IHRC Observations on the Assisted Decision-Making (Capacity) Bill 2013

March 2014

IHRC

AN COIMISIÚN UM CHEARTA AN DUINE
IRISH HUMAN RIGHTS COMMISSION

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INTRODUCTION

1. The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution (NHRI), set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001 and functioning in accordance with the United Nations Paris Principles. The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and practice of the State. One of the functions of the IHRC is to examine legislative proposals and to report its views on the implications of such proposals for human rights, having regard to the Constitution and international human rights treaties to which Ireland is a party.[1] The IHRC is mandated to make recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and promote human rights in the State.[2]

2. The IHRC welcomes the opportunity to comment on the provisions of Assisted Decision-Making (Capacity) Bill 2013. The IHRC has previously issued comments on the Scheme of Mental Capacity Bill 2008 (2008 Scheme), which was referred to the IHRC pursuant to section 8(b) of the Human Rights Commission Act 2000 by the then Department of Justice, Equality and Law Reform. The IHRC also made a submission to the Joint Oireachtas Committee on Justice, Defence and Equality on the Mental Capacity Bill in 2011.

3. The Bill is intended to move Irish law away from archaic and discriminatory approaches to mental capacity and towards an approach based on supporting a person's capacity set out in international human rights law, most notably the UN Convention on the Rights of Persons with Disabilities. In addition to the calls from the IHRC for reform in this area, the Law Reform Commission (LRC) has also recommended this change since 2006. In its 2006 *Report on Vulnerable Adults and the Law* the LRC[3] describes the functional approach as involving an 'issue-specific and time-specific assessment of a person's decision making ability'.[4] Such an approach would be in stark contrast to the current system whereby a finding of incapacity, under the Wards of Court system, is applied to every decision and legal transaction a person may make.

4. The most progressive understanding of the functional approach to capacity in international law is set out in Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD). Although Ireland signed the Disability Convention when it opened for signature on 30 March 2007, it has still not ratified the Convention. This legislation, which will introduce urgently needed reform into the present system, has been anticipated for the past 5 years.[5] This delay is extremely regrettable and has meant that an archaic system has been left in place that is not fit

[1] Section 8(b) of the Human Rights Commission Act 2000.
[2] Section 8(d) of the Human Rights Commission Act 2000.
[3] Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC 83-2006). This Report provided detailed recommendations for the enactment of new capacity legislation.
[4] Ibid., at p.46.
[5] Press Release of the Department of Justice, Equality and Law Reform, 'Minister Ahern Announces Proposals for a Mental Capacity Bill' (15 September 2008), available at <http://www.justice.ie/en/JELR/Pages/Minister%20Ahern%20announces%20proposals%20for%20a%20Mental%20Capacity%20Bill> (visited 5 March 2014).

for purpose and does not adequately recognise the rights of persons with disabilities despite its clear conflict with international human rights law and standards. The reason for this extensive delay in amending the Victorian-era legislation that has regulated this area to date (for example the 1811 Marriage of Lunatics Act and 1871 Lunacy Regulation (Ireland) Act) is difficult to understand. Subject to the recommendations set out in these Observations the IHRC calls on the State to introduce the present legislation promptly and ensure that it is enacted and in force as soon as possible so that the rights of persons with decision-making support needs are fully recognised and vindicated by the State.

5. The IHRC is mindful that its sister body; the Equality Authority, has also considered this Bill, and made separate recommendations in relation to integrating it with relevant domestic equality legislation. The IHRC endorses those recommendations, and considers these Observations and recommendations to be in addition, and complementary to, those made by the Equality Authority.

Note on Terminology

6. The 2013 Capacity Bill creates a number of new legal arrangements in relation to decision-making, which are referenced throughout these Observations and for ease of reference are set out in a narrative form here.

(a) Decision-Making Assistants

7. Section 10 of the 2013 Bill allows a person, in circumstances where he or she thinks their capacity is in question or that their capacity may shortly be in question, to appoint a decision-making assistant. This decision-making assistant will *assist* the relevant person in making one or more decisions as relate to their personal welfare or property and affairs.

(b) Co-Decision-Makers

8. Section 18 allows a person, in circumstances where he or she considers that their capacity is in question or that their capacity may shortly be in question, to appoint a co-decision-maker. This co-decision-maker will *jointly make* decisions with the relevant person as relates to the person's personal welfare or property and affairs. Suitable persons for the role of co-decision-maker will be those persons who have a close "relationship of trust" with the relevant person and are also capable of effectively performing the functions of a co-decision maker. A co-decision making agreement can either be made on foot of an application to Court, or by agreement between a relevant person and the person they wish to appoint as their co-decision maker.[6]

[6] It should be noted that a co-decision-making agreement is stated to have no effect unless it is the subject of a co-decision-making order by the court under section 17(3)(a), however it is unclear how this provision interacts with section 18, which provides for co-decision making agreements to be made without a court order.

(c) Decision-Making Orders

9. Section 23(2)(a) allows the court in certain circumstances to make decision-making orders on behalf of a relevant person, where the matter is urgent or it is otherwise expedient to do so. The circumstances in which a person can be subject to such a decision-making order include where: the court has declared that a person lacks capacity unless they have the assistance of co-decision-maker, but it is not possible to appoint such a co-decision-maker; or the court has declared the person to lack capacity even if they have the assistance of a co-decision-maker. A decision-making-order allows the court to make decisions on issues relating to the relevant person's personal welfare (e.g. where the relevant person should live, the diet and dress of the relevant person, the employment and training and rehabilitation the relevant person should receive and so on (s.25)) or decisions relating to the relevant person's property and affairs (e.g. the custody, control and management of the person's property or property rights, the carrying out of any contract entered into by the relevant person and so on (s.26)).

(d) Decision-Making Representatives

10. Section 23(2)(b) allows the court to make an order appointing a person to be a decision-making representative for a relevant person. The decision-making representative will act as the agent of the relevant person in respect of relevant decisions made by the representative (s.24(5)). If the court cannot find a suitable person willing or able to act as a decision-making representative, it may request that the Public Guardian nominate two or more persons from a panel (which is to be established under s.61(1) of the Bill). A decision-making representative will make decisions relating to the personal welfare of the relevant person as well as the property and affairs of the relevant person. Such decisions may therefore relate to matters considered above, including: where the relevant person should live; the diet and dress of the relevant person; the employment, training and rehabilitation the relevant person should receive; the custody, control and management of the relevant person's property and property rights; and the carrying out of any contract entered into by the relevant person and so on (ss.25-26).

(e) Enduring Powers of Attorney (EPAs)

11. An enduring power of attorney (EPA) is essentially an instrument which contains a statement by a person (the donor) that he or she intends a power of attorney to be effective at any subsequent time when the donor lacks or shortly may lack capacity to look after his or her personal welfare and/or manage his or her property and affairs. An attorney may therefore make decisions relating to the donor's personal welfare and/or property and affairs). It should be noted that where a person creates an EPA, the power does not come into effect until it has been registered with the Public Guardian (ss.43-48).

12. The legal arrangements described above essentially provide a continuum of decision-making aids, ranging from supported decision-making to more extensive substituted decision-making. This overall framework, and the various levels of decision-making intervention provided by the Bill, will be discussed in more detail throughout these Observations.

I. OVERALL COMMENT

13. On the basis of its analysis of the Bill, the IHRC has an overall concern that this legislation will not meet the standards of the CRPD and will not fully meet the needs of people who require decision-making support in a manner that respects their rights. While the Bill does go some way towards rectifying the unacceptable system currently in place, it continues to perpetuate aspects of the paternalistic approach of the Wards of Court system and the Mental Health Act 2001 as affirmed by the Courts in case law.[7] The IHRC considers that the current draft of this legislation is not fully grounded in recognition of, or respect for, the individual rights of people who may require decision-making support. This legislation should be framed in a way that empowers individuals to exercise the full extent of their decision-making capacity in relation to their lives, even where that capacity may appear extremely limited.

14. The IHRC considers that this Bill requires reconsideration and refocusing to place the inherent rights of the individual at its core, and to provide for an approach whereby a person is given every opportunity to have their will and preference upheld in recognition of their individual autonomy. The present legislation focuses on creating a system that while on the one hand affirming a presumption of capacity still allows for the removal or substitution of decision-making, which in the view of the IHRC is in certain respects merely a 'repackaging' of the present system. In particular, the IHRC would highlight the provisions that allow for Court declarations that a person either has or does not have capacity (sections 3 and 15) and the apparent 'rebranding' of the Office of the Wards of Court into the Office of the Public Guardian, as symptomatic of the approach taken in aspects of this draft legislation.

15. The human rights standards that will be discussed hereafter affirm that every person has legal capacity at all times. This cannot be taken away and is the cornerstone to our understanding of all persons as rights holders, irrespective of whether they have a disability. Mental capacity can however, on a practical level, fluctuate and may need to be supported in different ways and to different degrees throughout a person's life. The present draft legislation does not fully reflect this principle.

16. It is also unclear where the present draft legislation provides for a functional assessment to mental capacity to determine the decision making supports a person needs *in practice*. While there is reference to functional assessments of capacity on a decision-by-decision basis in the explanatory note to section 3, it is unclear how this will be triggered by virtue of the operation of the legislation itself. At present, a person will either 'self-assess' as requiring support (section 10) or an application will be made to the Court for a declaration that the relevant person lacks capacity absent a co-decision maker (section 15(1)(a)) or even with a co-decision maker (section 15(1)(b)). While capacity under section 3 refers to the ability of the person to 'understand the nature and consequences of a decision to be made by him', the rest of the Bill does not appear to support such a decision-by-decision process or assessment. The IHRC notes further that the definition of 'decision' includes a 'class of decisions'. Thus the manner in which a 'decision' is construed in practice may be so

[7] See, for instance, *Croke v Smith* (Unreported) High Court 31 July 1995; *Croke v Smith (No. 2)* [1998] IR 101; *Re Philip Clarke* [1950] IR 235; and *E. H. v St. Vincent's Hospital & ors* [2009] IESC 46. See also paras x-x hereafter.

broad as to negate the functional approach, for instance if a class of decisions was to be considered to cover all matters regarding a person's welfare.

17. Further specific concerns that impact on the overall legislation or which are not addressed in the legislation are as follows:

Explicit Reference to CRPD

18. Reference to the CRPD in the long title to the Bill would be welcome. A clear statement that the Bill is for the purpose of giving effect to that Convention would highlight that the Bill intends to reflect the principles of the Convention and also underscore Ireland's commitment to this Convention and the principles contained therein and to assist in the ongoing interpretation of the legislation in light of evolving standards under the CRPD. The IHRC **recommends** that explicit reference to the CRPD, and specifically Article 12, be included in the legislation. The IHRC further **recommends** that the European Convention on Human Rights (ECHR) be explicitly referenced in the long title, in order to reflect the importance of the rights contained therein to the operation of this legislation.

Need for Clear Basis in the Principle of Non-Discrimination

19. Non-discrimination in the enjoyment of rights is one of the fundamental principles of human rights and is reflected in the CRPD.[8] This principle should be reflected in the text of the Bill and govern all its provisions. This would ensure that the decisions and actions taken by virtue of this legislation are firmly grounded in this fundamental principle.

Need for Reconsideration of the Complexity of the Legislation

20. The IHRC notes that the draft legislation is 90 pages long, containing 114 sections (not including the Schedules). In addition to its length, the text appears to be overly complicated, difficult to navigate and makes the legislation fundamentally non-user friendly for those who are covered by its provisions and those conferred with particular roles under it. While the IHRC understands that the legislation needs to be comprehensive, the current format, structure and length appear to lack precision. The IHRC **recommends** that efforts be made to simplify the current text so that it is clear and understandable, most importantly for persons with a cognitive disability, and also bearing in mind that courts will be required to interpret it in the future in a practical way; legal professionals and others will be required to provide advice to people concerned with this legislation and in addition families, carers, medical and other professionals will also need to understand its operation and scope. The complexity of the current Bill, will inevitably lead to litigation regarding the interpretation of its

[8] Article 5 provides: Equality and non-discrimination: 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

provisions or failure to comply with its provisions, and leave gaps in the protection due to persons who require decision making supports.

21. In addition, the IHRC **recommends** that resources be made available to produce a number of plain language guides to the legislation once enacted directed to the various stakeholders effected by the legislation or with responsibility for the operation of the legislation.[9] Other non-written resources to explain the function of the Bill should also be actively promoted.

Sterilisation

22. The IHRC is concerned by the reference made to the issue of sterilisation, under section 4 of the draft legislation. This brief reference to the inherent jurisdiction of the High Court to consider issues relating to non-therapeutic sterilisation of persons lacking capacity raises numerous concerns regarding the potential infringement of such persons' reproductive rights. This issue is further discussed at paragraphs 279-313 of these Observations below. However, the IHRC considers that any provision regarding the potential sterilizations of persons with disabilities in not one which can be left unaddressed in the law.

23. Notwithstanding the generality of its concerns above, the IHRC provides the following recommendations for amendments to the current draft, with a view to ensuring that it meets international human rights standards and will create a system in Ireland that respects the dignity and rights of everyone who may require support in decision making.

II. Analysis and Recommendations on Specific Issues

A. Legal Capacity v. Mental Capacity

(i) Preliminary Discussion

24. Article 12 CRPD (in relevant part) provides for the rights of persons with disabilities to equal recognition as persons before the law in the following terms:

> *Article 12 – Equal recognition before the law*
>
> *(1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
>
> *(2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
>
> *(3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*

[9] It is noted that the Office of the Public Guardian will have a responsibility to produce codes of practice, and the duty to produce accessible information on the operation of the legislation could suitably also be conferred on that Office.

25. It is clear on a literal reading that while Article 12(1) affirms the rights of persons with disabilities to be recognised as persons before the law, Article 12(2) affirms the rights of persons with disabilities to enjoy legal capacity on an equal basis with other persons. As such, the sub-articles are complementary, in that the recognition of an individual's legal personality is a necessary prerequisite for the recognition and exercise of that individual's legal capacity.

26. The IHRC is concerned that the Bill fails to distinguish between two distinct concepts, legal capacity and mental capacity, in a manner that is incompatible with Article 12. Recognition of legal capacity is core to the protection of the rights of persons with disabilities. Such recognition is fundamental to human 'personhood' and freedom. It protects the dignity of persons as well as their autonomy; their ability to act, have legal recognition of their decisions on an equal basis with others. In other terms, it allows individuals to take charge of their own lives.

27. Article 12 requires that the right of persons with disabilities to enjoy and exercise legal capacity on an equal basis with others is recognised, and precludes the denial of this right on the grounds of a person's disability.

28. In this regard, the IHRC notes and endorses the view advanced in a report prepared for the Law Commission of Ontario that:

> *The CRPD breaks the link between mental capacity and legal capacity, by prohibiting discrimination on the basis of disability in the enjoyment and exercise of legal capacity. On their face, mental capacity statutory provisions which articulate cognitive tests for having one's legal capacity recognized and protected appear to be in violation of the CRPD.*[10]

(ii) Relevant Provisions of the 2013 Bill

29. In its long title the draft legislation is described as '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' (emphasis added).

30. Section 2 states that 'capacity' means 'mental capacity', a term which is to be construed in accordance with section 3.

31. Section 3 of the Bill provides for an assessment of a person's decision making capacity, whereby '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' (section.3(1)). A person lacks 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, and (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 means of a third party or otherwise). The explanatory memorandum notes that the Bill is intended to shift Irish law from the current 'all or nothing' approach to a flexible functional one,[11] and that it

[10] Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, Law Commission of Ontario (October 2010), at p.67.
[11] Explanatory Memorandum to the 2013 Bill, at p.1.

is time and issue specific.[12] It also states that the section takes a 'time- and issue-specific approach'. Section 3(6) provides that the question of capacity shall be determined 'on the balance of probabilities'. It should be noted that this provision establishes a particular standard in respect of determining mental capacity, which appears to be at odds with another standard for assessing capacity set out in section 8(2). Specifically, section 8(2) sets out a presumption that a person has [mental] capacity unless the contrary is shown 'in accordance with the provisions of this Act.' In addition is s also noted that there is at present a presumption of legal capacity at common law that applies to all persons, other than Wards of Court, and while this may not be wholly relevant in the present context, it is important to bear in mind in the context of the overall legislation.

32. Section 4 sets out the jurisdiction of the Circuit and High Courts under the Bill. A finding that a person lacks mental capacity, and the making of a declaration to this effect pursuant to section 15, is a condition precedent to the exercise by the court of its jurisdiction under the Bill to make co-decision-making orders (s.17), and decision-making orders by the Court or the appointment of a decision-making representative (s.23).

33. It is apparent from the foregoing that insofar as the Bill defines 'capacity', this term is restricted to mental capacity or decision-making capacity, and that no provision is made in respect of legal capacity, or more generally for the recognition of persons with disabilities as persons before the law enjoying legal capacity. The potential implications of the failure in the draft legislation to distinguish between legal capacity and mental capacity, combined with the failure to include a specific guarantee of the right of persons with disabilities to enjoy and exercise legal capacity on an equal basis with others, are twofold.

34. First, the legislation is open to being construed as making the enjoyment and exercise of legal capacity contingent upon an individual's mental capacity/decision-making capacity, as assessed pursuant to the criteria set out at section 3 of the Bill.

35. Secondly, the various orders which the Circuit Court is empowered to make on foot of a finding that a person lacks mental capacity/decision-making capacity are capable of being understood as denying or otherwise restricting a person's legal capacity, unless such a legal consequence is expressly precluded by the legislation.

36. Such a lacuna in the legislation appears to risk individuals being reduced to the situation of those presently under the Wards of Court system, where their legal personality is stripped from them and they essentially have no rights, other than those afforded under a form of judicial protection. Although the issue is referred to more generally here, the practical implications of this failure to guarantee full legal recognition to persons with disabilities is most clearly illustrated by the treatment of such persons in the context of the court procedures provided for under the Bill.

[12] Ibid., at p.2.

(iii) Relevant International and Domestic Standards

UN Committee on the Rights of Persons with Disabilities

37. In its draft General Comment on Article 12 CPRD,[13] the Committee on the Rights of Persons with Disabilities (the supervisory body for the purpose of the CRPD) affirms that legal capacity and mental capacity are to be regarded as distinct concepts.

38. The Committee advances the view in the draft General Comment that legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). Mental capacity refers to the decision-making skills of an individual, which vary among individuals and may be different for a given individual depending on many factors, including environmental and social factors. Article 12 CPRD does not in the Committee's view permit perceived or actual deficits in mental capacity to be used as justification for denying legal capacity.[14]

39. The Committee notes that in most of the State reports which it has examined, the concepts of mental and legal capacity have been conflated, such that where an individual is assessed as having impaired decision-making skills (often because of a cognitive or psychological disability), they are deprived of their legal capacity to make a particular decision.

40. The Committee comments that, regardless of whether a status approach, outcome approach, or functional approach is adopted in assessing an individual's mental capacity, the reliance on an individual's impaired mental capacity and/or decision-making skills as a basis for denying or restricting that person's legal capacity amounts to a discriminatory denial of that person's right to equal recognition before the law which is not permitted by Article 12.[15]

High Commissioner for Human Rights

41. The Office of the High Commissioner for Human Rights, in providing guidance for assessing whether the right of persons with disabilities to equal recognition before the law is respected in a State's laws, suggests that it should be asked inter alia whether (a) there is a legal guarantee recognising the rights of persons with disabilities to enjoy legal capacity on an equal basis with others, (b) whether there are exceptions to this legal guarantee which could be discriminatory, for instance on the basis of mental or other types of disability, and (c) whether there is a legal mechanism through which persons with disabilities are fully or partially deprived of their legal capacity to act on the basis of their disability.[16]

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[13] Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention: Equal Recognition before the Law*, Adopted at the Tenth Session (2-13 September 2013). As the Comment was the product of a long consultation process, it is unlikely that the general thrust of the comment will change on adoption in due course, and thus it provides useful guidance in the present context.

[14] Ibid., at para.12.

[15] Ibid., at para.13.

[16] Office of the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* (New York and Geneva, 2010), at p.55.

Legal capacity in other international human rights instruments

42. In providing for the recognition of the legal capacity of persons with disabilities, the CRPD reflects Article 15(2) of the Convention on the Elimination of All Forms of Discrimination against Women, which provides that States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. The term 'legal capacity' as employed in these Conventions is to be understood as referring to a person's capacity to have rights, and to exercise those rights on an equal basis with others without discrimination on the grounds of gender or disability. The necessity of affirming the legal capacity of both women and disabled persons in this context is to be understood against a historical background in which these groups have been discriminatorily denied equal recognition before the law.

43. The right to recognition of one's legal capacity is, like the right to education, both a human right in itself, and an indispensable means of realising other rights.[17] Equal recognition before the law is crucial to ensuring that persons with disabilities enjoy and exercise the rights set out at Article 12(5) CRPD, including the right to own or inherit property, control their own financial affairs, and the right not to be arbitrarily deprived of their liberty.

