person resides, or a person residing with, or an employee or agent of, such owner or registered provider, as the case may be, unless the proposed appointee is a spouse or civil partner, parent, child or sibling of the relevant person.

(2) Subject to *subsection (3)*, where, subsequent to the appointment of a co-decision-maker—

(*a*) the co-decision-maker is convicted of an offence in relation to the person or property of the appointer or the person or property of a child of the appointer,

(*b*) a safety or barring order is made against the co-decision-maker in relation to the appointer or a child of the appointer,

(*c*) the co-decision-maker becomes an undischarged bankrupt or subject to a debt settlement arrangement or personal insolvency arrangement which is current or is convicted of an offence involving fraud or dishonesty,

(*d*) the co-decision-maker becomes a person in respect of whom a declaration has been made under section 150 of the Act of 1990, or

(*e*) the co-decision-maker becomes a person who is the subject of a disqualification order by virtue of Part VII of the Act of 1990,

(*f*) the co-decision-maker becomes the owner, or the registered provider, of a nursing home (whether or not it is a nursing home registered under the Health Act 2007), a mental health facility, or residential facility for persons with disabilities, in which the relevant person resides, or a person residing with, or an employee or agent of, such owner or registered provider, as the case may be, where the co-decision-maker is not a spouse or civil partner, parent, child or sibling of the relevant person,

the co-decision-making order concerned shall be invalidated, to the extent that it relates to the approval of the appointment of that co-decision-maker under the co-decision-making agreement concerned, with effect from the day on which the co-decision-maker falls within any of *paragraphs (a)* to *(f)*.

(3) *Subsections (1)(d)*, *(e)* and *(f)* and *(2)(c)*, *(d)* and *(e)* shall not apply as respects the appointment of a person as a co-decision-maker for the proposed appointer or appointer, as the case may be, relating only to relevant decisions on the personal welfare of the proposed appointer or appointer, as the case may be.

(4) In *subsections (1)(g)* and *(2)(f)* "owner" includes a person managing a nursing home, mental health facility, or residential facility for persons with disabilities, or a director (including a shadow director within the meaning of section 27 of the Act of 1990) of, or a shareholder in or an employee or agent of, a company which owns or manages such a home or facility.

Functions and scope of authority of co-decision-makers.

21.—(1) Subject to *section 17(3)*, a co-decision-maker for the appointer shall advise the appointer respecting matters the subject or to be the subject of relevant decisions, and shall share with the appointer the authority to make relevant decisions and may do all things necessary to give effect to the authority vested in him or her.

(2) Where a relevant decision made by the appointer and a co-decision-maker for the appointer requires the signing of any document for its implementation, the document is void unless the appointer and the co-decision-maker co-sign the document.

(3) In exercising his or her functions under this Part, a co-decision-maker for the appointer shall—

(*a*) advise the appointer by explaining relevant information and considerations relating to a relevant decision,

(*b*) ascertain the will and preferences of the appointer on a matter the subject or to be the subject of a relevant decision and assist the appointer to communicate them,

(*c*) assist the appointer to obtain any information or personal records (in this section referred to as "relevant information") that the appointer is entitled to and that is or are required in relation to a relevant decision,

(*d*) assist the appointer to make and express a relevant decision, and

(*e*) endeavour to ensure that the appointer's relevant decisions are implemented.

(4) A co-decision-maker for the appointer shall not, without the consent of the appointer—

(*a*) attempt to obtain information that is not reasonably required for making a relevant decision, or

(*b*) use relevant information for a purpose other than in relation to a relevant decision.

(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, and

(*b*) is safely disposed of when no longer required.

(6) Except where the court otherwise orders, a co-decision-maker for the appointer shall be entitled 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.

(7) (*a*) A co-decision-maker for the appointer shall, at least once every 12 months after the co-decision-making agreement which appointed the co-decision-maker becomes the subject of a co-decision-making order, or within such shorter period as the court may direct, prepare and submit to the Public Guardian a report in writing as to the performance of his or her functions as such co-decision-maker.

(*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 all expenses paid or reimbursed to the co-decision-maker concerned for the relevant period concerned.

(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.

Restrictions on co-decision-makers.

22.—(1) Where there is both a co-decision-maker and a decision-making representative for a relevant person—

(*a*) the co-decision-maker shall not exercise any power granted to the decision-making representative and which is exercisable by the decision-making representative, and

(*b*) the co-decision-maker shall exercise any powers which the co-decision-maker is authorised to exercise in a manner which is not inconsistent with the powers of the decision-making representative which are exercisable by the decision-making representative.

(2) Where there is both a co-decision-maker and an attorney (under an enduring power of attorney registered under *section 46*) for a relevant person—

(*a*) the co-decision-maker shall not exercise any power granted to the attorney and which is exercisable by the attorney, and

(*b*) the co-decision-maker shall exercise any powers which the co-decision-maker is authorised to exercise in a manner which is not inconsistent with the powers of the attorney which are exercisable by the attorney.

Chapter 5

Decisions by court or decision-making representative appointed by court

Power of court to make orders and appoint decision-making representative, etc.

23.—(1) This section applies where—

(*a*) the court has made a declaration in respect of a relevant person which falls within *paragraph (a)* of *section 15(1)* but the court is unable, by virtue of *section 17(5)* or *20*, to make the co-decision-making order concerned, or

(*b*) the court has made a declaration in respect of a relevant person which falls within *paragraph (b)* of *section 15(1)*.

(2) Where this section applies, the court may make one or both of the following orders:

(*a*) an order making the decision or decisions concerned on behalf of the relevant person where it is satisfied that the matter is urgent or that it is otherwise expedient for it to do so;

(*b*) subject to *subsection (3)* and *section 24*, an order appointing a person to be a decision-making representative for the relevant person for the purposes of making one or more than one decision specified in the order on behalf of the relevant person.

(3) Where the court proposes to appoint a decision-making representative for a relevant person but no suitable person is willing or able to act as such decision-making representative—

(*a*) the court shall request the Public Guardian to nominate 2 or more persons from the panel established under *section*

61(1) for consideration by the court for such appointment, and

(*b*) the court may, under *subsection (2)(b)*, appoint, from amongst those nominees, a person to be a decision-making representative for the relevant person for the purposes referred to in that paragraph.

(4) In making a decision-making order or decision-making representative order, the court may make provision for such other matters as it considers appropriate, including—

(*a*) subject to *subsection (5)*, the conferral of powers on a decision-making representative,

(*b*) the imposition of duties on a decision-making representative,

(*c*) the attachment of conditions relating to the making of any relevant decision by a decision-making representative or the exercise of any power by a decision-making representative in his or her capacity as a decision-making representative, and

(*d*) the period of time for which the order is to have effect.

(5) In making a decision-making representative order, the court shall, in so far as the order relates to the conferral of powers referred to in *subsection (4)(a)*, ensure that the powers conferred are as limited in scope and duration as is necessary in the circumstances having regard to the interests of the relevant person the subject of the order.

(6) The court may appoint one or more than one person as a decision-making representative for a relevant person and may so appoint different persons in respect of different relevant decisions.

(7) A decision-making representative order appointing more than one person as a decision-making representative for a relevant person in relation to the same relevant decisions shall make provision as to whether such persons are to act—

(*a*) jointly,

(*b*) jointly and severally, or

(*c*) jointly as respects some relevant decisions and jointly and severally as respects other relevant decisions.

(8) The court may make a decision-making order or decision-making representative order notwithstanding that an application has not been made to it under this Part for an order in that respect or in those terms.

(9) The court may vary or discharge a decision-making order or decision-making representative order, whether of its own motion or pursuant to an application to it under this Part by a person entitled by virtue of *section 14* to make the application.

(10) Where the court is satisfied that a decision-making representative for a relevant person has behaved, is behaving or is proposing to behave in a manner outside the scope of the authority conferred on him or her by the court, or in a manner that is not in the interests of the relevant person, the court may—

(*a*) revoke the appointment of the decision-making representative, or

(*b*) vary the terms of a decision-making representative order relating to—

(i) the appointment of the decision-making representative,

(ii) the nature or extent of the powers conferred on the decision-making representative, or

(iii) the duties imposed on the decision-making representative.

Decision-making representatives — general.

24.—(1) The court shall not appoint a person to be a decision-making representative for a relevant person unless it considers that the person is suitable for appointment as a decision-making representative as respects the powers which it is proposed to give the decision-making representative for that relevant person.

(2) Subject to *subsection (4)*, a person (in this section referred to as the "proposed appointee") shall not be appointed as a decision-making representative for a relevant person if—

(*a*) the proposed appointee has not attained the age of 18 years,

(*b*) the proposed appointee has been convicted of an offence in relation to the person or property of the relevant person or the person or property of a child of the relevant person,

(*c*) a safety or barring order has been made against the proposed appointee in relation to the relevant person or a child of the relevant person,

(*d*) the proposed appointee is an undischarged bankrupt or currently in a debt settlement arrangement or personal insolvency arrangement or has been convicted of an offence involving fraud or dishonesty,

(*e*) the proposed appointee is a person in respect of whom a declaration has been made under section 150 of the Act of 1990,

(*f*) the proposed appointee is a person who is or was the subject of a disqualification order by virtue of Part VII of the Act of 1990, or

(*g*) the proposed appointee is the owner, or the registered provider, of a nursing home (whether or not it is a nursing home registered under the Health Act 2007), a mental health facility, or a residential facility for persons with disabilities, in which the relevant person resides, or a person residing with, or an employee or agent of, such owner or registered provider, as the case may be, unless the proposed appointee is a spouse or civil partner, parent, child or sibling of the relevant person.

(3) Subject to *subsection (4)*, where, subsequent to the appointment of a decision-making representative for a relevant person—

(*a*) the decision-making representative is convicted of an offence in relation to the person or property of the relevant person or the person or property of a child of the relevant person,

(*b*) a safety or barring order is made against the decision-making representative in relation to the relevant person or a child of the relevant person,

(*c*) the decision-making representative becomes an undischarged bankrupt or subject to a debt settlement arrangement or personal insolvency arrangement which is current or is convicted of an offence involving fraud or dishonesty,

(*d*) the decision-making representative becomes a person in respect of whom a declaration has been made under section 150 of the Act of 1990,

(*e*) the decision-making representative becomes a person who is the subject of a disqualification order by virtue of Part VII of the Act of 1990, or

(*f*) the decision-making representative becomes the owner, or the registered provider, of a nursing home (whether or not it is a nursing home registered under the Health Act 2007), a mental health facility, or residential facility for persons with disabilities, in which the relevant person resides, or a person residing with, or an employee or agent of, such owner or registered provider, as the case may be, where the decision-making representative is not a spouse or civil partner, parent, child or sibling of the relevant person,

the decision-making representative order concerned shall be invalidated, to the extent that it relates to the appointment of that decision-making representative, with effect from the day on which the decision-making representative falls within any of *paragraphs (a)* to *(f)*.

(4) *Subsections (2)(d)*, *(e)* and *(f)* and *(3)(c)*, *(d)* and *(e)* shall not apply as respects the appointment of a person as a decision-making representative for a relevant person relating only to relevant decisions on the personal welfare of the relevant person.

(5) A decision-making representative for a relevant person acts as the agent of the relevant person in relation to a relevant decision made by the decision-making representative.

(6) (*a*) Except where the court otherwise orders, a decision-making representative for a relevant person shall be entitled to be reimbursed out of the assets of the relevant person in respect of his or her fair and reasonable expenses which are reasonably incurred in performing his or her functions as such decision-making representative.

(*b*) Where the court so directs in a decision-making representative order appointing a decision-making representative for a relevant person, the decision-making representative shall be entitled to be paid a reasonable amount in respect of remuneration in relation to the performance of his or her functions as such decision-making representative and which functions are carried out in connection

with his or her trade or profession or in other exceptional circumstances specified in the order, and such remuneration shall be paid from the assets of the relevant person.

(7) (*a*) A decision-making representative for a relevant person shall at least once every 12 months, or within such shorter period as the court may direct, prepare and submit to the Public Guardian a report as to the performance of his or her functions as such decision-making representative.

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

(8) A decision-making representative order appointing a decision-making representative for a relevant person may provide for the giving of such security by the decision-making representative to the Public Guardian as the court considers appropriate in relation to the proper performance of the functions of such decision-making representative.

(9) A decision-making representative order shall, unless it provides otherwise, be invalidated to the extent that it relates to a decision-making representative who is the spouse of the relevant person and subsequently—

(*a*) the marriage is annulled or dissolved either—

(i) under the law of the State, or

(ii) under the law of another state and is, by reason of that annulment or dissolution, not or no longer a subsisting valid marriage under the law of the State,

(*b*) either a decree of judicial separation is granted to either spouse by a court in the State or any decree is so granted by a court outside the State and is recognised in the State as having like effect,

(*c*) a written agreement to separate is entered into between the spouses, or

(*d*) subject to *section 2(2)*, the spouses separate and cease to cohabit for a continuous period of 12 months.

(10) A decision-making representative order shall, unless it provides otherwise, be invalidated to the extent that it relates to a decision-making representative who is the civil partner of the relevant person and subsequently—

(*a*) the civil partnership is dissolved,

(*b*) a written agreement to separate is entered into between the civil partners, or

(*c*) subject to *section 2(2)*, the civil partners separate and cease to cohabit for a continuous period of 12 months.

(11) Subject to *section 2(2)*, a decision-making representative order shall, unless it provides otherwise, be invalidated to the extent

that it relates to a decision-making representative who is the cohabitant of the relevant person and subsequently the cohabitants separate and cease to cohabit for a continuous period of 12 months.

(12) The invalidation of all or part of a decision-making representative order under *subsection (3)*, *(9)*, *(10)* or *(11)* shall not of itself affect a relevant decision made by the decision-making representative concerned for the relevant person prior to the occurrence of the event which caused such invalidation.

(13) In *subsections (2)(g)* and *(3)(f)* "owner" includes a person managing a nursing home, mental health facility, or residential facility for persons with disabilities, or a director (including a shadow director within the meaning of section 27 of the Act of 1990) of, or a shareholder in or an employee or agent of, a company which owns or manages such a home or facility.

Scope of decision-making order or decision-making representative order relating to personal welfare.

25.—Subject to *section 27*, a decision-making order or decision-making representative order, as appropriate, relating to the personal welfare of a relevant person—

(*a*) may, without prejudice to the generality of *section 23(2)(b)*, authorise a decision-making representative for the relevant person to make decisions on behalf of the relevant person in respect of any one or more than one of the following matters:

(i) where the relevant person should live;

(ii) persons with whom the relevant person may or may not have contact;

(iii) the employment, training and rehabilitation the relevant person should receive;

(iv) the diet and dress of the relevant person;

(v) the inspection of the personal papers, or a class of personal papers, of the relevant person;

(vi) whether or not the relevant person may travel outside the State;

(vii) granting or refusing consent to the carrying out or continuation of a treatment of the relevant person by a healthcare professional;

and

(*b*) may make provision for such other matters as the court considers appropriate.

Scope of decision-making order or decision-making representative order relating to property and affairs.

26.—(1) Subject to *section 27*, a decision-making order or decision-making representative order, as appropriate, relating to the property and affairs of a relevant person—

(*a*) may, without prejudice to the generality of *section 23(2)(b)*, authorise a decision-making representative for the relevant person to make decisions on behalf of the relevant person in respect of any one or more than one of the following matters:

(i) the custody, control and management of some or all of the relevant person's property or property rights;

(ii) the sale, exchange, mortgaging, charging, gift or other disposition of the relevant person's property;

(iii) the acquisition of property in the name of the relevant person, or on his or her behalf;

(iv) the carrying on, on behalf of the relevant person, of any profession, trade or business which may lawfully be carried on by a person other than the relevant person;

(v) the making of a decision which will have the effect of dissolving a partnership in which the relevant person is a partner;

(vi) the carrying out of any contract entered into by the relevant person;

(vii) the discharge of the relevant person's debts or other obligations, whether or not any such debt or obligation is legally enforceable against the relevant person;

(viii) the execution or exercise of any of the powers or discretions vested in the relevant person as a tenant for life;

(ix) providing, to the extent that the relevant person might have been expected to do so, for the needs of the decision-making representative or of other persons;

(x) the conduct of proceedings before any court or tribunal, whether in the name of the relevant person or on his or her behalf;

(xi) making an application for housing, social welfare or other benefits or otherwise protecting or advancing the interests of the relevant person in relation to those matters,

and

(*b*) may make provision for such other matters as the court considers appropriate.

(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.

(3) (*a*) Subject to *paragraph (b)*, the court may, notwithstanding that there is a decision-making representative for a relevant person, confer on the Public Guardian the custody, control and management of some or all of the property of the relevant person if the court considers that the Public Guardian is the most appropriate person to exercise that power in respect of that property.

(*b*) An order under *paragraph (a)* may require all or some of the property of the relevant person which is money to be lodged into court.

(4) Where the court proposes to make an order under *subsection (3)(a)* in respect of the property of a relevant person, 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 to such matters as respects the management of the property to which the order may relate.

(5) Where the court makes an order under *subsection (3)(a)* in respect of the property of a relevant person, it may make the order subject to such conditions as it considers appropriate.

Restrictions on decision-making representatives.

27.—(1) Without prejudice to the generality of *section 25(a)(ii)*, nothing in this Part shall permit a decision-making representative for a relevant person to be given the power to prohibit a particular person from having contact with the relevant person.

(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.

(3) Where there is both a decision-making representative and an attorney (under an enduring power of attorney registered under *section 46*) for a relevant person—

(*a*) the decision-making representative shall not exercise any power granted to the attorney and which is exercisable by the attorney, and

(*b*) the decision-making representative shall exercise any powers which the decision-making representative is authorised to exercise in a manner which is not inconsistent with the powers of the attorney which are exercisable by the attorney.

(4) A decision-making representative for a relevant person shall not refuse consent to the carrying out or continuation of life-sustaining treatment for the relevant person.

(5) A decision-making representative for a relevant person shall not do an act that is intended to restrain the relevant person unless—

(*a*) the relevant person lacks capacity in relation to the matter in question or the decision-making representative reasonably believes that the relevant person lacks such capacity,

(*b*) the decision-making representative reasonably believes that it is necessary to do the act in order to prevent harm to the relevant person or to another person, and

(*c*) the act is a proportionate response to the likelihood of the harm referred to in *paragraph (b)* and to the seriousness of such harm.

(6) For the purposes of this section, a decision-making representative for a relevant person restrains the relevant person if he or she—

(*a*) uses, or indicates an intention to use, force to secure the doing of an act which the relevant person resists,

(*b*) restricts the relevant person's liberty of movement, whether or not the relevant person resists, or

(*c*) authorises another person to do any of the things referred to in *paragraph (a)* or *(b)*.

(7) For the purposes of this section, a decision-making representative for a relevant person does more than restrain the relevant person if he or she deprives the relevant person of the relevant person's liberty within the meaning of Article 5(1) of the European Convention on Human Rights.

(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 made under that section.

Chapter 6

Interim orders, reviews and expert reports

Interim orders.

28.—(1) Where an application under this Part has been brought before the court but not determined, the court may make an interim

order in relation to the relevant person the subject of the application if—

(*a*) the matter to which the order relates is one in respect of which the court may make an order under this Part,

(*b*) the court has reason to believe that the relevant person lacks capacity in relation to the matter, and

(*c*) in the opinion of the court, it is in the interests of the relevant person to make the order without delay.

(2) An order under this section shall—

(*a*) limit the period of time for which the order shall have effect, and

(*b*) limit the operation of the order to matters specified in the order,

but the court may renew the order if it considers that it is in the interests of the relevant person to do so.

(3) The court may vary or revoke an order made under this section, whether of its own motion or pursuant to an application to it by a person entitled by virtue of *section 14* to make the application.

(4) This section shall, with all necessary modifications, apply to a direction which the court may give under this Part as it applies to an order which it may make under this Part.

Review of declaration as respects capacity.

29.—(1) Where the court makes a declaration under *section 15(1)*, an application for a review of the declaration may, with the consent of the court, be made to the court at any time by any of the persons referred to in any of *paragraphs (a)* to *(h)* of *section 14(3)*.

(2) Notwithstanding *subsection (1)*, the court shall in every case review a declaration under *section 15(1)* at intervals specified by the court when making the declaration but in every such case at intervals of—

(*a*) subject to *paragraph (b)*, not more than 12 months,

(*b*) not more than 3 years if the court is satisfied that the relevant person is unlikely to recover his or her capacity.

(3) The periods of 12 months and 3 years referred to in *subsection (2)* shall run from the date on which the court last reviewed the declaration referred to in that subsection.

(4) (*a*) Where, having reviewed the capacity of a relevant person, the court is satisfied that the relevant person no longer lacks capacity to make one or more than one relevant decision, the court shall—

(i) make an order revoking or amending, as appropriate, the declaration concerned under *section 15(1)*,

(ii) make an order varying or discharging, as appropriate,—

(I) a co-decision-making order of which the co-decision-making agreement made by the relevant person is the subject, or

(II) a decision-making order or decision-making representative order of which the relevant person is the subject,

and

(iii) give such directions as it thinks appropriate for the order or orders to have full effect.

(*b*) Where, having reviewed the capacity of a relevant person, the court is satisfied that the relevant person continues to lack capacity to make one or more than one relevant decision, the court shall make an order confirming the declaration concerned under *section 15(1)*.

(5) This section shall not apply where the reason why the application to the court under this Part seeking a declaration under *section 15(1)* relating to capacity in respect of the relevant person the subject of the application was made is no longer of relevance.

Expert reports.

30.—(1) In considering any application under this Part for a declaration, order or review, the court shall have all such powers as are necessary to assist it in making a decision.

(2) For the purposes of an application referred to in *subsection (1)*, the court may direct that such reports as the court considers necessary be furnished to it, including—

(*a*) medical reports relating to the relevant person the subject of the application (including reports relating to the cognitive ability of that person),

(*b*) reports relating to the circumstances of the relevant person (including financial reports and valuations of property in which the relevant person has an interest), and

(*c*) reports from healthcare professionals relating to the relevant person.

Chapter 7

Notification of Public Guardian of declarations, etc., under this Part

Notification of Public Guardian.

31.—Where the court makes a declaration or an order under this Part, or gives a direction under this Part, the registrar of the court making the declaration or order, or giving the direction, shall in each case furnish a copy of the declaration or order, or the direction, as the case may be, to the Public Guardian as soon as is practicable after the declaration or order is made or the direction is given.

Chapter 8

Legal aid in respect of applications under this Part

Amendment of Act of 1995.

32.—The Act of 1995 is amended—

(*a*) in section 26(3)—

(i) in paragraph (*a*), by substituting "has already been given," for "has already been given, and",

(ii) in paragraph (*b*), by substituting "section 28(9)(*c*), and" for "section 28(9)(*c*).", and

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

"(*c*) a party to an application under *Part 4* of the *Assisted Decision-Making (Capacity) Act 2013* shall qualify for legal advice.",

and

(*b*) in section 28(3)—

(i) in paragraph (*a*), by substituting "a child," for "a child, or",

(ii) in paragraph (*b*), by substituting "the *Sex Offenders Act 2001*), and" for "the *Sex Offenders Act 2001*),", and

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

"(*c*) an application under *Part 4* of the *Assisted Decision-Making (Capacity) Act 2013* relating to the matter referred to in *section 15(1)* of that Act,".

PART 5

Wards

Definitions — *Part 5*.

33.—"ward" means a relevant person in the wardship of a wardship court;

"wardship court" means the High Court or Circuit Court exercising its jurisdiction in wardship matters and, in relation to a ward, means that court which made the order by virtue of which the ward is a ward.

Application of this Act to wards.

34.—(1) *Part 2* shall apply to an action taken by a person, in respect of a ward, which is equivalent to or similar to an action which may be taken under this Act by a person (including any court) who falls within any paragraph of the definition of "intervention" in *section 2(1)* as if—

(*a*) the action were an intervention, and

(*b*) the person were an intervener.

(2) Subject to *subsection (1)* and *sections 35* to *37*, this Act shall not apply to wards.

Review of capacity of wards who are adults and discharge of wardship.

35.—(1) An application for the review of the capacity of a ward who has attained the age of 18 years may, with the consent of the wardship court, be made to the wardship court at any time by—

(*a*) the ward, or

(*b*) such other person as appears to the wardship court to have a sufficient interest or expertise in the welfare of the ward.