Relevant jurisprudence of the European Court of Human Rights

44. The European Court of Human Rights (ECtHR) has expressed the view on a number of occasions (particularly in the context of the detention of persons with cognitive or psychological disabilities) that the recognition of an individual's legal capacity is crucial for the exercise by that individual of their rights and freedoms, including the right to liberty, privacy and personal autonomy.[18]

45. It is to be acknowledged that insofar as denials or restrictions of legal capacity have been held to constitute an interference with the right to respect for private life as guaranteed by Article 8(1) of the European Convention on Human Rights, the Court has gone on to consider whether such an interference by a public authority was capable of justification under Article 8(2), i.e. whether it was in accordance with law, pursued a legitimate aim, and was necessary in a democratic society for the attainment of those aims.[19]

46. As such, the Court's jurisprudence under Article 8 is presently of limited usefulness in assessing whether the present Bill is compatible with Article 12 CRPD, in that the ECHR makes provision for the possible removal of legal capacity on the basis of mental capacity (provided such a measure is proportionate), whereas the CRPD precludes the removal or limitation of legal capacity on the grounds of

[17] Committee on Economic, Social and Cultural Rights, *General Comment 13, The Right to Education*, Adopted at the Twenty-First Session (8 December 1999) E/C.12/1999/10.
[18] *Shtukaturov v Russia*, App. No. 44009/05, Judgment of 27 March 2008, (2012) 54 EHRR 27, at para.71; *Salontaji-Drobnjak v Serbia*, App. No. 36500/05, Judgment of 13 October 2009, at para.144; *X and Y v Croatia*, App. No. 5193/09, Judgment of 3 November 2011, at para.102; *Stanev v Bulgaria*, App. No. 36760/06, Judgment of 17 January 2012, (2012) 55 EHRR 22, at para O-II2 (partly dissenting Opinion of Judge Kalaydjieva).
[19] *Lashin v Russia*, App. No. 33117/02, Judgment of 22 January 2013, at paras.77-81.

disability.[20] However, this approach by the Court is evolving, as the Court has recognised the CRPD as a source of guidance in relation to the rights of persons with disabilities, and thus its approach may be expected to be modified as the standards in the CRPD receive greater recognition.[21]

(iv) Observations and recommendations – legal capacity and mental capacity

47. Considered in the light of the foregoing principles, is incompatible with Article 12 CRPD in that it does not contain an express guarantee that disabled persons enjoy legal capacity on an equal basis with others in all aspects of life, and as such is therefore capable of being construed as providing for the restriction and/or denial of legal capacity on the basis of a functional assessment of mental capacity.

48. The IHRC **recommends** that Section 2 of the Bill be amended by deleting the current definition of 'capacity', and providing for separate definitions of 'legal capacity' and 'mental capacity'. 'Mental capacity' should continue to be construed in accordance with section 3 of the Bill, while 'legal capacity' should be defined in section 2 of the Bill as meaning the capacity to have legal rights and duties, and the capacity to exercise those legal rights and duties.

49. Section 3 is a critical component of the legislation. It identifies how capacity will be assessed and what will be regarded as a lack of capacity. Section 3 as currently formulated may not fully reflect the safeguards required by Article 12(4) CRPD. In particular, there is an absence of explicit reference to proportionality, tailoring and application of measures for the shortest time possible. The explanation in the explanatory memorandum indicates that it is the intention of the legislation that this provision is intended to be time and issue specific. The IHRC **recommends** that section 3 be amended to include specific provision for the time and issue bound nature of any mental capacity assessment under this legislation.

50. Section 3(2) provides that a person 'lacks the capacity to make a decision where…'. This terminology indicates that section 3 may not have the correct focus as regards the rights of the individual. It should not be an all-or-nothing determination that a person either has or does not have capacity as this does not reflect the approach of international human rights law and standards. It is **recommended** that section 3 be amended to provide that a person either has capacity or *requires decision-making support.*

51. The definition of capacity should also take into account the supports that the person needs in order to exercise their decision-making capacity. The Principles relevant to these supports are set out in section 8, but are not referenced in section 3.

[20] It is perhaps to be noted that the Committee of Ministers of the Council of Europe has affirmed that people with disabilities have the right to recognition everywhere as persons before the law, and that when assistance is needed to exercise that legal capacity, Member States must ensure that this is appropriately safeguarded by law (*Recommendation REC(2006)5 on the Council of Europe Action Plan to Promote the Rights and Full Participation of People with Disabilities*, Adopted 5 April 2006). In *Shtukaturov*, the Court stated that while the principles contained in such Recommendations had no force of law, they were capable of being regarded as defining a common European standard in the this area, at para.95.

[21] See note 16 above.

The addition of a cross-reference may assist with this issue and the IHRC **recommends** that this be included.

52. The IHRC considers that given the seriousness of a determination of a lack of capacity on a person's life, a higher standard than the 'balance of probabilities' should be applied in relation to evidence under this section. In addition, it should be noted here that there is further discrepancy between section 3 and section 8 insofar as they each set out different standards for determining mental capacity (s.3(6) setting out a standard based on the 'balance of probabilities' and section 8(2) setting out a presumption of capacity unless the contrary is proven). It is unclear how these two standards should be dealt with and/or integrated, though it is noted that an assessment of both standards would seem to indicate that the section 3(6) 'balance of probabilities' standard for assessing capacity is not CRPD compatible, whereas the section 8(2) 'presumption' is CRPD compatible. Given this more suitable standard set out in section 8(2), the IHRC would therefore **recommend** that section 3(6) be brought in line with section 8(2). It is also useful to refer here to paragraph 188 below which deals with matters of evidence that the Circuit Court should be satisfied of before making any declaration under section 15.

53. The IHRC further **recommends** that section 8 of the Bill should be amended to contain a clear statement that a relevant person continues to enjoy legal capacity notwithstanding any declaration or order which may be made under the Bill as to that person's mental capacity. In addition, it is **recommended** that section 8 make reference to the full range of human rights of the relevant person, rather than just providing specific reference to the rights of the relevant person to his or her 'dignity, bodily integrity, privacy and autonomy.' (s.8(6)(b)).[22]

54. Section 8 of the Bill should be further amended by the insertion of an additional subsection which provides that, for the avoidance of doubt, nothing in this Act, or any measure taken pursuant to the Act shall be construed as permitting the removal, restriction, curtailment, abridgment, denial or any other form of interference with the legal capacity of a relevant person.

55. Consequent amendments to the Bill should be made, such that 'mental capacity' should be substituted for 'capacity' where this term is used in isolation (as distinct from its use in the phrases 'testamentary capacity' and 'decision-making capacity', where no amendment will be necessary).

B. EQUAL ACCESS TO JUSTICE

(i) Preliminary Discussion

56. The IHRC considers equal access to justice for persons with disabilities to be a necessary corollary of the right to exercise legal capacity, and a vital component of the right to a fair trial[23] and an effective remedy.

[22] Section 2 of the Human Rights Commission Act, 2000 provides a comprehensive definition of "human rights" that might be usefully referenced here.

[23] This right is protected *inter alia* under Articles 38 and 40.3 of the Constitution and Article 6 of the ECHR.

57. The IHRC recognises that persons with disabilities, and particularly those with cognitive or psychological disabilities, face significant obstacles in securing access to justice on an equal footing with those who do not have such disabilities.

58. The Council of Europe Commissioner on Human Rights has observed, in the context of a third party intervention before the ECtHR, that partial or complete legal incapacitation of persons with disabilities, together with factors such as poverty, isolation, inadequate legal representation and insufficient provision of legal aid, combine to create an unusually high degree of social exclusion, which in the Commissioner's view accounts for the significant discrepancy between the scale of human rights violations perpetrated against persons with disabilities, and the relatively low number of court cases brought in relation to such violations.[24]

59. Article 13 CRPD recognises that in order to secure effective access to justice for persons with disabilities on an equal basis with others, provision must be made by way of procedural accommodations in order to ensure the effective role of such persons as direct and indirect participants in all legal proceedings.

60. The IHRC is concerned that the Bill does not make adequate provision in the form of positive measures designed to ensure equal access to justice for persons with disabilities, and indeed that in material respects the Bill preserves discriminatory obstacles to equality of access derived from the current wardship regime.

61. In particular, the IHRC considers that the following issues fall to be considered:

- The overall suitability of the courts system to dealing with determinations regarding mental capacity
- The provision of legal representation;
- The provision of legal aid in respect of such representation;
- The hearing of applications under the Bill otherwise than in the presence of the person who is the subject of such an application;
- The making of costs orders in respect of applications under Part 4 of the Bill.

(ii) Relevant Provisions of the 2013 Bill

62. Proceedings which may be brought under Part 4 are to the Circuit Court, and include applications for declarations as to mental capacity (s.15), co-decision-making orders (s.17), decision-making orders (s.23(1)), decision-making representative orders (s.23(2)), and interim orders (s.28). Such applications may be made by any person with the consent of the court, or without such consent by the persons listed at section

[24] *The Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, App. No. 47848/08, third party intervention by the Council of Europe Commissioner for Human Rights under Article 35(3) ECHR, Strasbourg (14 October 2011) CommDH (2011) 37, at paras.10-13. See also the report of the EU Agency for Fundamental Rights, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (Luxembourg: Publications Office of the EU, 2011).

14(3).[25] Appeals are allowed on a point of law only to the High Court and in turn the Supreme Court.[26]

63. This Part of the legislation relates to applications to a court without the consent of the relevant person, which procedure shall be regulated by the Rules of Court (per section 14(7)). It should further be noted that section 15, regarding the making of declarations as to mental capacity, allows the Court to make a declaration that the relevant person lacks capacity in the absence of a co-decision maker or even if a co-decision maker is available: that is, even despite assistance, although the existence of a decision making agreement must be brought to the attention of the Court. The comments that follow regarding the Office of the Public Guardian are relevant in this regard

<u>The Appropriateness of the Circuit Court as the forum for the determinations of Capacity</u>

64. The IHRC considers that an overall question arises for consideration as to whether a formal court setting is the most appropriate forum for the initial consideration, and making of arrangements regarding mental capacity and supported decision making by the State under the Bill. While the IHRC considers that ultimate legal determinations regarding mental capacity, with attendant arrangements being put in place, most certainly require a court like jurisdiction, with full fair hearing rights for the party concerned, it is unclear that this should be the first point at which decision making arrangements (other than decision making assistance agreements) are facilitated by the State and put in place for the benefit of the relevant person. In this regard the IHRC **recommends** that serious consideration be given to the possibility of a more mediated response where a question arises regarding a person's decision making capacity, and which could involve the Office of the Public Guardian, facilitating a process by which supported decision making models are explored for the person concerned, and agreed to by the relevant person, that person's supporters, carers and family as appropriate, and thereafter monitored and reviewed by that Office on a periodic basis to determine whether any changes are needed to the arrangements, or if indeed if it is necessary to make an application to court for a more binding arrangement to be put in place. Such a process, if clearly based on the will and preference of the relevant person, and the cooperation of that person's "circle of support" could avoid many unnecessary and costly court applications, that ultimately may encroach more than is necessary on the autonomy rights of the relevant person, and put their friends, family or carers in the invidious position of instigating unnecessary and inherently adversarial court proceedings.

65. The further analysis below in relation to Part 4 and the courts process should be read in light of the above recommendation.

[25] That is: (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.
[26] Section 109.

The Provision of Legal Representation

66. No provision is made in the Bill for the automatic appointment by a court or other authority of a legal practitioner to represent the person who is the subject of an application under Part 4 of the Bill. However, the Bill does deal with the issue of legal aid and advice, for both the applicant, and the person, the subject of the proceedings, referred to as a 'relevant person'. In addition there is a provision specifically dealing with the legal costs incurred by the applicant, where the applicant is not the relevant person.

67. Pursuant to section 14(9) of the Bill, where a person who is the subject of such an application, has not instructed a legal practitioner, the court may direct the Public Guardian to appoint a 'court friend' for the relevant person, but only where no decision-making assistant, co-decision-maker, decision-making representative or attorney (under an enduring power of attorney) has been appointed, or where such a person exists but is not willing to assist in the course of a hearing. The powers and duties of court friends are provided for under section 60(1) of the Bill, and largely involve accessing records relevant to the court hearing, and representing the interests of the person in the context of the court proceedings, even if the relevant person does not attend.[27] There is no requirement that the 'court friend' would be legally qualified, and indeed it appears most likely this will not be the case.

68. Section 14(6)(a) of the Bill provides that a party to proceedings under Part 4 who retains legal representation for the purpose of those proceedings shall be liable for the costs of that legal representation. While, 'a party' to the proceedings is not defined, it is presumable that this would include both the applicant, and also the relevant person, noting also that such a relevant person has the right to apply to the Court on their own behalf in respect of any Order made by the Court.

The Provision of Legal Aid in Respect of Such Legal Representation

69. Section 14(6)(b) of the Bill provides that section 28 of the Civil Legal Aid Act 1995 ('the 1995 Act') shall apply to proceedings or proposed proceedings 'under this section which relate to section 15(1)'. This provision essentially allows the applicant to Court and the relevant person to apply for legal aid[28] or advice,[29] and certain amendments are proposed to the Civil Legal Aid Act, 1995, that would not require a full merits test to be applied to such an application, but any such person applying for legal aid would still have to meet the financial eligibility criteria.[30]

[27] Section 60(4) provides that a court friend will not be entitled to access the medical records of the relevant person, unless they are a qualified medical practitioner.
[28] Section 28, Civil Legal Aid Act, 1995
[29] Section 26, Civil legal Aid Act, 1995.
[30] Proposed amendments to the 1995 Act are provided for at section 32 of the Bill. The proposed amendment to s.28 of the 1995 Act is such that where the proceedings which are the subject of the application for legal aid concern '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', the applicant is exempted from the eligibility criteria provided for at s.28(2)(c) and (e) of the 1995 Act. In broad terms the financial eligibility requirements for legal aid / advice, are that a person must have a "disposable income of less than €18,000" and also a "disposable capital of less than €100,000". The family home is not included in an assessment of the person's disposable capital.

70. In order to qualify for legal aid, an applicant or relevant person under Part 4 of the Bill would have to show that:

- He or she satisfies the financial eligibility criteria provided for by section 29 of the 1995 Act;

- As a matter of law he or she has reasonable grounds for instituting, defending, or being a party to the proceedings under Part 4 of the Bill; and that

- The proceedings are the most satisfactory means (having regard to all the circumstances of the case, including the probable cost to the applicant) by which the result sought by the applicant, or a more satisfactory result, may be achieved.

<u>The Hearing of Applications in the Absence of the Person who is the Subject of that Application</u>

71. Provision is made at section 107 for the hearing of applications under Part 4 (applications to the court in respect of relevant persons), Part 6 (enduring powers of attorney), or Part 9 (detention matters) in the absence of the person who is the subject of such an application where, in the opinion of the Circuit Court or High Court:

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.

<u>The Making of Costs Orders under Part 4 of the Bill</u>

72. The Bill makes provision for circumstances in which an applicant (not the relevant person) under Part 4 of the Bill does not meet the financial eligibility criteria for securing legal aid at section 14(6)(c), by providing that the Court may, if 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.

(iii) Relevant International and Domestic Standards

73. The right of access to justice has been recognised as a necessary component of the right to a fair trial and/or to an effective remedy in a range of international human rights instruments.[31]

[31] Article 8, Universal Declaration on Human Rights; Article 2(3) and Article 14(1), International Covenant on Civil and Political Rights; Articles 6 and 13 ECHR.

Article 13 CRPD

74. As already noted the CRPD guarantees access to justice for persons with disabilities under Article 13. The express provision made at Article 13 is in addition to the guarantee set out at Article 12(3) that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. It is to be noted that the principle of accessibility underlies the Convention as a whole, and guides its interpretation (Article 9).

75. In its draft General Comment on Article 12 CPRD, the Committee on the Rights of Persons with Disabilities has recognised the inter-relationship between the guarantee of equal recognition before the law (Article 12) and access to justice (Article 13), and that the recognition of the right to legal capacity is essential for securing access to justice.[32] The Committee affirms that State Parties must ensure that persons with disabilities have access to justice on an equal basis with others, and that this necessarily entails access to legal representation. Noting the historical exclusion of persons with disabilities from the justice system, and recognising that difficulties in securing access to legal representation is a significant obstacle to the exercise of legal capacity, the Committee states that individuals who experience interferences with their right to legal capacity must have the opportunity to challenge these interferences, whether on their own behalf or with legal representation, and to defend their rights in court.[33]

76. In its concluding observations on the initial report of China submitted under Article 35 CRPD, the Committee criticised the failure to ensure that persons with disabilities could intervene in the judicial system 'as subjects of rights and not as objects of protection', and noted that instead of ensuring that its civil procedure laws were accessible to persons with disabilities on an equal basis with others, 'patronising measures [had been] put into place, such as the designation of public defenders that treat the person concerned as if they lack capacity'. These criticisms were made notwithstanding the provision by China of legal aid for persons with disabilities through a network of legal aid service centres.[34]

International Covenant on Civil and Political Rights

77. The UN Human Rights Committee has stated that the guarantee under Article 14 ICCPR of equality before the courts, and of a fair and public hearing by a competent, independent and impartial tribunal established by law, prohibits any distinctions regarding access to courts which are not based in law and cannot be objectively justified on reasonable grounds. This guarantee is violated where an individual's attempts to access competent courts or tribunals are systematically frustrated, whether *de jure* or *de facto*, and where certain persons are prevented from bringing proceedings by virtue of their membership of a discriminatory category.

[32] Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention: Equal Recognition before the Law*, Adopted at the Tenth Session (2-13 September 2013).
[33] Ibid., at para.34.
[34] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of China*, Adopted by the Committee at the Eighth Session (17-28 September 2012) CRPD/C/CHN/CO/1, at paras.23-24.

78. The UN Human Rights Committee has also emphasised that the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. Thus, while the mandatory provision of legal assistance is generally limited to criminal proceedings, the requirements of the right of access to justice may necessitate positive steps by State Parties to provide legal aid in civil proceedings, in particular to persons of insufficient means.[35]

UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care

79. The implications of the guarantee of access to justice in the sphere of mental health have been addressed in the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, which provide in relevant part:

> *Any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an independent and impartial tribunal established by domestic law. The person whose capacity is at issue shall be entitled to be represented by counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it.*[36]

European Convention on Human Rights

80. The jurisprudence developed under Article 6 ECHR, which guarantees the right to a fair trial in the determination of civil rights and obligations or any criminal charge, is instructive both as to when the right of access to justice is engaged, and as to the normative content of this right.

81. The ECtHR has recognised that the right of access to a court is an inherent element of Article 6(1) ECHR, and that the rule of law in civil matters is inconceivable without this right.[37]

82. Further, the ECtHR has held that the capacity to deal personally with one's property involves the exercise of private rights and thus of 'civil rights and obligations', such that proceedings relating to the detention of a mentally ill person, and the consequential loss of the capacity to administer private property, amounts to a

[35] Human Rights Committee, *General Comment No. 32: Right to Equality before Courts and Tribunals and to Fair Trial*, Adopted on Ninetieth Session (9-27 July 2007) CCPR/C/GC32, at paras.9-10.
[36] Office of the High Commissioner for Human Rights, *UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, Adopted by General Assembly resolution 46/119 (17 December 1991) A/RES/46/119, at Principle 1(6).
[37] *Golder v United Kingdom*, App. No. 4451/70, Judgment of 21 February 1975, (1979-80) 1 EHRR 524, at paras.28, 35-36.

determination of those 'civil rights and obligations', and fell to be considered under Article 6(1).[38]

83. The guarantees contained in Article 6(1), including the right of access to justice, are engaged where the proceedings amount to a dispute (Fr. 'contestation') which are 'directly decisive' for such rights and obligations.[39]

84. While an individual's right of access may be limited by operation of law, such a limitation must not impair the essence of the right, must pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[40] While the Court has held that mental illness might permit certain limitations on the right of access to the courts, it cannot warrant the total absence of that right.[41]

85. The right is one of *effective* access, and the fulfillment by a Member State of its obligation to an effective right of access to the courts may of necessity require the taking of positive action, including the provision of the assistance of legal aid where indispensable for effective access to a court, in particular where legal representation is compulsory, or by reasons of the complexity of the procedure or the facts of the case.[42]

86. The ECtHR has elaborated on the criteria to be applied in determining whether the provision of legal aid is necessary in the following terms:

> *The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.*[43]

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[38] *Winterwerp v Netherlands*, App. No. 6301/73, Judgment of 24 October 1979, (1979-80) 2 EHRR 387, at paras.73-75.

[39] *Ringeisen v Austria (No.1)*, App. No. 2614/65, Judgment of 16 July 1971,(1979-80) 1 EHRR 455, at para.94; *Le Compte v Belgium*, App. Nos. 6878/75, 7238/75, Judgment of 23 June 1981, (1981)4 EHRR 1, at para.47.

[40] *Ashingdane v The United Kingdom*, App. No. 8225/78, Judgment of 28 May 1985,(1985) 7 EHRR 528; *Ivison v The United Kingdom*, App. No. 39030/97, Judgment of 16 April 2002

[41] *Winterwerp v Netherlands*, App. No. 6301/73, Judgment of 24 October 1979, (1979-80) 2 EHRR 387, at para.75.

[42] *Airey v Ireland*, App. No. 6289/73, Judgment of 9 October 1979, (1979-1980) 2 EHRR 305, at paras.24-26.

[43] *Steel and Morris v The United Kingdom*, App. No. 68416/01, Judgment of 15 February 2005, [2005] ECHR 103, at para.61. This case followed from the earlier decision in *Airey v Ireland*(see above) where the Court stated at para.26:

> Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.

Constitution

87. It is well established that a right of access to the courts is an implied personal right under Article 40.3.1° of the Constitution. While the constitutional right to state funded legal aid when facing a criminal charge which entails serious consequences for the accused, including the possible loss of liberty, has been recognised in *The State (Healy) v O'Donoghue*,[44] the question of whether this principle is capable of extension so as to give rise to a constitutional right to civil legal aid has been considered in a series of cases.[45] It is noted in this regard that the constitutional right in question in *The State (Healy) v O'Donoghue* was interpreted in light of the right to a fair hearing under Article 6 ECHR.

88. Notably in the present context, in *Stevenson v Landy*[46] Lardner J applied the principle adduced in *The State (Healy) v O'Donoghue* in the context of proceedings relating to the refusal to grant an applicant legal aid in respect of wardship proceedings taken against her by the Eastern Health Board, which sought to take the applicant mother's infant son into wardship. In construing the relevant provisions of the legal aid scheme, Lardner J was of the view that the impugned criterion for securing legal aid (i.e. of there being a likelihood of success) was inappropriate in the context of the wardship proceedings, in which the welfare and best interest of the child were the overriding considerations.

89. The implications of the decision in *Stevenson v Landy* have been somewhat restricted by the decision of the Supreme Court in *Magee v Farrell*,[47] in which it was held that the right identified in *The State (Healy) v O'Donoghue* did not extend to proceedings other than criminal proceedings. In his Judgment, for a unanimous Court, Finnegan J (Murray CJ and Fennelly J concurring) stated that the decision of Lardner J was confined to the construction of the relevant provisions of the legal aid scheme, and did not support a constitutional entitlement to state funded legal aid. A right to legal representation did not carry with it a right to state funded legal aid, and in the Supreme Court's view there was no justification for the extension of the principle in *The State (Healy) v O'Dononghue* to wardship proceedings.

90. In the yet more recent High Court decision of *MX v Health Service Executive*[48] MacMenamin J noted that:

> *The interpretation of the Constitution in this area of the law should be informed by, and have regard to, international conventions. This principle of interpretation, of course, applies a fortiori in relation to the regard which, as*

[44] *The State (Healy) v O'Donoghue* [1976] IR 325.
[45] See *Forrest v Legal Aid Board* (Unreported, High Court, O'Hanlon J, 4 December 1992); *Kirwan v Minister for Justice* [1994] 2 IR 417; *O'Donoghue v Legal Aid Board* [2004] IEHC 413, [2006] 4 IR 204.
[46] *Stevenson v Landy* (Unreported, High Court, Lardner J, 10 February 1993).
[47] *Magee v Farrell* [2009] IESC 60, [2009] 4 IR 703. See also *Magee v Ireland* (Application No. 53743/09) before the ECtHR concerning the issue of access for next-of-kin to legal aid for participation in an Inquest. A Friendly Settlement was reached between the parties and noted by the Court on 20 November 2012. In the settlement, Ireland agreed to enact legislation providing for legal aid and advice to parties to certain proceedings before a coroner.
[48] [2012] IEHC 491

a matter of law, must be had to decisions of the European Court of Human Rights (see ss 2- 5 of the European Convention on Human Rights Act, 2003).[49]

91. MacMenamin J also acknowledged therein that the understanding of the 'broader range of constitutional "personal capacity rights"' [under consideration in the case] should be informed by 'the United Nations Convention on the Rights of Persons with Disabilities as well as the principles enunciated in the judgments of the European Court of Human Rights'. He added that, in an appropriate case and context, the principles established in international conventions can, where they are consistent with the Constitution itself, provide helpful reference points for the identification of 'prevailing ideas and concepts' to which regard shall be had for the purpose of interpreting the Constitution as a living document.[50]

92. Therefore the existing case law in relation to whether there exists in certain circumstances a constitutional right to legal aid may also be influenced by Article 12 and 13 CRPD. While not strictly relevant in the present context it is also noted that the EU Charter of Fundamental Rights makes provision for legal aid that would go further than the present constitutional approach.[51]

Existing statutory framework

93. It is useful to consider the existing statutory framework relating to legal representation and legal aid for persons with cognitive or psychological disabilities against the background of the right of access to justice, as provided for under the Constitution and relevant international human rights instruments.

94. Amongst the functions of the Mental Health Commission under the Mental Health Act 2001 ('the 2001 Act') are those of assigning a barrister or solicitor to represent an individual who is the subject of an involuntary admission order or renewal order (unless the individual proposes to engage a legal representative him or herself) (section 17(1)(b)), and to make a scheme for the granting by the Commission of legal aid to such an individual (section 33(1)(c)).

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[49] Ibid., at p.31.
[50] Ibid.
[51] The right to an effective remedy and to a fair trial, are guaranteed by Article 47 of EU Charter of Fundamental Rights ('CFR'), largely reflects Articles 6 and 13 ECHR. Pursuant to Article 52(3) CFR, insofar as Article 47 CFR contains rights which correspond to the rights guaranteed under the ECHR, the meaning and scope of those rights is identical. Article 52(3) CFR does not, however, prevent the EU law from providing for more extensive protection than that afforded under the ECHR, and Article 47 CFR does so in a number of material respects. First, it makes express provision for legal aid in a manner which is not restricted to criminal proceedings: 'Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'. Further, Article 47 is more extensive than Article 6 ECHR in that it is not confined to disputes relating to civil law rights and obligations,[51] and more extensive than Article 13 ECHR, in that it guarantees the right to an effective remedy before a court (as opposed to a national authority). The Court of Justice enshrined this right as a general principle of Union law which applies to Member States when they are implementing EU law (Case 222/84 *Johnston* [1986] ECR 1651; see also Case 222/86 *Heylens* [1987] ECR 4097 and Case C-97/91 *Borelli* [1992] ECR I-6313). See again *Explanations Relating to the Charter of Fundamental Rights* (Official Journal of the European Union, 14 December 2007) 2007/C 303/2.

95. While no express provision is made in the 2001 Act in relation to the funding of such representation, the Mental Health Legal Aid Scheme (2005) para.3.1(1)(c) states that, where the Commission assigns a legal representative to represent a patient, it will do so without regard to the patient's means or assets, and no payment need be made by the patient either to the Commission or to the legal representative.

96. In determining the scope of the legal representation, provided for under section 17(1)(b) of the 2001 Act, in *EJW v Watters*,[52] Peart J held that this right was not limited to representation at the Mental Health Tribunal, but rather that it was intended that the patient should have legal representation from the point at which such a representative was appointed by the Commission, and that as such a representative therefore was required to act on behalf of that patient, not merely in relation to a review hearing before the Mental Health Tribunal, but 'generally in order to protect the patient's interests'.

97. Similarly, the Criminal Law (Insanity) Act 2006 makes provision at section 12(6)(a) for the making of a scheme for the granting by the Mental Health (Criminal Law) Review Board of legal aid to involuntary patients.

98. Separately, the awarding of costs in wardship proceedings is governed by section 94 of the Lunacy Regulation (Ireland) Act 1871, which provides that the Lord Chancellor (whose former jurisdiction is now exercised by the President of the High Court):

> *may order the costs and expenses of and relating to the petitions, applications, orders, directions, conveyances, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the land or stock, or the rents or dividends in respect of which the same respectively shall be made, in such manner as he may think proper.*

99. This provision fell to be interpreted by Finnegan P in *In Re Keogh (A Ward of Court)*[53] in the context of an unsuccessful wardship petition. Notwithstanding the dismissal of the petition, the petitioner sought his costs, and was resisted by the respondent who in turn sought her costs. Relying on the decision in *In the Matter of MJ*[54] Finnegan P held that in deciding whether to make an order that the costs of the petition be paid out of the estate of the respondent, it was to be considered (a) whether there was reasonable ground for alleging mental incapacity on the part of the respondent, and (b) whether it was for the benefit of the respondent that the inquiry should have proceeded for the purpose of bringing the respondent under the care of the court. Finnegan P rejected an argument advanced on behalf of the respondent that the equality guarantee contained at Article 40.1 of the Constitution precluded a departure from the normal principle that costs follow the event solely on the basis that the respondent was the subject of proceedings under the 1871 Act, and applying the foregoing criteria, stated:

> *The practice of the court since 1871 has been that if a petition has been properly presented and for the lunatic's benefit exclusively by a person entitled*

[52] *EJW v Watters & Anor* [2008] IEHC 462.
[53] *In Re Keogh (A Ward of Court)* (Unreported, High Court, Finnegan P., 24 October 2002).
[54] *In the Matter of MJ* [1929] IR 509.

to present it the costs will be made payable out of the ward's estate even though the petition should be unsuccessful or the proceedings upon the inquiry granted result in the alleged lunatic being found sane or the finding of lunacy be quashed upon a traverse. Where the petition is presented bona fide the costs of opposing the inquiry will not be fixed on the Petitioner even though the opposition succeeds. [...] The Petitioner having acted on reasonable grounds and bona fide in the interest of the Respondent it cannot be said that his being awarded costs represents an injustice to the Respondent.[55]

(iv) Observations and recommendations – equal access to justice

100. Subject to the views of the IHRC in relation to the desirability of over reliance on formal court proceedings and the role of the Office of Public Guardian (see above at para. 55), the IHRC is of the view that an application for a declaration as to mental capacity, pursuant to section 15 of the Bill, and for any consequential orders under Part 4 of the Bill, must be regarded as a 'determination of civil rights' within the meaning of Article 6(1) ECHR, and in particular the right to administer private property, of the person who is the subject of such an application.

101. The IHRC **recommends** that section 15 should be amended to remove references to a person 'lacking' capacity. This should be replaced with a determination that a person requires a specific level of decision-making support. This support under the Bill may range at one end of the scale from supported (assisted) decision-making to facilitated (co-decision) making to substituted decision-making (decision making representatives and decision making orders) at the other end of the scale.

102. Under section 15(1), the Court may only make a declaration that a person 'lacks' mental capacity unless assisted by a co-decision-maker or lacks capacity even with the assistance of a co-decision-maker. There is no provision for the possibility of a declaration that a person has capacity with adequate supports such as an assisted decision maker, although this may be implied where a Court is satisfied it should refuse an application. It is considered that for the sake of clarity such a provision should be made explicit. The possible limitation placed on the Court by this section may not be in keeping with international human rights standards, and indeed, the intention of the Bill to ensure a functional, tailored approach to capacity assessments and the provision of support. The IHRC **recommends** that section 15(1) be amended to allow for the possibility of the Court making a declaration that the person has capacity if assisted by a decision-making-assistant. This would also be in keeping with the guiding principles set out in section 8 whereby an intervention in respect of a relevant person shall be made in a manner that minimises restrictions on their rights and freedoms and reflects the will and preference of the person.

103. It is also **recommended** that section 15 should also include a requirement to consider the possibility of putting in place a decision making agreement, and also specific reference to the declaration being made in respect of a particular decision or area of the person's life and to the time-bound nature of the decision, bearing in mind Article 12(4) CRPD.

[55] *In Re Keogh (A Ward of Court)*, at p.5.

104. Section 29, considered below, is also relevant to this section and the IHRC's recommendations as regards section 29 should be read in conjunction with its section 15(1) recommendations.

The Provision of Legal Representation

105. The IHRC notes with concern that, by way of contrast with the relevant provisions of the Mental Health Act 2001, the Bill does not require the appointment of a legal representative.

106. Section 14(8) provides that the Court may allow the person to be assisted by a court friend if they have not instructed a legal practitioner except where there is a suitable support person in the form of a decision-making assistant and so on. It would of course be preferable to ensure that the person can be assisted by a court friend where it is their request to have such support, and the Bill should reflect this, for example, through the use of the imperative 'shall' in this sub-section, insofar as this is in accordance with the will and preference of the person. Furthermore, the IHRC does not regard the provision made in respect of the appointment by the Office of the Public Guardian of a court friend to assist a person who is the subject of an application in relation to his or her mental/decision-making capacity as amounting to an adequate safeguard of such a person's right to legal representation in the context of proceedings which will of necessity be of some legal complexity, given the person's presumed disability, and will have the most serious of consequences for a person who is subject of such an application.

107. In addition, while a relevant person, the subject of an application under Part 4, has the right to apply for legal advice or legal aid, under the Civil legal Aid Act, 1995, or indeed may appoint a legal practitioner from their own means (if any) to represent them, the Bill explicitly allows for and endorses a situation where such persons would not be legally represented in court. The Bill creates no nexus between the decision making function of the Legal Aid Board and Court proceedings under Part 4, such that the relevant judge would be obliged to await a decision of the Legal Aid Board before proceeding with an application, or such a judge would be empowered to direct or make application to the Legal Aid Board in relation to the provision of legal aid under the Act. Without such a direct connection between the functions of the Legal Aid Board, and the relevant court hearing the application, it is likely that some applications for legal aid by a relevant person will not have been determined before a Court hearing goes ahead, leaving the relevant person legally unrepresented. In addition the Bill makes no provision for the circumstances of a person with a disability who is unable themselves, by reason of their disability, and who does not have support available to them, to make the necessary application for legal aid, or indeed engage legal representation from their own means. Thus, there is no safeguard under the Bill to ensure that a relevant person at least has the opportunity to engage legal representation if this is their will and preference, nor is the Court required to inquire if this is so.

108. Part 4 of the Bill also appears to seek to equate legal representation in a court setting, with the other decision making mechanisms provided for under the Bill (decision-making assistants, co-decision makers, decision-making representatives or attorneys and court friends). In the view of the IHRC this cannot be the case. The Bill

sets out an elaborate and complex system for making determinations regarding mental capacity and the consequences that flow from such determinations. Applications before the Circuit Court bear on the fundamental rights of the relevant person, and as such, an *ad hoc* approach to legal representation undermines the right to fair procedures of the person concerned, particularly taking into account that by definition such persons may already be in a vulnerable position by reason of a disability. The only safeguard offered under the Bill is the default appointment of a court friend through the Public Guardians Office, a person who may well be a useful support to the person in attending court proceedings, but who will not be fully qualified to navigate the complexities of the law involved, nor qualified in court advocacy. In addition, the functions and role of the persons appointed under the various decision-making mechanisms under the Bill are wholly distinct from the role of a legal representative in a court setting. For instance, it is far from clear how a decision-making representative or a person appointed under a power of attorney, could independently represent the relevant person in court without coming into conflict or over-lapping with their other decision-making duties. Another concern in this regard is the fact that a clear inequality of arms may arise between the person making the application, if that person has legal representation, and the relevant person, if they do not have such representation.

109. The IHRC **recommends** that the Bill make provision for the appointment of a legal representative by the Office of the Public Guardian to represent a person who is the subject of an application under Part 4 of the Bill (whether as applicant or respondent), unless such a person proposes to engage such a representative himself.

110. The IHRC **further recommends** that such legal representation be expressed to be in respect of any matter relating to that person's mental/decision-making capacity and the exercise of his legal capacity, rather than being confined to the hearing of applications under Part 4 of the Bill.

The Provision of Legal Aid

111. The IHRC considers that the vindication of the right of access to the courts for persons with disabilities requires the State to take positive measures in the form of the provision of legal representation, and that the provision of legal aid in respect of such representation is necessary for a fair hearing, having regard to the importance of what is at stake for the relevant person under Part 4 of the Bill, the complexity of the law and procedure, and in particular the applicant's capacity to represent himself/ herself effectively.[56] In this regard, the IHRC has concerns that the manner in which the legal aid provisions of the Bill have been drafted are ambiguous in a number of important respects, which are ultimately to the detriment of the relevant person.

[56] In considering whether any positive duty arises for the State under Article 6(1), it was stated in *Airey v Ireland*, App. No. 6289/73, Judgment of 9 October 1979, (1979-1980) 2 EHRR 305,at para.25: …hindrance in fact can contravene the Convention just like a legal impediment. Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is…no room to distinguish between acts and omissions". The obligation to secure an effective right of access to the courts falls into this category of duty.

112. The reference made at section 14(6)(b) of the Bill to proceedings 'under this section which relate to section 15(1)' is obscure. It may have been intended to refer to proceedings under 'this Part' (i.e. Part 4) which relate to section 15(1). Even if such an amendment were made, however, the proposed limitation of the application of the 1995 Act to applications under Part 4 of the Bill which 'relate to' section 15(1) lacks clarity. The matters provided for at section 15(1) of the Bill are (a) a declaration that a relevant person lacks capacity without the assistance of a co-decision-maker, and (b) a declaration that the relevant person lacks capacity even if provided with such assistance. It is to be envisaged that circumstances may arise where it may be argued that one or more of the orders which may be made under Part 4 do not 'relate to' the matters provided for at section 15(1). In addition this would exclude any court procedures that arise under other Parts of the Bill, for instance appeals to the High Court, or the procedures that apply to Wards of Court under Part 5 of the Bill.

113. The IHRC therefore **recommends** that insofar as provision is made for legal aid in respect of applications under Part 4 of the Bill, this should be free from any requirement that the application 'relates to' section 15 of the Bill, and should apply in relation to any other Court proceedings that arise under different parts of the Bill as appropriate.

114. As noted the Bill does not make direct provision for a scheme of legal aid in respect of legal representation for persons who are the subject of applications under the Bill. Instead, by virtue of the proposed amendments to the Civil Legal Aid Act 1995, the provision of legal aid in respect of applications under Part 4 of the Bill remains subject to the applicant first applying and thereafter satisfying the financial eligibility criteria.

115. While the IHRC recognises that, generally, legal aid will only be necessary where an individual has insufficient funds, it may be envisaged that even where a person who is the subject of such applications has sufficient resources to meet the attendant legal costs at the outset of proceedings under Part 4 of the Bill, these resources may be gradually exhausted by subsequent applications and reviews.

116. There is therefore a clear risk that by requiring a person with a cognitive or psychological disability to bear the costs of legal representation in respect of applications under Part 4, a declaration regarding the fact of loss of mental/decision-making capacity will have a significant and detrimental impact on such a person's assets which may amount to an unjustified and discriminatory interference with his or her property rights.[57]

117. Overall, the IHRC **recommends** that the Bill make provision for the making of a scheme of legal aid by the Office of the Public Guardian whereby legal representation in respect of a person who is the subject of an application under Part 4 or any other relevant Part of the Bill may be afforded legal aid without regard to his or her financial resources.

[57] Whether under Article 40.3.1° and/or Article 43 of the Constitution and/or Article 1 of Protocol No.1 ECHR.

Applications in the Absence of the Relevant Person

118. As mentioned above, section 107 of the 2013 Bill allows for applications to the Court under Parts 4, 6 and 9 of the Bill to be heard in the absence of the relevant person who is the subject of the application. By permitting applications under Parts 4, 6 and 9 of the Bill to be heard in their absence, the Bill further places a limitation on the right of a person who is the subject of an application to have a fair hearing, to exercise his or her legal capacity, and to be afforded equal access to the courts. While some allowance may have to be made for Court proceedings not to be delayed indefinitely by the unavailability of a party or witness to the proceedings, the breadth of the grounds for allowing the absence of the person the subject of the application – as set out in sections 107(1)(a)-(d) – does not appear to be sufficiently narrowly drawn to ensure the optimum participation of person with disabilities in legal proceedings that profoundly impact on their rights. Furthermore, given that no express provision is made in section 107 for the attendance of the relevant person's legal representative, or even a 'court friend', at an application made in the absence of that relevant person, the section is capable of being regarded as an impermissible interference with the very essence of these rights.

119. The IHRC recognises that the criteria laid out at section 107(1)(a) to (c) of the Bill represent an attempt to objectively justify this interference with reference to legitimate aim(s) and to ensure that there is a reasonable relationship of proportionality between the means employed and the aim(s) sought to be achieved. These criteria are, on their face, rational and objective. While, however, a facility to excuse a person from the obligation to be present in Court and who is a subject to an application under Parts 4, 6 or 9 of the Bill may be capable of objective justification, such a facility should not effectively negate the right of access to the courts.

120. In the IHRC's view, section 107, if it is to be compatible with relevant international human rights standards, must be **amended** to ensure that (a) the exceptions in relation to the attendance of the relevant person in court proceedings are drawn more narrowly and subject to a requirement of reasonable accommodation, (b) a person who is the subject of an application is legally represented in his or her absence, and (c) in considering whether to allow an application to be made in the absence of the relevant person, the High Court must have due regard to the rights, will and preference of that person in relation to his or her attendance at the hearing, insofar as these are ascertainable.

121. The IHRC therefore **recommends** that the allowable circumstances in which a person would not be required to attend court pursuant to section 107 be more narrowly drawn and include a requirement for reasonable accommodation as set out in Article 13 CRPD.

122. The IHRC further **recommends** that section 107 be amended to ensure that even where the High Court is satisfied, having regard to the matters set out at section 107(1) of the Bill, that an application under Parts 4, 6 or 9 may be heard in the absence of the person who is the subject of such an application, there is a requirement that the relevant person be legally represented at any such hearing held in his or her absence.