(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 anniversary of the commencement of this section.

(3) (*a*) Where, having reviewed the capacity of a ward, the wardship court is satisfied that the ward does not lack capacity to make decisions in respect of all matters, it shall discharge the ward from wardship and may make such ancillary orders (including ancillary orders relating to the return to the former ward of his or her property, if any) and give such directions as it thinks appropriate having regard both to the discharge and the circumstances of the former ward.

(*b*) Without prejudice to *section 15(2)*, *paragraph (c)* applies to a ward where, having reviewed the capacity of the ward, the wardship court is satisfied that—

(i) the ward lacks capacity, unless the assistance of a suitable person as a co-decision-maker is made available to him or her, to make one or more than one decision relating to his or her personal welfare or property and affairs, or both, or

(ii) the ward lacks capacity, even if the assistance of a suitable person as a co-decision-maker were made available to him or her, to make one or more than one decision relating to his or her personal welfare or property and affairs, or both.

(*c*) Where this paragraph applies to a ward by virtue of *paragraph (b)*, the wardship court—

(i) shall make the appropriate declaration under *section 15(1)* in relation to the ward as if the wardship court were the court under *Part 4*,

(ii) may, in respect of that declaration, make orders and take other actions (including the giving of directions) under *Part 4* as if the wardship court were the court under that Part, and

(iii) shall discharge the ward from wardship upon such date, or the occurrence of such event, as may be specified by the wardship court, and may make such ancillary orders and give such directions as it thinks appropriate having regard both to the declaration and the circumstances of the former ward.

(4) Immediately upon a ward being discharged from wardship pursuant to *subsection (3)(c)(iii)*, the declaration referred to in *subsection (3)(c)(i)*, and the orders and other actions referred to in *subsection (3)(c)(ii)*, that relate to the former ward shall be deemed to be the declaration, orders and actions of the court under *Part 4*, and the provisions of this Act shall apply to such declaration, orders and actions accordingly.

(5) *section 14* shall, with all necessary modifications, apply to an application under this section to a wardship court as it applies to an application under *Part 4* to the court.

Public Guardian and wards who are adults.

36.—A wardship court may, after consultation with the Public Guardian, in respect of—

(*a*) a ward—

(i) who was a ward immediately before the commencement of this section, and

(ii) who has attained the age of 18 years,

or

(*b*) a class of wards—

(i) who were wards immediately before the commencement of this section, and

(ii) each member of which has attained the age of 18 years,

direct the Public Guardian to exercise his or her functions in relation to that ward, or that class of wards, as the case may be, as if the ward or class of wards were the subject of a declaration under *section 15(1)(b)* that the ward, or the wards who fall within that class, lacked capacity, and the wardship court may, in order to give effect to its direction, give such other directions as it thinks appropriate having regard to the circumstances of the ward or the members of that class of wards, as the case may be.

Public Guardian and wards who are minors.

37.—(1) A wardship court may, after consultation with the Public Guardian, in respect of a ward—

(*a*) who was a ward immediately before the commencement of this section, and

(*b*) who has not attained the age of 18 years,

direct the Public Guardian to exercise his or her functions in relation to that ward as if the ward were the subject of a declaration under *section 15(1)(b)* that the ward lacked capacity, and the wardship court may, in order to give effect to its direction, give such other directions as it thinks appropriate having regard to the circumstances of the ward.

(2) Where, from the commencement of this section, a person who has not attained the age of 18 years is taken into wardship by a wardship court, the Public Guardian, unless the wardship court otherwise directs, shall exercise his or her functions in relation to that ward, subject to such directions (if any) given by the wardship court as it thinks appropriate having regard to the circumstances of

the ward, as if the ward were the subject of a declaration under *section 15(1)(b)* that the ward lacked capacity.

(3) This section applies notwithstanding *section 13*.

PART 6

Enduring Powers of Attorney

Chapter 1

Interpretation, application and characteristics of enduring power

Interpretation — *Part* 6.

38.—(1) In this Part—

"attorney" means the donee of an enduring power, and includes—

(*a*) a person acting pursuant to *section 40(5)*, and

(*b*) the donee of an enduring power created under Part II of the Act of 1996 which has not been registered under section 10 of that Act before the commencement of *section 39*;

"enduring power" shall be construed in accordance with *section 40(1)*;

"invalidated", in relation to a registered enduring power of attorney, means ceasing to be in force;

"notice" means notice in writing;

"personal welfare" includes the matters referred to in *section 25(a)*;

"property and affairs" includes the matters referred to in *section 26(1)(a)*;

"registered", in relation to an enduring power of attorney, means registered under *section 46*, and "registered" shall be construed accordingly.

(2) An application to the High Court under this Part shall be made in a summary manner.

(3) Where any question arises under this Part as to what the donor of an enduring power might at any time be expected to do, it shall be assumed that the donor had the capacity to do so.

Application of this Part, etc.

39.—(1) This Part shall not apply to an enduring power of attorney created under Part II of the Act of 1996 except where the instrument creating such power has not been registered under section 10 of that Act before the commencement of this section.

(2) Part II of the Act of 1996 shall not apply to—

(*a*) an enduring power of attorney created under this Part, or

(*b*) an enduring power of attorney created under that Part II which has not been registered under section 10 of that Act before the commencement of this section.

(3) This Part shall have effect only as respects—

(*a*) an instrument purporting to create an enduring power of attorney executed from the commencement of this section, and

(*b*) an instrument purporting to create an enduring power of attorney—

(i) under Part II of the Act of 1996,

(ii) executed before the commencement of this section, and

(iii) which has not been registered under section 10 of the Act of 1996 before that commencement.

(4) No enduring power of attorney shall be created under the Act of 1996 from the commencement of this section and any instrument purporting to create such a power shall, to the extent that it so purports, be void.

Characteristics of enduring power.

40.—(1) A power of attorney is an enduring power of attorney within the meaning of this Part—

(*a*) if the instrument creating the power contains a statement by the donor to the effect that the donor intends the power to be effective at any subsequent time when the donor lacks or shortly may lack—

(i) capacity to look after his or her personal welfare,

(ii) capacity to manage his or her property and affairs, or

(iii) both capacity to look after his or her personal welfare and capacity to manage his or her property and affairs,

and

(*b*) the enduring power is in compliance with the provisions of this section and regulations made under this section.

(2) An enduring power of attorney created under this Part may relate to the donor's personal welfare or property and affairs, or both, and the instrument creating the power may appoint one or more than one person to be an attorney as respects the donor's personal welfare or property and affairs or specified matters in relation to his or her personal welfare or property and affairs.

(3) The Minister may make regulations as respects enduring powers of attorney, including—

(*a*) prescribing the form of an enduring power of attorney,

(*b*) prescribing procedures and requirements relating to the execution of an enduring power of attorney,

(*c*) prescribing information to be included in or annexed to an enduring power of attorney for the purpose of ensuring that an instrument purporting to create an enduring

power of attorney incorporates adequate information as to the effect of creating or accepting the power,

(*d*) the keeping of accounts by the attorney in relation to the management and disposal of the donor's property,

(*e*) the remuneration (if any) to be paid to the attorney,

(*f*) the giving by the donor of notice of the execution of the power to specified persons or classes of persons,

(*g*) the attestation of the signatures of the donor and the attorney,

(*h*) specific provision for cases where more than one attorney is appointed,

(*i*) prescribing the form of an application under *section 45(1)* for the registration of an enduring power of attorney and the information to be included in the form, and

(*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.

(4) Regulations made under *subsection (3)* may include a requirement that the enduring power of attorney contain a statement—

(*a*) by the donor, that the donor has read the information as to the effect of creating the power of attorney or that such information has been read to the donor,

(*b*) by a legal practitioner (or a member of some other specified class of persons) that, after interviewing the donor and making any necessary enquiries, the legal practitioner (or such member)—

(i) is satisfied that the donor understood the effect of creating the power, and

(ii) has no reason to believe that the document is being executed by the donor as a result of fraud or undue pressure,

(*c*) by a registered medical practitioner, that in his or her opinion at the time the document was executed, the donor had the capacity, with the assistance of such explanations as may have been given to the donor, to understand the effect of creating the power, and

(*d*) by the attorney, that the attorney understands the duties and obligations of an attorney, including—

(i) the duty to act in accordance with the guiding principles,

(ii) the duty to act in the interests of the donor,

(iii) the duty to account fully for any of the property of the donor that comes into the hands of the attorney or within the control of the attorney,

(iv) the requirements relating to the registration of the power, and

(v) the obligation to make reports to the Public Guardian in compliance with *section 48(4)*.

(5) The donor of the enduring power may, in the instrument creating the power, appoint one or more specified persons, being persons who are not disqualified, to act as attorney if an attorney appointed by the power dies or is unable or declines to act, or is disqualified from acting as an attorney.

(6) Subject to *subsection (8)*, a power of attorney is not an enduring power of attorney unless, when executing the instrument creating it, the attorney—

(*a*) is either—

(i) an individual who has attained the age of 18 years who—

(I) is not a person who has been convicted of an offence in relation to the person or property of the donor or the person or property of a child of the donor,

(II) is not a person against whom a safety or barring order has been made in relation to the donor or a child of the donor,

(III) is not a person who is an undischarged bankrupt or currently in a debt settlement arrangement or personal insolvency arrangement or who has been convicted of an offence involving fraud or dishonesty,

(IV) is not a person in respect of whom a declaration has been made under section 150 of the Act of 1990, or

(V) is not a person who is or was the subject of a disqualification order by virtue of Part VII of the Act of 1990,

or

(ii) a trust corporation (within the meaning of section 30 of the Act of 1965),

and

(*b*) is not the owner, or the registered provider, of a nursing home (whether or not it is a nursing home registered under the Health Act 2007), a mental health facility, or a residential facility for persons with disabilities, in which the donor resides, or a person residing with, or an employee of or an agent of, such owner or registered provider, as the case may be, unless the attorney is a spouse or civil partner, parent, child or sibling of the donor.

(7) Subject to *subsection (8)*, where subsequent to the appointment of an attorney for a person under an enduring power of attorney-

(*a*) if the attorney is an individual—

(i) the attorney is convicted of an offence in relation to the person or property of the donor or the person or property of a child of the donor,

(ii) a safety or barring order is made against the attorney in relation to the donor or a child of the donor,

(iii) the attorney becomes an undischarged bankrupt or subject to a debt settlement arrangement or personal insolvency arrangement which is current or is convicted of an offence involving fraud or dishonesty,

(iv) the attorney becomes a person in respect of whom a declaration has been made under section 150 of the Act of 1990, or

(v) the attorney becomes a person who is the subject of a disqualification order by virtue of Part VII of the Act of 1990,

(*b*) if the attorney is a corporation, the attorney ceases to be a trust corporation (within the meaning of section 30 of the Act of 1965), or

(*c*) the attorney becomes the owner, or the registered provider, of a nursing home (whether or not it is a nursing home registered under the Health Act 2007), a mental health facility, or a residential facility for persons with disabilities, in which the donor resides, or a person residing with, or an employee of or an agent of, such owner or registered provider, as the case may be, where the attorney is not a spouse or civil partner, parent, child or sibling of the donor,

the enduring power of attorney concerned is invalidated, to the extent that it relates to the appointment of that attorney, with effect from the day on which the attorney falls within any of *paragraphs (a)* to *(c)*.

(8) *Subsections (6)(a)(i)(III)*, *(IV)* and *(V)* and *(7)(a)(iii)*, *(iv)* and *(v)* shall not apply to an enduring power of attorney which authorises, or to the extent that it authorises, an attorney for a relevant person to make relevant decisions on the personal welfare of the relevant person.

(9) A power of attorney which gives the attorney a right to appoint a substitute or successor is not an enduring power of attorney.

(10) An enduring power shall, unless it provides otherwise, be invalidated to the extent that it relates to an attorney who is the spouse of the donor and subsequently—

(*a*) the marriage is annulled or dissolved either—

(i) under the law of the State, or

(ii) under the law of another state and is, by reason of that annulment or dissolution, not or no longer a subsisting valid marriage under the law of the State,

(*b*) either a decree of judicial separation is granted to either spouse by a court in the State or any decree is so granted by a court outside the State and is recognised in the State as having like effect,

(*c*) a written agreement to separate is entered into between the spouses, or

(*d*) subject to *section 2(2)*, the spouses separate and cease to cohabit for a continuous period of 12 months.

(11) An enduring power shall, unless it provides otherwise, be invalidated to the extent that it relates to an attorney who is the civil partner of the donor and subsequently—

(*a*) the civil partnership is dissolved,

(*b*) a written agreement to separate is entered into between the civil partners, or

(*c*) subject to *section 2(2)*, the civil partners separate and cease to cohabit for a continuous period of 12 months.

(12) Subject to *section 2(2)*, an enduring power shall, unless it provides otherwise be invalidated to the extent that it relates to an attorney who is the cohabitant of the donor and subsequently the cohabitants separate and cease to cohabit for a continuous period of 12 months.

(13) (*a*) An enduring power which has been registered shall not cease to be in force on the exercise by the court of any of its powers under *Part 4* in respect of the donor concerned.

(*b*) 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.

(14) No disclaimer, whether by deed or otherwise, of an enduring power which has not been registered shall be valid until the attorney gives notice of it to the donor.

(15) The invalidation of all or part of an enduring power of attorney under *subsection (7)*, *(10)*, *(11)* or *(12)* shall not of itself affect a relevant decision made by the attorney concerned for the donor prior to the occurrence of the event which caused such invalidation.

(16) In *subsections (6)(b)* and *(7)(c)* "owner" includes a person managing a nursing home, mental health facility, or residential facility for persons with disabilities, or a director (including a shadow director within the meaning of section 27 of the Act of 1990) of, a shareholder in or an employee or agent of, a company which owns or manages such a home or facility.

Scope of authority of enduring power and coming into operation of enduring power, etc.

Scope of authority of attorneys under enduring power — personal welfare decisions.

41.—(1) An enduring power may confer authority on an attorney for a donor to make any decisions about the donor's personal welfare or specified matters concerning the donor's personal welfare.

(2) A personal welfare decision—

(*a*) shall not extend to making decisions on healthcare in respect of a donor in circumstances other than those where the donor lacks or shortly may lack capacity, and

(*b*) extends to giving or refusing treatment by a person providing healthcare for the donor other than refusing life-sustaining treatment.

(3) Subject to *subsection (4)*, the authority to make personal welfare decisions is subject to any conditions or restrictions contained in the instrument.

(4) An enduring power of attorney does not authorise an attorney for a donor to do an act that is intended to restrain the donor unless—

(*a*) the donor lacks capacity in relation to the matter in question or the attorney reasonably believes that the donor lacks such capacity,

(*b*) the attorney reasonably believes that it is necessary to do the act in order to prevent harm to the donor or to another person, and

(*c*) the act is a proportionate response to the likelihood of the harm referred to in *paragraph (b)* and to the seriousness of such harm.

(5) For the purposes of this section, an attorney for a donor restrains the donor if he or she—

(*a*) uses, or indicates an intention to use, force to secure the doing of an act which the donor resists,

(*b*) restricts the donor's liberty of movement, whether or not the donor resists, or

(*c*) authorises another person to do any of the things referred to in *paragraph (a)* or *(b)*.

(6) For the purposes of this section, an attorney for a donor does more than restrain the donor if he or she deprives the donor of the donor's liberty within the meaning of Article 5(1) of the European Convention on Human Rights.

(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.

Scope of authority of attorneys under enduring power — property and affairs of donor.

42.—(1) An enduring power may confer general authority (as described in *subsection (2)*) on an attorney for a donor to act on the donor's behalf in relation to all or a specified part of the property and affairs of the donor or may confer on the attorney general authority to do on the donor's behalf specified things or make decisions on specified matters in relation to the donor's property and affairs and the authority may, in either case, be conferred subject to conditions and restrictions.

(2) Where an instrument is expressed to confer general authority on an attorney for a donor, it operates to confer, subject to the restriction imposed by *subsection (4)* and to any conditions or restrictions contained in the instrument, authority to do on behalf of the donor anything which the donor can lawfully do by attorney.

(3) Subject to any conditions or restrictions contained in the instrument, an attorney for a donor under an enduring power, whether general or limited, may act under the power for the attorney's benefit or that of other persons to the following extent but no further:

(*a*) may act in relation to himself or herself or in relation to any other person if the donor might be expected to provide for his or her or that person's needs respectively; and

(*b*) may do whatever the donor might be expected to do to meet those needs.

(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:

(*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.

Coming into operation and survival of enduring power.

43.—(1) Subject to *subsection (2)* and *section 45*, where a person creates an enduring power of attorney, the power shall not come into operation until it has been registered.

(2) Where an attorney for a donor has made an application for registration of the instrument, then, until the application has been determined, the attorney may take action under the power—

(*a*) to maintain the donor or prevent loss to the donor's assets,

(*b*) to the extent permitted by the enduring power and *section 40*, make a relevant decision on the personal welfare of the donor which cannot reasonably be deferred until the application has been determined, or

(*c*) to maintain the attorney or other persons in so far as that is permitted by *section 42(3)*.

(3) Where an attorney for a donor purports to act pursuant to *subsection (2)*, then, in favour of a person who deals with the attorney without knowledge that the attorney is acting otherwise than in accordance with that subsection, the transaction between them shall be as valid as if the attorney were acting in accordance with the enduring power and *subsection (2)*.

Chapter 3

Registration of enduring power and related matters

Functions of High Court prior to registration.

44.—Where the High Court has reason to believe that the donor of an enduring power may lack or shortly may lack capacity and the High Court is of the opinion that it is necessary, before the instrument creating the enduring power is registered, to exercise any power which would become exercisable under *section 49* on its registration, the High Court may, on application to it by any interested party, exercise that power under this section and may do so whether or not the attorney concerned for the donor has made an application to the Public Guardian for the registration of the instrument.

Application for registration.

45.—(1) Where an attorney for a donor under an enduring power (including an enduring power created under Part II of the Act of 1996 but not registered under section 10 of that Act before the commencement of *section 39*) has reason to believe that the donor lacks or shortly may lack capacity, the attorney shall, as soon as is practicable, make an application, in compliance with regulations made under *section 40(3)*, to the Public Guardian for the registration of the instrument creating the enduring power.

(2) Before making the application the attorney shall comply with the provisions as to notice set out in *Schedule 1*.

(3) The attorney may, before making the application, apply to the High Court for its determination of any question as to the validity of the power.

(4) A certificate to the effect that the donor lacks or shortly may lack—

(*a*) capacity to look after his or her personal welfare,

(*b*) capacity to manage his or her property and affairs, or

(*c*) both capacity to look after his or her personal welfare and capacity to manage his or her property and affairs,

and purporting to be signed by a registered medical practitioner (or other healthcare professional whom the High Court considers suitable to assess a person's capacity) may be accepted as evidence of the matters contained in that certificate.

(5) A person who, in or in connection with an application for registration, makes a statement or gives a certificate which he or she knows to be false in a material particular commits an offence and shall be liable—

(*a*) on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months, or both, and

(*b*) on conviction on indictment, to a fine not exceeding €15,000 or imprisonment for a term not exceeding 2 years, or both.

Registration of enduring power.

46.—(1) On an application for registration being made in accordance with *section 45*, the Public Guardian shall, unless *subsection (2)* applies, register the instrument to which the application relates.

(2) Where in the case of an application for registration of an enduring power—

(*a*) a valid notice of objection to the registration pursuant to *subsection (3)* from a person to whom the attorney has given notice pursuant to *paragraph 2(1)* of *Schedule 1* is received by the Public Guardian before the expiry of the period of 5 weeks beginning on the day on which that notice was given,

(*b*) it appears from the application that there is no one to whom notice has been given under *paragraph 2* of *Schedule 1*, or

(*c*) there is reason to believe that appropriate enquiries might disclose evidence on which the Public Guardian could be satisfied that one of the grounds of objection set out in *subsection (3)* was established,

the Public Guardian shall neither register the instrument nor refuse the application until he or she has made or caused to be made such enquiries (if any) as he or she thinks appropriate in the circumstances of the case.

(3) For the purposes of this Part, a notice of objection to the registration of an instrument is valid if the objection is made on one or more than one of the following grounds:

(*a*) that the power purported to have been created by the instrument was not valid;

(*b*) that the power created by the instrument is no longer a valid and subsisting power;

(*c*) that the donor does not lack or will not shortly lack capacity;

(*d*) that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney;

(*e*) that fraud or undue pressure was used to induce the donor to create the power.

(4) Subject to *section 51*, where the Public Guardian receives a valid objection under this section or is satisfied following the making of enquiries under *subsection (2)* that there are valid grounds for the making of an objection to the registration of the power, the Public Guardian shall apply to the High Court for a determination as to whether the instrument should be registered.

(5) The High Court, in determining an application under *subsection (4)*, may direct that an instrument purporting to create an enduring power of attorney be registered as an enduring power of attorney notwithstanding that it is not in compliance with *section 40* or regulations made under that section where the High Court is satisfied that—

(*a*) the donor intended the power to be effective during any period when the donor lacks capacity,

(*b*) that the power was not executed as a result of fraud or undue pressure,

(*c*) that the attorney is suitable to be the attorney of the donor, and

(*d*) that it is desirable in the interests of justice that the instrument be registered.

Effect and proof of registration.

47.—(1) The effect of the registration of an instrument is that—

(*a*) no revocation of the power by the donor shall be valid unless the High Court confirms the revocation under *section 49(4)*,

(*b*) no disclaimer of the power shall be valid except on notice to the donor and with the consent of the High Court, and

(*c*) the donor may not extend or restrict the scope of the authority conferred by the instrument and no consent or instruction given by the donor after registration shall, in the case of a consent, confer any right and in the case of an instruction, impose or confer any obligation or right on or create any liability of the attorney or other persons having notice of the consent or instruction.

(2) *Subsection (1)* shall apply for so long as the instrument is registered whether or not the donor lacks capacity for the time being.

(3) On the registration of an enduring power, the Public Guardian shall supply an attested copy of the enduring power to the donor and any persons who were given notice under *paragraph 2* of *Schedule 1* of the application for registration.

(4) A document purporting to be a copy, attested by the Public Guardian, of an instrument that has been registered shall be evidence of the contents of the instrument and of the fact that it has been registered.

(5) *Subsection (4)* is without prejudice to any other method of proof authorised by law.

Register of enduring powers of attorney and reports following registration.

48.—(1) The Public Guardian shall establish and maintain a register of enduring powers of attorney that have been registered.

(2) Members of the public may inspect the register free of charge during normal office hours.

(3) The Public Guardian may issue an attested copy of a registered enduring power of attorney to a person who on application satisfies the Public Guardian that the applicant has a good and sufficient reason to be issued with such copy.

(4) (*a*) An attorney under an enduring power of attorney that has been registered shall at least once every 12 months prepare and submit to the Public Guardian a report as to the performance of his or her functions as such attorney.

(*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 all expenses and remuneration paid or reimbursed to the attorney concerned for the donor concerned.

Chapter 4

Functions of High Court as respects enduring power of attorney and revocation of that power

Functions of court as respects registered enduring power of attorney.

49.—(1) Where an instrument has been registered, the High Court shall, on application to it by the donor, the attorney, the Public Guardian or any other interested party, have the functions specified in *subsections (2)* to *(6)*.

(2) The High Court may—

(*a*) determine any question as to the meaning or effect of the instrument,

(*b*) give directions with respect to—

(i) a relevant decision relating to the personal welfare of the donor made or about to be made by the attorney,

(ii) the management or disposal by the attorney of the property and affairs of the donor,

(iii) the rendering of accounts by the attorney and the production of the records kept by the attorney for that purpose, or

(iv) the remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive, or the payment of additional, remuneration,

(*c*) require the attorney to furnish information or produce documents or things in his or her possession as attorney,

(*d*) give any consent or authorisation to act which the attorney would have to obtain from a donor with capacity,

(*e*) authorise the attorney to act for the attorney's own benefit or that of other persons than the donor otherwise than in accordance with *section 42(4)* (but subject to any conditions or restrictions contained in the instrument), or

(*f*) where appropriate, relieve the attorney wholly or partly from any liability incurred or which may have been incurred on account of a breach of duty as an attorney.