123. Finally, the IHRC **recommends** that section 107 be amended by the insertion of an additional subsection which provides that in deciding whether to hear such an application in the absence of the relevant person, the High Court shall have due regard to the rights, will and preference of that person in relation to his or her attendance at the hearing, insofar as these are reasonably ascertainable.

The Making of Costs Orders under Part 4 of the Bill

124. A further aspect of Part 4 that raises concerns is the provision that would allow the Court to make an order that the legal costs arising from the application (even if unsuccessful) may be recovered from the assets of the relevant person (the person who is the subject of the application) for the benefit of the person making the application. This would apply in circumstances where the Legal Aid Board had refused legal aid to the applicant as they did not satisfy the relevant financial eligibility criteria. In determining whether to make an order that such legal costs be paid out of the assets of the person who is the subject of the application, the sole consideration for a court is whether it is "in the interests of justice" to do so. When considering the interests of justice, it is unclear the extent to which the Court will have regard to the circumstances of the relevant person, as opposed to the circumstances of the applicant.

125. This provision allows for a clear interference with the property rights of the relevant person, which interference arises from two arbitrary factors. First, the fact that the person has a disability or is presumed to have a disability causing diminished mental capacity. Secondly, the financial status of the applicant, which is a factor that is wholly extraneous to the relevant person. In addition, diminishing the assets of the relevant person, is likely to undermine their ability to live independently, also a right under Article 19 CRPD, and recognised under Article 26 of the EU Charter of Fundamental Rights.

126. Aside from possible arbitrariness, this provision also has additional implications for the relevant person. It is not excluded that the person may be the subject of multiple applications before the Circuit Court and thus multiple costs orders may be made against the property of that relevant person. In addition the failure to provide a more comprehensive system of legal aid may deter the making of an application under the Bill, even where this is done for the purpose of safeguarding the interests of the relevant person. While most court proceedings can be compromised before a full hearing takes place, or indeed before any legal proceedings are initiated, thus allowing opportunities for a potential defendant to minimise the legal costs that arise from litigation, the court proceedings contemplated under Part 4 would not lend themselves to such arrangements being reached, nor should they. This fact, however, creates multiple opportunities for the assets of the relevant person to be diminished under a statutory regime put in place by the State, supposedly for the benefit of persons with disabilities that require decision-making support.

127. Indeed, the IHRC is concerned that by making provision for the paying of the legal costs by an applicant under Part 4 of the Bill who does not meet the financial eligibility criteria for legal aid out of the assets of the relevant person where it is in the interests of justice to do so, section 14(6)(c) of the Bill is essentially replicating section 94 of the Lunacy Regulation (Ireland) Act 1871.

128. Furthermore, the IHRC is of the view that the discretion conferred on the courts by section 14(6)(c) of the Bill is overbroad, and that the power to make an award of costs, perhaps even to an unsuccessful applicant, out of the assets of a person whose mental/decision-making capacity has been called into question is inconsistent with the guarantees under Articles 12 and 13 CRPD of equal recognition and equal access to justice.

129. Finally, it is noted that the Court is not required to have specific regard to the rights, will or preference of the person who is the subject of the application, insofar as they are reasonably ascertainable. It is noted that the Bill is otherwise silent as regards the matter of legal costs, which potentially creates a risk that costs orders could be made against the relevant person by the Circuit Court within its inherent jurisdiction to do so notwithstanding the express provision of the Bill.

130. The IHRC **recommends** that section 14(6)(c) of the Bill be deleted and the awarding of costs in relation to any application or review under Part 4 be specifically prohibited.

C. SUBSTITUTED DECISION-MAKING, ASSISTED/SUPPORTED DECISION-MAKING AND RELEVANT SAFEGUARDS

(i) Preliminary Discussion

131. The IHRC is anxious that the Bill when enacted will give practical effect to the rights of disabled persons to dignity, autonomy and the freedom to make one's own decisions. In particular that the Bill would always be directed to upholding the will and preference of the person concerned.

132. In the existing statutory framework, that is the Wards of Court system, a determination of incapacity results in a total loss of personal and legal autonomy, and in the vesting of authority in another person to make decisions about that person's life, often with regard to an objective 'best interests' standard, rather than with regard to the rights, will and preference of the person concerned.

133. The IHRC recognises that in order to give effect to the right of a disabled person to enjoy and exercise his or her legal capacity on an equal basis with others, regimes of substitute decision-making must be abolished and replaced by assisted decision-making, such that the rights, will and preference of the individual concerned are realised notwithstanding an impairment or loss of mental capacity in relation to a particular decision or decisions for a particular period of time.

134. As such, the function of the Bill in this regard should be twofold, (a) to abolish or phase out existing regimes of substitute decision-making, and (b) to provide for supported decision-making to the maximum degree possible.

(ii) Relevant Provisions of the 2013 Bill

135. In its long title, the Bill is described as making provision for the reform of the law relating to persons who require or may require assistance in exercising their

decision-making capacity; however, this stated objective is not always reflected in the provisions of the Bill.

Assisted Decision-Making, Co-Decision-Making, Decision-Making Representatives, and Decision-Making Orders (Sections 10-12 and Sections 16-27)

136. The Bill introduces mechanisms for assisted decision-making at Part 3, co-decision-making at Chapter 4 of Part 4, decision-making representative and decision-making orders at Chapter 5 of Part 4, and informal decision-making at Part 7.

137. These mechanisms are subject to the guiding principles provided for at section 8 of the Bill, which makes reference to the need, when making an intervention in respect of a person who is the subject of an application, to do so in a manner that minimises the restriction of that person's rights and freedom of action, and that has due regard to the need to respect the right of that individual to dignity, bodily integrity, privacy and autonomy (section 8(6)). Further, an intervener is required, insofar as practicable, to permit, encourage and facilitate the participation of such a person in an intervention, to give effect to the past and present will and preferences of that person, and to take into account his or her beliefs and values insofar as these are reasonably ascertainable (section 8(7)). The IHRC overall welcomes the inclusion of these guiding principles in the legislation.

138. Section 10 provides for the possibility of a person over the age of 18 appointing a person to assist them in making one or more decisions on their personal welfare (as defined in Section 25(a)), property and affairs (as defined in Section 26(1)(a)).[58]

139. Section 10 also provides for regulations to be made by the Minister in respect of certain matters, but does not name the Minister as an intervener governed by the guiding principles under section 8.

140. Where the Court has made a declaration under section 15(1) that the relevant person requires a co-decision-maker, sections 16 to 17 apply. Co-decision-making agreements for the purposes of these sections are subject to the approval and oversight of the Court. Co-decision-making agreements pursuant to these sections shall be subject to periodic review in the first 9 to 15 months after making the order, and thereafter every three years.

141. Section 18 deals with the creation of a co-decision-making agreement by the relevant person. Section 19 relates to the requirement of a co-decision-maker to acquiesce to a decision where certain conditions are met. Section 20 lists the grounds for prohibiting a person from being a co-decision maker. Section 21 sets out the functions and scope of authority of co-decision-makers, including the reporting requirements to the Public Guardian, and section 22 sets out the restrictions that may apply.

142. Pursuant to Section 23(1), the appointment of a decision-making representative and the making of decision-making orders provided for at Chapter 5 are

[58] See also FNs 60 and 61 (in para. 133).

available where the Court has made a declaration that a person lacks mental capacity even with the assistance of a co-decision-maker, or where the Court has declared that a person lacks capacity unless assisted by a co-decision-maker, but is unable to appoint a co-decision-maker either because the relevant person and the co-decision-maker do not consent to the making of the co-decision-making order pursuant to section 17(5), or because there is an obstacle to the appointment of a co-decision-maker by virtue of section 20. Section 23 allows the Court itself to make decisions on behalf of the relevant person or to appoint decision-making representatives,[59] following a declaration under section 15(1). This section applies where the Court is unable to make the relevant co-decision-making order.[60] Section 24 outlines the instances in which a decision-making representative will not be appointed, enumerates the instances in which a decision-making representative may be removed and the appropriate manner in which the decision-making representative is to be reimbursed. Sections 25 and 26 outline the scope of decision-making orders and decision-making representative orders in relation to the 'personal welfare' of the relevant person (section 25)[61] and the 'property and affairs' of the relevant person (section 26)[62], thus

[59] A decision-making representative is defined by section 2(1) of the Bill as '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.'

[60] Paragraph (b) of section 15(1) '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.'

[61] Section 25 describes the scope of a decision-making order or decision-making representative order, as relates to the *personal welfare* matters of a relevant person. It states that such orders may make decisions for the relevant person specifically regarding the following issues: where the relevant person should live; the persons with whom the relevant person may or may not have contact; the employment, training, and rehabilitation the relevant person should receive; the diet and dress of the relevant person; the inspection of personal papers of the relevant person; whether or not the relevant person may travel outside the State; and the granting or refusing to consent to certain healthcare treatments of the relevant person. Section 25(b) further states that a decision-making order or decision-making representative order may make decisions relating to the personal welfare of the relevant person on 'such other matters as the court considers appropriate.'

[62] Section 26 states that as regards decisions relating to the *property and affairs* of a relevant person, a decision-making order or decision-making representative order may make decisions specifically relating to the following matters: the custody, control and management of the relevant person's property or property rights; the sale, exchange, mortgaging, charging, gift or other disposition of the relevant person's property; the acquisition of property in the name of the relevant person, or on his or her behalf; the carrying on of any profession, trade or business on behalf of the relevant person; the making of a decision which has the effect of dissolving a partnership in which the relevant person is a partner; the carrying out of any contract entered into by the relevant person; the discharge of the relevant person's debts or other obligations; the execution or exercise of any of the powers or discretions vested in the relevant person as a tenant for life; providing for the needs of other persons or the decision-making representative, to the extent that the relevant person might have been expected to do so; the conduct of proceedings before any court or tribunal, whether in the name of the relevant person or on his or her behalf; and 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. In addition, section 26(1)(b) states that a decision-making order or decision-making representative order may make decisions relating to the property and affairs of the relevant person on 'such other matters as the court considers appropriate.' Section 26(2) sets out special provisions relating to the power of a decision-making representative to dispose of a relevant person's property by way of gift. Thus, the decision-making representative may only, without the specific approval of the court, give gifts to: other persons who are related to or connected to the relevant person and which are related to a special occasion; charities to which the relevant person made or might reasonably be expected to make gifts. This is provided that the value of the gift is reasonable having regard to all the circumstances and the relevant person's assets. Sections 26(3)-(5) discuss the power of the court, notwithstanding the

defining these two terms within the legislation. Section 27 places limitations upon decision-making representatives. This includes, among other provisions, preventing usurpation of powers of attorney, prohibiting refusal of 'life-sustaining treatment' for the relevant person, and limiting the powers of the decision-making representative to restrain the relevant person in specific circumstances.

143. While limitations are placed on the scope and duration of the powers of a decision-making representative by virtue of section 23(5), (10) and section 27, it is clear that the range of matters covered by decision-making orders or decision-making representative orders relating to the 'personal welfare' and 'property and affairs' of the relevant person is without limit, having regard to the terms of section 25(b) and section 26(b) respectively, which provides that the court may make additional provision for such other matters as it thinks appropriate.

Wards of Court (sections 33-37)

144. Part 5, sections 33 to 37 cover the situation of persons who are Wards of Court pursuant to the system currently in place. This Part provides for the retention of the existing wardship regime, albeit subject to the provision that the general principles provided for at section 8 of the Bill will apply to actions taken in respect of a ward which are similar to interventions made in respect of a person who is the subject of an application under the Bill. Sections 35 to 37 essentially provide for the transition of individuals out of the wardship regime, whether by discharge, or by making the appropriate declarations and orders provided for under Part 4.

145. Section 33 provides for the High Court or the Circuit Court to be the wardship court. Section 35(1) allows that a review of the capacity of a ward who has reached 18 years may be made to the Court, with that Court's consent. Section 35(2) appears to provide for a review of all existing wardship arrangements within three years of the *commencement* of the section, and allows the Court to declare that a ward does not lack capacity or require assistance. Section 35(3)(a) provides for the discharge of a ward from wardship in certain circumstances. Section 36 provides for consultation between the wardship court and the Public Guardian.

146. Sections 33 to 37 appear to be transitional arrangements to allow for the moving of people from the current wardship system into the new system that will be created by this legislation. Those provisions allowing for all existing wardship arrangements to be reviewed, by virtue of section 35(2), are welcomed. The IHRC **recommends** that there should be no delay after enactment on the commencement of section 35(2), so as to ensure that all current wards are subject to a review of their status at the earliest point. The IHRC also **recommends** that the timeframe for review be shortened from 3 years, as this is too long to leave persons in the wardship system prior to review. Previous **recommendations** regarding the provision of legal aid and representation to relevant persons apply with even greater force in respect of Wards of Court.

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existence of a decision-making representative, to confer on the Public Guardian the custody, control and management of a relevant person's property. The court can confer such authority in situations where they think the Public Guardian is the 'most appropriate person' to exercise that power.

Informal Decision-Making (Sections 53-54)

147. Part 7, sections 53 and 54, relate to what is referred to as "*informal decision-making*" in personal welfare matters and make provision for the taking of action in respect of a person's personal welfare, healthcare or treatment, subject to certain limitations. Essentially, these provisions permit an action to be taken by an informal decision-maker where it does not relate to or closely relate to a matter referred to in section 4(2).[63]

148. Pursuant to section 53(2), the informal decision maker shall not incur any legal liability which would not have been incurred if the relevant person had the capacity to consent to the action and consented. Section 53(3) provides that the informal decision-maker shall be indemnified from the monies of the relevant person. The section does not purport to remove civil liability for loss or damage or criminal liability for negligence for the acts of informal decision-makers and in this regard section 113 is noted, whereby, *inter alia*, an informal decision-maker may be liable for ill treatment or wilful neglect of the relevant person.

Interim Orders, Reviews and Expert Reports (Sections 28-30)

149. Sections 28 to 30 deal with the making of interim orders, review of section 15(1) capacity declarations and the role of expert reports. Section 29 provides for reviews of declarations made by a court under section 15(1) which can be done at any time on request of a person listed in section 14(3)(a)-(h)[64] and must be done in any event within 12 months or within 3 years where 'the court is satisfied that the relevant person is unlikely to recover his or her capacity'. The court may revoke or amend or confirm a section 15(1) declaration 'having reviewed the capacity of the relevant person'. The court may seek medical, healthcare or other reports ('expert reports') to assist it in its decision, pursuant to section 30.

(iii) Relevant International and Domestic Standards

CRPD

150. Amongst the general principles underlying the guarantees of the CRPD are respect for the inherent dignity, individual autonomy, and independence of disabled persons, which rights encompass the freedom of disabled persons to make their own choices (Article 3(a) CRPD).

151. This general principle is reflected in the guarantees of equality and non-discrimination (Article 5), equal recognition before the law (Article 12) and access to justice (Article 13). Crucial to securing the dignity, autonomy and freedom of

[63] That is: (a) non-therapeutic sterilisation; (b) withdrawal of artificial life-sustaining treatment; or (c) the donation of an organ.

[64] That is: (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 [Part 4] where the application relates to that order.

disabled persons is the requirement that State Parties take appropriate measures to provide access by such persons to the support they may require in exercising their legal capacity (Article 12(3)).

152. In its draft General Comment on Article 12 CRPD, the UN Committee on the Rights of Persons with Disabilities has recognised that in order to secure the right of persons with disabilities to exercise their legal capacity by making decisions about their own lives which are respected by others, substitute decision-making regimes must be replaced by supported/assisted decision-making regimes.[65]

153. The Committee defines substitute decision-making regimes as systems where:

- Legal capacity is removed from the individual, even if this is just in respect of a single decision;

- A substitute decision-maker can be appointed by someone other than the individual, and this can be done against the person's will; and

- Any decision taken by a substitute decision-maker is to be made according to the objective 'best interests' of the individual, as opposed to the individual's own will and preferences.[66]

154. The Committee has stated in clear terms that support for the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities, and 'should never amount to substitute decision-making'.[67]

155. The obligation to replace substitute decision-making with assisted decision-making requires *both* the abolition of the former and the development of the latter. Thus, the 'development of supported decision-making systems in parallel with the retention of substitute decision-making regimes is not sufficient to comply with Article 12'.[68]

156. While the Committee has not adopted a prescriptive approach as to the forms which assisted decision-making may take, it has enumerated minimum conditions for compliance with Article 12 CRPD, which include the requirements that:

- Supported decision-making must be available to all. An individual's level of support needs (especially where these are high), should not be a barrier to obtaining support in decision-making;

- All forms of support to exercise legal capacity (including more intensive forms of support) must be based on the will and preference of the individual, not on the perceived/objective best interests of the person;

[65] Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention: Equal Recognition before the Law*, Adopted at the Tenth Session (2-13 September 2013).
[66] Ibid., at para.23.
[67] Ibid., at para.15.
[68] Ibid., at para.24.

- The use of support in decision-making must not be used as a justification for limiting other fundamental rights of persons with disabilities;

- Legal recognition of the supporter(s) formally chosen by the individual must be available and accessible, and the State Party has an obligation to facilitate the creation of these supports. This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge a decision of a supporter if s/he believes the supporter is not acting based on the will and preference of the individual;

- The person must have the right to refuse support and end or change the support relationship at any time they choose.[69]

157. In reviewing measures taken by States Parties to give effect to their obligations under the CRPD, the Committee has observed that there is a widespread misunderstanding of the implications of Article 12(3) for substitute decision-making regimes, commenting that:

> *there has been a general failure to understand that the human rights-based model of disability implies the shift from a substitute decision-making paradigm to one that is based in supported decision-making.*[70]

158. The Committee has repeatedly stated in its concluding observations on reports submitted under Article 35 CRPD that States Parties must 'review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making with assisted-decision making regimes, which respect the person's autonomy, will and preferences'.[71]

159. In particular, the IHRC notes the concluding observations made by the Committee in relation to Hungary's implementation of Article 12 CRPD, in which it expressed concerns that legislation introduced with a view to providing for supported decision-making by way of implementation of Article 12 CRPD retained a regime of substitute decision-making, albeit in a modified form.[72]

Other Relevant Human Rights Standards

160. The values of dignity, autonomy and freedom are not of course confined to the CPRD, and have been recognised in a range of international human rights instruments.

161. The European Court of Human Rights has frequently referred to the rights of personal and legal autonomy as a component of the right to privacy guaranteed by Article 8 ECHR, and the right to a fair trial as guaranteed by Article 6 ECHR.

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[69] Ibid., at para.25.
[70] Ibid., at para.3.
[71] Ibid., at para.22. See e.g. concluding observations on initial reports submitted by: Tunisia (CRPD/C/TUN/C0/1), at paras.22-23; Spain (CRPD/C/ESP/CO/1), at paras.33-34; Peru (CRPD/C/PER/CO/1), at para.25; China (CRPD/C/CHN/CO/1), at para.22; and Argentina (CRPD/C/ARG/CO/1), at paras.19-22.
[72] CRPD/C/HUN/CO/1, at para.25.

162. These rights have been foregrounded in the context of applications to appoint legal guardians in respect of persons with cognitive and/or psychological disabilities. Thus in *Stanev v Bulgaria*[73] the Court relied on the CRPD as evidence of the 'growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible'.[74] In *Shtukaturov v Russia*[75] the Court was of the view that, in the context of proceedings in which the applicant's mother sought to deprive the applicant son of legal capacity by appointing a legal guardian, the applicant's 'personal autonomy in almost all areas of life was at issue, including the eventual limitation of his liberty'.[76] Similarly, in *Lashin v Russia*[77] the Court accepted that the incapacitation proceedings at issue amounted to a serious limitation on the applicant's personal autonomy.[78]

163. Guidance may also be taken from the Court's jurisprudence in relation to assisted suicide, as the Court has been willing to recognise, in the context of applications by persons with psychological and/or medical conditions which amounted to disabilities, that the concept of private life encompasses the rights of self-determination and personal autonomy as important principles underlying the interpretation of Article 8 ECHR.[79]

164. The IHRC also notes the centrality of human dignity to the guarantees provided for by the EU Charter of Fundamental Rights (Article 1), which finds expression in the rights of the elderly to lead a life of dignity and independence (Article 25), and the right of persons with disabilities to benefit from measures designed to ensure their independence (Article 26).[80]

165. The protection of personal autonomy has been recognised as a core constitutional value, flowing from the commitment made in the preamble to the Constitution to securing the dignity and freedom of the individual, from the protection of the person as guaranteed by Article 40.3.2°, and from the unenumerated rights of bodily integrity and personal privacy derived from Article 40.3.1°.[81] The comments made by Denham CJ, in the context of a constitutional challenge to the criminalisation of assisted suicide brought by a plaintiff who was suffering from a disability, are instructive:

> *The appellant has not sought to identify any unenumerated right other than such as flows from the respect for and protection of life and of the person*

[73] *Stanev v Bulgaria*, App. No. 36760/06, Judgment of 17 January 2012, (2012) 55 EHRR 22.
[74] Ibid., at para.244.
[75] *Shtukaturov v Russia*, App. No. 44009/05, Judgment of 27 March 2008, (2012) 54 EHRR 27.
[76] Ibid., at para.71.
[77] *Lashin v Russia*, App. No. 33117/02, Judgment of 22 January 2013.
[78] Ibid., at para.77.
[79] *Pretty v The United Kingdom*, App. No. 2346/02, Judgment of 29 April 2002, (2002) 35 EHRR, at para.61; cf. *Haas v Switzerland*, App. No. 31322/07, Judgment of 20 January 2011, (2011) 53 EHRR 33.
[80] The Explanations to the Charter emphasise that the dignity of the human person is 'not only a fundamental right in itself but constitutes the real basis of human rights', see *Explanations Relating to the Charter of Fundamental Rights* (Official Journal of the European Union, 14 December 2007) 2007/C 303/2. The Court of Justice of the EU has affirmed that a fundamental right to human dignity is a part of EU law, see Case C-377/98 *Netherlands v European Parliament and Council*, at paras.70-77.
[81] See, for example, *McGee v. The Attorney General* [1974] IR 284, *Norris v The Attorney General* [1984] IR 36.

within the terms of Article 40.3. Within that context however the appellant invokes constitutional values of autonomy, self-determination and dignity. It is undoubted that the Constitution recognises and respects these general values in the rights protected by it.[82]

(iv) Observations and recommendations – substitute and assisted/supported decision-making

166. In light of the foregoing, the IHRC regards the maintenance of substitute decision-making as being inconsistent with Article 12 CRPD, with the rights of autonomy, dignity and freedom to make one's own choices, and with the enjoyment of such rights and freedoms without discrimination on the basis of disability.

167. The IHRC is concerned that, by providing for the making of decision-making representative and decision-making orders, for informal decision-making, and for the retention of the wardship regime, the Bill both creates new mechanisms for substitute decision-making, and maintains aspects of the wardship regime in modified form.

168. The IHRC recognises that by virtue of section 8 of the Bill, an intervener (which will include a decision-making assistant, co-decision-maker, decision-making representative, attorney, informal decision-maker, the Courts and the Public Guardian) is required to give effect to principles of minimal restriction of the relevant person's rights and freedom of action, and to have due regard to the need to respect the right of the relevant person's dignity, bodily integrity, privacy and autonomy. Such an intervener is also required (insofar as is practicable) to permit, encourage and facilitate the relevant person to participate in the intervention, and to give effect to the past and present will and preferences of the relevant persons, and to take into account the belief and values of that person together with any other relevant factor, insofar as these are reasonably ascertainable.

169. Section 8 is therefore a critical component of the legislation. The Principles contained in section 8 will be of crucial importance for the underpinning and operation of the Act. Thus, they must reflect a contemporary understanding of supported decision-making that acknowledges every person's innate capacity and right to self-determination without discrimination. In particular, the operation of this legislation must be founded on the principle that it reflects the 'will and preferences' of the relevant person, with facilitated decision-making as a last resort. The IHRC **recommends** that the Guiding Principles explicitly provide that the purpose of the legislation is to provide for supported decision-making based on a presumption of capacity.

170. The responsibility for the application of the Guiding Principles in section 8 lies with the intervener. It does not refer to these being guiding principles for the Courts in the specific part of the legislation dealing with the Courts' jurisdiction their determinations under this legislation. As previously **recommended** by the IHRC in relation to the Heads of Bill, section 8 should explicitly refer to the Principles being guides for the Courts in their decision-making on matters relevant to this legislation. It

[82] *Fleming v Ireland & Ors* [2013] IESC 19, at para.110.

is also **recommended** that these Guiding Principles apply to the Minister in the formulation of any regulations under this legislation.

171. Section 8(6)(a)(i) refers to an intervention being made in a manner that minimises the restriction of the relevant person's rights. The current draft Bill does not contain a definition of 'rights'. It would be helpful in this regard to include a definition in the Bill. Section 2 of the Human Rights Commission Act, 2000, may be instructive in this regard. In the alternative, it may be preferable to restructure this provision into a positive provision whereby any intervention shall be made in a manner that respects the person's rights, recalling in this regard that a number of human rights permit no restriction whatsoever. In this regard, the rights set out in the CRPD should be clearly reflected, to emphasise the importance of the individual's rights including: the right to access to justice (Article 13); the right to be free from exploitation, violence and abuse (Article 16); the right to live independently and choose their living situation (Article 19); the right to respect for privacy (Article 22) and the family (Article 23); and the right to respect for health (Article 25).

172. There is also a lack of clarity in relation to section 8(6)(a)(ii), which refers to a person's 'freedom of action'. This term also lacks definition both in the draft legislation and more generally in Irish law. It is **recommended** that its meaning and scope should be clarified and brought into line with the definition of human rights more generally.

173. The Guiding Principles should also include reference to the safeguards required under Article 12(4) CRPD – in particular, the time-limits, proportionality, and judicial review. Furthermore, there should be a clear statement around the need to ensure that interveners do not have a conflict of interest in respect of the decision to be made. This requirement is highlighted in Article 12(4), but currently does not appear in the Bill. Section 8 would seem the most appropriate place for its inclusion. The IHRC **recommends** specific inclusion of principles relation to time-limitation, proportionality, conflict-of-interests and judicial oversight in section 8.

174. While the IHRC welcomes this statement of general principles in section 8, there would appear to be inadequate safeguards in the Bill to ensure that these are given effect in every intervention made. The only further reference made to the general principles in the Bill is to the power of the Minister for Justice and Equality to make regulations in relation to decision-making agreements (s.10(3)(d)(ii)), co-decision-making agreements (s.18(4)(d)(ii)) and enduring powers of attorney (s.40(4)(d)(ii)), which may require that such instruments must contain statements that the relevant appointee understands his or her duties and obligations, including the duty to act in accordance with the guiding principles, noting, however, that the Minister is not listed as an intervener under section 2, and is not bound by the Guiding Principles.

<u>Assisted Decision-Making, Co-Decision-Making, Decision-Making Representatives, and Decision-Making Orders (Sections 10-12 and Sections 16-27)</u>

175. Section 10(3) provides that the Minister may make regulations in respect of a range of issues including in relation to the form, procedures and requirements of decision-making assistance agreements. In light of the importance of the Guiding

Principles, set out in section 8, the IHRC **recommends** that the section 8 Principles also be explicitly applicable to the Minister in making any regulations under this section, by listing the Minister as an intervener.

176. In order to ensure compliance with the CRPD, sections 10 and 11 should be clear that the relevant decision for the purposes of the legislation is the decision of the person concerned (that is, the person who has appointed a decision-making assistant) and shall reflect their will and preferences, and that this is a decision-making support provision.

177. As with the IHRC's recommendation in relation to section 10(3), the IHRC **recommends** that section 18(4) make explicit reference to the Guiding Principles as guiding the creation of any regulations under this section.

178. Furthermore, the IHRC considers that the timeframe provided in this Part of the legislation is too long and should be revised. A review of a declaration that a person lacks capacity every three years fails to take proper account of changing degrees of capacity. The IHRC **recommends** that the timeframe for examination of a co-decision-making agreement be shortened.

179. In particular, the IHRC notes that no mechanism is provided for whereby the compliance by an intervener with these principles may be reviewed, whether at the instigation of the relevant person or an interested third party, and that no provision is made for the imposition of sanctions for a failure to give effect to the guiding principles set out at section 8 by interveners.

180. Sections 24(9) and (10) provide for the revocation of the decision-making representative's appointment, or for the varying of the terms of the decision-making representative order. However, it is somewhat unclear how the relevant person is to seek to change or revoke the order to appoint a decision making representative. While such a challenge by the relevant person may be provided for by section 14, it is important that there is both clarity and simplicity in the application process for the relevant person to vary or appeal against the terms of the decision-making order. The IHRC **recommends that** section 24 provide a clear reference to the mechanism for appeal by the relevant person of the decision-making order in question. This section should also explicitly provide that the 'rights, will and preferences' of the relevant person, as emphasized by Article 12(4) CRPD, will be the paramount consideration when creating a decision-making order, and that the decision-making representative will afford the rights, will and preferences of the relevant person priority. The IHRC would also again reiterate its **recommendation** that there should be a scheme which provides for legal aid for those seeking to challenge specific court orders in relation to their mental capacity.[83]

181. Sections 24(6) and (7) provide for the remuneration of the relevant person's decision-making representative. However, it is unclear how a decision-making representative is to be reimbursed if the relevant person has no available assets to facilitate such reimbursement. The IHRC **recommends** that this matter be clarified in

[83] IHRC, *Note on Mental Capacity Bill submitted to the Oireachtas Joint Committee on Justice, Defence and Equality*, August 2011, at p.4.

the legislation, with due regard given to the situation of indigent relevant persons, who should not be denied the right to benefit from this legislation due to a lack of resources.

182. Section 25 provides the definition of personal welfare for the purposes of this Part of the legislation and more broadly for the Bill. Section 25 gives quite extensive powers over the life and affairs of the relevant person to a court or a decision-making representative. The IHRC **recommends** that section 25 should thus include reference to the Guiding Principles set out in section 8. Section 25 should also particularly reference the rights, will and preference of the relevant person, whose concerns must be the paramount consideration when engaging in any form of substitute decision-making.

183. Section 26 gives extensive powers to the court or a decision-making representative in relation to the property rights of the relevant person. Article 12(5) CRPD calls upon States to take all appropriate and effective measures to ensure that persons with disabilities 'are not arbitrarily deprived of their property.' ECHR jurisprudence supports this principle. For example, in *Winterwerp v Netherlands* the ECtHR stated: '[w]hatever the justification for depriving a person of unsound mind of the capacity to administer his property… mental illness may render legitimate certain limitations upon the exercise of the 'right to a court', it cannot warrant the total absence of that right.'[84] The IHRC **recommends** that, similar to section 25, there should be a clear link back to the Guiding Principles in section 8 and a clear reference to the will and preference of the relevant person, which the decision-making representative must be aware of when managing, or disposing of, the relevant person's assets.

184. Section 27(5) indicates that if the decision-making representative is to restrain the relevant person, such restraint must be performed as a proportionate response to the likely harm that the relevant person would cause to himself or herself, or to another. Article 5(1) of the ECHR allows for the lawful arrest or detention of 'persons of unsound mind.'[85] This Article is explicitly referenced in section 27(7). However, there may be conflict between section 27(5) and Article 14 CRPD, which states that 'the existence of a disability shall in no case justify a deprivation of liberty.'[86] The IHRC **recommends** that this section also reference the principles in section 8, taking into account the relevant persons human rights, and in addition any restraint must only arise in a situation of extreme urgency, and never over a protracted period. In addition, any act of restraint should be subject to an oversight mechanism, including strict protocols for the reporting of any such incident, possibly to the Office of Public Guardian.

[84] *Winterwerp v Netherlands*, App. No. 6301/73, Judgment of 24 October 1979 (1979-80) 2 EHRR 387, at para.75.
[85] Article 5(1)(e) ECHR.
[86] Note that this conflict appears to exist in a number of instruments, *see* Fennell, Philip William Hugh and Khaliq, Urfan, 'Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English law' *European Human Rights Law Review* 2011 (6), pp. 662-674.

185. Furthermore, the IHRC **recommends** that section 27(7) be reformulated to provide that the decision-making representative shall not have the right to deprive the relevant person of their liberty as defined by Article 5 ECHR.

186. The IHRC also observes that the provisions of the Bill which relate to the review of capacity of existing adult wards provide that such a review will commence on or before the third anniversary of the commencement of section 35. The IHRC is concerned that this section might remain un-commenced for some time, and/or that even when commenced there will be significant and inevitable delays in reviewing the capacity of existing wards and making the relevant declarations and orders under Part 4. In the view of the IHRC, such a delay would be incompatible with the obligation under CRPD to take immediate steps to abolish regimes of substitute decision-making.

187. The IHRC therefore **recommends** that:

- Where it is proposed by the Court to make a decision-making representative order and/or a decision-making order on application to it by one of the persons specified at section 14, the relevant person be independently represented by a legal practitioner, whether retained by the relevant person or appointed by the Office of the Public Guardian, and legally aided without regard to the relevant person's means.

- As a condition precedent for the exercise of the Court's jurisdiction to make a decision-making representative order and/or a decision-making order, the applicant be required to show compliance with the guiding principles under section 8 by establishing to the satisfaction of the Court that:

    - the proposed intervention represents the option which is the least restrictive of the relevant person's rights, freedom of action, dignity, bodily integrity, privacy and autonomy which is necessary in the circumstances;

    - the intervener has taken such steps as are reasonably practicable to permit, encourage, facilitate, or improve the relevant person's participation in the intervention, giving full particulars of such steps;

    - the intervener has taken such steps as are reasonably practicable to give effect to the past and present will and preferences of the relevant person, insofar as these are reasonably ascertainable. Where such steps have been taken, the intervener should give full particulars of any expression of the relevant person's past and/or present will and preferences made by the relevant person;

    - the intervener has taken into account the beliefs and values of the relevant person insofar as is reasonably practicable. Where such steps have been taken, the intervener should give full particulars of any relevant beliefs and values held by the relevant person;

- that any such expression of the will, preference, belief or value as aforesaid, which was made by the relevant person in documentary form, be exhibited to the affidavit grounding the application.

- Provision be made in the Bill for the periodic review of decision-making representative orders and decision-making orders in the same or similar manner to the review mechanisms already provided for in respect of co-decision-making orders (s.17(7)) and declarations as to incapacity (s.29);

- Provision be made in the Bill for an accessible and effective remedy for a consistent failure to give effect to any/all of the guiding principles by an intervener, either on the application of the relevant person or by such other person as appears to a court to have a bona fide and sufficient interest in the matter;

- Provision be made in the Bill for the imposition of sanctions or measures for any consistent failure to uphold the general principles. Any sanctions must be effective, dissuasive and proportionate.[87]

Wards of Court (Sections 33-37)

188. Section 35(1) allows an application to the wardship court to be made by the ward or 'such other person as appears to the wardship court to have a sufficient interest or expertise in the welfare of the ward'. This phrasing seems to be vague and it could benefit from more precision.

189. Section 35(3)(b) sets out the options for the Court when reviewing a wardship. As with section 15(1), as noted above, it appears that the Court may only make a declaration that a person lacks mental capacity unless assisted by a co-decision-maker or lacks capacity even with the assistance of a co-decision-maker. Again, there does not appear to be any explicit requirement on the Court to consider the possibility of an assisted decision making agreement being entered into. This section therefore suffers from the same deficiency as section 15(1). The IHRC **recommends** that the possibility of a person being assessed as having capacity with an assisted decision maker should be specifically included in this section.

190. Section 35(3) allows the Court, having reviewed the capacity of a ward, to discharge the ward from the system where the Court is 'satisfied that the ward does not lack capacity to make decisions in respect of all matters'. This implies that all wards shall be discharged except where they lack capacity to make decisions 'in respect of all matters'. While the implication appears to be that that most wards will be discharged from the wardship system upon turning 18, the current language of this sub-section appears to create a potentially conflicting standard to that contained in sections 3 and 8 regarding the presumption of capacity. The IHRC **recommends** that this wording be adapted so as to reflect a functional approach to capacity and also ensure that the person enjoys a presumption of capacity.

[87] It is noted that the only relevant sanction under the Bill is contained at section 113, and relates to ill treatment or wilful neglect of a relevant person, and attracts criminal sanctions.

191. Section 36 allows for the possibility of the wardship court, in consultation with the public guardian, to direct the Public Guardian to exercise its functions in respect of a ward or class of wards 'as if the ward or class of wards were the subject of a declaration under section 15(1)(b)'. As it is currently formulated, this would appear to remove the requirement for a proper capacity assessment to be undertaken in relation to a person or a whole 'class' of persons. Thus, this appears to allow for the possibility of individuals being declared as lacking capacity without a proper assessment being made, which, if it were the case, would not be in keeping with international human rights standards and, indeed, would defeat the purpose of the legislation. The IHRC **recommends** that this section be clarified to ensure that there is no possibility for a person to be declared as lacking capacity without a proper functional assessment of their capacity being undertaken and with the appropriate safeguards of time limitations and proportionality. Furthermore, the possibility of a 'class of wards' – itself being an unclear term – being declared as lacking capacity should be removed as this would appear to negate individual and tailored assessments as required under the CRPD.

192. The IHRC is concerned that the Public Guardian's Office is not presently proposed to be established independently of the Courts Service (dealt with hereafter). As it stands, the wardship court would consult with a part of the courts service in relation to wards, and such consultation may lack sufficient safeguards of independence and transparency. In this regard the IHRC **recommends** that such a possibility be excluded under the Bill.

193. The IHRC further **recommends** that a form of administrative tribunal be set up on the commencement of the Bill, to review the capacity of existing wards with a view to making the appropriate declarations and orders under Part 4, and securing the timely and orderly winding-up of the wardship system.

194. Furthermore, it is unclear whether sections 36 and 37 remove the requirement for an assessment of capacity pursuant to an application. These two sections appear to provide the possibility for circumvention of the procedural requirements for a functional assessment of capacity. The IHRC **recommends** that sections 36 and 37 explicitly provide for the necessary procedural safeguards and functional assessment of each individual's capacity.

195. The IHRC reiterates its recommendations regarding legal aid and representation under Part 4 of the Bill, and recommends that similar provision be made for Wards of Court in the context of the review of their wardship and any orders made thereunder.

Informal Decision-Making on Personal Welfare (Sections 53-54)

196. Section 53 appears to allow for a fourth category of assistance in relation to a relevant person: the 'informal decision-maker', who may take actions in relation to the relevant person's 'personal welfare'. While the IHRC understands that there is a need for flexibility and realism within the provisions of the legislation in relation to the day-to-day life of a person who may need assistance in some decision-making matters, the IHRC is concerned that as presently formulated, section 53 and section 54 may not be in keeping with the relevant international human rights law standards and may be open to misuse against relevant persons due to a lack of clarity and specificity.

In particular, the IHRC notes the definition of personal welfare provided elsewhere in the legislation (section 25), and the fundamental nature of the issues covered within that definition for the life of the relevant person, including living arrangements, medical treatment and travel.[88]

197. It is unclear to whom section 53 is intended to apply and what the limits of the informal-decision-maker's actions are to be. In addition, where there is no determination regarding the person's mental capacity required to make these sections operate, it is far from clear why the Bill proposed to introduce another layer of substituted decision making which circumvents all the other safeguards in the Bill, rather than providing for informal supports to be provided to a person in relation to their day to day welfare, excluding decisions with more far reaching consequences, such as with whom and where to live or major financial transactions.

198. However, the IHRC notes the reference in section 63(2)(c)(ii) to preparation of codes of practice by the Public Guardian *inter alia* for 'the guidance of informal decision-makers (including healthcare professionals who are likely to be informal decision-makers)'. There should be a clear statement as to the class or categories of person likely to come within the 'informal' provisions of section 53. At present, it may risk undermining the rest of the legislation by providing an 'alternative' to a formal assistance arrangement, without the necessary safeguards.

199. The IHRC therefore raises the following specific concerns:

- The IHRC notes that there is no definition of 'personal welfare' provided for in section 53. 'Personal welfare' is defined in section 25, which lists areas that comprise personal welfare in relation to a decision-making order or decision-making representative order.[89] In light of the fundamental nature of the issues covered in section 25 for the life of the relevant person, it may be that a specific and much more limited definition for the purposes of informal decision-making needs to be included in section 53;

- There is no reference in the section as to how the capacity of the relevant person is to be assessed or what guidelines the informal decision-maker is supposed to follow in taking action. It appears to presuppose a category of persons who are outside of the scope of the assisted decision-making, co-

[88] Section 25 describes the scope of a decision-making order or decision-making representative order, as relates to the *personal welfare* matters of a relevant person. It states that such orders may make decisions for the relevant person specifically regarding the following issues: where the relevant person should live; the persons with whom the relevant person may or may not have contact; the employment, training, and rehabilitation the relevant person should receive; the diet and dress of the relevant person; the inspection of personal papers of the relevant person; whether or not the relevant person may travel outside the State; and the granting or refusing to consent to certain healthcare treatments of the relevant person. Section 25(b) further states that a decision-making order or decision-making representative order may make decisions relating to the personal welfare of the relevant person on 'such other matters as the court considers appropriate.'

[89] These are listed as: (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.

decision-making or power of attorney provisions elsewhere in the legislation as there is no cross-reference to the other sections of the legislation;

- There is no reference to a limitation on the reimbursement of an informal decision-maker and while the legislation states that the informal decision-maker 'shall keep a record of all expenditure incurred and money received' it does not specify what is to be done with such record or who may inspect or challenge it;

- There does not appear to be any provision for oversight of an informal decision-maker, either by the Courts or by the Public Guardian;

- There is no link to the section 8 guiding principles or any other requirements of consideration by the informal decision-maker, such as the best interests of the person or their human rights.

200. The IHRC **recommends** that these two sections be reconsidered in their entirety. Appreciating the need for day-to-day decision-making assistance for persons with capacity assistance needs, the IHRC **recommends** that provision for informal support be incorporated into the other sections of the legislation and that any other provision for informal decision-making be strictly limited to day-to-day matters, with full respect for the person's autonomy, the guiding principles and their human rights. Any provision for carers or family in the legislation should be clear and ensure that they are protected and not unduly burdened by administrative requirements, recognising the vital role that they play in the lives of persons with supported decision-making needs.