(3) Where the High Court gives directions under *subsection (2)(b)*, imposes a requirement under *subsection (2)(c)*, gives consent or an authorisation under *subsection (2)(d)* or an authorisation under *subsection (2)(e)*, it shall cause the Public Guardian to be notified of such directions, the imposition of such requirement, or the giving of such consent or authorisation, as the case may be, and the Public Guardian shall monitor the giving of effect by the attorney to such direction, requirement, or the terms of such consent or authorisation, as the case requires.

(4) (*a*) The High Court shall, on application for that purpose made to it, confirm the revocation of the power if satisfied that the donor has done whatever is necessary in law to effect an express revocation of the power and was capable of revoking the power of attorney at the time of the purported revocation.

(*b*) An application to which *paragraph (a)* refers shall be made on notice to the attorney.

(5) The High Court may direct the Public Guardian to cancel the registration of an instrument in any of the following circumstances:

(*a*) where the High Court confirms the revocation of the power under *subsection (4)* or consents to a disclaimer under *section 47(1)(b)*;

(*b*) on being satisfied that the donor has, and is likely to continue to have, capacity;

(*c*) on being satisfied that the power has ceased to be in force by reason of the death or adjudication in bankruptcy of the donor or by virtue of—

(i) the death or lack of capacity of the attorney, or

(ii) *section 40(7)*, *(10)*, *(11)* or *(12)*;

(*d*) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected;

(*e*) on being satisfied that, having regard to all the circumstances, the attorney is unsuitable to be the attorney for the donor;

(*f*) on being satisfied that fraud or undue pressure was used to induce the donor to create the power;

(*g*) on being satisfied that there is any other good and sufficient reason to do so.

(6) Where the High Court directs the cancellation of the registration of an instrument pursuant to *subsection (5)(e)* or *(f)*, it shall by order revoke the power created by the instrument.

(7) Where the High Court directs the cancellation of the registration of an instrument under *subsection (5)* (other than *paragraph (b)*), the instrument shall be delivered up to the Public Guardian to be cancelled unless the High Court otherwise directs.

Revocation of enduring power of attorney.

50.—(1) A revocation of a registered enduring power may be made by the donor at any time if the donor has capacity to do so.

(2) The Minister may by regulations make provision concerning the revocation of enduring powers of attorney, including—

(*a*) prescribing the form of the revocation of an enduring power,

(*b*) prescribing procedures and requirements relating to the execution of the revocation of an enduring power,

(*c*) prescribing information to be included in or annexed to the document purporting to effect the revocation in order to enable the person revoking the enduring power to have adequate information as to the effect of revoking the enduring power,

(*d*) the inclusion in the document of the following statements:

(i) a statement by the donor, that he or she has read the information referred to in *paragraph (c)* as to the effect of revoking the power or that such information has been read to him or her;

(ii) a statement by a legal practitioner (or a member of another specified class of persons) that, after interviewing the donor and making any necessary enquiries, the legal practitioner (or such member)—

(I) is satisfied that the donor understood the effect of revoking the power, and

(II) has no reason to believe that the document is being executed by the donor as a result of fraud or undue pressure;

(iii) a statement by a registered medical practitioner (or other healthcare professional whom the High Court considers suitable to assess a person's capacity) that, in his or her opinion at the time the revocation was executed by the donor, the donor had the capacity, with the assistance of such explanations as may have been given to the donor, to understand the effect of revoking the power,

(*e*) the attestation of the signature of the donor, and

(*f*) the giving by the donor to specified persons of notice of the execution of the revocation.

Protection of attorney and third person where registered power invalid.

51.—(1) *Subsections (2)* and *(3)* shall apply where an instrument which did not create a valid enduring power has been registered, whether or not the registration has been cancelled at the time of the act or transaction in question.

(2) An attorney who acts pursuant to an enduring power which is not or no longer a valid power shall not thereby incur any liability (either to the donor or to any other person) unless at the time of acting the attorney knows—

(*a*) that the instrument did not create a valid enduring power,

(*b*) that an event has occurred which, if the instrument has created a valid enduring power, would have invalidated the power or caused it to cease to be in force, or

(*c*) that the registration of the instrument has been cancelled.

(3) Any transaction between the attorney and another person shall, in favour of that person, be as valid as if the power had then been in existence, unless at the time of the transaction that person has knowledge of any of the matters referred to in *subsection (2)*.

(4) Where the interest of a purchaser depends on whether a transaction between the attorney and another person was valid by virtue of *subsection (3)*, it shall be presumed in favour of the purchaser, unless the contrary is shown, that the transaction was valid if—

(*a*) the transaction between that person and the attorney was completed within 12 months of the date on which the instrument was registered, or

(*b*) that person makes a statutory declaration before or within 3 months after the completion of the purchase or transaction, that he or she had no reason at the time of the transaction to doubt that the attorney had authority to dispose of or deal in the property which was the subject of the transaction.

(5) For the purposes of section 18 of the Act of 1996 in its application to an enduring power, the revocation of which by the donor is, by virtue of *section 47(1)(a),* invalid unless and until confirmed by the High Court under *section 49(4)*, the following applies:

(*a*) knowledge of the confirmation of the revocation by the High Court constitutes knowledge of the revocation of the power, and

(*b*) knowledge of the unconfirmed revocation does not constitute knowledge of the revocation of the power.

(6) In this section "purchaser" has the meaning assigned to it by section 18 of the Act of 1996.

Joint and several attorneys.

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,

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

(2) This Act, in its application to joint attorneys, applies to them collectively as it applies to a single attorney but subject to *subsection (3)* and *Schedule 2*.

(3) Where 2 or more persons are appointed (or are deemed to have been appointed) to act jointly as attorneys, then, in the case of the death, lack of capacity or disqualification of any one or more of them, the remaining attorney or attorneys may continue to act, whether solely or jointly, as the case may be, unless the instrument creating the enduring power expressly provides to the contrary.

(4) This Act, in its application to joint and several attorneys, applies with the modifications specified in *subsections (5)* to *(8)*.

(5) A failure, as respects any other attorney, to act in accordance with the provisions of *section 40* and regulations made thereunder shall prevent the instrument applying in that attorney's case without affecting its efficacy as respects the other attorney or attorneys.

(6) Where one or more but not both or all the attorneys makes or joins in making an application for registration of the instrument—

(*a*) an attorney who is not an applicant as well as one who is may act in accordance with *section 43(2)* pending the determination of the application,

(*b*) notice of the application shall also be given under *Schedule 1* to the other attorney or attorneys, and

(*c*) objection may validly be taken to the registration on a ground relating to the attorney who is not an applicant as well as to one who is an applicant.

(7) The Public Guardian shall not refuse to register an instrument because a ground of objection referred to in *section 46(3)* to an attorney or a power referred to in the instrument is established if the objection referred to in that section is not made or established as respects another attorney appointed under the instrument, but shall register the instrument and make an application to the High Court under *section 46(4)* in respect of the objection as if the words "the registration of the instrument should be cancelled under *section 49(5)*" were substituted for the words "the instrument should be registered" appearing in *section 46(4)*.

(8) The High Court shall not direct the cancellation of the registration of an instrument pursuant to *section 49(5)(c)*, *(e)* or *(f)* where those provisions do not apply to another attorney or attorneys and, in such case, the Public Guardian shall alter the registration in accordance with the order of the High Court.

Informal decision-making on personal welfare of relevant person.

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)*.

(2) An informal decision-maker who, in taking or authorising the taking of an action in respect of a relevant person, acts in compliance with the provisions of this Act shall not incur any legal liability which he or she would not have incurred if the relevant person—

(*a*) had the capacity to consent in relation to the action, and

(*b*) had given consent to the informal decision-maker to take or authorise the taking of the action.

(3) Where an informal decision-maker takes or authorises the taking of an action pursuant to this section in respect of a relevant person and such action incurs the expenditure of money, then, to the extent that such expenditure is incurred by the informal decision-maker—

(*a*) the informal decision-maker shall be entitled to be indemnified by the relevant person, or

(*b*) if the informal decision-maker has money in his or her possession or control which is the property of the relevant person, the informal decision-maker shall be entitled to reimburse himself or herself from such money.

(4) An informal decision-maker who receives money pursuant to *subsection (3)* shall keep a record of all expenditure incurred and money received.

(5) Where an informal decision-maker takes or authorises the taking of an action pursuant to this section in respect of a relevant person, nothing in this section shall be construed to relieve—

(*a*) the informal decision-maker, or

(*b*) if the informal decision-maker only authorised the taking of the action, the person who took the action,

from his or her civil liability for loss or damage, or his or her criminal liability, arising from his or her negligence in taking the action or authorising the taking of the action, as the case may be.

(6) Where an informal decision-maker takes or proposes to take, or authorises or proposes to authorise the taking of, an action pursuant to this section in respect of a relevant person, *subsections (5)* to *(8)* of *section 27* shall, with all necessary modifications, apply to the informal decision-maker, in so far as that action is concerned, as those subsections apply to a decision-making representative for a

relevant person and an act that is intended to restrain the relevant person.

Limitations to informal decision-making.

54.—(1) 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 can only be taken pursuant to an order of the court or High Court under this Act.

(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,

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

(3) Nothing in this section shall be construed to prevent an informal decision-maker, pending a decision concerning any relevant issue by a court or High Court exercising its powers under this Act, from—

(*a*) providing life-sustaining treatment for a relevant person, or

(*b*) doing any act which he or she reasonably believes to be necessary to prevent a serious deterioration in the health of a relevant person.

PART 8

Public Guardian

Chapter 1

Appointment, functions and terms and conditions of Public Guardian

Appointment of Public Guardian.

55.—(1) The Courts Service shall appoint a person to perform the functions conferred on the Public Guardian by this Act.

(2) In considering a person for appointment as the Public Guardian, the Courts Service shall satisfy itself that the person has the appropriate experience, qualifications, training or expertise to effectively perform the functions referred to in *subsection (1)*.

(3) A person is not eligible for appointment as the Public Guardian if he or she—

(*a*) is a member of either House of the Oireachtas,

(*b*) is entitled under the rules of procedure of the European Parliament to sit in that Parliament, or

(*c*) is a member of a local authority within the meaning of the Local Government Act 2001.

Functions of Public Guardian.

56.—(1) The Public Guardian shall have as objectives—

(*a*) the promotion of public awareness of matters (including the principles and procedures of the United Nations Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006, as amended by any protocol thereto that is for the time being in force in the State) relating to the exercise of their capacity by persons who lack or shortly may lack capacity to make decisions for themselves,

(*b*) the promotion of public confidence in the process of dealing with matters which affect those persons who lack or shortly may lack capacity to make decisions for themselves, and

(*c*) performing his or her functions in an efficient and effective manner.

(2) The functions of the Public Guardian are—

(*a*) to supervise decision-making assistants, co-decision-makers, decision-making representatives and attorneys for relevant persons,

(*b*) to establish and maintain a register of decision-making assistance agreements,

(*c*) to establish and maintain a register of co-decision-making orders,

(*d*) to establish and maintain a register of decision-making orders and decision-making representative orders,

(*e*) to establish and maintain a register of enduring powers of attorney,

(*f*) to appoint special visitors and general visitors,

(*g*) to direct a special visitor or general visitor to visit—

(i) a decision-making assistant, co-decision-maker, decision-making representative or attorney for a relevant person, or

(ii) a relevant person for whom there is a decision-making assistant, co-decision-maker, decision-making representative or attorney 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,

(*h*) to receive security which has been directed by the court to be furnished by a decision-making representative for a relevant person in relation to the performance of his or her functions,

(*i*) if required to do so by the court, to have the custody, control and management of some or all of the property of a relevant person,

(*j*) to receive and consider reports from—

(i) co-decision-makers, decision-making representatives or attorneys for relevant persons, and

(ii) special visitors and general visitors,

(*k*) to report to the court or High Court on such matters relating to proceedings under this Act as the court or High Court, as the case may be, requires,

(*l*) 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 for a relevant person is performing his or her functions as decision-making assistant, co-decision-maker, decision-making representative or attorney, as the case may be,

(*m*) to act on complaints referred to in *paragraph (l)* 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,

(*n*) to nominate persons to act as decision-making representatives where the court is unable to find other persons who are willing or suitable to so act,

(*o*) to appoint court friends for relevant persons,

(*p*) to establish an Internet website (which may be part of the Internet website of the Courts Service) or provide, or arrange for the provision of, other electronic means by which to disseminate information to members of the public relevant to the performance of the Public Guardian's functions and which will, in the opinion of the Public Guardian, assist members of the public to understand the operation of this Act and the Public Guardian's role in relation thereto,

(*q*) to promote public awareness of—

(i) the provisions of *Part 3* to the persons or classes of persons likely to make decision-making assistance agreements,

(ii) the provisions of *Part 4* to the persons or classes of persons likely to make applications to the court under that Part,

(iii) the provisions of *Part 5* to wards and other persons likely to make applications to a wardship court under that Part, and

(iv) the provisions of *Part 6* to persons or classes of persons likely to create enduring powers of attorney under that Part,

(*r*) to provide advice and guidance to bodies in the State in relation to their dealings with relevant persons, and

(*s*) to perform such other functions as are assigned to him or her by or under this Act or another Act.

(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 care or treatment of a relevant person.

(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 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.

(5) Rules of court may make provision relating to the Public Guardian and the performance of his or her functions under this Act, and may in particular make provision for the giving of security by decision-making representatives for relevant persons and the enforcement and discharge of security so given.

(6) Subject to *subsection (7)*, for the purpose 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—

(*a*) at any reasonable time, examine and take copies of—

(i) any health record,

(ii) any record of, or held by, the Health Service Executive and compiled in connection with its social services function, and

(iii) any record held by an institution responsible for the care or treatment of persons, including any hospital or other institution for the care or treatment of mentally ill or intellectually disabled persons and any public or private institution for the care of elderly or infirm persons,

in so far as the record concerned relates to a relevant person, or

(*b*) interview a relevant person in private or otherwise than in private.

(7) *Subsection (6)* shall not entitle the Public Guardian to direct a general visitor to examine and take copies of any health record of a relevant person unless the general visitor is a registered medical practitioner.

Terms and conditions of Public Guardian.

57.—(1) Subject to *subsection (2)*, the Public Guardian shall hold office for a term of 6 years and may be re-appointed to the office for a second or subsequent term.

(2) The Public Guardian shall hold office on such terms and conditions as may be determined by the Courts Service, with the consent of the Minister given after consultation with the Minister for Public Expenditure and Reform, at the time of appointment or reappointment.

(3) A person appointed to be Public Guardian shall be a civil servant in the Civil Service of the State and shall be a member of the staff of the Courts Service.

Chapter 2

Staff of Office of Public Guardian

Staff of Office of Public Guardian.

58.—(1) A person who is a member of the staff of the Office of the Public Guardian shall be a member of the staff of the Courts Service and the provisions of Part V of the Act of 1998 shall apply to such staff.

(2) The Public Guardian may delegate a function under this Act of the Public Guardian to a member of the staff of the Courts Service assigned for the time being to the Office of the Public Guardian (other than the power to delegate under this subsection and the functions specified in *section 63*), and, accordingly, references in this Act to the Public Guardian shall be construed, where appropriate having regard to any delegation made under this subsection, as including, as respects the matters so delegated, references to any person to whom such functions stand delegated.

(3) The Public Guardian may revoke a delegation made pursuant to *subsection (2)*.

(4) The Courts Service shall appoint such number of persons to be members of the staff of the Office of the Public Guardian as may be approved by the Minister with the consent of the Minister for Public Expenditure and Reform.

(5) The Courts Service shall determine the grades of staff of the Office of the Public Guardian and the numbers in each grade as may be approved by the Minister with the consent of the Minister for Public Expenditure and Reform.

(6) The Courts Service shall be the appropriate authority (within the meaning of the Public Service Management (Recruitment and Appointments) Act 2004 and the Civil Service Regulation Acts 1956 to 2005) in relation to members of the staff of the Office of the Public Guardian.

(7) The Courts Service may, from time to time, engage such specialist advisers as the Public Guardian may consider necessary to assist him or her in the discharge of his or her functions under this Act.

(8) Any fees due to an adviser engaged under *subsection (7)* shall be subject to the prior agreement of the Minister, given with the consent of the Minister for Public Expenditure and Reform, and shall form part of the expenses of the Courts Service.

Special visitors and general visitors.

59.—(1) The Public Guardian may, in accordance with this section, appoint a person to be a special visitor or general visitor.

(2) A special visitor—

(*a*) is a registered medical practitioner who has particular knowledge, expertise and experience as respects the capacity of persons, or

(*b*) is a person who, although not a registered medical practitioner, is, in the opinion of the Public Guardian, a person who has particular knowledge, expertise and experience as respects the capacity of persons.

(3) A general visitor is a person who, in the opinion of the Public Guardian, is a person who possesses relevant qualifications, or has other relevant expertise or experience, to assist the Public Guardian in performing his or her supervisory function referred to in *section 56(2)(a)*.

(4) An appointment of a person as a special visitor or general visitor shall be made subject to such terms and conditions (including those relating to remuneration and allowances) as the Minister, with the consent of the Minister for Public Expenditure and Reform, may determine.

Court friends.

60.—(1) The Public Guardian may or, where *section 14(9)* applies, shall, in accordance with this section, appoint a person to be a court friend for a relevant person.

(2) (*a*) A court friend for a relevant person is a person who assists the relevant person in relation to an application under *Part 4* in respect of which the relevant person is the subject.

(*b*) The court, on the hearing of such application, may hear submissions from the court friend on behalf of the relevant person.

(3) Subject to *subsection (4)*, a court friend for a relevant person may, for the purpose of assisting the relevant person in relation to an application under *Part 4* in respect of which the relevant person is the subject—

(*a*) at any reasonable time, examine and take copies of—

(i) any health record,

(ii) any record of, or held by, the Health Service Executive and compiled in connection with its social services function, and

(iii) any record held by an institution responsible for the care or treatment of persons, including any hospital or other institution for the care or treatment of mentally ill or intellectually disabled persons and any

public or private institution for the care of elderly or infirm persons,

in so far as the record concerned relates to the relevant person, and

(*b*) interview the relevant person in private or otherwise than in private.

(4) *Subsection (3)* shall not entitle a court friend to examine and take copies of any health record of a relevant person unless the court friend is a registered medical practitioner.

(5) A court friend for a relevant person shall assist and attend with the relevant person in court or, if the relevant person is not attending the hearing concerned, promote the interests of the relevant person in court.

(6) A court friend for a relevant person may attend and represent the relevant person at any meeting, consultation or discussion, in connection with an application under *Part 4* in respect of which the relevant person is the subject, at which the interests of the relevant person are being considered, whether or not the relevant person is attending the meeting, consultation or discussion, as the case may be.

(7) A court friend for a relevant person may be appointed for such term and subject to such conditions, and may be paid such remuneration and allowances, as the Minister, with the consent of the Minister for Public Expenditure and Reform, may determine.

(8) *Subsections (2)* to *(6)* shall, with all necessary modifications, apply to a person who falls within *paragraph (b)* of *section 14(8)* in respect of a relevant person and to the application under *Part 4* which relates to the relevant person as those subsections apply to a court friend for a relevant person and to the application under *Part 4* which relates to the second-mentioned relevant person.

Panels to be established by Public Guardian.

61.—(1) The Public Guardian shall establish a panel of suitable persons willing and able to act as decision-making representatives for relevant persons where *section 23(3)* applies and from which the Public Guardian shall nominate persons to the court for appointment as decision-making representatives.

(2) A panel of suitable persons willing and able to act as special visitors and from which the Public Guardian shall appoint special visitors.

(3) A panel of suitable persons willing and able to act as general visitors and from which the Public Guardian shall appoint general visitors.

(4) A panel of suitable persons willing and able to act as court friends and from which the Public Guardian shall appoint court friends.

Chapter 4

Reports by Public Guardian and codes of practice

Reports by Public Guardian.

62.—(1) The Public Guardian shall, not later than 31 March in each year, submit to the Board a report on the Public Guardian's

activities in the immediately preceding calendar year or, if this Part commenced during that calendar year on a date other than 1 January, the period on and from that commencement to and including the immediately preceding 31 December.

(2) The Board shall cause a copy of a report submitted to it pursuant to *subsection (1)* to be forwarded to the Minister not later than 28 days after the date on which the Board received the report.

(3) The Public Guardian shall, within 2 years but not earlier than one year from the date of the establishment of the Office of the Public Guardian, submit to the Board a report—

(*a*) on the effectiveness of the Office of the Public Guardian,

(*b*) on the adequacy of the functions assigned under this Act to the Public Guardian, and

(*c*) containing such recommendations (if any) that the Public Guardian thinks would improve the effectiveness of the Office of the Public Guardian or the adequacy of the functions assigned to the Public Guardian under this Act, or both.

(4) The Board shall cause a copy of a report submitted to it pursuant to *subsection (3)* to be sent to the Minister, not later than 28 days after it was so submitted or such longer period as the Minister may permit in any particular case, together with any recommendations the Board may wish to make in relation to it.

(5) At the end of each 5 year period commencing with the date of the establishment of the Office of the Public Guardian, the Public Guardian shall submit to the Board and the Minister a report reviewing the general performance of the objectives and functions of the Public Guardian in the previous 5 years.

(6) The Public Guardian may make any other reports that he or she considers appropriate for drawing to the Board's and the Minister's attention matters that have come to his or her notice and that, in his or her opinion, should, because of their gravity or other exceptional circumstances, be the subject of a special report to the Board and the Minister.

(7) As soon as practicable after receiving a report under this section, the Minister shall cause a copy of it to be laid before each House of the Oireachtas.

Codes of practice.

63.—(1) In this section—

"body concerned", in relation to a person concerned, means the body responsible for hearing complaints about failures to maintain professional standards in respect of the profession practised by the person concerned;

"code of practice" includes part of a code of practice and, in relation to a code of practice published or approved of under *subsection (2)*, means such code as in force from time to time under this section;

"person concerned", in relation to a code of practice, means a person for whom the code is providing guidance.

(2) The Public Guardian may—

(*a*) prepare and publish a code of practice,

(*b*) request another body to prepare a code of practice, or

(*c*) approve of a code of practice prepared by another body, whether or not pursuant to a request referred to in *paragraph (b)*,

for the purposes of one or more of the following:

(i) the guidance of persons, including healthcare professionals, assessing whether a person lacks capacity in relation to any matter;

(ii) the guidance of informal decision-makers (including healthcare professionals who are likely to be informal decision-makers);

(iii) the guidance of decision-making assistants;

(iv) the guidance of co-decision-makers;

(v) the guidance of decision-making representatives;

(vi) the guidance of attorneys;

(vii) the guidance of special visitors;

(viii) the guidance of general visitors;

(ix) the guidance of court friends;

(x) the guidance of healthcare professionals as respects the circumstances in which urgent treatment may be carried out without the consent of a relevant person and what type of treatment may be provided;

(xi) with respect to such other matters concerned with this Act as the Public Guardian thinks appropriate.

(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.

(4) The Public Guardian shall, before publishing a code of practice pursuant to his or her power under *subsection (2)(a)* or approving of a code of practice pursuant to his or her power under *subsection (2)(c)*—

(*a*) make available, to the persons whom the Public Guardian considers appropriate having regard to the matters to which the code relates (which may be any of the persons who fall within *paragraphs (a)* to *(e)* of *subsection (3)*), in such manner as the Public Guardian considers appropriate, a draft of the code,

(*b*) invite the persons to whom he or she has made the draft available to make representations in writing on it to the Public Guardian within a period determined by the Public Guardian, being a period of not less than 30 days from the date of making the draft available to those persons,

(*c*) consider the representations (if any) received, and

(*d*) make any modifications that he or she considers appropriate to the draft.

(5) The Public Guardian shall not publish or approve of a code of practice under *subsection (2)* except with the consent of—

(*a*) if the code does not relate to healthcare matters, the Minister after consultation with the Board, and

(*b*) if the code relates (whether in whole or in part) to healthcare matters, the Minister after consultation with the Minister for Health and the Board.

(6) Where the Public Guardian publishes or approves of a code of practice under *subsection (2)*, he or she shall cause a notice to that effect to be published in *Iris Oifigiúil* and such notice shall specify—

(*a*) the persons or classes of persons for whom the code is providing guidance,

(*b*) the date from which the code has effect, and

(*c*) the place where a copy of the code may be viewed, inspected or purchased.

(7) The Public Guardian shall keep posted, on the Internet website or by the other electronic means referred to in *section 56(2)(p)*, a copy of each code of practice published or approved of under *subsection (2)*, as the code is in force from time to time, on and from the date on which the code has effect.

(8) The Public Guardian shall arrange for that part of the Internet website or other electronic means referred to in *section 56(2)(p)* which contains a code of practice pursuant to *subsection (7)* to ordinarily be accessible by members of the public.

(9) Subject to *subsection (10),* the Public Guardian may—

(*a*) amend or revoke a code of practice published under *subsection (2)*, or

(*b*) withdraw approval of any code of practice approved of under *subsection (2)*.

(10) *Subsections (3)* to *(5)* shall, with all necessary modifications, apply to a code of practice that the Public Guardian proposes to

amend or revoke, or withdraw his or her approval of, under *subsection (9)* as *subsections (3)* to *(5)* apply to a code of practice that the Public Guardian proposes to publish or approve of under *subsection (2)*.

(11) Where the Public Guardian amends or revokes, or withdraws his or her approval of, a code of practice published or approved of under *subsection (2)*, the Public Guardian shall cause a notice to that effect to be published in *Iris Oifigiúil* specifying—

(*a*) the code to which the amendment, revocation or withdrawal of approval, as the case may be, relates and, if applicable, particulars of the amendment,

(*b*) the persons or classes of persons in respect of whom the code is so amended, revoked or approval is withdrawn, as the case may be, and

(*c*) the date from which the amendment, revocation or withdrawal of approval, as the case may be, shall have effect.

(12) A document bearing the seal of the Courts Service and purporting to be a code of practice published or approved of under *subsection (2)* or, where such a code has been amended under this section, the code as so amended, shall be admissible in any legal proceedings.

(13) A person concerned shall have regard to a code of practice published or approved of under *subsection (2)* when performing any function under this Act in respect of which the code provides guidance.

(14) Where it appears to a court, tribunal, or body concerned, conducting any proceedings that—

(*a*) a provision of a code of practice published or approved of under *subsection (2)*, or

(*b*) a failure to comply with a code of practice published or approved of under *subsection (2)*,

is relevant to a question arising in the proceedings, the provision or failure, as the case may be, shall be taken into account in deciding the question.

(15) To the extent that a code of practice published or approved of under *subsection (2)* is for the purposes of court friends, the provisions of the code shall, with all necessary modifications, apply to a person who falls within *paragraph (b)* of *section 14(8)* in respect of a relevant person as those provisions apply to a court friend for a relevant person.

Chapter 5

Courts Service to manage Office of Public Guardian

Amendment of section 5 of Act of 1998.

64.—Section 5 of the Act of 1998 is amended by inserting, after paragraph (*a*), the following new paragraph:

"(*ab*) manage the Office of the Public Guardian;".

Definitions — *Part 9.*

65.—In this Part—

"approved centre" has the meaning assigned to it by section 2 of the Act of 2001;

"clinical director" has the meaning assigned to it by section 2 of the Act of 2001;

"consultant psychiatrist" has the meaning assigned to it by section 2 of the Act of 2001;

"detention order"—

(*a*) in *section 68*, means an order referred to in *subsection (1)* of that section, and

(*b*) in *section 69*, means an order referred to in *subsection (1)* of that section;

"independent consultant psychiatrist" means a consultant psychiatrist who is a member of the panel established under *section 66*;

"mental disorder" has the meaning assigned to it by section 3 of the Act of 2001;

"person concerned" means the person the subject of a detention order.

Panel of independent consultant psychiatrists to be established by Courts Service.

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.

Detention-related safeguards.

67.—Where an issue arises in the course of an application to the court or the High Court under this Act, or otherwise in connection with the operation of this Act, as to whether a person who lacks capacity is suffering from a mental disorder, the procedures provided for under the Act of 2001 shall be followed as respects any proposal to detain (within the meaning of the European Convention on Human Rights) that person.

Review of detention orders in certain circumstances (approved centres).

68.—(1) 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, be reviewed by the wardship court in accordance with *subsection (2)*.

(2) Where, on a review of a detention order, the wardship court is satisfied that the person concerned is suffering from a mental disorder, it may direct that the detention of the person concerned in the approved centre, or such other approved centre as may be determined by the wardship court having obtained the views of the clinical director of that other centre, shall continue for such further period, not exceeding 3 months, and not exceeding 6 months in the case of any subsequent review carried out by the wardship court under *subsection (3)*, as the wardship court may determine.

(3) Before the period referred to in *subsection (2)*, or such other period as may be determined by the wardship court, expires, the wardship court shall review the continued detention of the person concerned in the approved centre and, if satisfied that the person concerned is suffering from a mental disorder, may direct that the person concerned shall continue to be detained in that centre or such other approved centre as may be determined by the wardship court having obtained the views of the clinical director of that other centre.

(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.

(5) The wardship court, when reviewing a detention order, shall hear evidence from the consultant psychiatrist responsible for the care or treatment of the person concerned and from an independent consultant psychiatrist selected by the wardship court.

(6) The function of the independent consultant psychiatrist referred to in *subsection (5)* is to examine the person concerned and report to the wardship court on the results of the examination, in particular whether, in the opinion of the psychiatrist, the person concerned is suffering from a mental disorder.

Review of detention orders in certain circumstances (non-approved centres).

69.—(1) 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, be reviewed by the wardship court in accordance with *subsection (2)*.

(2) Where, on a review of a detention order, the wardship court is satisfied that the person concerned is suffering from a mental disorder, it may direct that the detention of the person concerned in the institution, or in such other place, being an approved centre, as may be determined by the wardship court having obtained the views of the clinical director for that other place, shall continue for such further period, not exceeding 3 months, and not exceeding 6 months in the case of any subsequent review carried out by the wardship court under *subsection (3)*, as the wardship court may determine.

(3) Before the period referred to in *subsection (2)*, or such other period as may be determined by the wardship court, expires, the wardship court shall review the continued detention of the person concerned in the institution or approved centre concerned and, if satisfied that the person concerned is suffering from a mental disorder, may direct that the person concerned shall continue to be detained, whether in the institution where the person concerned was first detained or in an approved centre determined in accordance with *subsection (2)* on a first or subsequent review.

(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.

(5) The wardship court, when reviewing a detention order, shall hear evidence from the consultant psychiatrist responsible for the care or treatment of the person concerned and from an independent consultant psychiatrist selected by the wardship court.

(6) The function of the independent consultant psychiatrist referred to in *subsection (5)* is to examine the person concerned and report to the wardship court on the results of the examination, in particular whether, in the opinion of the psychiatrist, the person concerned is suffering from a mental disorder.

PART 10

Convention on International Protection of Adults

Chapter 1

Preliminary

Interpretation — *Part 10.*

70.—(1) In this Part—

"adult" means a person who—

(*a*) as a result of an impairment or insufficiency of his or her personal faculties, cannot protect his or her interests, and

(*b*) has reached 18 years of age;

"Convention" means the Convention on the International Protection of Adults agreed at The Hague on 13 January 2000 (the text of which, in the English language, is for convenience of reference set out in *Schedule 3*);

"Convention country" means a country in which the Convention is in force;

"protective measure" has the meaning assigned to it by *section 73(1)*;

(2) A reference in this Part to an Article is a reference to an Article of the Convention.

(3) An expression which appears in this Part and in the Convention is to be construed in accordance with the Constitution.

(4) The High Court, in interpreting this Part and the Convention, may have regard to the Explanatory Report on the Convention by Mr. Paul Lagarde of 5 January 2000, edited by the Permanent Bureau of the Hague Conference on private international law.

Convention given effect.

71.—This Part—

(*a*) gives effect in the State to the Convention in so far as this Act does not otherwise do so, and

(*b*) makes related provision as to the private international law of the State.

Countries, territories and nationals.

72.—(1) In this section "country" includes a territory which has its own system of law.

(2) Where a country has more than one territory with its own system of law, a reference to the country, in relation to one of its nationals, is to the territory with which the national has the closer, or the closest, connection.

73.—(1) In this section "protective measure" means a measure directed to the protection of the person or property of an adult, including any of the following— Protective measures.

(*a*) the determination of incapacity and the institution of a protective regime;

(*b*) placing the adult under the protection of a judicial or administrative authority;

(*c*) guardianship, curatorship or any corresponding system;

(*d*) the designation and functions of a person having charge of the adult's person or property, or representing or otherwise helping him or her;

(*e*) placing the adult in a place where protection can be provided;

(*f*) administering, conserving or disposing of the adult's property;

(*g*) authorising a specific intervention for the protection of the person or property of the adult.

(2) Where a measure of like effect to a protective measure has been taken in relation to a person before he or she reached 18 years of age, this Part applies to the measure in so far as it has effect in relation to him or her once he or she has reached that age.

74.—(1) Any function under the Convention of a Central Authority is exercisable in the State by the Public Guardian. Central Authority.

(2) A communication may be sent to the Central Authority in relation to the State by sending it to the Public Guardian.

CHAPTER 2

Jurisdiction of competent authority

75.—(1) The High Court may exercise its functions under this Part (in so far as it cannot otherwise do so) in relation to— Scope of jurisdiction.

(*a*) an adult habitually resident in the State,

(*b*) an adult's property in the State,

(*c*) an adult present in the State or who has property there, if the matter is urgent, or

(*d*) an adult present in the State, if a protective measure which is temporary and limited in its effect to the State is proposed in relation to him or her.

(2) An adult present in the State shall be treated for the purposes of this section as habitually resident there if—

(*a*) his or her habitual residence cannot be ascertained,

(*b*) he or she is a refugee, or

(*c*) he or she has been displaced as a result of disturbance in the country of his or her habitual residence.

Provisions supplementary to *section 75*.

76.—(1) The High Court may also exercise its functions under this Part (in so far as it cannot otherwise do so) in relation to an adult if *subsection (2)* or *(3)* applies in relation to him or her.

(2) This subsection applies in relation to an adult if—

(*a*) he or she is an Irish citizen, and

(*b*) Article 7 has, in relation to the matter concerned, been complied with.

(3) This subsection applies in relation to an adult if the High Court, having consulted such person as it considers appropriate, agrees to a request under Article 8 in relation to the adult.

Exercise of jurisdiction.

77.—(1) *Subsection (2)* shall apply where jurisdiction is exercisable, in respect of Articles 9 to 11, under this Part in connection with a matter which involves a Convention country other than the State.

(2) The High Court shall comply with any duty imposed on it in consequence of such jurisdiction in connection with such matter.

(3) Article 12 also applies, in so far as its provisions allow, in relation to such matters.

Provisions supplementary to *section 77*.

78.—A reference in this Part to the exercise of jurisdiction under this Part is to the exercise of functions under this Act as a result of this Chapter.

Chapter 3

Applicable law

Applicable law.

79.—In exercising jurisdiction under *Chapter 2*, the High Court shall apply the law of the State but may, in so far as the protection of the person or the property of the adult requires, if it thinks that the matter has a substantial connection with a country other than the State, apply or take into consideration the law of that other country.

Provisions supplementary to *section 79*.

80.—Where a protective measure is taken in one contracting state but implemented in another, the conditions of implementation are governed by the law of the other state.

Enduring powers of attorney, etc.

81.—(1) If the donor of an enduring power is habitually resident in the State at the time of granting the power, the law applicable to the existence, extent, modification or extinction of the power is—

(*a*) the law of the State, or

(*b*) if he or she specifies in writing the law of a connected country for the purpose, that law.

(2) If he or she is habitually resident in another country at that time, but the State is a connected country, the law applicable in that respect is—

(*a*) the law of the other country, or

(*b*) if he or she specifies in writing the law of the State for the purpose, that law.

(3) A country is connected, in relation to the donor, if it is a country—

(*a*) of which he or she is a national,

(*b*) in which he or she was habitually resident, or

(*c*) in which he or she has property.

(4) Where this section applies as a result of *subsection (3)(c)*, it applies only in relation to the property which the donor has in the connected country.

(5) The law applicable to the manner of the exercise of an enduring power is the law of the country where it is exercised.

(6) In this Chapter "enduring power" means—

(*a*) an enduring power of attorney as provided for in *section 38*, or

(*b*) any other power of like effect.

Disapplication or modification of enduring power of attorney, etc.

82.—(1) Where an enduring power is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the High Court, in exercising jurisdiction under this Part, may disapply or modify the power.

(2) Where, in accordance with this Chapter, the law applicable to the power is, in one or more respects, that of a country other than the State, the High Court shall, so far as possible, take into consideration the law of the other country in that respect (or those respects).

Drawing up of enduring power of attorney which falls within *section 81(6)(b)*.

83.—Regulations may provide for *Part 6* of this Act, in so far as it relates to the formalities for drawing up an enduring power of attorney, to apply with modifications in relation to an enduring power which falls within *section 81(6)(b)*.

Protection of third parties.

84.—(1) This section applies where a person (in this section referred to as a "representative") in purported exercise of an authority to act on behalf of an adult enters into a transaction with a third party.

(2) The validity of the transaction may not be questioned in proceedings, nor may the third party be held liable, merely because—

(*a*) where the representative and third party are in the State when entering into the transaction, *subsection (3)* applies, or

(*b*) where they are in another country at that time, *subsection (4)* applies.

(3) This subsection applies if—

(*a*) the law applicable to the authority in one or more respects is, as a result of this Part, the law of a country other than the State, and

(*b*) the representative is not entitled to exercise the authority in that respect (or those respects) under the law of that other country.

(4) This subsection applies if—

(*a*) the law applicable to the authority in one or more respects is, as a result of this Chapter, the law of the State, and

(*b*) the representative is not entitled to exercise the authority in that respect (or those respects) under that law.

(5) This section shall not apply if the third party knew or ought to have known that the applicable law was—

(*a*) in a case within *subsection (3)*, the law of the other country,

(*b*) in a case within *subsection (4)*, the law of the State.

Mandatory rules.

85.—Where the High Court is entitled to exercise jurisdiction under this Part, the mandatory provisions of the law of the State apply, regardless of any system of law which would otherwise apply in relation to the matter.

Public policy.

86.—Nothing in this Part requires or enables the application in the State of a provision of the law of another country if its application would be manifestly contrary to public policy.

Chapter 4

Recognition and enforcement

Recognition.

87.—(1) A protective measure taken in relation to an adult under the law of a country other than the State is to be recognised in the State if it was taken on the ground that the adult is habitually resident in the other country.

(2) A protective measure taken in relation to an adult under the law of a Convention country other than the State is to be recognised in the State if it was taken on a ground mentioned in Chapter 2 (Jurisdiction) of the Convention.

(3) The High Court may disapply this section in relation to a measure if it thinks that—

(*a*) the case in which the measure was taken was not urgent,

(*b*) the adult was not given an opportunity to be heard, and

(*c*) that omission amounted to a breach of natural justice.

(4) The High Court may disapply this section in relation to a measure if it thinks that—

(*a*) recognition of the measure would be manifestly contrary to public policy,

(*b*) the measure would be inconsistent with a mandatory provision of the law of the State, or

(*c*) the measure is inconsistent with one subsequently taken, or recognised, in the State in relation to the adult.

(5) The High Court may disapply this section in relation to a measure taken under the law of a Convention country in a matter to which Article 33 applies, if the High Court thinks that that Article has not been complied with in connection with that matter.

Application to High Court for declaration on protective measure.

88.—(1) An interested person may apply to the High Court for a declaration as to whether a protective measure taken under the law of a country other than the State is to be recognised in the State.

(2) No permission is required for an application to the High Court under this section.

Provisions supplementary to *sections 87* and *88*.

89.—For the purposes of *sections 87* and *88*, any finding of fact, on which the authority of the state where the measure was taken based its jurisdiction, is conclusive.

Enforcement.

90.—(1) An interested person may apply to the High Court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than the State is enforceable in the State.

(2) The High Court shall make the declaration if—

(*a*) the measure falls within *section 87(1)* or *(2)*, and

(*b*) that section is not disapplied in relation to it as a result of *section 87(3)*, *(4)* or *(5)*.

(3) A measure to which a declaration under this section relates is enforceable in the State as if it were a measure of like effect taken by the High Court.

Measures taken in relation to those aged under 18.

91.—(1) *Subsection (2)* shall apply where—

(*a*) a provision giving effect to, or otherwise deriving from, the Convention in a country other than the State applies in relation to a person who has not attained the age of 18 years, and

(*b*) a measure is taken in relation to that person in reliance on that provision.

(2) This Chapter shall apply in relation to a measure referred to in *paragraph (b)* of *subsection (1)* as this Chapter applies in relation to a protective measure taken in relation to an adult under the law

of a Convention country other than the State, and the other provisions of this Chapter shall, with all necessary modifications, be construed accordingly.

Review of measures taken outside State.

92.—The High Court may not review the merits of a measure taken outside the State except to establish whether the measure complies with this Part in so far as it is, as a result of this Part, required to do so.

Rules of court.

93.—Rules of court may make provision about an application under *section 88* or *90*.

Chapter 5

Co-operation

Proposal for cross-border placement.

94.—(1) This section applies where it is proposed to place an adult in an establishment in a Convention country other than the State.

(2) The Central Authority in the State must consult the Central Authority or other competent authority in that other country about the proposed placement and, for that purpose, shall send it—

(*a*) a report on the adult, and

(*b*) a statement of the reasons for the proposed placement.

(3) If the Central Authority or other competent authority in the other country opposes the proposed placement within a reasonable time, the proposed placement may not be proceeded with.

Proposal received by Central Authority under Article 33.

95.—A proposal received by the Central Authority in the State under Article 33 in relation to an adult is to proceed unless the Central Authority opposes it within a reasonable time.

Adults in danger, etc.

96.—(1) This section applies if the High Court is informed that an adult—

(*a*) who is in serious danger, and

(*b*) in relation to whom the High Court has taken, or is considering taking, protective measures,

is, or has become, resident in a Convention country other than the State.

(2) The High Court shall arrange for the Central Authority in the State to tell the Central Authority or another competent authority in that other country about—

(*a*) the danger, and

(*b*) the measures taken or under consideration.

Circumstances in which co-operation is prohibited.

97.—The Central Authority may not request from, or send to, a Central Authority or other competent authority in a Convention country information in accordance with Chapter 5 (Co-operation) of the Convention in relation to an adult if it thinks that doing so—

(*a*) would be likely to endanger the adult or his or her property, or

(*b*) would amount to a serious threat to the liberty or life of a member of the adult's family.

CHAPTER 6

Miscellaneous

Certificates.

98.—A certificate given under Article 38 by an authority in a Convention country other than the State is, unless the contrary is shown, proof of the matters contained in it.

Powers to make further provision as to private international law.

99.—The Minister may make regulations to enable the Convention to be given better effect in the State.

Exceptions.

100.—Nothing in this Part or in regulations made under *section 99*, applies to any matter to which the Convention, as a result of Article 4, does not apply.

Regulations.

101.—A reference in this Part to regulations is to regulations made for the purposes of this Part.

Commencement.

102.—The following provisions of this Part have effect only if the Convention is in force in accordance with Article 57:

(*a*) *section 76*;

(*b*) *section 77*;

(*c*) *section 87(2)* and *(5)*;

(*d*) *Chapter 5*; and

(*e*) *section 98*.

PART 11

MISCELLANEOUS

Clinical trials.

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.

Patients whose treatment is regulated by Part 4 of Act of 2001.

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's 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.

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

Payment for necessary goods and services.

105.—(1) A person who lacks capacity to enter into a contract for the sale of goods or services shall pay the supplier a reasonable sum for goods or services supplied at his or her request only if the goods or services are suitable to the person's—

(*a*) condition in life, and

(*b*) actual requirements,

at the time when the goods or services, as the case may be, are so supplied.

(2) Section 2 of the Sale of Goods Act 1893 is amended by deleting "mental incapacity or".

Consent and capacity in specific matters.

106.—Unless otherwise expressly provided, nothing in this Act shall be construed as altering or amending the law in force on the coming into operation of this section relating to the capacity or consent required as respects a person in relation to any of the following:

(*a*) marriage;

(*b*) civil partnership;

(*c*) judicial separation, divorce or a non-judicial separation agreement;

(*d*) the dissolution of a civil partnership;

(*e*) the placing of a child for adoption;

(*f*) the making of an adoption order;

(*g*) guardianship;

(*h*) sexual relations;

(*i*) voting at an election or at a referendum;

(*j*) serving as a member of a jury.

Application under *Part 4*, *6* or *9* to be heard in presence of relevant person or person concerned.

107.—(1) An application to the court or the High Court under *Part 4* (including an application under *section 28*) or *6* shall be heard in the presence of the relevant person the subject of the application unless, in the opinion of the court or the High Court, as the case may be—

(*a*) the fact that the relevant person is not or would not be present in court would not cause an injustice to the relevant person,

(*b*) such attendance may have an adverse effect on the health of the relevant person,

(*c*) the relevant person is unable, whether by reason of old age, infirmity or any other good and substantial reason, to attend the hearing, or

(*d*) the relevant person is unwilling to attend.

(2) *Subsection (1)* shall, with all necessary modifications, apply to a review under *Part 9* by the wardship court of a detention order in respect of the person concerned (within the meaning of *section 65*) as it applies to an application under *Part 4* or *6* to the court or High Court in respect of the relevant person the subject of the application.

Wills.

108.—(1) Subject to *subsection (2)*, nothing in this Act shall be construed as altering or amending the law relating to the capacity of a person to make a will.

(2) Where a person who has made a valid will loses testamentary capacity, the High Court may, acting on its own motion or an application to it by the Public Guardian, alter the will where it is satisfied that exceptional circumstances have arisen since the loss of testamentary capacity and the interests of justice so demand, and a will so altered shall have the same force and effect as if the alteration had been made by that testator in the manner required by the Act of 1965.

Appeals.

109.—An appeal lies—

(*a*) to the High Court from a decision of the Circuit Court exercising any jurisdiction under this Act, and

(*b*) to the Supreme Court from a decision of the High Court exercising any jurisdiction under this Act,

on a point of law only.

Lunacy Regulation (Ireland) Act 1871 to cease to have effect.

110.—(1) Subject to *subsection (2)* and *Part 5*, the Lunacy Regulation (Ireland) Act 1871 shall cease to apply to every application which relates to—

(*a*) whether a person lacks capacity to make a decision concerning his or her personal welfare or his or her property and affairs, and

(*b*) the personal welfare, or the property and affairs, of a person who lacks capacity in that regard,

made from the commencement of this section.

(2) Subject to *Part 5*, nothing in *subsection (1)* shall affect the validity of any order—

(*a*) made by the High Court or Circuit Court within their respective jurisdiction, and

(*b*) which was in force immediately before the commencement of this section.

Amendment of section 26A of Courts (Supplemental Provisions) Act 1961.

111.—Section 26A (inserted by section 189 of the Personal Insolvency Act 2012) of the Courts (Supplemental Provisions) Act 1961 is amended—

(*a*) by inserting the following after subsection (2):

"(2A) The functions, power and jurisdiction conferred on the Circuit Court by the *Assisted Decision-Making (Capacity) Act 2013* may, subject to this section, be performed and exercised by a specialist judge.",

and

(*b*) in subsection (5), by inserting ", or subsections (2A) and (3)," after "subsections (2) and (3)".

Amendment of Civil Registration Act 2004.