Interim Orders, Reviews and Expert Reports (Sections 28-30)

201. Section 29 provides for periodic reviews of orders made under section 15(1) and thus creates important safeguards thereto. The IHRC **recommends** that section 29 should be explicitly referenced in section 15(1).

202. Section 29(1) provides for an application for review 'with the consent of the court'. The IHRC **recommends** that the court should always accept an application for review where it comes from the relevant person and such a person should not require the consent of Court to make an application.

203. There does not appear to be any explicit provision for legal aid for the review proceedings under section 29. In the absence of such specification, it would appear that the costs of these proceedings would be borne from the assets of the relevant person. There does not appear to be provision for the situation of an indigent relevant person. The IHRC **recommends** that as per its previous recommendation in this regard a general provision with respect to legal aid be included in this legislation to ensure that it meets the requirements of accessibility for persons concerned by the legislation.

D. OFFICE OF THE PUBLIC GUARDIAN

(i) Relevant Provisions of the 2013 Bill

204. Part 8, sections 55 to 64, provide for the establishment of the office of the Public Guardian. This office will be under the auspices of the Court Service and the Public Guardian will be appointed by the Courts Service (section 55(1)).

(ii) Observations and Recommendations – Public Guardian

205. As a general point, the IHRC suggests that the language of 'guardianship' should be reconsidered. The IHRC notes that this language is used in the UK model, which was developed in 2005, prior to the adoption and coming into force of the CRPD. 'Guardianship' language is paternalistic and not in keeping with the modern recognition of supported decision-making and definition of capacity and the IHRC **recommends** that it be removed from the legislation and replaced with more appropriate language which places emphasis on oversight and supported decision making.

206. The IHRC is concerned that the Public Guardian's office not be simply a 'repackaging' of the Office of the Wards of Court. In keeping with the stated and presumed intention and aim of this legislation to reform the present archaic system in line with contemporary understandings and international law, there should be the establishment of an independent office that can recruit its own staff. It is appreciated that some of the present Office of the Wards of Court staff will be highly qualified persons in this area, but there should be the possibility to recruit additional staff with specific qualifications in the area of the rights of persons with disabilities or persons with decision-making challenges. The State risks undermining the present legislation and continuing the antiquated system under a different name if a new and independent body is not established through this legislation.[90]

207. Section 56 sets the objectives of the office of the Public Guardian. It does not however set the aim or goals of the office. The objectives as currently listed are also more closely aligned with 'functions' than actual 'objectives'. Without a clear statement of the *purpose* of the Public Guardian, the ability to assess in future its effectiveness will be in doubt. The IHRC **recommends** that a clear aim for the office be set down in the legislation, which would allow for assessing its effectiveness and efficiency in future. These aims should clearly reflect the need to uphold and vindicate the rights of relevant persons under the legislation, and under the CRPD. It would be particularly regrettable if reasons of financial or administrative expediency dictated the formation of this important office and were thus allowed to impact on the potential of this legislation to support persons with decision-making needs.

208. There is no statement of the independence of the Public Guardian. It is **recommended** that this should be clearly included, and reference to the Paris Principles may be of assistance here. It is unclear, apart from the reason identified above regarding the 'rebranding' of the Office of Wards of Court, why the Public

[90] Cf. post FN 98 (in para 233) citing the House of Lords Select Committee on the Mental Capacity Act 2005.

Guardian is so closely linked to the Courts and indeed is a subordinated office within that organisation.

209. Section 57 allows for the appointment of the Public Guardian for 6 years, renewable indefinitely. In light of the importance of this position, the person appointed should not have an indefinite term and it is **recommended** that this be amended. Furthermore, it should not be a position that is essentially under the control of the Courts Service (sections 55(1) and 57(2). It is **recommended** that the Oireachtas should have a role in the appointment process, which should be open and transparent and publicly advertised. The staff of the Office of the Public Guardian should have specific qualifications relevant to the operation of this legislation. They should be public servants and be independent of the Courts Service in the execution of their duties.

210. It is **recommended** that the Public Guardian have a positive duty under the legislation to periodically review and affirm the appropriateness of any decision making arrangements provided for under the Bill, taking into account the guiding principles under section 8. In addition, the Office of the Public Guardian should have overall responsibility to ensure the legislation is complied with in practice and its objectives upheld.

211. It is further **recommended** that section 52 (2)(m) which deals with complaints to the Public Guardian, be amended to deal in detail regarding the process involved in dealing with any complaints from a relevant person, and more crucially the powers of the Public Guardian to address such complaints. At present there is a vague provision regarding applications to the Circuit Court or High Court, but it is far from clear that section 52(2)(m) could be considered an adequate remedy for any breach of the provisions of the Bill or failure to apply the guiding principles under section 8.

E. Detention, Right to Autonomy, Consent to Treatment and the Integration with the Mental Health Act 2001

(i) Preliminary Discussion

212. The IHRC regards it as crucial that the Bill, when introduced, forms part of a coherent legal regime relating to mental health, which in turn is informed by and gives practical effect to the rights and freedoms contained in the CRPD.

213. It is clear that the successful integration of the Bill with the existing statutory infrastructure, and in particular the Mental Health Act 2001 ('the 2001 Act'), is a necessary condition for securing the rights of persons with disabilities to exercise legal capacity on an equal basis with others.

214. More particularly, it is essential that a finding that a person is suffering from a mental disorder which requires their involuntary admission into an approved centre under the 2001 Act does not result in such persons being deprived of the protections of the Bill in the context of decisions relating to their detention, treatment and care.

215. The IHRC is concerned that there are significant tensions between relevant provisions of the Bill and the 2001 Act in relation to (a) the detention of persons with

disabilities and the right to liberty and security, (b) the application of the 'best interests' principle and the right of disabled persons to autonomy, and (c) assessments of the capacity to consent to treatment, and the involvement of persons with disabilities in such decisions.

216. The IHRC, as well as a range of other bodies and organisations in Ireland, have repeatedly criticised aspects the Mental Health Act 2001. It is regrettable that the opportunity has not been taken to amend that Act in tandem with the present Bill.

(ii) Relevant Provisions of the 2013 Bill

217. The legislation in its current form provides for matters which are relevant to the 2001 Act in respect of the restraint, detention and involuntary treatment of persons who lack mental capacity.

218. Restrictions are placed on the power of decision-making representatives and attorneys to restrain relevant persons under ss.27 and 41 of the Bill respectively. Restraint for the purposes of these sections is defined as the use (or the indication of the intention to use) force to secure the doing of an act which the relevant person resists, or the restriction of the relevant person's liberty of movement, whether or not the relevant person resists. These sections provide that a decision-making representative or attorney shall not restrain a person unless (a) the relevant person lacks capacity in relation to the matter, or the decision-making representative/attorney reasonably believes that the relevant person lacks such capacity, (b) the decision-making representative/attorney reasonably believes that it is necessary to restrain the relevant person in order to prevent him or her from harming him/herself or another person, and (c) the restraint is a proportionate response to the likelihood of the seriousness of the apprehended harm. These sections go on to provide that a decision-making representative does more than restrain the relevant person if he or she deprives the relevant person of his/her liberty within the meaning of Article 5(1) ECHR. The foregoing provisions are expressed to be subject to the proviso that they shall not be construed as prejudicing the generality of section 69 of the 2001 Act, which provides for the placing of patients in seclusion and for their being restrained by mechanical means in circumstances where it is necessary for the purposes of treatment, or to prevent the patient from injuring himself or herself or others.

219. Section 104 of the Bill relates to the treatment of patients with mental disorders, and provides that where such treatment is regulated by Part 4 of the 2001 Act, nothing in the Bill authorises a person to give a patient treatment for a mental disorder, or to consent to a patient's being given treatment for a mental disorder.

220. Part 9 of the Bill makes provision for the detention of persons with mental disorders, and for the review of detention orders. Section 67 states that where an issue arises in the course of an application to the Court under the capacity legislation, or otherwise in connection with the capacity legislation, as to whether a person who lacks capacity is suffering from a mental disorder, the procedures provided for under the 2001 Act shall be followed as regards any proposal to detain ('within the meaning of the ECHR') that person.

221. Sections 65-69 deal with detention matters. Section 66 provides for the Courts Service to establish a panel of consultant psychiatrists 'willing and able' to carry out

independent medical examinations under this Part of the legislation. Section 67 provides for the application of the Mental Health Act 2001 where an application is made to a court 'as to whether a person is suffering from a mental disorder' as defined under the 2001 Act,[91] and there is a proposal to detain. Section 68 provides for a review of the detention of a person detained before the commencement of the section in an approved centre and section 69 relates to detention in a place 'other than an approved centre'.

222. Sections 68 and 69 provide for the review by the wardship court of the detention of persons being detained in both approved and non-approved centres at the point of commencement of the capacity legislation, and for the making of orders directing the continued detention of such persons where the wardship court is satisfied, on the basis of evidence furnished by the detained person's treating consultant psychiatrist together with an independent consultant psychiatrist (drawn from a panel created pursuant to section 67), that the person concerned is suffering from a mental disorder. Where the wardship court is satisfied that the person concerned is no longer suffering from a mental disorder, it must discharge him or her from detention. Such reviews are to be conducted 'as soon as possible'.

(iii) Relevant International and Domestic Standards

<u>International Standards Relating to Detention</u>

223. Article 14 CRPD, which relates to liberty and security of the person, provides:

> *1. States Parties shall ensure that persons with disabilities, on an equal basis with others:*
>
> *(a) Enjoy the right to liberty and security of person;*
> *(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*
>
> *2. States Parties shall ensure that if persons with disabilities are deprived of*

[91] Section 3 of the 2001 Act provides as follows—
(1) In this Act "mental disorder" means mental illness, severe dementia or significant intellectual disability where — (a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or (b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and (ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.(2) In subsection (1)— "mental illness" means a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons; "severe dementia" means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression; "significant intellectual disability" means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person.

their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

224. Article 5(1) ECHR, which guarantees the right to liberty and security of the person, provides that no person shall be deprived of his liberty save in accordance with law. Amongst the circumstances in which such a deprivation may take place is the lawful detention of persons of unsound mind (Article 5(1)(e)). A deprivation of liberty, however, is subject to the requirements and safeguards provided for at Article 5(2) – (5). In particular, Article 5(4) provides that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided 'speedily' by a court, and his release ordered if the detention is not lawful.

225. The Court has developed a significant body of jurisprudence relating to the substantive and procedural guarantees arising from Article 5 in the context of the detention of persons of 'unsound mind'. In the leading case of *Winterwerp v The Netherlands*[92] the Court set out three minimum conditions which must be satisfied in order for there to be a lawful detention of a person of unsound mind within the meaning of Article 5(1)(e). First, the individual concerned must be reliably shown to be of unsound mind, i.e. a true mental disorder must be established before a competent authority on the basis of objective medical expertise. Secondly, the mental disorder must be of a kind or degree warranting compulsory confinement. Thirdly, the validity of continued confinement must depend upon the persistence of such a disorder.

226. In finding that the applicant's inability under domestic mental health legislation to have his detention reviewed by a court constituted a violation of Article 5(4), the Court held that the detention of persons of unsound mind required a review of the lawfulness of such detention to be available at reasonable intervals, and the reviewing authority was required to possess a requisite degree of independence and to adopt procedures of a judicial character which incorporated appropriate safeguards with respect to the deprivation of liberty in question. The minimal requirements of such proceedings were that the person so detained should have access to a court and the opportunity to be heard either in person or, where necessary, through representation. While the existence of a mental illness might require restrictions or modifications of the exercise of such procedural rights, it could not justify the impairment of the very essence of such rights. Indeed, special procedural safeguards might be necessary to protect the interests of persons whose mental condition impaired their capacity to act for themselves.

227. The ECtHR has recognised that there may be a deprivation of liberty for the purposes of Article 5(1) even in the absence of a compulsory detention measure. In

[92] *Winterwerp v Netherlands*, App. No. 6301/73, Judgment of 24 October 1979 (1979-80) 2 EHRR 387. See also, *inter alia*: *Ashingdane v United Kingdom*, App. No. 8225/78, Judgment of 28 May 1985, (1985) 7 EHRR 528; *X v United Kingdom*, App. No. 7215/75, Judgment of 5 November 1981, (1982) 4 EHRR 188; *Aerts v Belgium*, App. No. 25357/94, Judgment of 30 July 1998, (2000) 29 EHRR 50; *Shtukaturov v Russia*, App. No. 44009/05, Judgment of 27 March 2008, (2012) 54 EHRR 27.

HL v United Kingdom[93] the Court was satisfied that the applicant had been deprived of his liberty in circumstances where, as an 'informal patient', he had been under the complete and effective control of the medical professionals responsible for his care, and had been under continuous supervision and control. The absence of procedural safeguards (namely applications for judicial review, a writ of habeas corpus, damages for false imprisonment and assault together with associated declaratory reliefs) had failed to protect the applicant against the arbitrary deprivation of his liberty, and did not satisfy the requirements of Article 5(4). In this regard, the Court recalled its earlier decision in *X v United Kingdom*,[94] where it had found that the review conducted in *habeas corpus* proceedings was not wide enough to bear on those conditions which were essential for the lawful detention of a person on the basis of unsoundness of mind since it did not allow a determination of the merits of the question as to whether the mental disorder persisted.

228. In order to ensure compliance with Article 5 ECHR, a decision to detain a person of 'unsound mind' must be based on objective medical evidence and the mental illness must result in a condition making detention necessary for the protection of the patient or others, and the detention must be justified on a continuing basis and reviewed regularly.[95] Any court examining a challenge to

229. Detention must provide guarantees of a fair procedure as per Article 6; that is, the right to legal representation and a fair hearing and the right to be present in court.[96] In *Shtukaturov v. Russia*, the ECtHR held that the domestic courts enjoy a certain margin of appreciation in cases involving a mentally ill person to ensure, *inter alia*, the good administration of justice and protection of the health of the person concerned. However, such measures should not affect the very essence of the right to a fair trial as guaranteed by Article 6 of the ECHR.[97] In that case, the ECtHR held that there had been a violation of Article 5(4) where the applicant did not have legal capacity to initiate the review of detention.[98] In addition, the ECtHR has emphasised that special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.[99]

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[93] *HL v United Kingdom*, App. No. 45508/99, Judgment of 5 October 2004, (2005) 40 EHRR 32.
[94] *X v United Kingdom*, App. No. 7215/75, Judgment of 5 November 1981, (1982) 4 EHRR 118.
[95] *Wintwerp v. The Netherlands*, App. No. 6301/73, Judgment of 24 October 1979, (1978-1980) 2 EHRR 387.
[96] *Airey v Ireland*, App. No. 6289/73, Judgment of 9 October 1979, (1979-1980) 2 EHRR 305, at para 26; *Steel and Morris v The United Kingdom*, App. No. 68416/01, Judgment of 15 February 2005, [2005] ECHR 103; *Shtukaturov v Russia*, App. No. 44009/05, Judgment of 27 March 2008, (2012) 54 EHRR 27, at paras.68, 72.
[97] *Shtukaturov v. Russia*, see above, at para.68. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has also stressed that the procedure by which involuntary placement is decided should offer guarantees of independence and impartiality, see *8th General Report on the CPT's activities covering the period 1 January to 31 December 1997* (31 August 1998) CPT/Inf (98) 12 [EN], at para.52.
[98] *Shtukaturov v. Russia*, see above, at para.123. In that case, the ECtHR found that the fact that the applicant fully depended on his mother's substitute decision-making powers and that she had requested his placement in hospital and opposed his release meant that the remedy was not directly accessible to him, at para.124.
[99] *Winterwerp v. The Netherlands*, see above, at para.60.

(iv) Observations and recommendations – Detention, Right to Autonomy, Consent to Treatment and the integration with the Mental Health Act 2001

Detention

230. The IHRC first notes that there is a concerning lack of detail around the qualifications, establishment, operation, requirements, and procedure for appeals that will attach to the panel of consultant psychiatrists under section 66.

231. The IHRC further notes that sections 68(4) and 69(4) should provide for the 'immediate' discharge of a person from detention where the court determines that they are no longer suffering from a mental disorder.

232. Section 67 of the Bill would appear to be designed to ensure that insofar as the question of whether a person has a mental disorder arises in the context of proceedings under the capacity legislation, where it is proposed that such a person be detained, the procedural safeguards provided for in respect of involuntary admissions under Part 2 of the 2001 Act will apply.

233. The IHRC notes the use of the qualifying phrase 'within the meaning of the European Convention on Human Rights' in conjunction with references to the deprivation of liberty and detention. The IHRC understands this formula to extend the concept of detention to forms of *de facto* detention such as that identified by the ECtHR in *HL*. It is to be noted that the England and Wales Mental Health Act 2007 defines a deprivation of liberty as having the meaning ascribed to it under Article 5(1); this definition is, however, supplemented by guidance on identifying deprivations of liberty by way of a statutory code of practice, now itself the subject of significant criticism for failing to guard against the deprivation of liberty of many person with an intellectual or cognitive disability.[100]

234. While the application of these safeguards is to be welcomed, the IHRC notes with concern that no express provision is made in either substantive or procedural terms for those who lack capacity and are deemed voluntary patients under section 2 of the Mental Health Act, 2001 to challenge a deprivation of liberty (whether *de facto* or *de jure*).

235. Section 2 of the Act defines "*voluntary patient*" means a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order. The IHRC has examined this issue previously and made extensive recommendations for reform of this area.[101] However, in the present context a concern arises that third parties may be in a position to "consent" to the treatment of a relevant person in an approved centre, under an order appointing a decision making representative or under a decision making order of the Courts, or indeed an informal decision maker.[102] In this regard the person, although deemed voluntary, may be in a form of de facto detention, but with no remedy in respect of same.

[100] House of Lords Select Committee on the Mental Capacity Act 2005; *Mental Capacity Act 2005: Post-Legislative Scrutiny*, Report of Session 2013-14, HL Paper 139, at p.12.
[101] *Policy Paper concerning the definition of "voluntary patient" under s. 2 of the Mental Health Act, 2001*, IHRC, February 2010.
[102] The definition of "*personal welfare*", under section 25 of the Bill, is noted.

236. The provisions of the Bill relating to the review of the detention of individuals who stand detained on the order of a wardship court on the commencement of the capacity legislation would not seem to include within their scope those wards who have been deprived of their liberty for the purposes of Article 5(1) ECHR, but who have not been subject to a formal detention order.

237. In particular, it is apparent from the wording of ss.68(1) and 69(1) that notwithstanding the use of the phrase 'detained (within the meaning of the European Convention on Human Rights)', such a deprivation of liberty will only be reviewed where it is on foot of an order of a wardship court.

238. Such reviews, which are to be conducted 'as soon as possible', and apparently on the motion of the wardship court rather than on application to it by or on behalf of a ward, do not in the view of the IHRC enable a person who has been deprived of his or her liberty (whether *de facto* or *de jure*, in an approved centre or in residential care, by a public authority or a private individual) to take proceedings by which the lawfulness of his or her detention may be decided 'speedily'.

239. The IHRC therefore **recommends** that:

- The Bill be amended to contain a more explicit definition of 'deprivation of liberty'. The IHRC suggests that such a definition could provide that references in the Bill to a deprivation of a person's liberty have the same meaning as in Article 5(1) of the European Convention on Human Rights and Article 14 of the CRPD, and that in determining whether a relevant person has been deprived of his or her liberty, regard is to be had to all the relevant circumstances in each individual case, which will include the type, duration, effects and manner of implementation of the measure in question and its impact on the relevant person;

- Provision be made for an effective and expeditious remedy whereby a person who lacks capacity and who is not an involuntary patient for the purposes of the 2001 Act is afforded an effective and expeditious remedy for challenging a deprivation of liberty, whether or not such a deprivation of liberty is by a public authority, and whether or not such detention is in an approved/unapproved centre or some other locus;

- A specific provision be included in the Bill that would prohibit any third party from consenting to a relevant person being treated in any approved centre;

- The proposed review of the detention of wards be broadened in its scope to include those who may have been *de facto* deprived of their liberty otherwise than on foot of a detention order made by a wardship court;

- The proposed review of the detention of wards be conducted within a specified time period, rather than 'as soon as possible' after the commencement of the capacity legislation. If necessary, an administrative tribunal should be set up

with a view to conducting an immediate and comprehensive review of the detention of wards.[103]

Right to Autonomy and 'Best Interests' Principle

240. The IHRC considers that there is a degree of incoherence arising from the application of the 'best interests' principle in the context of the 2001 Act, and the assisted decision-making provisions of the Bill.

241. As observed above, section 67 of the Bill provides that where it is proposed in the context of capacity proceedings that a person be detained on the grounds that they are suffering from a mental disorder, 'the procedures provided for under the Act of 2001 shall be followed'.

242. In any decision taken under the 2001 Act concerning the care or treatment of a person, including a decision to make an admission order in relation to such a person, the 'best interests' of the person must be the principal consideration, with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made. This is subject to the proviso that in making such a decision under the 2001 Act, due regard is to be given to the need to respect the right of the person concerned to dignity, bodily integrity, privacy and autonomy (s.4). Notably, this section of the 2001 Act makes no reference to the will or preferences of the person concerned.