112.—The Civil Registration Act 2004 is amended—

(*a*) in section 2(2), by substituting the following for paragraph (d):

"(*d*) one of the parties to the proposed marriage lacks, or both of the parties to the proposed marriage lack, the capacity (within the meaning of the *Assisted Decision-Making (Capacity) Act 2013*) to consent to the marriage,",

(*b*) in section 2(2A), by substituting the following for paragraph (d):

"(*d*) one of the parties to the proposed civil partnership lacks, or both of the parties to the proposed civil partnership lack, the capacity (within the meaning of the *Assisted Decision-Making (Capacity) Act 2013*) to consent to the civil partnership,",

(*c*) in section 58—

(i) in subsection (9)(a), by substituting "Subject to subsection (12), a party" for "A party", and

(ii) by substituting the following for subsection (11):

"(11) An objection on the ground that one of the parties to the proposed marriage lacks, or both of the parties to the proposed marriage lack, the capacity to consent to the marriage shall be accompanied by—

(*a*) a copy of a declaration by the Circuit Court under *section 15(1)* of the *Assisted Decision-Making (Capacity) Act 2013* that one of the parties to the proposed marriage lacks, or both of the parties to the proposed marriage lack, the capacity to make a decision to consent to being married,

(*b*) a copy of a declaration by the Circuit Court under *section 15(1)* of the *Assisted Decision-Making (Capacity) Act 2013* that one of the parties to the proposed marriage lacks, or both of the parties to the proposed marriage lack, the capacity to make the class of decisions specified in the declaration where the decision to consent to being married is a decision which falls within that class of decisions, or

(*c*) a copy of an application made under *Part 4* of the *Assisted Decision-Making (Capacity) Act 2013* (accompanied by a copy of a related interim order of the Circuit Court under that Part) to the Circuit Court by the person making the objection where the application relates (whether in whole or in part) to the capacity of one of the parties, or both of the parties, to the proposed marriage to make a decision to consent to being married.

(12) Without prejudice to *section 109* of the *Assisted Decision-Making (Capacity) Act 2013*, subsection (9) shall not apply to a decision referred to in that subsection to the extent that the decision relates to an objection referred to in subsection (11).",

and

(*d*) in section 59F—

(i) in subsection (11), by substituting "Subject to subsection (15), a party" for "A party", and

(ii) by substituting the following for subsection (14):

"(14) An objection on the ground that one of the parties to the proposed civil partnership lacks, or both of the parties to the proposed civil partnership lack, the capacity to consent to being in a civil partnership shall be accompanied by—

(*a*) a copy of a declaration by the Circuit Court under *section 15(1)* of the *Assisted Decision-Making (Capacity) Act 2013* that one of the parties to the proposed civil partnership lacks, or both of the parties to the proposed civil partnership lack, the capacity to make a decision to consent to being in a civil partnership,

(*b*) a copy of a declaration by the Circuit Court under *section 15(1)* of the *Assisted Decision-Making (Capacity) Act 2013* that one of the parties to the proposed civil partnership lacks, or both of the parties to the proposed civil partnership lack, the capacity to make the class of decisions specified in the declaration where the decision to consent to being in a civil partnership is a decision which falls within that class of decisions, or

(*c*) a copy of an application made under *Part 4* of the *Assisted Decision-Making (Capacity) Act 2013* (accompanied by a copy of a related interim order of the Circuit Court under that Part) to the Circuit Court by the person making the objection where the application relates (whether in whole or in part) to the capacity of one of the parties, or both of the parties, to the

proposed civil partnership to make a decision to consent to being in a civil partnership.

(15) Without prejudice to *section 109* of the *Assisted Decision-Making (Capacity) Act 2013*, subsection (11) shall not apply to a decision referred to in that subsection to the extent that the decision relates to an objection referred to in subsection (14).".

Offences.

113.—A decision-making assistant, co-decision-maker, decision-making representative, attorney or informal decision-maker for a relevant person who ill-treats or wilfully neglects the relevant person 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.

Review of this Act.

114.—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.

SCHEDULE 1

Section 45.

PART 1

Duty to give notice to donor and other persons

Duty to give notice to donor

1. (1) Subject to *subparagraph (2)*, before making an application for registration, the attorney shall give notice of intention to do so to the donor.

(2) *Paragraph 4(2)* shall apply in relation to the donor as it applies in relation to a person who is entitled to receive notice under this Schedule.

Duty to give notice to other persons

2. (1) Subject to *paragraph 4*—

(*a*) if regulations made under *section 40(3)* have required notice of the execution of an enduring power of attorney to be brought to the attention of specified persons, the attorney shall, before making an application for registration, give notice of intention to do so to those persons,

(*b*) if any of those persons is dead or lacks capacity or his or her whereabouts cannot be reasonably ascertained, the attorney shall give notice of intention to make such an application to the other person or persons, and

(*c*) if all those persons are dead or lack capacity or their whereabouts cannot be reasonably ascertained, the attorney shall, before making such an application, give notice of intention to do so to the persons (if any) who are entitled to receive notice by virtue of *paragraph 3.*

(2) When giving notice pursuant to *subparagraph (1)*, the attorney shall also give notice to the Public Guardian of intention to apply to him or her for registration of the enduring power.

3. (1) Subject to the limitations contained in *subparagraphs (2)* to *(4)*, persons of the following classes are entitled to receive notice under *paragraph 2(1)(c)*:

(*a*) a decision-making assistant, co-decision-maker or decision-making representative for the donor;

(*b*) the donor's spouse or civil partner;

(*c*) the donor's children;

(*d*) a person with whom the donor is cohabiting;

(*e*) the donor's parents;

(*f*) the donor's brothers and sisters, whether of the whole or half blood;

(*g*) the widow or widower of a child of the donor;

(*h*) the donor's grandchildren;

(*i*) the children of the donor's brothers and sisters of the whole blood; and

(*j*) the children of the donor's brothers and sisters of the half blood.

(2) A person is not entitled to receive notice under this paragraph if the name or address of that person is not known to and cannot be reasonably ascertained by the attorney.

(3) Except where *subparagraph (4)* applies, no more than 3 persons are entitled to receive notice by virtue of this paragraph and, in determining the persons who are so entitled, persons falling within *clause (a)* of *subparagraph (1)* are to be preferred to persons falling within *clause (b)* of that subparagraph, persons falling within *clause (b)* are to be preferred to persons falling within *clause (c)* of that subparagraph, and so on.

(4) Notwithstanding the limit of 3 specified in *subparagraph (3)*, where—

(*a*) there is more than one person falling within any of *clauses (a)* to *(h)* of *subparagraph (1)*, and

(*b*) at least one of those persons would be entitled to receive notice by virtue of this paragraph,

then, subject to *subparagraph (2)*, all the persons falling within that clause are entitled to receive notice by virtue of this paragraph.

4. (1) An attorney shall not be required to give notice under *paragraph 2* to himself or herself or to any other attorney under the power who is joining in making the application, notwithstanding that he or she or, as the case may be, the other attorney is entitled to receive notice by virtue of *paragraph 3*.

(2) In the case of any person who is entitled to receive notice under this Schedule, the attorney, before applying for registration, may make an application to the Public Guardian to be dispensed from the requirement to give that person notice; and the Public Guardian may grant the application if he or she is satisfied—

(*a*) that it would be undesirable or impracticable for the attorney to give such notice, or

(*b*) that no useful purpose is likely to be served by giving it.

PART 2

Contents of notices

5. A notice to the donor under this Schedule—

(*a*) shall be in the form prescribed by regulations made under *section 40(3)*,

(*b*) shall state that the attorney proposes to make an application to the Public Guardian for the registration of the instrument creating the enduring power in question, and

(*c*) shall inform the donor that, whilst the instrument remains registered, any revocation of the power by the donor will be ineffective unless and until the revocation is confirmed by the High Court.

6. A notice to any other person under this Schedule—

(*a*) shall be in the form prescribed by regulations made under *section 40(3)*,

(*b*) shall contain the statement mentioned in *paragraph 5(b)*,

(*c*) shall inform the person to whom it is given that that person may object to the proposed registration by notice in writing to the Public Guardian before the expiry of the period of 5 weeks beginning with the day on which the notice under this Schedule was so given, and

(*d*) shall specify, as the grounds on which an objection to registration may be made, the grounds set out in *section 46(3)*.

PART 3

Duty to give notice to other attorneys

7. (1) Subject to *subparagraph (2)*, before making an application for registration, an attorney under a joint and several power shall give notice of intention to do so to any other attorney under the power who is not joining in making the application; and *paragraphs 4(2)* and *6* shall apply in relation to attorneys entitled to receive notice by virtue of this paragraph as they apply in relation to persons entitled to receive notice under this Schedule.

(2) An attorney is not entitled to receive notice by virtue of this paragraph if his or her address is not known to and cannot be reasonably ascertained by the applying attorney.

PART 4

Supplementary

8. For the purposes of this Schedule, a notice given by post may be sent by prepaid registered post to the usual or last known place of residence of the person to whom it is to be given and shall be regarded as given on the day on which it was posted.

Section 52.

SCHEDULE 2

Joint Attorneys

1. In *section 40(6)*, the reference to the execution of the instrument shall be read as a reference to the execution of the instrument by the second or last attorney.

2. In *sections 40(8)*, *44*, *46(3)* and *49(2)* and *(5)*, references to the attorney shall be read as including references to any attorney under the power and, in the case of *section 49(5)(c)*, subject to *section 52(3)*.

SCHEDULE 3

Section 70.

Convention on the International Protection of Adults

(Concluded 13 January 2000)

The States signatory to the present Convention,

Considering the need to provide for the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests,

Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults,

Recalling the importance of international co-operation for the protection of adults,

Affirming that the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations,

Have agreed on the following provisions—

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

(1) This Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.

(2) Its objects are—

a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult;

b) to determine which law is to be applied by such authorities in exercising their jurisdiction;

c) to determine the law applicable to representation of the adult;

d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;

e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

Article 2

(1) For the purposes of this Convention, an adult is a person who has reached the age of 18 years.

(2) The Convention applies also to measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken.

Article 3

The measures referred to in Article 1 may deal in particular with—

a) the determination of incapacity and the institution of a protective regime;

b) the placing of the adult under the protection of a judicial or administrative authority;

c) guardianship, curatorship and analogous institutions;

d) the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult;

e) the placement of the adult in an establishment or other place where protection can be provided;

f) the administration, conservation or disposal of the adult's property;

g) the authorisation of a specific intervention for the protection of the person or property of the adult.

Article 4

(1) The Convention does not apply to—

a) maintenance obligations;

b) the formation, annulment and dissolution of marriage or any similar relationship, as well as legal separation;

c) property regimes in respect of marriage or any similar relationship;

d) trusts or succession;

e) social security;

f) public measures of a general nature in matters of health;

g) measures taken in respect of a person as a result of penal offences committed by that person;

h) decisions on the right of asylum and on immigration;

i) measures directed solely to public safety.

(2) Paragraph 1 does not affect, in respect of the matters referred to therein, the entitlement of a person to act as the representative of the adult.

CHAPTER II — JURISDICTION

Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the adult have jurisdiction to take measures directed to the protection of the adult's person or property.

(2) In case of a change of the adult's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6

(1) For adults who are refugees and those who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these adults are present as a result of their displacement have the jurisdiction provided for in Article 5, paragraph 1.

(2) The provisions of the preceding paragraph also apply to adults whose habitual residence cannot be established.

Article 7

(1) Except for adults who are refugees or who, due to disturbances occurring in their State of nationality, are internationally displaced, the authorities of a Contracting State of which the adult is a national have jurisdiction to take measures for the protection of the person or property of the adult if they consider that they are in a better position to assess the interests of the adult, and after advising the authorities having jurisdiction under Article 5 or Article 6, paragraph 2.

(2) This jurisdiction shall not be exercised if the authorities having jurisdiction under Article 5, Article 6, paragraph 2, or Article 8 have informed the authorities of the State of which the adult is a national that they have taken the measures required by the situation or have decided that no measures should be taken or that proceedings are pending before them.

(3) The measures taken under paragraph 1 shall lapse as soon as the authorities having jurisdiction under Article 5, Article 6, paragraph 2, or Article 8 have taken measures required by the situation or have decided that no measures are to be taken. These authorities shall inform accordingly the authorities which have taken measures in accordance with paragraph 1.

Article 8

(1) The authorities of a Contracting State having jurisdiction under Article 5 or Article 6, if they consider that such is in the interests of the adult, may, on their own motion or on an application by the authority of another Contracting State, request the authorities of one of the States mentioned in paragraph 2 to take measures for the protection of the person or property of the adult. The request may relate to all or some aspects of such protection.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are—

a) a State of which the adult is a national;

b) the State of the preceding habitual residence of the adult;

c) a State in which property of the adult is located;

d) the State whose authorities have been chosen in writing by the adult to take measures directed to his or her protection;

e) the State of the habitual residence of a person close to the adult prepared to undertake his or her protection;

f) the State in whose territory the adult is present, with regard to the protection of the person of the adult.

(3) In case the authority designated pursuant to the preceding paragraphs does not accept its jurisdiction, the authorities of the Contracting State having jurisdiction under Article 5 or Article 6 retain jurisdiction.

Article 9

The authorities of a Contracting State where property of the adult is situated have jurisdiction to take measures of protection concerning that property, to the extent that such measures are compatible with those taken by the authorities having jurisdiction under Articles 5 to 8.

Article 10

(1) In all cases of urgency, the authorities of any Contracting State in whose territory the adult or property belonging to the adult is present have jurisdiction to take any necessary measures of protection.

(2) The measures taken under the preceding paragraph with regard to an adult habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 9 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to an adult who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

(4) The authorities which have taken measures under paragraph 1 shall, if possible, inform the authorities of the Contracting State of the habitual residence of the adult of the measures taken.

Article 11

(1) By way of exception, the authorities of a Contracting State in whose territory the adult is present have jurisdiction to take measures of a temporary character for the protection of the person of the adult which have a territorial effect limited to the State in question, in so far as such measures are compatible with those already taken by the authorities which have jurisdiction under Articles 5 to 8, and after advising the authorities having jurisdiction under Article 5.

(2) The measures taken under the preceding paragraph with regard to an adult habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 8 have taken a decision in respect of the measures of protection which may be required by the situation.

Article 12

Subject to Article 7, paragraph 3, the measures taken in application of Articles 5 to 9 remain in force according to their terms, even if a

change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III — APPLICABLE LAW

Article 13

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

(2) However, in so far as the protection of the person or the property of the adult requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

Article 14

Where a measure taken in one Contracting State is implemented in another Contracting State, the conditions of its implementation are governed by the law of that other State.

Article 15

(1) The existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests, are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing.

(2) The States whose laws may be designated are—

a) a State of which the adult is a national;

b) the State of a former habitual residence of the adult;

c) a State in which property of the adult is located, with respect to that property.

(3) The manner of exercise of such powers of representation is governed by the law of the State in which they are exercised.

Article 16

Where powers of representation referred to in Article 15 are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult, they may be withdrawn or modified by measures taken by an authority having jurisdiction under the Convention. Where such powers of representation are withdrawn or modified, the law referred to in Article 15 should be taken into consideration to the extent possible.

Article 17

(1) The validity of a transaction entered into between a third party and another person who would be entitled to act as the adult's representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was

not entitled to act as the adult's representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that such capacity was governed by the latter law.

(2) The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 18

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 19

In this Chapter the term 'law' means the law in force in a State other than its choice of law rules.

Article 20

This Chapter does not prevent the application of those provisions of the law of the State in which the adult is to be protected where the application of such provisions is mandatory whatever law would otherwise be applicable.

Article 21

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy.

CHAPTER IV — RECOGNITION AND ENFORCEMENT

Article 22

(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

(2) Recognition may however be refused—

a) if the measure was taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the provisions of Chapter II;

b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

c) if such recognition is manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable;

d) if the measure is incompatible with a later measure taken in a non-Contracting State which would have had jurisdiction under Articles 5 to 9, where this later measure fulfils the requirements for recognition in the requested State;

e) if the procedure provided in Article 33 has not been complied with.

Article 23

Without prejudice to Article 22, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 24

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 25

(1) If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.

(2) Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.

(3) The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 22, paragraph 2.

Article 26

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 27

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law.

CHAPTER V — CO-OPERATION

Article 28

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.

(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 29

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.

(2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of adults.

Article 30

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to—

a) facilitate communications, by every means, between the competent authorities in situations to which the Convention applies;

b) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of an adult where it appears that the adult may be present and in need of protection within the territory of the requested State.

Article 31

The competent authorities of a Contracting State may encourage, either directly or through other bodies, the use of mediation, conciliation or similar means to achieve agreed solutions for the protection of the person or property of the adult in situations to which the Convention applies.

Article 32

(1) Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the adult so requires, may request any authority of another Contracting State which has information relevant to the protection of the adult to communicate such information.

(2) A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

(3) The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention.

Article 33

(1) If an authority having jurisdiction under Articles 5 to 8 contemplates the placement of the adult in an establishment or other place where protection can be provided, and if such placement is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the adult together with the reasons for the proposed placement.

(2) The decision on the placement may not be made in the requesting State if the Central Authority or other competent authority of the requested State indicates its opposition within a reasonable time.

Article 34

In any case where the adult is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the adult have been taken or are under consideration, if they are informed that the adult's residence has changed to, or that the adult is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 35

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the adult's person or property in danger, or constitute a serious threat to the liberty or life of a member of the adult's family.

Article 36

(1) Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.

(2) Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 37

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI — GENERAL PROVISIONS

Article 38

(1) The authorities of the Contracting State where a measure of protection has been taken or a power of representation confirmed may deliver to the person entrusted with protection of the adult's person or property, on request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred.

(2) The capacity and powers indicated in the certificate are presumed to be vested in that person as of the date of the certificate, in the absence of proof to the contrary.

(3) Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 39

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 40

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 41

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 42

Each Contracting State may designate the authorities to which requests under Article 8 and Article 33 are to be addressed.

Article 43

(1) The designations referred to in Article 28 and Article 42 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law not later than the date of the deposit of the instrument of ratification, acceptance or approval of the Convention or of accession thereto. Any modifications thereof shall also be communicated to the Permanent Bureau.

(2) The declaration referred to in Article 32, paragraph 2, shall be made to the depositary of the Convention.

Article 44

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the person or property of the adult shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

Article 45

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units—

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;

b) any reference to the presence of the adult in that State shall be construed as referring to presence in a territorial unit;

c) any reference to the location of property of the adult in that State shall be construed as referring to location of property of the adult in a territorial unit;

d) any reference to the State of which the adult is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the adult has the closest connection;

e) any reference to the State whose authorities have been chosen by the adult shall be construed

—as referring to the territorial unit if the adult has chosen the authorities of this territorial unit;

—as referring to the territorial unit with which the adult has the closest connection if the adult has chosen the authorities of the State without specifying a particular territorial unit within the State;

f) any reference to the law of a State with which the situation has a substantial connection shall be construed as referring to the law of a territorial unit with which the situation has a substantial connection;

g) any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure in force in such territorial unit or authority of the territorial unit in which such measure was taken;

h) any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure in force in such territorial unit or authority of the territorial unit in which recognition or enforcement is sought;

i) any reference to the State where a measure of protection is to be implemented shall be construed as referring to the territorial unit where the measure is to be implemented;

j) any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit.

Article 46

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply—

a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;

b) in the absence of such rules, the law of the relevant territorial unit as defined in Article 45 applies.

Article 47

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply—

a) if there are rules in force in such a State identifying which among such laws applies, that law applies;

b) in the absence of such rules, the law of the system or the set of rules of law with which the adult has the closest connection applies.

Article 48

In relations between the Contracting States this Convention replaces the *Convention concernant l'interdiction et les mesures de protection analogues*, signed at The Hague 17 July 1905.

Article 49

(1) The Convention does not affect any other international instrument to which Contracting States are Parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.

(2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of adults habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.

(3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.

(4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 50

(1) The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.

(2) The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.

(3) The Convention shall apply from the time of its entry into force in a Contracting State to powers of representation previously granted under conditions corresponding to those set out in Article 15.

Article 51

(1) Any communication sent to the Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.

(2) However, a Contracting State may, by making a reservation in accordance with Article 56, object to the use of either French or English, but not both.

Article 52

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII — FINAL CLAUSES

Article 53

(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law on 2 October 1999.

(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 54

(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 57, paragraph 1.

(2) The instrument of accession shall be deposited with the depositary.

(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b)* of Article 59. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 55

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 56

(1) Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 55, make the reservation provided for in Article 51, paragraph 2. No other reservation shall be permitted.

(2) Any State may at any time withdraw the reservation it has made. The withdrawal shall be notified to the depositary.

(3) The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 57

(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 53.

(2) Thereafter the Convention shall enter into force—

a) for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 54, paragraph 3;

c) for a territorial unit to which the Convention has been extended in conformity with Article 55, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 58

(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 59

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 54 of the following—

a) the signatures, ratifications, acceptances and approvals referred to in Article 53;

b) the accessions and objections raised to accessions referred to in Article 54;

c) the date on which the Convention enters into force in accordance with Article 57;

d) the declarations referred to in Article 32, paragraph 2, and Article 55;

e) the agreements referred to in Article 37;

f) the reservation referred to in Article 51, paragraph 2, and the withdrawal referred to in Article 56, paragraph 2;

g) the denunciations referred to in Article 58.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 13 January, 2000, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law.

Click here for Bill

AN BILLE UM CHINNTEOIREACHT CHUIDITHE (CUMAS), 2013

ASSISTED DECISION-MAKING (CAPACITY) BILL 2013

EXPLANATORY MEMORANDUM

Background and purpose of the Bill

The purpose of the Bill is to reform the law and to provide a modern statutory framework that supports decision-making by adults and enables them to retain the greatest amount of autonomy possible in situations where they lack or may shortly lack capacity.

The Bill changes the existing law on capacity, shifting from the current all or nothing status approach to a flexible functional one, whereby capacity is assessed on an issue- and time-specific basis. The Bill replaces the Wards of Court system with a modern statutory framework to assist persons in exercising their decision-making capacity.

The Bill provides a statutory framework enabling formal agreements to be made by persons who consider that their capacity is in question, or may shortly be in question, to appoint a trusted person to act as their decision-making assistant to assist them in making decisions or as a co-decision-maker who will make decisions jointly with them.

The Bill also provides for the making of applications to court in respect of persons whose capacity may be in question to seek a declaration as to whether those persons lack capacity and for the making of consequent orders approving co-decision-making agreements or appointing decision-making representatives.

The Bill provides for protection from liability for informal decision-makers in relation to personal welfare and healthcare decisions made on behalf of a person with impaired capacity where such decisions are necessary and where no formal decision-making arrangements are in place. It modernises the law relating to enduring powers of attorney.

The Bill also provides for the establishment of a new statutory office, the Office of the Public Guardian. The Office of the Public Guardian will supervise decision-making assistants, co-decision-makers, decision-making representatives and persons holding enduring powers of attorney.

Reform of the law on decision-making capacity is one of the actions required to enable the State to ratify the United Nations Convention on the Rights of Persons with Disabilities.

The Bill gives effect in the State to the Hague Convention on the International Protection of Adults.

Provisions of the Bill

The Bill contains 11 Parts. The following paragraphs contain a brief description and an outline of the principal reforms proposed in each Part.

PART 1

PRELIMINARY AND GENERAL

Part 1 provides standard provisions relating to citation, commencement and laying of regulations.

Section 1 (Short title and commencement) sets out the short title and citation (subsection (1)), and provides that the Minister may make orders for the commencement of various provisions of the Bill (subsection (2)).

Section 2 (Interpretation — general) is a standard interpretation section defining the primary terms referred to throughout the Bill.

Section 3 (Person's capacity to be construed functionally) makes provision for a functional definition of capacity. Capacity must be assessed on the basis of a person's cognitive ability to understand the nature and consequences of a decision in the context of available choices at the time of the decision. This time- and issue-specific approach allows for fluctuations in capacity (subsection (1)). Subsection (2) provides that a person lacks capacity to make a decision if he or she is unable to understand, retain or weigh information relevant to a decision or is unable to communicate his or her decision either directly or through a third party. The use of communication tools (such as sign-language and visual aids) does not imply that the person is unable to understand the information (subsection (3)). Subsection (4) provides that a person is regarded as having the capacity to make a decision even if he or she is able to retain the information relevant to the decision for a short time only. Subsection (5) provides that information relevant to a decision includes information about the reasonably foreseeable consequences of the available choices and of failing to make a decision. Any question as to whether a person has capacity shall be decided on the balance of probabilities (subsection (6)).

Section 4 (Circuit Court to have exclusive jurisdiction under this Act except for certain matters reserved for High Court, etc.) confers exclusive jurisdiction on the Circuit Court to deal with applications under the Bill dealing with determination of capacity, the approval of co-decision-making agreements and the appointment of decision-making representatives for persons lacking capacity (subsection (1)). Certain matters regarding enduring powers of attorney, wards of court and detention matters are reserved for the High Court. Subsection (2) also reserves to the High Court matters relating to non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment and organ donation.

Section 5 (Laying of regulations) is a standard provision that provides for the laying of any regulations made under the Bill before the Houses of the Oireachtas.

Section 6 (Expenses) is a standard provision enabling the expenses of the Minister to be paid out of moneys provided by the Oireachtas. It provides a general authority for the Minister, with the sanction of the Minister for Public Expenditure and Reform, to expend moneys provided by the Oireachtas.

Section 7 (Repeal of the Marriage of Lunatics Act 1811) repeals the Marriage of Lunatics Act 1811.

PART 2

PRINCIPLES THAT APPLY BEFORE AND DURING INTERVENTION IN RESPECT OF RELEVANT PERSONS

Part 2 contains guiding principles which set out a general overarching framework to guide persons (and the court) in making an intervention such as assisting or making a decision on behalf of a person who lacks capacity.

Section 8 (Guiding principles) sets out the principles applying to all decisions and actions taken under the Bill in support or on behalf of a person lacking capacity (subsection (1)). It provides that capacity is always presumed unless the contrary can be shown in accordance with the provisions of the Bill (subsection (2)). It requires that a relevant person shall not be treated as unable to make his or her own decisions unless all practicable steps to help him or her make a decision have been taken without success (subsection (3)). A person shall not be considered as unable to make a decision merely by reason of making, having made, or being likely to make, an unwise decision (subsection (4)). No intervention shall be made unless it is necessary to do so having regard to the individual circumstances of the relevant person (subsection (5)). It provides that the least restrictive option with regard to the relevant person's rights and freedom of action must be taken (subsection (6)). Subsection (7) sets out the duties of the intervener when making an intervention. The intervener must permit, encourage and facilitate the relevant person to participate as fully as possible, when making the intervention, and must give effect to the past and present will and preferences of the relevant person if practicable to do so. The intervener must take into account, as far as is reasonably ascertainable, the beliefs and values of the relevant person and consider the views of anyone named by the relevant person or any decision-making assistant, co-decision-maker, decision-making representative or attorney for the relevant person. The intervener may also take into account the views of others charged with the care of the relevant person (subsection (8)). Consideration must be given to the likelihood that the person may recover capacity and to the urgency of making the intervention prior to such recovery (subsection (9)).

PART 3

ASSISTED DECISION-MAKING

Part 3 provides a statutory framework for formal agreements to be made by persons who consider that their capacity is in question, or may shortly be in question, to appoint a trusted person to act as their decision-making assistant.

Section 9 (Definitions — Part 3) provides definitions for the purposes of the Part.

Section 10 (Decision-making assistance agreement) allows a person who considers that his or her capacity is in question, or may shortly be in question, to appoint another person to assist him or her in making decisions on his or her personal welfare and/or property and affairs (subsection (1)). The appointment of a decision-maker must be made by means of a decision-making assistance agreement (subsection (2)). Subsection (3) empowers the Minister to make regulations prescribing the form and formalities of decision-making assistance agreements. Subsection (4) allows an appointer (the person whose capacity is in question) to appoint one or more decision-making assistants to replace a decision-making assistant who dies or who becomes disqualified. Subsections (5) to (10) provide for the invalidation of a decision-making assistance agreement in specified circumstances. Subsection (11) allows an appointer to vary or revoke a decision-making assistance agreement at any time.

Section 11 (Functions and scope of authority of decision-making assistants) sets out the functions and scope of authority of decision-making assistants. Decision-making authority remains with the appointer who will be actively assisted, typically by family members, relatives and carers, in accessing information, in understanding the information, in making and expressing decisions on matters specified in the agreement, and in implementing decisions made. The assistant must ascertain the will and preferences of the appointer and endeavour to ensure that the appointer's decisions are implemented (subsection (1)). Subsection (2) prohibits decision-making assistants from attempting to obtain information that is not reasonably required for the purposes of the decision without the consent of the appointer. Decision-making assistants must take reasonable steps to ensure that relevant information is kept secure and is safely disposed of when no longer required (subsection (3)).

Section 12 (Persons who shall not be appointed as decision-making assistants, etc.) prohibits persons convicted of an offence in relation to the person or property of the appointer or child of the appointer, or against whom a safety or barring order has been made in respect of the appointer or child of the appointer, from being appointed as decision-making assistant.

PART 4

APPLICATIONS TO COURT IN RESPECT OF RELEVANT PERSONS AND RELATED MATTERS

Chapter 1

Application of this Part

Section 13 (Application of this Part) stipulates that Part 4 does not apply to persons under 18 years.

Chapter 2

Applications under this Part

Section 14 (Persons who may make applications to court under this Part, etc.) requires that the relevant person and other specified persons must be notified of any applications made to the court under

this Part (subsection (1)) and that, subject to subsection (3), the person making the application must obtain prior approval of the Court before making an application (subsection (2)). Subsection (3) provides for exceptions to subsection (2) and lists persons who may make applications to the court without the court's prior approval. Subsection (4) sets out certain information that must be included in an application to the court under this Part. Subsection (5) provides for any existing decision-making assistance agreement, co-decision-making agreement or an order appointing a decision-making representative or power of attorney, to be brought to the notice of the court. Subsection (6) provides that any party to the proceedings can retain legal representation at their own expense. It also provides that where the matter at issue is the decision-making capacity of a person and a party to the proceedings applies to the Legal Aid Board for legal aid, paragraphs (*c*) and (*e*) of section 28(2) of the Civil Legal Aid Act 1995 (as amended by section 32 of the Bill) will not be applicable. This means the Legal Aid Board will not take into account the likelihood or otherwise of the application being successful nor the probable cost to the Board of granting legal aid when making a decision as to whether or not to give legal aid. It further provides that where an applicant for an order under this Part applies for legal aid and fails to qualify on financial grounds, the court may order, in the interests of justice, that where he or she incurs legal costs associated with the application, he or she may be recompensed out of the estate, if any, of the relevant person. Subsection (7) provides for rules of court to make detailed provision for proceedings under this Part. Subsections (8) and (9) allow a person who is the subject of an application to be assisted in court by a court friend if they are not legally represented or do not have a decision-making assistant, a co-decision-maker, decision-making representative, attorney or other person willing to assist them with the proceedings. Subsection (10) requires that proceedings under this Part be as informal as practicable and be held in private.

Chapter 3

Declarations as to capacity, etc., and matters following declarations

Section 15 (Power of court to make declarations as to capacity, etc.) gives the court power to make declarations as to whether or not an individual has capacity, whether or not aided by another person. The declaration can relate to a specific decision or to decisions on such matters as are described in the declaration (subsection (1)). Subsection (2) restricts the court's jurisdiction by not allowing it to make a declaration as to whether or not a person has capacity to create or revoke an enduring power of attorney. Subsection (3) gives the court the power to make declarations as to whether or not a proposed intervention would be unlawful. However, the court cannot make a declaration as to the lawfulness of a proposed intervention if the intervener is the court or High Court or if the intervention is being taken pursuant to an order of the court or High Court (subsection (4)).

Chapter 4

Co-decision-making

Section 16 (Definitions — Chapter 4) provides definitions for the purposes of this Chapter.

Section 17 (Power of court to make co-decision-making order, etc.) applies where the court has made a declaration under this Part that

a person lacks capacity to make a decision or class of decisions on his or her own but has decision-making capacity if assisted by a suitable person (subsection (1)). Subsection (2) provides that the court may approve a co-decision-making agreement presented by the person whose capacity is in question or by any other person entitled to make an application by virtue of section 14 who has the consent of the relevant person. The court must be satisfied that the agreement was made in accordance with the provisions of this Chapter and with the will and preferences of the relevant person before approving it. A co-decision-making agreement has no legal effect unless the court has approved it by issuing a co-decision-making order. Once a co-decision-making order has been issued, the agreement can be revoked or varied only with the consent of the court (subsection (3)). Subsection (4) provides that once a co-decision-making agreement has been approved by the court, all relevant decisions (decisions on matters that are prescribed in the co-decision-making agreement) must be made jointly by the relevant person (the person whose capacity is in question) and the co-decision-maker, otherwise they are void. The relevant person and the co-decision-maker must consent to the making of a co-decision-making order. In the absence of a co-decision-making agreement, the court can make a co-decision-making order if the relevant person has capacity to appoint a co-decision-maker and there is a suitable co-decision-maker available (subsection (5)). The court may vary or discharge a co-decision-making order as of right or on application by a person entitled to make an application by virtue of section 14 (subsection (6)). Subsection (7) provides for periodic review of a co-decision-making order. The court can decline to carry out a review if it is satisfied that the review is unnecessary (e.g. if recently varied or discharged as provided for under subsection (7)) (subsection (8)). Subsection (9) provides that the court may revoke a co-decision-making order or vary the terms of an order relating to the appointment of a co-decision-maker, if the co-decision-maker acts or is proposing to act outside the scope of the authority conferred on him or her by the court. Subsections (10) and (11) allow the court to revoke a co-decision-making order or to vary the terms of an order relating to the appointment of a co-decision-maker if it is satisfied that the relevant person's capacity has improved to the extent that he or she no longer requires the support of a co-decision-maker or if the relevant person's capacity has deteriorated to the extent that he or she is unable to make decisions even with the support of the co-decision-maker. The court may also revoke a co-decision-making order or vary the terms of an order if it is satisfied that the relationship between the relevant person and the co-decision-maker has broken down to such an extent that making joint decisions is not possible. Subsection (12) allows the court, when revoking a co-decision-making order, to make further orders in respect of the relevant person.

Section 18 (Co-decision-making agreement) allows a person who considers that his or her capacity is, or will shortly be, in question, to appoint a suitable person to make joint decisions with them on matters related to his or her personal welfare and/or property and financial affairs (subsection (1)). Subsection (2) provides that a person is deemed suitable for appointment as a co-decision-maker for another person if he or she is a relative or friend of the proposed appointer (the person whose capacity is in question) and is capable of performing effectively co-decision-making functions. The appointment of a co-decision-maker must be made in a co-decision-making agreement and the agreement must be drafted in compliance with regulations made under subsection (4) (subsection (3)). Subsection (4) empowers the Minister to make regulations prescribing the form and formalities of co-decision-making agreements. The

appointer may appoint more than one co-decision-maker in a co-decision-making agreement but not more than one in respect of the same decision. The appointer may also appoint one or more co-decision-makers to replace a co-decision-maker who dies or who becomes disqualified. Subsections (6) to (10) provide for a co-decision-making agreement to be invalidated in specified circumstances, such as if the appointer and co-decision-maker get divorced. The invalidation of all or part of a co-decision-making agreement will not affect a relevant decision made prior to the invalidation (subsection (11)). Subsection (12) allows an appointer to vary or revoke a co-decision-making agreement at any time before a co-decision-making order is made. Subsection (13) provides that a relevant decision made jointly in good faith by the appointer and a co-decision-maker shall be considered to have been made by the appointer.

Section 19 (Co-decision-maker shall acquiesce in relevant decision made by appointer where certain conditions are met) provides that the co-decision-maker must acquiesce in a decision made by the relevant person and cannot refuse to sign a document required to implement the decision if a reasonable person could have made the decision and if no harm is likely to result to the relevant person or any other person from the decision.

Section 20 (Persons who shall not be appointed as co-decision-makers) prohibits certain persons from being appointed as co-decision-maker. It includes those who have been convicted of an offence in relation to the person or property of the appointer or a child of the appointer or against whom a safety or barring order has been made in relation to the appointer or a child of the appointer (subsection (1)). Subsection (2) provides for the invalidation of a co-decision-making order if a co-decision-maker is convicted of an offence in relation to the person or property of the appointer or a child of the appointer, or against whom a safety or barring order has been made in relation to the appointer or a child of the appointer. A co-decision-making order also becomes invalidated if the co-decision-maker becomes an undischarged bankrupt or is subject to a current debt settlement arrangement or personal insolvency arrangement or is convicted of fraud or dishonesty etc. Subsection (3) modifies the categories of person who may be prohibited from being appointed as co-decision-maker in respect of personal welfare decisions for an appointer. It specifies that certain categories of person may not be appointed to handle financial matters on behalf of the relevant person, such as registered bankrupts, but can be appointed to address personal welfare matters only. Subsection (4) clarifies the meaning of ''owner'' in subsection (1)(*g*) and (2)(*f*) to include a person who is managing a nursing home, mental health facility, or residential facility for persons with disabilities or a director, sub-director, shareholder in, or employee or agent of, a company that owns or manages such a home or facility.

Section 21 (Functions and scope of authority of co-decision-makers) sets out the functions and scope of authority of co-decision-makers. The appointer and the co-decision-maker share the authority to make relevant decisions. The co-decision-maker must advise the appointer on relevant matters and decisions and may do all things necessary to give effect to the authority vested in him or her (subsection (1)). Where a relevant decision made by an appointer and a co-decision-maker requires a document to be signed in order to implement the decision, the document is void if the appointer and the co-decision-maker do not co-sign the document (subsection (2)). Subsection (3) lists the duties and functions of a co-decision-maker including explaining relevant information and considerations relating

to the relevant decision, ascertaining the will and preferences of the appointer and assisting the appointer in communicating these preferences and in making and expressing a relevant decision. Subsection (4) prohibits co-decision-makers from attempting to obtain information that is not reasonably required for the decision or from using relevant information for a purpose other than in relation to the relevant decision without the consent of the appointer. Co-decision-makers must take reasonable steps to ensure that relevant information is kept secure and is safely disposed of when no longer required (subsection (5)). A co-decision-maker may be reimbursed out of the assets of the appointer for fair and reasonable expenses that are reasonably incurred in performing his or her duties unless the court orders otherwise (subsection (6)). Subsection (7) requires a co-decision-maker to submit an annual report to the Public Guardian on the performance of his or her functions as a co-decision-maker. Rules of court will determine the format of the annual reports by co-decision-makers. Subsection (8) places restrictions on a co-decision-maker in terms of the gifts that can be made from the appointer's property where specific provision to that effect is made in the decision-making agreement. Where a specific provision has been made for the giving of gifts, the giving of gifts is restricted to certain occasions and the value of the gift must be reasonable having regard to all the circumstances and, in particular, the size of the appointer's estate.

Section 22 (Restrictions on co-decision-makers) provides that a co-decision-maker has no power over matters where either a decision-making representative appointed by the court or a donee of enduring powers of attorney has powers to act on those matters for the relevant person.

Chapter 5

Decisions by court or decision-making representative appointed by court

Section 23 (Power of court to make orders and appoint decision-making representative, etc.) applies where the court is unable to make a co-decision-making order or has made a declaration that a person lacks capacity even with the assistance of a co-decision-maker (subsection (1)). It empowers the court to make orders either to make the decision or decisions itself (decision-making order) or to appoint a decision-making representative to do so (decision-making representative order) (subsection (2)). Subsection (3) requires the court, where it proposes to appoint a decision-making representative and no suitable person is available or willing to act in this role, to request the Public Guardian to nominate two or more persons from an established panel of decision-making representatives. The court may appoint one of the nominees to be the decision-making representative for the relevant person. In making an order under this section the court may make provision for such matters as it considers appropriate, including setting out conditions governing the role of a decision-making representative (subsection (4)). Subsection (5) provides that where powers are conferred on a decision-making representative under this section, they should be as limited in scope and duration as possible in the circumstances. The court may appoint more than one person as a decision-making representative for a relevant person and may appoint different persons for different matters (subsection (6)). Subsection (7) provides that where more than one person is appointed as a decision-making representative by the court, the court must specify how the decision-making representatives are to act jointly or separately. Subsection (8) allows

the court to make an order under this section even if an application to make such an order has not been made. The court may vary or discharge an order under this section as of right or if an application is made by a party to the proceedings (subsection (9)). Subsection (10) provides that the court may vary the terms of an order or revoke the appointment of a decision-making representative if the decision-making representative acts or is proposing to act outside the scope of the authority conferred on him or her.

Section 24 (Decision-making representatives — general) provides that before appointing a decision-making representative, the court must be satisfied that the proposed decision-making representative is a suitable person to act as decision-making representative for the relevant person and to carry out the necessary tasks and duties associated with being a decision-making representative (subsection (1)). Subsection (2) prohibits certain persons from becoming decision-making representatives. Subsection (3) provides for a decision-making representative order to be invalidated if a decision-making representative is subsequently convicted of an offence in relation to the person or property of the relevant person or of his or her child, or if a safety or barring order has been made against him or her in relation to the relevant person or a child of the relevant person. The order can also be invalidated if the decision-making representative becomes an undischarged bankrupt or is subject to a current debt settlement arrangement or personal insolvency arrangement or is convicted of fraud or dishonesty etc. Subsection (4) provides that certain grounds for prohibition of appointment as decision-making representative (in subsection (2)) or invalidation of decision-making representative orders (in subsection (3)) will not apply if the decision-making representative has been appointed in respect of personal welfare matters only. Subsection (5) provides that a decision-making representative will be treated as an agent of the relevant person in relation to matters covered by the decision-making representative order. Subsection (6) entitles a decision-making representative to be reimbursed out of the assets of the relevant person for reasonable expenses in discharging his or her functions except where the court orders otherwise. The court may direct that the decision-making representative be paid a reasonable amount of remuneration for performing his or her functions as decision-making representative when those functions are carried out in connection with his or her trade or profession or in other exceptional circumstances specified in the order. Subsection (7) requires a decision-making representative to submit an annual report to the Public Guardian on the performance of his or her functions as a decision-making representative. The format of such annual reports may be determined by rules of court. The court, on appointing a decision-making representative, may require the decision-making representative to give security as it considers appropriate in relation to the proper performance of the functions of such decision-making representative (subsection (8)). Subsections (9) to (11) provide for a decision-making representative order to be invalidated in specified circumstances, such as if the relevant person and decision-making representative get divorced. The invalidation of all or part of a decision-making representative order will not affect a relevant decision made by the decision-making representative prior to the occurrence of the event that caused the invalidation (subsection (12)). Subsection (13) clarifies the meaning of ''owner'' in subsection (2)(*g*) and (3)(*f*) to include a person who is managing a nursing home, mental health facility, or residential facility for persons with disabilities or a director, sub-director, shareholder in or employee or agent of, a company that owns or manages such a home or facility.

Section 25 (Scope of decision-making order or decision-making representative order relating to personal welfare) outlines matters in respect of which the court may appoint a decision-making representative to make decisions on behalf of the relevant person in respect of their personal welfare. It also allows the court to make provision for such matters as it considers appropriate.

Section 26 (Scope of decision-making order or decision-making representative order relating to property and affairs) outlines matters in respect of which the court may appoint a decision-making representative to make decisions on behalf of the relevant person in respect of their property and affairs. It also allows the court to make provision for such matters as it considers appropriate (subsection (1)). Subsection (2) places restrictions on a decision-making representative in relation to the giving of gifts on behalf of the relevant person and he or she may make gifts of the relevant person's property only where specific provision to that effect is made in the decision-making representative order. Where a specific provision has been made allowing gifts to be given, the giving of gifts is restricted to certain occasions and the value of the gift must be reasonable having regard to all the circumstances and in particular the size of the relevant person's estate. Subsection (3) allows the court to grant custody, management and control of the property of the relevant person to the Public Guardian, even where a decision-making representative has been appointed. Subsection (4) requires the Public Guardian to have regard to the views of the relatives of the relevant person and any other persons the court directs if the court proposes to make an order under subsection (3). Subsection (5) allows the court to make any of its orders under subsection (3), in respect of the property of the relevant person, subject to such conditions as it considers appropriate.

Section 27 (Restrictions on decision-making representatives) sets out restrictions to the powers of a decision-making representative. Subsection (1) restricts a decision-making representative from prohibiting a person from having contact with the relevant person. Subsection (2) requires the decision-making representative to get court approval before making settlement of any part of the relevant person's property or exercising any power vested in the relevant person. Subsection (3) prevents a decision-making representative from overriding an act by an attorney who is acting within the scope of an enduring power of attorney. It also prevents a decision-making representative from exercising any power in a manner that is inconsistent with an enduring power of attorney. Subsection (4) specifies that a decision-making representative cannot refuse consent to the carrying out or continuing of life-sustaining treatment for the relevant person. Subsections (5) and (6) impose limitations on decision-making representatives in relation to the use of restraint on a relevant person. Subsection (7) provides that a decision-making representative is considered to restrain a relevant person if he or she deprives the relevant person of his or her liberty as provided for in Article 5(1) of the European Convention on Human Rights. Subsection (8) ensures that there is no conflict between the Bill and section 69 of the Mental Health Act 2001 including rules made under that section.

Chapter 6

Interim orders, reviews and expert reports

Section 28 (Interim orders) provides for emergency situations and empowers the court to make an interim order in relation to a

relevant person who is the subject of an application under Part 4 that has yet to be determined (subsection (1)). Subsection (2) limits the duration and scope of interim orders but it allows the court to renew the order if it is in the interests of the relevant person. Subsection (3) allows the court to vary or revoke an order made under this section as of right or if an application is made by a party to the application. Subsection (4) provides that this section applies to a direction the court may give under this Part as well as to any order made under this Part.

Section 29 (Review of declaration as respects capacity) provides that the court may consent to a review of a declaration as respects capacity on application to it by any of the persons specified in paragraphs (*a*) to (*h*) of section 14(3) (subsection (1)). Subsection (2) makes provision for the court to review a declaration as respects capacity at regular intervals as specified in the declaration or at intervals of not more than 12 months or 3 years if the court is satisfied that the relevant person is unlikely to recover his or her capacity. Subsection (3) specifies that the periods of 12 months and 3 years referred to in subsection (2) run from the date on which the court last reviewed the declaration. Subsection (4) empowers the court, having reviewed the capacity of a relevant person, to revoke or amend the declaration, and vary or discharge a co-decision-making order, a decision-making order or a decision-making representative order if it finds that the relevant person has the capacity to make decisions in respect of some or all of the matters specified in the order. It also requires the court, having reviewed the capacity of the relevant person and finding that the relevant person does not have the capacity to make decisions in respect of matters specified in the order, to confirm the declaration. Subsection (5) provides that a review of a declaration as respects capacity of a relevant person is not necessary if the reason for the initial application seeking a declaration of capacity is no longer of relevance.

Section 30 (Expert reports) gives the court all such powers as are necessary to assist it in making a decision on an application for a capacity declaration or when reviewing a capacity declaration (subsection (1)). Subsection (2) is an indicative list of reports that the court may ask to be furnished to it to assist it in making a decision.

Chapter 7

Notification of Public Guardian of declarations, etc. under this Part

Section 31 (Notification of Public Guardian) requires the registrar of the court making the declaration or order, or giving the direction as respects capacity of a relevant person, to provide a copy of the declaration, order or direction to the Public Guardian as soon as is practicable.

Chapter 8

Legal aid in respect of applications under this Part

Section 32 (Amendment of Act of 1995) amends the Civil Legal Aid Act 1995 and provides that any party to proceedings in respect of capacity will be entitled to free legal advice provided that they qualify financially. It also provides that the Legal Aid Board will not go into the merits of the case when considering an application for legal aid in relation to proceedings under Part 4 of this Bill, which

means that a likelihood of success in proceedings and a favourable cost-benefit ratio will not be prerequisites for the granting of legal aid.

PART 5

WARDS

Section 33 (Definitions — Part 5) provides definitions for the purposes of the Part.

Section 34 (Application of this Act to wards) provides that the guiding principles set out in Part 2 apply to an action taken in respect of a ward that is equivalent or similar to an action taken under this Bill to an intervention as defined in section 2 (subsection (1)). Subject to subsection (1) sections 35 to 37 only apply to wards (subsection (2)).