243. Since the general principles contained at section 8 of the 2013 Bill are restricted in their application to 'interventions' as defined (i.e. applications under the capacity legislation), it would appear that a person who lacks capacity and who suffers from a mental disorder such that it is proposed to detain him or her is deprived of the benefit of these general principles.

244. In interpreting the phrase "*best interests*" (which remains undefined in the 2001 Act) the Courts have adopted an avowedly paternalistic approach, and have adopted a line of authority derived from cases decided under the Mental Treatment Act 1945 ('the 1945 Act').

245. Thus in *In re Philip Clarke* O'Bryne J, in considering the constitutionality of section 165 of the 1945 Act, described the general aim and purpose of the legislation in the following terms:

> *The impugned legislation is of a paternal character, clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and well-being of the public generally. The existence of mental infirmity is too widespread to be overlooked, and was, no doubt, present to the minds of the draftsmen when it was proclaimed in Article 40.1 of the Constitution that, though all citizens, as human beings are to be held equal before the law, the State, may, nevertheless, in its enactments, have due regard to differences of capacity, physical and moral, and of social function.*

[103] Such a Tribunal might in fact rely on the existing provision regarding Mental Health Tribunals under the Mental Health Act, 2001.

> *We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity, to remain at large to the possible danger of themselves and others.*[104]

The dicta of O'Bryne J were approved by McGuinness J in *Gooden v St Otteran's Hospital*,[105] and in *EH v The Clinical Director of St Vincent's Hospital*[106] Kearns J (as he then was), in interpreting the phrase 'voluntary patient' for the purposes of section 23(1) of the 2001 Act, and having referred to the foregoing cases under the 1945 Act, stated 'I do not see why any different approach should be adopted in relation to the Mental Health Act 2001, nor, having regard to the Convention, do I believe that any different approach is mandated or required by article 5 of the European Convention on Human Rights 1950'.[107]

246. The IHRC is of the view that the best interests properly understood in a non-paternalistic manner and which upholds the will and preference of the person with disabilities need not necessarily conflict with the rights of such a person to dignity, autonomy and the exercise of legal capacity as guaranteed by the CRPD. However, insofar as the application of the best interests principle may amount to a form of substituted decision-making which unduly restricts the rights and freedoms of a person on the grounds of their disability, the IHRC is of the view that such an approach is not compatible with the guarantees of non-discrimination and equal recognition before the law as provided for under the CRPD.

247. The approach taken in England and Wales in the Mental Capacity Act 2005 is instructive in this regard, in that it modifies the traditional common law concept of best interests to reflect relevant international human rights standards. While the phrase 'best interests' is not defined in the 2005 Act, a list of factors are identified which are to be considered in determining the best interests of a person who lacks mental/decision-making capacity. Thus a person making such a determination must consider all the relevant circumstances, and in particular must take the following steps:

> *s.4(3) He must consider—*
>
> > *(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
> > *(b) if it appears likely that he will, when that is likely to be.*
>
> *(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*

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[104] *In re Philip Clarke* [1950] IR 235, at pp.247-248.
[105] *Gooden v St Otteran's Hospital* [2005] 3 IR 617.
[106] *EH v The Clinical Director of St Vincent's Hospital* [2009] IESC 46, [2009] 3 IR 774. Cf: *Croke v Smith (No.2)* (Unreported, High Court, Budd J., 27 July 1995); *JH v Lawlor* [2007] IEHC 225, [2008] 1 IR 476; *WQ v Mental Health Commission* [2007] IEHC 154, [2007] 3 IR 755; *MR v Byrne and Flynn* [2007] IEHC 73, [2007] 3 IR 211.
[107] *EH v The Clinical Director of St Vincent's Hospital* [2009] IESC 46, at para.44.

[...]

(6) He must consider, so far as is reasonably ascertainable—

> *(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*
> *(b) the beliefs and values that would be likely to influence his decision if he had capacity, and*
> *(c) the other factors that he would be likely to consider if he were able to do so.*

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

> *(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*
> *(b) anyone engaged in caring for the person or interested in his welfare,*
> *(c) any donee of a lasting power of attorney granted by the person, and*
> *(d) any deputy appointed for the person by the court,*

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

248. The IHRC believes that the introduction of capacity legislation in this jurisdiction represents a welcome opportunity to either replace the term "*best interests*" with the will and preference of the individual or to formulate a new statutory definition of the best interests principle, which is compatible with the guarantees of autonomy, dignity, non-discrimination, and equal recognition before the law as guaranteed by the CRPD.

249. The IHRC is concerned that the current disparity of approach as and between section 4 of the 2001 Act and section 8 of the 2013 Bill will give rise to an irrational and arbitrary differentiation between those who lack capacity *simpliciter*, and those who in addition have a mental disorder which may warrant their admission to an approved centre.

250. The IHRC therefore **recommends** that:

- Provision be made in the 2013 Bill for the amendment of the 2001 Act by the insertion of a definition of 'best interests' which is consistent with section 8 of the Bill, and compatible with the CRPD;

- In the alternative, provision be made in the Bill for the application of the general principles set out at section 8 of the Bill to decisions relating to the treatment and care of persons under the 2001 Act.

Assessment of Capacity and Consent to Treatment

251. As noted above, section 104 of the Bill provides that nothing in the capacity legislation authorises a person to give a patient treatment for a mental disorder, or 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.

252. The implications of this provision would seem to be that a person who lacks mental capacity and requires treatment will be subject to a functional assessment of his or her capacity pursuant to section 3 of the Bill, and will have the benefit of guiding principles set out at section 8 of the Bill, whereas a person who lacks mental capacity and in addition is a 'patient' subject to an involuntary admission order under the 2001 Act will instead be subject to the 'consent to treatment provisions' provided at Part 4 thereof.

253. Consent, for the purposes of section 56 of the 2001 Act, means consent obtained freely without threats or inducements, where:

> *(a) the consultant psychiatrist responsible for the care and treatment of the patient is satisfied that the patient is capable of understanding the nature, purpose and likely effects of the proposed treatment; and*
>
> *(b) the consultant psychiatrist has given the patient adequate information, in a form and language that the patient can understand, on the nature, purpose and likely effects of the proposed treatment.*

254. By way of contrast, pursuant to section 3 of the Bill, where a decision is taken in relation to the care and treatment of a person who lacks mental capacity but who is not an involuntary patient, regard will be required to be had to his or her capacity to understand the nature and consequences of the decision to be made by him or her in the context of the available choices at the time the decision is made, and a person will only lack decision-making capacity 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.*

255. Further, pursuant to section 8 of the Bill, in making a decision in relation to the treatment and care of a relevant person, the intervener will be required to:

(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.

256. The clear disparity in relation to the assessment of a person's capacity to consent to, and participate in, decisions relating to their care and treatment is compounded by the application of a separate common law test of capacity to those persons who are neither involuntary patients under the 2001 Act, nor persons who are the subject of an intervention under the Bill.[108]

257. The IHRC is concerned that this disparity is inconsistent with Article 17 CRPD, which provides that every person with a disability has a right to respect for his or her physical and mental integrity on an equal basis with others, and with Article 12 CRPD, which guarantees the right to enjoy and exercise legal capacity on an equal basis with others.

258. The IHRC further reiterates its reservations as to whether the provisions of Part 4 of the 2001 Act as a whole are compatible with the CRPD and the ECHR, in circumstances where decisions concerning treatment are made on a substitute decision-making basis without regard to the will and preferences of the person concerned in relation to the proposed treatment, and where a determination as to a person's capacity to consent to receive treatment is not subject to review by an independent tribunal or court.

[108] See *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79 and *Fitzpatrick & Ryan v FK (No.2)* [2008] IEHC 104, [2009] 2 IR 7.

259. The IHRC recognises that involuntary medical treatment is capable of amounting to a breach of Articles 3 (prohibition of torture) and/or Article 8 (privacy) ECHR. Thus, by way of example, in *X v Finland*[109] the ECtHR considered that the forced administration of medication to a person who was the subject of an involuntary care order represented a serious interference with the applicant's physical integrity, which interference had to be in accordance with law and necessary in a democratic society as required by Article 8(2). In this regard the Court noted that the decision-making of the treating doctors was entirely free from any form of immediate judicial scrutiny, and that there was no remedy available to the applicant whereby she could require a court to rule on the lawfulness, including the proportionality of the forced administration of medication, and to have such treatment discontinued. The Court concluded that, in the absence of the requisite safeguards against arbitrariness, the interference could not be said to be 'in accordance with law', such that there had been a violation of the applicant's rights under Article 8.[110]

260. It was in the light of the jurisprudence of the ECtHR relating to consent to medical treatment, and indeed to the CRPD, that MacMenamin J concluded in *MX v HSE*[111] that section 60 of the 2001 Act (which relates to the continuation of the administration of medicine), to be applied in a constitutional manner, had to include a right to independent review and assisted, as opposed to substitute decision-making.[112] The learned judge made the following observations as to the implications of the relevant constitutional and human rights guarantees for the administration of involuntary treatment:

> *I do not think there is anything inconsistent with the avowedly paternalistic nature of the legislation or that jurisprudence, insofar as they concern liberty, in also ensuring that the wishes and choices of a person suffering from a disability, while under such care, should be guaranteed in a manner which, 'as far as practicable' (to use the phrase adopted in Article 40.3.1 of the Constitution), vindicates his or her personal capacity rights. The interpretation of the Constitution in this area of the law should be informed by, and have regard to international conventions…If a patient lacks capacity, does it not follow that, in order to vindicate these rights, the patient should, where necessary, be assisted in expressing their view as part of the decision-making process? It cannot be said that such a process is impractical. I think the constitutional duty involved here is a positive one…As the ECtHR judgments point out, however, such decision-making in this area should seek to apply a "functional approach" to capacity, involving both an issue-specific and time-specific assessment of the plaintiff's decision-making ability. One determination should not be permanent; the process must refer to "differences in capacity" (Article 40.3 of the Constitution). This involves analysing, not only differences in capacity between patients, but also variations in each patient's capacity at particular times. Only in that manner can their rights be properly vindicated in accordance with the constitutional requirement.*[113]

[109] *X v Finland*, App. No. 34806/04, Judgment of 3 July 2012.
[110] Cf. *Herczegfalvy v Austria*, App. No. 10533/83, Judgment of 24 September 1992, (1993) 15 EHRR 437.
[111] *MX v HSE* [2012] IEHC 491.
[112] Ibid., at para.5.
[113] Ibid., at paras.59, 73, 79.

261. The IHRC considers that in order to secure the rights of persons with disabilities to enjoy and exercise their legal capacity, decisions relating to their care and treatment must be taken in a manner that has due regard to their will and preference, insofar as this is reasonably ascertainable. The IHRC is of the view that the guarantee of the enjoyment of bodily and mental integrity on an equal basis with others is violated by the disparity in the manner in which capacity to consent to treatment is assessed, and decisions relating to the care and treatment of those lacking mental/decision-making capacity are made, under the 2001 Act and the 2013 Bill respectively.

262. The IHRC therefore **recommends** that:

- Provision be made in the Bill for the amendment of section 56 of the 2001 Act with a view to inserting a functional test of capacity which reflects section 3 of the Bill;

- Provision be made in the Bill for the application of the general principles provided for at section 8 of the Bill, including the presumption of capacity, to decisions made relating to the treatment and care of involuntary patients under the 2001 Act.

F. ENDURING POWERS OF ATTORNEY ('EPAS')

(i) Preliminary Discussion

263. The IHRC welcomes the inclusion of EPAs within the scope of the proposed legislation, and particularly welcomes the introduction of a coherent statutory framework for the determination of and exercise of capacity both in the context of assisted decision-making and enduring powers of attorney.

264. In this regard, the IHRC notes the recommendations made by the Law Reform Commission in its *Report on Vulnerable Adults and the Law*:

> *One of the Commission's central recommendations in this report is the enactment of specialist mental capacity legislation. In this context it is considered appropriate to relocate a reformed enduring powers of attorney regime within this comprehensive legislative framework. It makes sense to place the provisions governing EPAs within a statute dealing with capacity and assisted decision-making. A unified legislative structure will help to ensure that the law relating to civil legal capacity and assisted decision-making is easily accessible. The inclusion of EPAs within the legislation would also pave the way for including attorneys within the supervisory net of the proposed Public Guardian which the legislation will also establish and would enable attorneys to be subject to the principles for assisting and substitute decision-makers to be included in mental capacity legislation.*[114]

[114] Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC 83-2006), at para.4.03.

(ii) Relevant Provisions of the 2013 Bill

265. Part 6, sections 38 to 52, provide for powers of attorney. Section 39 explains that the provisions of this part of the Bill will not apply to an enduring power of attorney created under the Powers of Attorney Act 1996, except where the instrument creating such a power has not been registered under the 1996 Act before the commencement of the 2013 Bill. It further clarifies that the 1996 Act will not apply to an enduring power of attorney created under the 2013 Bill and also explains that pursuant to the commencement of this Bill, no further EPAs may be made under the 1996 Act.

266. Section 40 describes the characteristics of an EPA, explaining that an EPA under this Part is a statement by a donor that the donor intends a power of attorney 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. Section 41 relates specifically to the scope of the power of attorney in respect of personal welfare decisions, while section 42 describes the scope of the power of attorney as regards the property and affairs of the donor. Section 43 clarifies that an EPA will not come into effect until it has been registered.

267. Sections 44-47 deal with the registration requirements of an EPA, with section 45 describing the duties of an attorney to make an application to the Public Guardian for registration of an EPA if he or she believes the donor lacks or may shortly lack capacity. Section 49 sets out the powers and functions of the High Court in respect of a registered EPA. Section 49(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 EPA. Section 50 further provides that a donor may revoke a registered EPA at any time provided he or she has the capacity to do so.

(iii) Observations and Recommendations – EPAs

Application of Section 8 General Principles to EPAs

268. The IHRC **recommends** that section 41 include an explicit requirement that the attorney act in the best interests of the donor with due regard for the donors human rights.[115] Reference to the Guiding Principles in section 8 should be explicitly included here. Indeed, to ensure that an EPA does not give rise to a form of substitute decision-making, it is vital that any steps taken by an attorney in relation to a relevant person on foot of an EPA are subject to the general principles set out at section 8 of the Bill.

269. In order for the general principles set out at section 8 of the Bill to apply to a given action, the action must be an 'intervention' for the purposes of section 2(1). An intervention is defined in the following terms:

> *"intervention", in relation to a relevant person, means an action taken under this Act (including regulations made under this Act, orders made under this*

[115] See discussion on the "*best interests*" principle at paras. 240-250 above.

Act, directions given under this Act or rules of court made for the purposes of this Act) in respect of the relevant person by—

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

270. This provision may give rise to an ambiguity as to whether the general principles only apply to an action taken by an attorney under the Bill itself (e.g. an application for registration pursuant to s.45), or whether these principles apply to all actions taken by an attorney whether under the Bill or on foot of an EPA.

271. Further, for the general principles set out at section 8 to be meaningful, an effective remedy for the breach of these principles by the attorney must be available to a donor (or a third party with a sufficient interest).

272. The IHRC therefore **recommends** that:

- the definition of intervention at section 2(1) of the Bill be amended to expressly include any/all steps taken by an attorney in exercise of the powers conferred on him/her by an EPA;

- the Bill make provision for an accessible and effective remedy for the breach of the general principles set out at section 8 in any action/actions taken by an attorney on foot of an EPA;

- the sanctions for any such breach of the general principles be effective, dissuasive and proportionate.

<u>Assessment of Capacity</u>

273. In order for the EPA provisions of the Bill to be compatible with the CRPD, the applicable test for capacity must be a functional one, as provided for by section 3 of the Bill and the presumption of capacity under section 8. In the Bill, in its present form, a loss of mental capacity *simpliciter* may be relied upon to create, register or revoke an EPA. This undifferentiated, all-or-nothing conception of mental capacity would appear to be incompatible with the CRPD, which requires a tailor-made, issue-specific, and time-specific assessment of mental capacity.

274. The question of the donor's capacity is central to the creation, registration, and revocation of an EPA. It may perhaps be envisaged that the use of the term "capacity" in conjunction with the qualifying phrases 'to look after his or her personal welfare' and/or 'to manage his or her property and affairs' may give rise to doubt as to whether the Court is required to apply the test for decision-making capacity as provided for by section 3, or some modified test. This is notwithstanding the fact that section 3(1) expressly provides that the section shall apply to the assessment of capacity for the purposes of creating an EPA.

275. Further, by only making provision for two categories of decision-making capacity (i.e. (a) capacity to look after one's personal welfare and/or (b) capacity to manage one's property and affairs) the Bill arguably adopts an overly restrictive approach which may circumscribe the range of decisions which may be the subject of an instrument creating an EPA.

276. The IHRC is of the view that the CRPD by necessary implication requires a differentiated approach to the assessment of capacity in the context of an application to register, cancel or revoke an EPA.

277. As such, a generalised loss of mental capacity in relation to one or more of these categories of decisions should not be capable of being relied upon as grounds for invoking all of the powers contained in an EPA. Rather, the onus should be on the donee to show that the donor has lost capacity in relation to one or more of the decisions or categories of decisions provided for in the instrument creating the EPA, and the Public Guardian should have the power to register only those parts of an EPA which relate to the particular loss of decision-making capacity concerned.

278. Similarly, the Court or the Public Guardian should enjoy the power to cancel or revoke only that part of an EPA which relates to the particular loss of decision-making capacity at issue, such that there may be circumstances in which a partial recovery of mental capacity will require the effective severance of an EPA, with those provisions which relate to a decision or class of decisions in respect of which the donor continues to lack capacity remaining in force.

279. The IHRC therefore **recommends** that:

- Section 40 of the Bill be amended to provide that, for the avoidance of doubt, in the phrases 'capacity to look after his or her personal affairs' and 'capacity to manage his or her property and affairs', capacity has the meaning assigned to it at section 2(1) and consequently shall be construed in accordance with section 3;

- Section 41(4), permitting an attorney to do an act that is 'intended to restrain the donor' where 'the donor lacks capacity in relation to the matter in question or the attorney reasonable believes that the donor lacks such capacity', be clarified. The question arises as to how such an assessment of capacity will be made and whether such an assessment is in keeping with the tailored, functional capacity assessment required by Article 12 CRPD needs to be carefully considered;[116]

- Part 6 of the Bill be amended to afford the Public Guardian and the High Court the power to register, cancel or revoke an EPA, *or part thereof*, on the grounds that the donor has lost or recovered the mental capacity to make a particular decision or class of decisions which is covered by an EPA.

<u>Revocation</u>

280. The Bill provides for the revocation of an EPA at ss.49(4) and 50 thereof. However, insofar as provision is made for revocation, such provisions are limited to

[116] See also previous discussion regarding "*restraint*" at paras. 184 and 217-218.

the revocation of an instrument which has been registered. As such, the legislation in its current form would not appear to provide for the revocation of such an instrument prior to its registration.

281. The IHRC notes that in its *Report on Vulnerable Adults and the Law* the Law Reform Commission highlighted an equivalent lacuna in the 1996 Act, and recommended that, provided the donor of an EPA which had not been registered retained the requisite capacity, there should be a mechanism for revocation provided for in legislation.[117]

282. The IHRC therefore **recommends** that:

- Part 6 of the Bill be amended to make express provision for the revocation of an instrument prior to its registration in circumstances where the donor has capacity to do so;

- Ensure that the donee, irrespective of any assessment of their mental capacity, has the legal capacity to challenge the continuance of an EPA in specified circumstances.

Amendment of existing statutory framework

283. The IHRC recalls that, in its draft General Comment on Article 12 CPRD, the UN Committee on the Rights of Persons with Disabilities states that the development of supported decision-making systems in parallel with the retention of substitute decision-making regimes is not sufficient to comply with Article 12 CPRD.[118]

284. The IHRC is concerned however that, pursuant to section 39 of the Bill, the introduction of Part 6 does not affect existing powers of attorney which have been registered under the Powers of Attorney Act 1996 ('the 1996 Act').

285. It is to be questioned whether the continued operation of the 1996 Act in respect of existing powers of attorney would be compatible with the State's obligations under the CRPD upon ratification, in particular as regards the assessment of a donor's capacity for the purpose of section 9 of the 1996 Act, or the application of the 'best interests' principle to personal care decisions made by attorneys under section 6 of the 1996 Act.

286. The IHRC therefore **recommends** that provision be made in the Bill for the amendment of the 1996 Act with a view to ensuring that existing powers of attorney are exercised in a manner that is compatible with the CPRD.

[117] Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC 83-2006), at paras.4.24-4.26.
[118] Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention: Equal Recognition before the Law*, Adopted at the Tenth Session (2-13 September 2013), at para.24.

G. MISCELLANEOUS ISSUES

(i) Need for Other Legislative Amendments

287. In addition to the urgent need for reform of the present wardship system and the introduction of functional capacity assessments into Irish law, there are a number of other pieces of legislation that require reform and are related to this present legislation, these include the Mental Health Act, 2001.