Section 35 (Review of capacity of wards who are adults and discharge of wardship) provides that an adult ward or another person considered to have sufficient interest or expertise in the welfare of the ward may apply to the wardship court for a review of the capacity of the ward (subsection (1)). It further provides that the wardship court, regardless of whether or not an application for a review of capacity is made, must review the capacity of adult wards before the third anniversary of the commencement of this section (subsection (2)). Having reviewed the capacity of the ward, the wardship court must discharge the ward from wardship if he or she is found to have the capacity to make decisions in respect of all matters. The wardship court may make ancillary orders and give directions as it thinks appropriate having regard to both the discharge from wardship and the circumstances of the ward (subsection (3)). It further provides that if, following a review, the wardship court finds that the ward lacks capacity unless assisted by a co-decision-maker, or lacks capacity even if a suitable person as a co-decision-maker were made available to him or her, the wardship court must make the appropriate declaration to that effect and discharge the ward from wardship. The wardship court may make orders and take actions, such as appoint a decision-making representative, in respect of the declaration as if the wardship court were the court under Part 4. Subsection (4) applies the provisions of the Bill to wards who lack capacity, provides that following the discharge of a ward who lacks capacity, declarations, orders and other actions taken by the wardship court prior to the discharge shall be deemed to be declarations, orders etc under this Bill and as such the provisions of this Bill apply to them. Subsection (5) applies the provisions in section 14 (Persons who may make applications to court under this Part etc.) to an application to a wardship court for a review of capacity of a ward.

Section 36 (Public Guardian and wards who are adults) enables a wardship court to transfer the supervision of existing adult wards to the Public Guardian.

Section 37 (Public Guardian and wards who are minors) enables a wardship court to transfer the supervision of existing (subsection (1)) or future (subsection (2)) wards under the age of 18 years to the Public Guardian.

PART 6

ENDURING POWERS OF ATTORNEY

Chapter 1

Interpretation, application and characteristics of enduring power

Section 38 (Interpretation — Part 6) provides definitions for the purposes of the Part (subsection (1)). Subsection (2) provides that an application to the High Court under this Part must be made in a summary manner. Subsection (3) provides that a person who agrees to an enduring power of attorney will be presumed to have capacity in relation to matters under this Part.

Section 39 (Application of this Part, etc.) Subsections (1) and (2) provide that the provisions of this Part do not apply to an enduring power of attorney created under Part II of the Powers of Attorney Act 1996 except where the instrument creating such a power has not been registered under section 10 of the 1996 Act before the commencement of this section, and that Part II of the 1996 Act does not apply to an enduring power of attorney created under this Part of the Bill or an enduring power of attorney created under the 1996 Act that has not been registered under section 10 of that Act before the commencement of this section. Subsection (3) provides that this Part applies only to an enduring power of attorney created after the commencement of this section and to an enduring power of attorney created under Part II of the 1996 Act that has not been registered under section 10 of that Act before the commencement of this section. Subsection (4) provides that, following the commencement of the section, no further enduring powers of attorney may be created under the 1996 Act.

Section 40 (Characteristics of enduring power) defines an enduring power of attorney within the meaning of this Part as a power of attorney that contains a statement by the donor that the donor intends the power to be effective at any subsequent time when the donor lacks capacity or may shortly lack capacity to look after his or her personal welfare and/or property and affairs, and that complies with the provisions of this section and any regulations made under it (subsection (1)). Subsection (2) allows an enduring power of attorney created under this Part to relate to a donor's property and affairs and personal welfare or both and the instrument creating the power may appoint one or more persons to be an attorney in respect of those matters. Subsection (3) allows the Minister to make regulations on various matters concerning enduring powers. Subsection (4) provides that regulations made under subsection (3) may include a requirement that the enduring power of attorney contain various statements. Subsection (5) allows a donor when creating the enduring power to appoint one or more persons to act as an attorney if an appointed attorney dies, declines to act or is disqualified from acting as an attorney. Subsection (6) provides that a power of attorney is not an enduring power of attorney unless, at the time the instrument is executed, the attorney has attained the age of 18 years, has not been convicted of an offence in relation to the person or property of the donor or the person or property of the donor's child, is not a person against whom a safety or barring order has been made in relation to the donor or child of the donor, is not an undischarged bankrupt or currently in a debt settlement arrangement or personal insolvency arrangement, has not been convicted of an offence involving fraud or dishonesty or has not had a declaration made against him or her under section 150 of the Companies Act 1990 or is not or was not subject to a disqualification order under Part VII

(Disqualifications and Restrictions: Directors and other Officers) of the Companies Act 1990. It allows a trust corporation within the meaning of section 30 of the Succession Act 1965 to be appointed as an attorney. Subsection (6)(*b*) prohibits the owner or registered provider (and certain persons connected with him or her) of a nursing home, mental health facility, or residential facility for persons with disabilities, in which the donor resides, from being an attorney, subject to certain exclusions. Subsection (7) makes provision for a power of attorney to be invalidated or cease to the extent that it relates to an attorney who becomes bankrupt or is convicted of an offence against the donor or his or her property or the donor's child or the child's property, or against whom a barring order is made in relation to the donor or child of the donor, or who is convicted of an offence involving fraud or dishonesty or who has a declaration made against him or her under section 150 of the Companies Act 1990 or becomes the subject of a disqualification order under Part VII of the Companies Act 1990. Subsection (8) specifies certain categories of person who can hold powers of attorney on personal welfare decisions but not on property and financial matters. Subsection (9) provides that a power of attorney that gives the attorney a right to appoint a substitute or successor cannot be an enduring power. Subsections (10) and (11) provide that if the attorney is the spouse or civil partner of the donor, the enduring power will lapse, unless provided otherwise in the power, if the marriage or civil partnership is subsequently annulled, dissolved, or a decree of judicial separation or a written agreement to separate is entered into, by the spouses or the civil partners as the case may be, or if the spouses or civil partners separate and cease to cohabit for a continuous period of 12 months or if a barring or safety order is made against the attorney in relation to the donor or vice versa. Subsection (12) makes provision for an enduring power of attorney in favour of a cohabitant donor to lapse, unless provided otherwise in the power, if subsequently the cohabitants separate and cease to cohabit for a continuous period of 12 months. Subsection (13) provides that a registered enduring power will not cease to be in force if the court exercises any of its powers under Part 4. It also provides that an enduring power that has not been registered will be invalidated when the court exercises any of its powers under sections 17(2) or 23(2) in respect of the donor concerned. Subsection (14) provides that a disclaimer of an enduring power that has not been registered by the attorney will not be valid except on notice to the donor. The invalidation of all or part of an enduring power under subsections (7), (10), (11) or (12) will not effect a relevant decision made by the attorney concerned for the donor prior to the occurrence of the event that caused the invalidation (subsection (15)). Subsection (16) defines an owner, such as of a nursing home, on whom certain restrictions are placed in terms of decisions on the personal welfare and property of a donor, as provided for in subsections (6)(*b*) and (7)(*c*).

Chapter 2

Scope of authority of enduring power and coming into operation of enduring power, etc.

Section 41 (Scope of authority of attorneys under enduring power — personal welfare decisions) provides that an enduring power may give general authority to the attorney to act in relation to all, or a specified part, of the personal welfare of the donor (subsection (1)). Subsection (2) limits the authority of the attorney to making decisions on healthcare only in circumstances where the donor lacks capacity or the attorney reasonably believes that the donor lacks

capacity. In relation to healthcare, the attorney can consent to the giving or refusing of treatment but cannot refuse life-sustaining treatment. Subsection (3) allows a donor to apply conditions and restrictions in the instrument that creates the enduring power to a general authority he or she confers on an attorney. Subsection (4) sets out the conditions where an attorney may restrain a donor. Subsection (5) defines ''restrains'' for the purposes of this section. Subsection (6) provides that an attorney is considered to do more than restrain a donor if he or she deprives the donor of his or her liberty as provided for in Article 5(1) of the European Convention on Human Rights. Subsection (7) provides that subsections (4) to (6) shall not constrain the generality of section 69 of the Mental Health Act 2001 or of rules made under that section.

Section 42 (Scope of authority of attorneys under enduring power — property and affairs of donor) provides that an enduring power may, subject to any conditions or restrictions, give general authority to the attorney to act in relation to all, or a specified part, of the property and affairs of the donor or may confer on the attorney a general authority to do specified things or take decisions on specified matters (subsection (1)). Where general authority is conferred by a donor on an attorney, the attorney has the authority to do anything on behalf of the donor that the donor can lawfully do, subject to the restrictions set out in subsection (4) (subsection (2)). Subsection (3) provides that, subject to any conditions or restrictions in the enduring power, the attorney may act for his or her own benefit or that of any other person only to the extent that the donor might be expected to provide for his or her or that person's needs. Subsection (4) provides that the attorney may make gifts of the donor's property only where specific provision to that effect is made in the enduring power. Where a specific provision has been made for the giving of gifts, the giving of gifts is restricted to certain occasions and the value of the gift must be reasonable having regard to all the circumstances and in particular the size of the donor's estate.

Section 43 (Coming into operation and survival of enduring power) provides that an enduring power will not come into effect until it has been registered (subsection (1)). Subsection (2) allows an attorney, once he or she has applied for registration, to take action under the enduring power to maintain the donor, to prevent loss to the donor's estate, to maintain the attorney or other persons so far as the donor might be expected to do so or to make a personal welfare decision that cannot be reasonably deferred until the application has been determined. Subsection (3) gives protection to third parties. It provides that a transaction between a person and an attorney who purports to be, but is not, acting under subsection (2) will be valid unless that person knows that the attorney has not acted in accordance with subsection (2).

Chapter 3

Registration of enduring power and related matters

Section 44 (Functions of High Court prior to registration) enables the High Court, before the registration of the enduring power, to exercise any powers it could exercise on registration if it has reason to believe that the donor may lack, or shortly may lack capacity. An application to the High Court under this section may be made by any interested party whether or not the attorney has made an application for registration of the instrument.

Section 45 (Application for registration) places the onus on the attorney to make an application to the Public Guardian for registration of an enduring power if he or she has reason to believe that the donor lacks or may shortly lack capacity (subsection (1)). Subsection (2) requires an attorney to comply with the notification procedures set out in Schedule 1 before making an application for registration. Subsection (3) allows the attorney to refer to the High Court for its determination of any question concerning the validity of the power, prior to making an application for the registration of the power. Subsection (4) enables the High Court to accept a certificate to the effect that a donor lacks or may shortly lack the capacity to manage his or her own property and affairs or to look after his or her personal welfare, signed by a registered medical practitioner or other suitable person, as evidence of capacity. Subsection (5) sets out the penalties that may be imposed should a person who, in an application for registration of a power, knowingly makes a statement that is false in a material particular.

Section 46 (Registration of enduring powers) deals with the Public Guardian's power to register, or refuse to register, an enduring power. Subsection (1) requires the Public Guardian to register the instrument if the application has been made in compliance with section 45. This requirement is subject to subsection (2). Subsection (2) sets out the exceptions to subsection (1), namely that the Public Guardian shall not register the power if a valid objection is received from a person who is entitled to notice within five weeks from the date the notice was given; if persons entitled to notice under the Bill have not been notified or if there is reason to believe that appropriate enquiries by the Public Guardian might bring to light evidence on which a valid objection could be made. If any of these exceptions apply, the Public Guardian must first carry out whatever enquiries he or she thinks appropriate before deciding on the application. Subsection (3) sets out what are valid grounds for objection. Subsection (4) provides that where the Public Guardian receives a valid objection or is satisfied that there are valid grounds for making the objection to the registration of the power, the Public Guardian must apply to the High Court for a determination as to whether the instrument should be registered. Subsection (5) allows the High Court to direct an instrument to be registered despite its not being in compliance with section 40 or regulations made under that section where it is satisfied that the donor intended the power to be effective during any period where he or she lacks capacity, that the power was not executed as a result of fraud or undue pressure, that the attorney is suitable to be an attorney of the donor and in the interests of justice it is desirable that the instrument be registered.

Section 47 (Effect and proof of registration) sets out the effect of registration. Subsection (1) provides that a revocation of power will not be valid unless it is confirmed by the High Court under section 49(4); a disclaimer by the attorney will not be valid except on notice to the donor and with the consent of the High Court; and once registration has taken place the donor cannot extend or restrict the power nor can he or she give a valid consent or instruction by which the attorney will be bound. Subsection (2) provides that subsection (1) applies for so long as the instrument is registered, regardless of whether or not the donor lacks capacity for the time being. Subsection (3) requires the Public Guardian to supply attested copies to the donor and anyone to whom notice was given before registration was applied for. Subsection (4) provides that copies of an enduring power attested by the Public Guardian will be evidence of its contents and of its registration. Subsection (5) provides that subsection (4) is without prejudice to any other method of proof that is recognised by law.

Section 48 (Register of enduring powers of attorney and reports following registration) requires the Public Guardian to maintain a register of enduring powers of attorney that have been registered (subsection (1)). Subsection (2) allows members of the public to inspect the register free of charge. Subsection (3) enables the Public Guardian to issue an attested copy of a registered enduring power of attorney to a person who has good and sufficient reason to be issued with a copy. Subsection (4) requires the attorney under a registered enduring power to submit a report as to the performance of his or her functions under the enduring power to the Public Guardian every 12 months. The report must include details of all expenses and remuneration paid or reimbursement to each attorney for the donor concerned and the form of the report shall be determined in rules of court.

Chapter 4

Functions of High Court as respects enduring power of attorney and revocation of that power

Section 49 (Functions of court as respects registered enduring power of attorney) details the functions that the High Court may exercise once an enduring power has been registered. Subsection (1) provides that the High Court may exercise the functions specified in subsections (2) to (6) where an application has been made to it by the donor, the attorney, the Public Guardian or any other interested party. Subsection (2) provides that the High Court may determine any question as to the meaning or effect of the instrument. The High Court may give directions with respect to the personal affairs and the management or disposal of the donor's property or affairs. It can also decide on the rendering of accounts and on the production of records kept by the attorney, and on the remuneration and expenses of the attorney. The High Court may require the attorney to furnish information or documents in his or her possession; give any consent or authorisation to act; authorise the attorney to act for his or her own or others' benefit outside the limitations of section 42(4) and, where appropriate, to relieve the attorney either wholly or partly from any liability incurred or which may have been incurred as a result of a breach of duty by the attorney. Subsection (3) sets out the circumstances in which the High Court must notify the Public Guardian of its directions, requirements, consent or authorisation made under subsection (2) and requires the Public Guardian to monitor the giving of effect of such directions, requirements, etc., by the attorney. Subsection (4) provides that the donor or someone acting on his or her behalf, on notice to the attorney, may apply to the High Court to revoke the instrument. The High Court will confirm the revocation of the power if it is satisfied that the donor has done whatever is required by law to effect this and also if it is satisfied that at the time of the purported revocation the donor was capable of revoking the power. Subsection (5) sets out the circumstances where the High Court may direct the Public Guardian to cancel the registration of an instrument. Such cancelation may be where the High Court confirms the revocation of the power under subsection (4) or consents to a disclaimer under section 47(1)(*b*). It can also be cancelled if the High Court is satisfied that the donor has, and is likely to continue to have, capacity, or where the power has ceased to be in force because the donor or attorney die or becomes bankrupt, or the court is satisfied that the power was not valid and subsisting when registered or that the attorney is unsuitable to be the donor's attorney, or that fraud or undue pressure was used to make the donor grant power of attorney, or if the court is satisfied that there is any other good and sufficient reason to do so.

Subsection (6) provides that where the High Court directs that registration of an instrument be cancelled because the attorney is deemed unsuitable or where fraud or undue pressure was used to induce the donor to create the power, the court shall by order revoke the power. Subsection (7) provides that where a registration has been cancelled under subsection (5) (other than when the cancellation has been due to the court being satisfied that the donor is likely to continue to have capacity), the instrument must be delivered up to the Public Guardian to be cancelled unless the court directs otherwise.

Section 50 (Revocation of enduring power of attorney) allows a donor to revoke a registered enduring power at any time provided he or she has the capacity to do so (subsection (1)). Subsection (2) enables the Minister to make regulations concerning the revocation of enduring powers of attorney.

Chapter 5

Miscellaneous

Section 51 (Protection of attorney and third person where registered power invalid) provides protection for acts done by an attorney and transactions between an attorney and a third party where either a registered enduring power did not create a valid enduring power or the power ceased to be in force and where neither the attorney nor the third party was aware of either circumstance at the time of those acts or transactions. Subsection (1) sets out the parameters to which subsections (2) and (3) apply, namely, that they shall apply where the invalid enduring power has been registered, whether or not it has been cancelled when the transaction involving the third party took place. Subsection (2) concerns the protection to the attorney in the circumstances outlined in subsection (1). It provides that where an attorney acts pursuant to an enduring power of attorney he or she will not incur any liability unless he or she is aware that the instrument did not create an enduring power or that it ceased to be in force after the registration or had been cancelled. Subsection (3) concerns the protection of the third party to a transaction under the instrument. It provides that where a transaction occurred under the authority of the enduring power, which at the time was invalid, the transaction shall be deemed a valid transaction unless the third party was aware of the invalidity of the instrument by reason of his or her knowledge of a factor outlined in subsection (2). Subsection (4) deals with subsequent transactions between any third party involved in the original transaction with the attorney and a subsequent purchaser, where that purchaser's title depends on whether the original transaction was valid by virtue of subsection (2). In such cases validity is presumed if the original transaction took place within 12 months of the date of the registration of the instrument or if the third party involved in the original transaction makes a statutory declaration before or within three months of the completion of the subsequent purchase, that he or she had no reason at the time of the original transaction to doubt that the attorney had the authority to dispose of or deal in the property. Subsection (5) is a technical provision adapting section 18 of the Act of 1996 to make it apply to to the particular characteristics of enduring powers as provided for in the Bill. Subsection (5) ensures that section 18 of the Act of 1996 will apply so as to protect the attorney and the third party even where the revocation of an enduring power has been confirmed by the High Court, provided that they do not know that the High Court has confirmed the revocation. They will also be protected if they have knowledge of a revocation that has not been so confirmed

because such a purported revocation is of no effect. Subsection (6) defines the meaning of the word ''purchaser''. It has the meaning assigned to it by section 18 of the Act of 1996 which states that ''purchaser'' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who, for valuable consideration, acquires an interest in any property; and includes also an intending purchaser.

Section 52 (Joint and several attorneys) and Schedule 2 contain provisions about the application of Part 6 to joint, and joint and several attorneys. Subsection (1) allows for the donor of an enduring power to appoint more than one person as an attorney. Such multiple appointments may be made either jointly or jointly and severally. Subsection (2) specifies that the Bill applies to joint attorneys collectively as it applies to a single attorney, subject to subsection (3) and Schedule 2. Subsection (3) provides that with regard to joint and several attorneys, where one dies, lacks capacity or is disqualified, the remaining attorney or attorneys may continue to act unless the instrument creating the enduring power provides to the contrary. Subsection (4) provides that the Bill applies to joint and several attorneys with the modifications set out in subsections (5) to (8). Subsection (5) provides that a failure by one attorney to comply with the requirements of creating an enduring power will disqualify that attorney only and not otherwise affect the power. Subsection (6) provides where one or more attorneys nominated under a power, but not both or all, applies to have an instrument registered, any of the attorneys may then act under the power pending a decision on the application. Notice must be given to the other attorney or attorneys of the application for registration and an objection to the registration may be made in respect of any attorney, whether or not he or she was party to the application for registration. Subsection (7) provides that where a valid objection under section 46(3) has been established in respect of an attorney or attorneys or a power, it shall not invalidate the instrument in respect of another joint or several attorney or attorneys against whom no objection has been made and as such the Public Guardian cannot refuse to register the instrument. However the Public Guardian must qualify the registration in the manner prescribed. Subsection (8) provides that where, under section 49(5)(*c*), (*e*) or (*f*), the High Court may cancel the registration of the instrument, it shall not do so if an enduring power subsists in respect of a joint and several attorney, or attorneys, who are not affected by those provisions. However, the Public Guardian must qualify the registration in accordance with an order of the High Court.

PART 7

INFORMAL DECISION-MAKING ON PERSONAL WELFARE MATTERS

Section 53 (Informal decision-making on personal welfare of relevant person) allows a person referred to as an ''informal decision-maker'', who is not a decision-making assistant, co-decision-maker, decision-making representative or attorney, subject to conditions and limitations set down in sections 53 and 54, to take or to authorise the taking of action in respect of a relevant person on personal welfare, healthcare or treatment except in relation to non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment or the donation of an organ by the relevant person or closely connected matters (subsection (1)). Subsection (2) provides protection for acts done or authorised by the informal decision-maker. It provides that where an informal decision-maker acts in compliance with the Bill,

he or she will not incur any liability that he or she would not have incurred if the relevant person had the capacity to consent to the action and had given consent to the informal decision-maker to take or to authorise the taking of the action. Subsection (3) entitles an informal decision-maker to be indemnified by the relevant person for any action taken or authorised that incurs expenditure. It also entitles the informal decision-maker to reimburse himself or herself out of the relevant person's money for expenditure incurred if he or she has possession or control of money belonging to the relevant person. Subsection (4) requires an informal decision-maker to keep a record of all expenditure incurred and money received. Subsection (5) provides that nothing in this section relieves an informal decision-maker, or a person authorised by an informal decision-maker to take an action in respect of a relevant person, of his or her civil or criminal liability for loss or damage arising from his or her negligence in taking the action or authorising the taking of the action. Subsection (6) applies the rules on restraint to an informal decision-maker as they apply to a decision-making representative as provided for under subsections (5) to (8) of section 27.

Section 54 (Limitations to informal decision-making) provides for limitations to the actions an informal decision-maker may take. Subsection (1) prevents an informal decision-maker from doing an act that under this Bill is the reserve of the High Court. Subsection (2) prevents an informal decision-maker from taking action that conflicts with a decision made by the relevant person with the assistance of a decision-making assistant or a decision made jointly with a co-decision-maker or a decision made by a decision-making representative or attorney of a relevant person. Subsection (3) provides that this section does not prevent an informal decision-maker from taking action if the relevant person requires life-sustaining treatment or if the relevant person's health would seriously deteriorate if action were not taken.

PART 8

PUBLIC GUARDIAN

Chapter 1

Appointment, functions and terms and conditions of Public Guardian

Section 55 (Appointment of Public Guardian) provides for the appointment of the Public Guardian by the Courts Service (subsection (1)). Subsection (2) specifies that the Courts Service, in considering a person for appointment as Public Guardian, must satisfy itself that the person has the appropriate experience, qualifications, training or expertise to effectively perform the functions of the office. Subsection (3) is a standard provision stating that members of either House of the Oireachtas, the European Parliament or a local authority are not eligible for appointment as the Public Guardian.

Section 56 (Functions of Public Guardian) sets out the objectives (subsection (1)) and functions of the Public Guardian (subsection (2)). Subsection (3) allows the Public Guardian, in carrying out his or her functions, to consult with any person who has any functions in relation to the care or treatment of the relevant person. It also requires such persons to give the Public Guardian all information, reports and assistance relating to the care or treatment as may be reasonably requested by the Public Guardian (subsection (4)). Rules

of court may make provision relating to the Public Guardian and the performance of his or her functions. They may deal with the giving of security by and may in particular make provision for the giving of security by decision-making representatives for relevant persons and the enforcement and discharge of security so given (subsection (5)). Subsection (6) enables the Public Guardian to instruct a special visitor or general visitor, as defined in section 59, to examine and take copies of records, including health records, relating to a relevant person and to interview the relevant person. Subsection (7) prohibits the Public Guardian from directing a general visitor to examine and take copies of any health record of a relevant person unless the general visitor is a registered medical practitioner.

Section 57 (Terms and conditions of Public Guardian) sets out the terms and conditions of employment of the Public Guardian. The Public Guardian will hold office for a period of 6 years and may be reappointed to the office for a second or subsequent term (subsection (1)). Subsection (2) empowers the Courts Service, with the approval of the Minister and following consultation with the Minister for Public Expenditure and Reform, to set the terms and conditions under which the Public Guardian will hold office. The Public Guardian will be a civil servant and a member of staff of the Courts Service (subsection (3)).

Chapter 2

Staff of Office of Public Guardian

Section 58 (Staff of Office of the Public Guardian) provides that the persons who are staff of the Office of Public Guardian are staff members of the Courts Service and as such the provisions of Part V of the Courts Service Act 1998 apply to them (subsection (1)). Subsection (2) makes provision for the Public Guardian to exercise his or her functions (other than those specified in section 63) by or through any member of the staff of the Courts Service assigned to the Office of the Public Guardian. Subsection (3) allows the Public Guardian to revoke a delegation of functions made under subsection (2). Subsections (4) and (5) provide for the Courts Service, with the approval of the Minister and the consent of the Minister for Public Expenditure and Reform, to appoint staff to the Office of the Public Guardian and to determine the number and grading of staff. Subsection (6) designates the Courts Service as the appropriate authority (within the meaning of the Public Service Management (Recruitment and Appointments) Act 2004 and the Civil Service Regulation Acts 1956 to 2005) in relation to staff of the Office of the Public Guardian. Subsections (7) and (8) permit the Courts Service to engage and pay specialist advisers whom the Public Guardian considers necessary. Prior approval of fees due to an adviser is required from the Minister and the Minister for Public Expenditure and Reform (subsection (8)).

Chapter 3

Special visitors, general visitors, court friends and panels

Section 59 (Special visitors and general visitors) allows the Public Guardian to appoint a person to be a special visitor or a general visitor (subsection (1)). Subsection (2) specifies that a special visitor must be a registered medical practitioner or possess other relevant qualifications and have particular knowledge, expertise and experience, as respects the capacity of persons. Subsection (3) provides that a general visitor is a person who, in the opinion of the Public Guardian, possesses relevant qualifications, expertise or

experience that will assist the Public Guardian in performing his or her supervisory functions in relation to decision-making assistants, co-decision-makers, decision-making representatives and attorneys for relevant persons. The appointment of a person as a special visitor or a general visitor is subject to such terms and conditions as the Minister, with the consent of the Minister for Public Expenditure and Reform, may deem appropriate (subsection (4)).

Section 60 (*Court friends*) allows the Public Guardian to appoint a court friend to assist the relevant person in court proceedings. It requires the Public Guardian to appoint a court friend to assist the relevant person where the relevant person has not instructed a barrister or solicitor and there is no decision-making assistant, co-decision-maker, decision-making representative, attorney or court friend to assist the relevant person in the course of a hearing (subsection (1)). Subsections (2), (3), (4) and (5) outline the functions of a court friend. Subsection (3) allows a court friend to examine and take copies of records, including health records, relating to a relevant person and to interview the relevant person in private. Subsection (4) provides that a court friend may not examine and take copies of any health record of a relevant person unless he or she is a registered medical practitioner. Subsection (5) requires the court friend to assist and support the relevant person in court and to promote the interests of the relevant person in court if the relevant person is not attending the hearing. Subsection (6) allows a court friend to attend and represent the relevant person at meetings, consultations or discussions, in connection with an application under Part 4. Subsection (7) provides that the appointment of a person as a court friend is subject to such terms and conditions as the Minister, with the consent of the Minister for Public Expenditure and Reform, may deem appropriate. Subsection (8) allows a suitable person who is willing and able to assist a relevant person during the course of a court hearing in relation to an application under Part 4 to carry out the same functions as a court friend. Subsections (2) to (6) apply to the person assisting the relevant person in court as they would apply to a court friend.

Section 61 (Panels to be established by Public Guardian) requires the Public Guardian to establish panels of suitable persons willing and able to act as decision-making representatives (subsection (1)), special visitors (subsection (2)), general visitors (subsection (3)), and court friends (subsection (4)) from which the Public Guardian must nominate persons to be appointed as decision-making representatives, special visitors, general visitors and court friends, as the case requires.

Chapter 4

Reports by Public Guardian and codes of practice

Section 62 (Reports by Public Guardian) makes provision for the preparation and submission of annual reports and other reports by the Public Guardian to the Board of the Courts Service and the subsequent submission of the reports to the Minister (subsections (1) and (2)). Subsection (3) requires the Public Guardian to submit to the Board of the Courts Service within 2 years of the establishment of the Office of the Public Guardian a report on the effectiveness of the Office, of the adequacy of the functions assigned under this Act to the Public Guardian and any recommendations as to how to improve the effectiveness of the Office. The report must subsequently be submitted by the Board of the Courts Service to the Minister together with any recommendations the Board wishes to make in relation to it (subsection (4)). The Public Guardian must, at

the end of each 5 year period, commencing with the date of the establishment of the Office of the Public Guardian, submit a report reviewing the general performance of the objectives and functions of the Public Guardian in the previous 5 years. Subsection (6) allows the Public Guardian to make any other reports that he or she considers appropriate for drawing to the Board's or the Minister's attention matters that in his or her opinion should be the subject of a special report. It also provides for copies of the reports to be laid before both Houses of the Oireachtas by the Minister (subsection (7)).

Section 63 (Codes of practice) enables the Public Guardian to prepare and publish a code of practice, to request another body to prepare a code of practice, or to approve a code of practice drafted by another body. Subsection (1) provides definitions for the purposes of the section. Subsection (2) allows the Public Guardian to prepare and publish a code of practice or to request another body to prepare a code of practice or to approve a code of practice drawn up by another body to guide persons involved in assisting persons who lack capacity in decision-making, including decision-making assistants, co-decision-makers, decision-making representatives, court friends and healthcare professionals. Subsection (3) is an indicative list of bodies and persons whom the Public Guardian may consult when drafting or approving a code of practice. The Public Guardian must provide a draft of a code that it wishes to publish or approve to appropriate persons and bodies (which may include those listed in subsection (3)). The Public Guardian must invite those persons and bodies to make representations in writing and must consider any representations made and make amendments as appropriate (subsection (4)). Subsection (5) requires the Public Guardian, prior to the publication or approval of a code of practice, to get the consent of the Minister, following consultation with the Board of the Courts Service. For codes of practice relating to healthcare, the Office of the Public Guardian must get the consent of the Minister, following consultation with the Minister for Health and the Board of the Courts Service. Subsection (6) requires the Public Guardian when he or she publishes or approves a code of practice to publish a notice to that effect in Iris Oifigiúil. The notice must specify the persons or classes of persons for whom the code is providing guidance, the date on which the code comes into effect and details of the location of where a copy of the code may be viewed. Subsections (7) and (8) require that a copy of each code of practice published or approved must be posted on the website of the Public Guardian and be accessible to members of the public. Subsection (9) allows the Public Guardian to amend or revoke a code of practice. It also allows the Public Guardian to withdraw approval for a code of practice. Subsection (10) provides that prior to amending, or revoking or withdrawing approval from a code of practice, the Public Guardian must consult with appropriate bodies and persons and get the consent of either the Minister, following consultation with the Board of the Courts Service, or of the Minister following consultation with the Minister for Health and the Board of the Courts Service, depending on whether the code relates to healthcare matters or not. Subsection (11) provides that where the Public Guardian amends, or revokes, or withdraws his or her approval of a code of practice, a notice to that effect must be published in *Iris Oifigiúil*. It also sets out the information that should be included in the notice. Subsection (12) makes provision for codes of practice to be admissible in legal proceedings. Subsection (13) places a duty on any person performing a function under this Act to have regard to a relevant code of practice published or approved by the Public Guardian. Subsection (14) requires a court, tribunal or body to take account of compliance or of non-compliance with codes of practice

where they exist. Subsection (15) provides that a code of practice published or approved by the Public Guardian for the purposes of court friends shall apply to other persons allowed by the court to assist the relevant person during the course of a hearing (as provided for in section 14(8)).

Chapter 5

Courts Service to manage Office of Public Guardian

Section 64 (Amendment of section 5 of Act of 1998) makes provision for the Office of Public Guardian to be managed by the Courts Service.

PART 9

DETENTION MATTERS

Section 65 (Definitions — Part 9) provides definitions for the purposes of the Part.

Section 66 (Panel of independent consultant psychiatrists to be established by Courts Service) makes provision for the Courts Service to set up a panel of suitable consultant psychiatrists willing and able to carry out medical examinations for the purposes of this Part.

Section 67 (Detention-related safeguards) deals with the possibility of a person who lacks capacity being detained involuntarily if he or she is suffering from a mental disorder. In such cases the procedures provided for in the Mental Health Act 2001 shall be followed.

Section 68 (Review of detention orders in certain circumstances (approved centres)) provides for a review, as soon as possible, of wardship of court orders detaining a person in an approved centre (subsection (1)). Subsection (2) provides that on first review under subsection (1) the court, if satisfied that the person is suffering from a mental disorder, may order the continued detention of the person in the original approved detention centre or an alternative approved centre, for a period of up to 3 months. On a second or subsequent review the court may extend that period up to 6 months. Subsection (3) requires the wardship court to review the continued detention of the person concerned before the expiration of the period referred to in subsection (2) and on being satisfied that the person concerned is suffering from a mental disorder may direct that the person shall continue to be detained in that centre or an alternative approved centre subject to the 6 month restriction set out in subsection (2). Subsection (4) provides that if the wardship court determines that a person is no longer suffering from a mental disorder he or she shall be discharged from detention. Subsections (5) and (6) provide that on a review the wardship court shall hear from the treating consultant psychiatrist and from an independent consultant psychiatrist as to whether the concerned person is in fact suffering from a mental disorder.

Section 69 (Review of detention orders in certain circumstances (non-approved centres)) provides for a review, as soon as possible, of wardship of court orders detaining a person in a non-approved centre (subsection (1)). Subsection (2) provides that on first review under subsection (1) the court, if satisfied that the person is suffering from a mental disorder, may order the continued detention of the person in the original institution or an alternative approved centre, for a period of up to 3 months. On a second or subsequent review

the court may extend that period up to 6 months. Subsection (3) requires the wardship court to review the continued detention of the person concerned before the expiration of the period referred to in subsection (2) and on being satisfied that the person concerned is suffering from a mental disorder may direct that the person shall continue to be detained in that institution or an alternative approved centre subject to the 6 month restriction set out in subsection (2). Subsection (4) provides that if the wardship court determines that a person is no longer suffering from a mental disorder he or she shall be discharged from detention. Subsections (5) and (6) provide that on a review the wardship court shall hear from the treating consultant psychiatrist and from an independent consultant psychiatrist as to whether the person concerned is in fact suffering from a mental disorder.

PART 10

CONVENTION ON INTERNATIONAL PROTECTION OF ADULTS

Part 10 gives effect in the State to the Hague Convention on the International Protection of Adults and makes related provision as to the private international law of the State.

Chapter 1

Preliminary

Section 70 (Interpretation — Part 10) provides for a standard interpretation section that defines certain words and phrases imported from the Convention (subsection (1)). A reference in this Part is a reference to an Article of the Convention (subsection (2)). Subsection (3) provides that this Part and the Convention must be construed in accordance with the Constitution. Subsection (4) allows the High Court to have regard to the Explanatory Report on the Convention by Mr. Paul Lagarde in interpreting this Part and the Convention.

Section 71 (Convention given effect) provides that this Part gives effect in the State to the Convention and makes related provision as to the private international law of the State.

Section 72 (Countries, territories and nationals) defines country to include a territory that has its own system of law (subsection (1)). Subsection (2) provides that where a country has more than one territory within its own system of law, reference to the country in relation to one of its nationals is to the territory with which the national has the closest connection.

Section 73 (Protective measures) provides an indicative list of measures that may be taken to protect the person or property of an adult that may be defined as ''protective measures'' (subsection (1)). Subsection (2) provides that where a measure of like effect to a protective measure is taken in relation to a person before he or she reaches the age of 18 this Part will apply to the measure only when he or she has reached 18.

Section 74 (Central Authority) provides for the functions of the Central Authority under the Convention to be carried out by the Public Guardian (subsection (1)). A communication to the Central Authority in relation to the State should be sent to the Public Guardian (subsection (2)).

Chapter 2

Jurisdiction of competent authority

Section 75 (Scope of jurisdiction) sets out the scope of the High Court's jurisdiction in relation to the exercising of its functions under this Part and the Convention (subsection (1)). It provides for a definition of ''habitually resident'' for the purposes of this section (subsection (2)).

Section 76 (Provisions supplementary to section 75) makes provision for the High Court to also exercise its functions under this Part in relation to an adult if he or she is an Irish citizen and Article 7 of the Convention has been complied with. Article 7 allows for concurrent subsidiary jurisdiction. The authorities of a Contracting State of which the adult is a national, have jurisdiction to take protective measures if they consider that they are in a better position to assess the interest of the adult. There are certain conditions attached to exercising jurisdiction under Article 7 and these must be adhered to. Subsection (3) allows the High Court to exercise its functions under this section if it agrees to a request under Article 8 of the Convention. Article 8 allows the authorities of a Contracting State to request the authorities of another Contracting State to take measures for the protection of the person or property of the adult.

Section 77 (Exercise of jurisdiction) applies where jurisdiction is exercisable in respect of Articles 9 to 11 of the Convention in connection with a matter which involves a Convention country other than the State (subsection (1)). It allows the High Court to carry out any duty imposed on it as a consequence of such jurisdiction being conferred on it. Articles 9 to 11 allow the authorities of a Contracting State in which the property of the adult is situated to take measures to protect the property even if the adult is not habitually resident in the state where the property is located. Subsection (3) applies Article 12 to the exercise of jurisdiction in relation to such matters. Article 12 ensures that any protective measure taken in respect of Article 5 to 9 remains in force even when the basis for the jurisdiction of the authority is no longer valid.

Section 78 (Provisions supplementary to section 77) provides that a reference in this Part to the exercise of jurisdiction under this Part is to the exercise of functions under this Act as a result of Chapter 2.

Chapter 3

Applicable law

Section 79 (Applicable law) provides that the High Court in exercising jurisdiction under Chapter 2 of this Part shall apply the law of the State. However, in relation to the protection of the person or property of the adult, the Court may apply or take into consideration the law of another State with which the situation has a substantial connection.

Section 80 (Provisions supplementary to section 79) provides that where a protective measure is taken in one Contracting State but implemented in another, the conditions of the implementation are governed by the law of the other state.

Section 81 (Enduring powers of attorney, etc.) provides for applicable law in relation to enduring powers of attorney.

Section 82 (Disapplication or modification of enduring power of attorney, etc.) allows the High Court, in exercising its jurisdiction under this Part, to disapply or modify an enduring power that is not exercised in a manner sufficient to guarantee the protection of the person or the property of the person (subsection (1)). In circumstances where the law applicable to the enduring power is not the State's law then the High Court must, so far as it is possible, take into consideration the law of the other country (subsection (2)).

Section 83 (Drawing up of enduring power of attorney which falls within section 81(6)(b)) allows for regulations that relate to the formalities for drawing up an enduring power of attorney as provided for in Part 6 of the Bill to apply with modifications in relation to an enduring power that falls within section 81(6)(*b*) (any other power of like effect).

Section 84 (Protection of third parties) applies where a third party enters, in good faith, into an agreement with a person who would be entitled to act as a representative of an adult under the law of the state where the transaction is concluded (and where both parties are present in the same state) but is not entitled to act as the adult's representative under the law as designated by the provisions of Chapter III of the Convention. It preserves the validity of the transaction and provides protection to a third party who has acted in good faith, unless the third party knew, or should have known, that the law as designated by Chapter III applied.

Section 85 (Mandatory rules) provides that, where the High Court is entitled to exercise jurisdiction under this Part, the mandatory provisions of the law of the State apply regardless of any system of law that would otherwise apply in relation to the matter. It permits the implementation of State mandatory provisions of law, even if the adult's protection has been arranged according to another State's law.

Section 86 (Public policy) provides that nothing in this Part requires or enables the application in the State of a provision of law from another country that would be manifestly contrary to public policy.

Chapter 4

Recognition and enforcement

Section 87 (Recognition) sets out the criteria for the recognition of a protective measure taken under the law of another country in the State and also the criteria for the disapplication of this section.

Section 88 (Application to High Court for declaration on protective measure) allows an interested person as of right to apply to the High Court for a declaration as to whether a protective measure taken under the law of another country is to be recognised in the State.

Section 89 (Provisions supplementary to sections 87 and 88) provides that for the purposes of sections 87 and 88 the High Court is bound by the findings of fact on which the authority of the state where the measure was taken based its jurisdiction.

Section 90 (Enforcement) allows an interested person to apply to the High Court for a declaration as to whether a protective measure taken and enforceable under the law of another country is enforceable in the State (subsection (1)). Subsection (2) requires the

High Court to make a declaration if the measure was taken on the ground that the adult is habitually resident in the other country or on a ground mentioned in Chapter II of the Convention unless section 87(1) or (2) have been disapplied as a result of section 87(3), (4) or (5). Subsection (3) provides that a declaration under this section is enforceable in the State as if it were a measure of like effect taken by the High Court.

Section 91 (Measures taken in relation to those aged under 18) provides for the recognition of previous measures taken under the 1996 Convention on the Protection of Children for the protection of a child or the property of a child and the possible continuation and implementation of those measures under the Protection of Children (Hague Convention) Act 2000. It is to avoid a break in protective measures when a child reaches the age of 18.

Section 92 (Review of measures taken outside State) provides that the High Court may not review the merits of a measure taken outside the State except where it is required to do so under this Part in order to establish whether the measure complies with this Part.

Section 93 (Rules of court) allows for rules of court to make provision about an application to the High Court in relation to the recognition or enforceability in the State of a measure taken in another country.

Chapter 5

Co-operation

Section 94 (Proposal for cross-border placement) applies where it is proposed to place an adult in an establishment in a Convention country other than the State (subsection (1)). Subsection (2) provides that the Central Authority in the State must consult with the Central Authority or other competent authority in the other country about the proposed placement. The Central Authority in the State must send a report on the adult and a statement of reasons for the proposed placement to the Central Authority or other competent authority in the other country. If the Central Authority or competent authority in the other country opposes the proposed placement within a reasonable time, the proposed placement may not be proceeded with (subsection (3)).

Section 95 (Proposal received by Central Authority under Article 33) provides that if the Central Authority in the State receives a proposal from another Convention country under Article 33 to place an adult in an establishment, the placement must proceed unless the Central Authority in the State opposes it within a reasonable time.

Section 96 (Adults in danger, etc.) applies if the High Court has taken or is considering taking protective measures in relation to an adult who is in serious danger and who resides in another Convention country (subsection (1)). The High Court must arrange for the Central Authority in the State to tell the Central Authority or other competent authority in the other country of the danger and the measures taken or under consideration (subsection (3)).

Section 97 (Circumstances in which co-operation is prohibited) provides that the Central Authority may not request from, or send to, a Central Authority or other competent authority in a Convention country information in accordance with Chapter V of the Convention in relation to an adult if it thinks that to do so would endanger the

adult or his or her property or would amount to a serious threat to the liberty or life of a member of the adult's family.

Chapter 6

Miscellaneous

Section 98 (Certificates) provides that a certificate given under Article 38 of the Convention by an authority in a Convention country is, unless the contrary is shown, proof of the matters contained in it. Article 38 of the Convention provides that a Contracting State where a measure has been taken or a power of representation confirmed may deliver to the person entrusted with protection of the adult's person or property, a certificate indicating the capacity in which that person is entitled to act and the powers conferred.

Section 99 (Powers to make further provision as to private international law) allows the Minister to make regulations to enable the Convention to be given better effect in the State.

Section 100 (Exceptions) provides that nothing in this Part, or in regulations made under section 99, applies to any matter to which the Convention, as a result of Article 4, does not apply. Article 4 of the Convention provides that the Convention does not apply to maintenance obligations, the formation, annulment and dissolution of marriage or any similar relationship, property regimes in respect of marriage or any similar relationships, trusts or succession, social security, public measures of a general nature in matters of health, measures taken in respect of a person as a result of penal offences committed by that person, decisions on the right of asylum and on immigration, or measures directed solely to public safety.

Section 101 (Regulations) provides that a reference to regulations in this Part is to regulations made for the purposes of this Part.

Section 102 (Commencement) provides that sections 76, 77, 87(2) and (5), 98 and Chapter 5 in this Part have effect only if the Convention is in force in accordance with Article 57 of the Convention.

PART 11

MISCELLANEOUS

Section 103 (Clinical trials) provides that nothing in the Bill gives anyone the authority to give consent on behalf of the person who lacks capacity to be a participant in a clinical trial.

Section 104 (Patients whose treatment is regulated by Part 4 of the Act of 2001) ensures that there is no conflict between this Bill and the Mental Health Act 2001. If a patient is being treated under Part 4 of the Act of 2001 then nothing in this Bill authorises a person to give a patient treatment for mental disorder or to give consent to a patient being given treatment for a mental disorder.

Section 105 (Payment for necessary goods and services) requires a person who lacks capacity who has entered into a contract for the sale of goods or services to pay the supplier a reasonable sum for the goods or services supplied, subject to the goods or services being suitable to the person's condition in life and actual requirements (subsection (1)). Subsection (2) deletes reference to mental

incapacity in section 2 of the Sale of Goods Act 1893 in relation to capacity to buy and sell because subsection (1) now provides for this.

Section 106 (Consent and capacity in specific matters) retains the law in force concerning capacity in certain contexts.

Section 107 (Application under Part 4, 6 or 9 to be heard in presence of relevant person or person concerned) provides that an application to the court for a declaration in respect of capacity or an enduring power of attorney must be heard in the presence of the relevant person unless: it would not cause an injustice to do otherwise, such attendance would have an adverse effect on the health of the relevant person, the relevant person is unable to attend for a good and substantial reason or the relevant person is unwilling to attend (subsection (1)). Subsection (2) provides that a review under Part 9 of a detention order must be heard in the presence of the person concerned subject to the same provisions listed in subsection (1).

Section 108 (Wills) provides that, subject to subsection (2), the law concerning the capacity of a person to make a will remains unchanged by the Bill (subsection (1)). Subsection (2) gives the High Court, acting on its own motion or that of the Public Guardian, the power to alter a will where exceptional circumstances have arisen since the testator lost testamentary capacity and the interests of justice so demand.

Section 109 (Appeals) allows a decision from the Circuit Court exercising any jurisdiction under this Bill to be appealed to the High Court and any decision made by the High Court under this Bill to be appealed to the Supreme Court on a point of law only (subsection (1)).

Section 110 (Lunacy Regulation (Ireland) Act 1871 to cease to have effect) provides that the Lunacy Regulation (Ireland) Act 1871 will cease to have effect from the commencement of the Bill except for on-going cases. Subsection (2) preserves the validity of any existing decision under the 1871 Act but allows for decisions to be reopened under Part 5.

Section 111 (Amendment of section 26A of Courts (Supplemental Provisions) Act 1961) amends the 1961 Act to allow Specialist Judges to perform and exercise the functions, powers and jurisdiction conferred on the Circuit Court by this Bill in relation to capacity matters.

Section 112 (Amendment of Civil Registration Act 2004) provides for the amendment of the Civil Registration Act 2004 to include as an impediment to marriage or civil partnership a lack of capacity to consent to the marriage or civil partnership, and further provides that objections on such grounds must be accompanied by a Circuit Court declaration to this effect under section 15(1).

Section 113 (Offences) provides that the ill-treatment or the wilful neglect of a relevant person by a decision-making assistant, a co-decision-maker, a decision-making representative, attorney or informal decision-maker is an offence and sets out the penalties.

Section 114 (Review of this Act) requires the Minister to review the functioning of the Act before the 5th anniversary of the date of enactment of the Act.

SCHEDULE 1

Schedule 1 deals with applications for registration of an enduring power of attorney. *Part 1 (Duty to give notice to donor and other persons)* sets out who should receive notice of an intention to register an enduring power of attorney. *Part 2 (Contents of notices)* outlines the information that must be included in the notice. *Part 3 (Duty to give notice to other attorneys)* provides that an attorney, before making an application for registration under a joint and several power, must give notice of intention to do so to any other attorney under the power who is not joining in making the application. *Part 4 (Supplementary)* provides that for the purpose of this schedule, a notice given by post may be sent by prepaid registered post to the usual or last known place of residence of the person to whom it is to be given and the date of postage shall be taken as the date of the notice.

SCHEDULE 2

JOINT ATTORNEYS

Schedule 2 contains provisions about the application of Part 6 to enduring powers of attorney to joint, and joint and several attorneys. It provides that reference to the execution of the instrument in section 40(6) is when the second or last attorney executes the instrument and specifies where in the text references to the attorney should be read as including references to any attorney under the power.

SCHEDULE 3

CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS

Schedule 3 appends a copy of the Hague Convention on the International Protection of Adults.

NOTE — This document is provided for guidance only and does not purport to be a legal interpretation.

Department of Justice and Equality,
July, 2013

Wt. —. 622. 7/13. Clondalkin. (38400). Gr. 30-15.