(ii) Need for Transitional Arrangements

288. At present, the legislation does not appear to include provision for automatic transitional arrangements from the wards of court system. A clear inclusion of and provision for transitional arrangements should be provided in the legislation, with due regard for the rights of all individuals within the current system, and acknowledgement that they will not have had the benefit of a proper capacity assessment in keeping with contemporary human rights standards, which situation must be rectified immediately upon enactment. The rights of Wards of Court should not be dependent on a future unspecified commencement date that puts their rights in limbo.

(iii) Sterilisation

Preliminary Discussion

289. The IHRC has previously addressed the grave and complex issues raised by the sterilisation of persons with intellectual disabilities in submissions made to the ECtHR on behalf of the European Group of National Human Rights Institutions in *Gauer & Ors v France.*[119]

290. The IHRC is concerned that the extremely limited reference made in the draft legislation to the issue of non-therapeutic sterilisation is not commensurate with the seriousness of the implications which such a procedure will invariably have for the privacy, autonomy, physical integrity, and reproductive rights of persons with a disability.

Relevant provisions of the Bill

291. Section 4 of the Bill reserves to the High Court exclusive jurisdiction in relation to all matters connected with non-therapeutic sterilisation of relevant persons who lack decision-making capacity.

[119] *Gauer & Ors v France*, App. No. 61521/08. Submissions made as amicus curiae can be found in: The European Group of National Human Rights Institutions, *Amicus Brief of the European Group of National Human Rights Intuitions to the European Court of Human Rights in Gauer v France* (16 August 2011), available at: <http://www.ihrc.ie/download/doc/european_group_nhris_third_party_intervention_gauer_v_france.doc> (visited 5 March 2014).

Defining and distinguishing 'therapeutic' and 'non-therapeutic' sterilisation

292. The IHRC interprets this provision as meaning, by necessary implication, that no application to the High Court under the legislation will be necessary in relation to the *therapeutic* sterilisation of relevant persons who lack capacity.

293. As such, the question of whether the sterilisation of such a person is 'therapeutic' or 'non-therapeutic' would seem to be fundamental to the exercise by the High Court of its statutory jurisdiction under s.4 of the Bill (as opposed, perhaps, to the exercise of its inherent *parens patriae* jurisdiction). However, the terms 'sterilisation', 'therapeutic', and 'non-therapeutic' are not defined in the draft legislation.

294. It is evident from the Law Reform Commission's Consultation Paper and subsequent *Report on Vulnerable Adults and the Law* that, in making recommendations as to the reservation to the High Court of jurisdiction in respect of the non-therapeutic sterilisation of persons lacking decision-making capacity, the Commission used the term 'non-therapeutic sterilisation' to refer to sterilisation which was used for contraceptive purposes, as opposed to circumstances where 'therapeutic sterilisation' was required to protect the mental or physical health of the person concerned (in particular where such a person was suffering a serious malfunction or disease of the reproductive organs).[120]

295. The experience of legislatures and courts in other jurisdictions shows that the meaning and use of these terms is not, however, uncontroversial.

296. The Australian Senate has recognised that the term 'sterilisation' may refer to a variety of procedures, including permanent sterilisation, medical procedures for which permanent sterilisation is a secondary outcome, and non-permanent contraceptive measures. In legislating for the non-therapeutic sterilisation of disabled persons, the Senate has found that the question of the coherence and validity of the distinction drawn between therapeutic and non-therapeutic sterilisation is very much to the fore. As one contributor to the Senate's deliberations put it:

> *The term 'therapeutic' itself is difficult to define. Pertaining to 'therapy', it is not clear whether legally it is limited to clinical treatment of a physical disorder, or whether it can encompass broader aspects of health and welfare, such as minimising emotional or behavioural disturbances.*[121]

297. The problem of distinguishing between those sterilisations which are therapeutic (and thus do not require court supervision), and those which are non-therapeutic (and thus do require such supervision) is one which has arisen in the superior courts of a number of Commonwealth nations.

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[120] Law Reform Commission, *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005), at paras.6.54-6.62; Law Reform Commission, *Report on Vulnerable Adults and the Law* (LRC 83-2006), at paras.2.81, 3.12-3.14.

[121] Community Affairs References Committee of the Australian Senate, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (July 2013), at para.1.43.

298. In the decision of the Canadian Supreme Court in *E v Eve*, La Forest J, while accepting the necessity of the distinction between therapeutic and non-therapeutic sterilisation, was circumspect as to where the line between the two actually lay:

> *The foregoing, of course, leaves out of consideration therapeutic sterilization and where the line is to be drawn between therapeutic and non-therapeutic sterilization. On this issue, I simply repeat that the utmost caution must be exercised commensurate with the seriousness of the procedure. Marginal justifications must be weighed against what is in every case a grave intrusion on the physical and mental integrity of the person.*[122]

299. The High Court of Australia has similarly accepted the necessity of maintaining the distinction between therapeutic and non-therapeutic sterilisation, without giving clear guidance as to how this distinction is to be made in practice:

> *It is necessary to make clear that, in speaking of sterilisation in this context, we are not referring to sterilisation which is a by-product of surgery appropriately carried out to treat some malfunction or disease. We hesitate to use the expressions "therapeutic" and "non-therapeutic", because of their uncertainty. But it is necessary to make the distinction, however unclear the dividing line may be.*[123]

300. In England and Wales the question of whether or not a sterilisation is therapeutic is a core criterion in determining whether such a procedure may be carried out without the leave of the court:

> *[I]n a case where the operation is necessary in order to treat the condition in question, it may be lawfully carried out even though it may have the incidental effect of sterilisation...I take the view that no application for leave to carry out such an operation need be made in cases where two medical practitioners are satisfied that the operation is: (1) necessary for therapeutic purposes, (2) in the best interests of the patient, and (3) that there is no practicable, less intrusive means of treating the condition.*[124]

301. In applying these criteria, the Court of Appeal has stressed that any interpretation and application should 'incline towards the strict and avoid the liberal', such that 'if a particular case lies anywhere near the boundary line it should be referred to the court by way of application for a declaration of lawfulness'.[125]

302. Insofar as the draft legislation makes provision for the therapeutic and/or non-therapeutic sterilisation of persons lacking decision-making capacity (whether to prohibit or to authorise such procedures), it is crucial that the delineation between such procedures is as clear as possible in order to provide guidance to, amongst others, medical and legal practitioners as to whether a particular procedure is

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[122] *E v Eve* [1986] 2 SCR 388.
[123] *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) ALJR 300 (*Re Marion*), at p.48.
[124] *In re GF (Medical Treatment)* [1992] 1 FLR 293, per Sir Stephen Brown P, at p.294.
[125] *In re S (Adult Patient: Sterilisation)* [2001] Fam 15, per Thorpe LJ, at 32A-B.

permissible and/or requires an application to the High Court under section 4 of the Bill.

303. The IHRC therefore **recommends** that the Bill be amended to include definitions of the terms 'sterilisation', 'therapeutic sterilisation', and 'non-therapeutic sterilisation'.

CRPD

304. The IHRC questions whether the sterilisation of a person lacking decision-making capacity, whether for therapeutic or non-therapeutic reasons, without his or her informed consent, may ever be regarded as a permissible interference with that person's human rights, and more particularly with those rights guaranteed by the CRPD.

305. The CRPD requires States Parties to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in *all* aspects of their lives (Article 12(2)), and recognises that every person with disabilities has the right to respect for his or her physical and mental integrity on an equal basis with others (Article 17).
306. A necessary corollary is that States Parties are required to take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, and in particular to ensure that persons with disabilities, including children, retain their fertility on an equal basis with others (Article 23(1)(c)). Further, the provision of health services to persons with disabilities (including the provision of health care programmes in the area of sexual and reproductive health) must be on the basis of free and informed consent (Article 25).

307. While the issue of sterilisation is of course not confined to women, the CRPD expressly recognises the intersectionality of discrimination on the grounds of gender and disability, such that women and girls with disabilities are routinely subject to multiple discrimination (Article 12).

308. In its draft General Comment on Article 12 CRPD, the Committee on the Rights of Persons with Disabilities makes explicit the relationship between the recognition of the legal capacity of persons with disabilities, and the right of women to legal capacity on an equal basis with men as recognised by Article 15 of the Convention on the Elimination of all Forms of Discrimination against Women ('CEDAW'). The Committee expressly refers to forced sterilisation as a particularly prevalent form of discrimination which is based on both gender and disability:

> *[W]omen with disabilities are subjected to high rates of forced sterilization, and are often denied control of their reproductive health and decision-making, the assumption being that they are not capable of consenting to sex. Certain jurisdictions also have higher rates of imposing substitute decision-makers on women than on men. Therefore, it is particularly important to*

> *reaffirm that the legal capacity of women with disabilities should be recognized on an equal basis with others.*[126]

309. The views of the Committee with regard to the compatibility of forced sterilisation with the CRPD are echoed in its concluding observations in relation to country reports submitted by States Parties. Thus, by way of example, in its concluding observations on Spain, the Committee urged the State Party 'to abolish the administration of medical treatment, in particular sterilization, without the full and informed consent of the patient'.[127]

Other relevant international human rights instruments

310. The recognition of non-consensual sterilisation of women with disabilities as a serious interference with the rights of such persons to equality, physical integrity, and autonomy is not confined to the CRPD.

311. Interpreting Article 16 of CEDAW, which affirms the equality of men and women in all matters relating to marriage and family relations, the Committee on the Elimination of Discrimination against Women has stated that compulsory sterilisation adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.[128] Thus the Committee, in in its concluding observations on the country report submitted by Australia, has recommended that the State party enact legislation 'prohibiting, except where there is a serious threat to life or health, the use of sterilisation of girls, regardless of whether they have a disability, and of adult women with disabilities in the absence of their fully informed free consent'.[129]

312. The Committee on Economic, Social and Cultural Rights has similarly affirmed that the sterilisation of women without their prior informed consent amounts to a serious violation of Article 10 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), which relates to the protection of the family and of mothers and children:

> *Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy. As the Standard Rules state, "persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood". The needs and desires in question should be recognized and addressed in both the recreational and the procreational contexts. These rights are commonly denied to both men and women with disabilities worldwide. Both the*

[126] Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention: Equal Recognition before the Law*, Adopted at the Tenth Session (2-13 September 2013), at para.31.
[127] Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities on the initial report of Spain*, Adopted at the Sixth Session (19-23 September 2011) CRPD/C/ESP/CO/1, at para.37.
[128] Committee on the Elimination of Discrimination against Women, *General Comment No.19: Violence against Women*, Adopted at the Eleventh Session (29 January 1992) A/47/38, at para.22.
[129] Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, Adopted at the Forty-Sixth Session (12-30 July 2010) CEDAW/C/AUL/CO/7, at para.43.

sterilization of, and the performance of an abortion on, a woman with disabilities without her prior informed consent are serious violations of article 10(2).[130]

313. The Committee on the Rights of the Child has also expressed concerns in relation to the sterilisation of girls with disabilities:

The Committee is deeply concerned about the prevailing practice of forced sterilisation of children with disabilities, particularly girls with disabilities. This practice, which still exists, seriously violates the rights of the child to her or his physical integrity and results in adverse life-long physical and mental health effects. Therefore, the Committee urges States Parties to prohibit by law the forced sterilisation of children on the grounds of disability.[131]

314. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has expressed the view that non-consensual sterilisation of women with disabilities, in the absence of therapeutic purpose, may amount to torture:

This is particularly the case when intrusive and irreversible, non-consensual treatments are performed on patients from marginalized groups, such as persons with disabilities, notwithstanding claims of good intentions or medical necessity…the administration of non-consensual medication or involuntary sterilization is often claimed as being a necessary treatment for the so-called best interest of the person concerned.[132]

315. The Special Rapporteur goes on to express reservations as to whether non-consensual sterilisation, even on therapeutic grounds, may ever be justified, citing a report of the International Federation of Gynecology and Obstetrics which states that 'sterilization for prevention of future pregnancy cannot be ethically justified on grounds of medical emergency. Even if a future pregnancy may endanger a woman's life or health, she…must be given the time and support she needs to consider her choice. Her informed decision must be respected, even if it is considered liable to be harmful to her health'.[133] The Special Rapporteur concludes:

The doctrine of medical necessity continues to be an obstacle to protection from arbitrary abuses in health-care settings. It is therefore important to clarify that treatment provided in violation of the terms of the Convention on the Rights of Persons with Disabilities – either through coercion or

[130] Committee on Economic, Social and Cultural Rights, *General Comment No.5: Persons with Disabilities*, Adopted at the Eleventh Session (9 December 1994) E/1995/22, at para.31.
[131] Committee on the Rights of the Child, *General Comment No.9: The Rights of Children with Disabilities*, Adopted at the Forty-Third Session (11-29 September 2006), at para.60.
[132] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Twenty-Second Session (1 February 2013) A/HRC/22/53, at para.32.
[133] Ibid., at para.33. The Special Rapporteur is citing the following report: International Federation of Gynecology and Obstetrics, *Ethical Issues in Obstetrics and Gynecology* (October 2012), at pp.123-124.

discrimination – cannot be legitimate or justified under the medical necessity doctrine.[134]

Observations and recommendations - sterilisation

316. In light of the foregoing, the IHRC is of the view that the non-therapeutic sterilisation of persons with disabilities without their full and informed consent is incompatible with the CRPD.

317. Rather, the CRPD requires that persons with disabilities be provided with the support they may require in exercising their legal capacity in the sphere of reproductive health, as in all other areas of their lives.

318. The IHRC notes that while a person's decision-making capacity may fluctuate over time, sterilisation will invariably have permanent and irreversible consequences for a person's mental and physical integrity. It was partly on this basis that La Forest J held on behalf of the Supreme Court of Canada in *E v Eve* that the non-therapeutic sterilisation of a woman with intellectual disabilities could not be justified, even where such a procedure was putatively in her best interests:

> *The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person…To begin with, it is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a court purports to act, let alone one in which that procedure is necessary in his or her best interest. [...] Nature or the advances of science may, at least in a measure, free Eve of the incapacity from which she suffers. Such a possibility should give the courts pause in extending their power to care for individuals to such irreversible action as we are called upon to take here. The irreversible and serious intrusion on the basic rights of the individual is simply too great to allow a court to act on the basis of possible advantages which, from the standpoint of the individual, are highly debatable.*[135]

319. Insofar as the therapeutic sterilisation of persons with disabilities is permissible under international human rights law, the IHRC is of the view that such interventions must only take place in defined and limited circumstances, and that adequate safeguards be put in place to prevent procedures which are not medically warranted.

320. There is a clear risk that, by adopting an overly broad definition of what is 'therapeutic', persons with disabilities may be subjected to sterilisation without their consent in the absence of judicial scrutiny and adequate procedural safeguards.

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[134] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Twenty-Second Session (1 February 2013) A/HRC/22/53, at para.35.

[135] *E v Eve* [1986] 2 SCR 388, at paras.86-88.

321. Accordingly, express provision should be made in the Bill for the making of applications to the High Court for leave to carry out a procedure which has as its purpose and/or effect the sterilisation of a relevant person who lacks mental capacity. Such an application should be regarded as an 'intervention' for the purposes of the Bill, such that in exercising its jurisdiction the High Court is required to have due regard to the matters set out at s.8 of thereof. While an exemption from the necessity for such an application should be provided for in the case of grave and immediate risk to the life and/or health of the person concerned, medical practitioners should be provided with clear criteria for the carrying out of sterilisations on persons who lack mental capacity, by way of Ministerial regulations published under the legislation.

322. The IHRC therefore **recommends** that:

- The Bill be amended to provide for definitions of the terms 'sterilisation', 'therapeutic sterilisation', and 'non-therapeutic sterilisation';

- The Bill be amended to contain an express prohibition of the non-therapeutic sterilisation of persons who lack mental capacity, or who would lack mental capacity without appropriate decision-making assistance, and such a prohibition should be attended by appropriate criminal sanction to ensure compliance;

- Section 4(2) of the Bill be amended to reserve to the High Court jurisdiction relating to every matter in connection with *therapeutic* sterilisation;

- Provision be made in the Bill be made for the making of applications to the High Court in relation to the therapeutic sterilisation of relevant persons who lacks mental capacity;

- Provision be made in the Bill whereby an application to the High Court in relation to the therapeutic sterilisation of a relevant person who lacks mental capacity is to be assessed (in addition to the matters set out at s.8 of the Bill);

- In making provision for applications to the High Court, the burden of proof be placed on the applicant to show (a) that the proposed sterilisation is necessary to preserve the life and/or health of the person concerned, and (b) that it is reasonable to believe that the person concerned will not recover decision-making capacity in relation to his or her reproductive health, even with appropriate decision-making assistance;

- An exemption from the necessity for the making of applications to the High Court in respect of the therapeutic sterilisation of relevant persons who lack mental capacity be provided for in the event of the immediate and serious risk to the life and/or health of the person concerned;

- The Minister be empowered under the legislation to publish criteria and guidance whereby medical practitioners are to assess whether a therapeutic sterilisation may be carried out on a relevant person who lacks capacity without leave of the High Court;

- Free, independent and accessible legal representation be made available to a relevant person who is the subject of an application to the High Court for therapeutic sterilisation.

(iv) Miscellaneous Provisions of the 2013 Bill (sections 103-114)

323. Section 106 provides a list of exemptions from the legislation, including marriage and marital status, adoption, guardianship, sexual relations, voting and jury service. Section 106 notes that, unless otherwise expressly provided, nothing within the Bill shall be construed as altering or amending existing laws relating to capacity and consent in these areas.

324. The IHRC is concerned that this list of exceptions is contrary to the ethos of the CRPD, in particular Article 12(2) which calls upon the State Parties to recognise that legal capacity is to be enjoyed by people with disabilities 'on an equal basis with others in all aspects of life.' The areas listed in section 106 represent some fundamental areas of a person's life. The functional approach to capacity appears to be removed for these areas, and rather, a sweeping 'all or nothing' approach is taken.

325. Section 106(a) of the Bill states that the principles of the Bill shall not extend to existing laws relating to marriage. The right to marry is protected by both the ECHR and CRPD. Article 8 of the ECHR provides that individuals possess the right to respect for private and family life, and Article 12 affirms the right of an individual to marry.[136] The institution of marriage is also protected under the Constitution. Article 23 of the CRPD places an onus on the State to take 'effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships'. This responsibility is further emphasised in subsection (a), which provides that the State must protect the right of all persons with disabilities who are of marriageable age 'to marry and found a family on the basis of free and full consent of the intending spouses is recognized.' Further, Article 3 of the CRPD emphasises that the State must have respect for the individual autonomy of persons with disabilities and their freedom to make their own choices.[137]

326. Section 106(h) precludes the extension of the Bill to sexual relations, which therefore fall to be considered under pre-existing law. Articles 23 and 25 of the CRPD explicitly acknowledge the rights to sexuality and sexual health services for people with disabilities. Article 23(1)(b) requires that 'reproductive and family planning education…and the means necessary to enable [individuals] to exercise these rights are provided', and subsection (1)(c) provides that persons with disabilities are to retain their fertility on an equal basis with others. Article 25(a) requires States to provide persons with disabilities with affordable health care 'including in the areas of sexual and reproductive health.' Further, it has been held that this falls within the

[136] Article 12 ECHR states as follows: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'

[137] While there is currently no presumption in Irish law that disabled persons lack the capacity to marry, a person who is a Ward of Court due to mental incapacity is not permitted to marry, *per* Lunacy Regulation Act 1871.

ambit of the Article 8 ECHR.[138] If existing Irish law governing sexual offences is to remain unchanged by the Bill, there may be subsequent issues regarding the compatibility of section 5 of the Criminal Law (Sexual Offences) Act 1993 with the provisions of the CRPD. This section criminalises sexual intercourse with a person who is deemed to be 'mentally impaired'[139], thus ignoring the capacity of such person to give consent. This provision appears not to be in accordance with Articles 12, 23 and 25 of the CRPD as it not only deprives persons with disabilities of their capacity to consent but also may prevent persons with disabilities from enjoying their rights under Articles 23 and 25 CRPD. Further, it may constitute an undue interference with Article 8 ECHR. This potential incompatibility was noted by the Law Reform Commission.[140] Though it is the case that the State must take steps to protect vulnerable individuals, this obligation must be carried out proportionately, and may not be used as a rationale for the deprivation of an individual's rights, as enumerated in the ECHR and CRPD. While Article 16 of the CRPD places an onus upon the State to take appropriate measures to prevent the abuse of persons with disabilities, the provision may not be used to divest individuals of their rights and freedoms, as protected by the CRPD. The IHRC recommends that section 106 be amended to remove the reference to sexual relations.

[138] '[The Court] considers that respect for private life "comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality" (Decision on Application No . 6825/74, X against Iceland) and that therefore sexual life is also part of private life.' See *Bruggemann and Scheuten v. Federal Republic of Germany*, App. No. 6959/75, Decision of 19 May 1976, at p.115.

[139] Section 5(5) of the Criminal Law (Sexual Offences) Act 1993 defines a 'mentally impaired' person as someone who is '...suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation.'

[140] Law Reform Commission, *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005), at p.143.