Statement by the IHRC to the
Oireachtas Joint Committee on Justice,
Defence and Equality
on the Proposed Mental Capacity Legislation
29 February 2012

Chair, members of the Committee, it is my great pleasure today to address the Oireachtas Joint Committee on Justice, Defence and Equality on the Commission's views on the proposed mental capacity legislation which in our view is overdue. The Commission is Ireland's National Human Rights Institution, established under the Human Rights Commission Act 2000 and our remit is to promote and protect human rights as defined in our legislation.

I am joined today by Commissioner Conleth Bradley Senior Counsel and by Acting Chief Executive Des Hogan. As the Committee may be aware, the IHRC has for some time called for itself to be accountable to the Oireachtas rather than to the Minister for Justice and I hope that in the context of the planned merger between the Commission and the Equality Authority this can occur. This may be a matter which this Committee wishes to examine when that legislation comes before it later this year.

You have our submission from last August before you. I will just pick up briefly on the main points raised as I know the Committee is anxious to put questions to the Commission and other delegations.

1. Legislation should be enacted this year. It is now 5 years since the UN Convention on the Rights of Persons with Disabilities ("CRPD") was signed in New York.[1] This Bill is among a number of matters stated to be holding up ratification. This was a major issue which arose in Ireland's recent Universal Periodic Review report before the UN Human Rights Council.

2. To conform with the CRPD, the proposed legislation must be informed by Article 12 of the said Convention, in addition to Constitutional and European Convention standards. Article 12, as you are no doubt aware, provides for legal recognition: there should be a presumption that every person has legal capacity (or decision making capacity). This should be understood as including whatever supports the person needs to exercise that capacity, What we would say is that the system to determine one's capacity should follow the functional approach to capacity. This means that just because one cannot deal with complex financial decisions does not mean that one cannot make decisions on voting or indicating other preferences. The system to determine capacity should thus be accessible to persons with mental disabilities and be affordable. This is also required under Article 5 which deals with non-discrimination and Article 19 which deals with independent living. Thus the assessment of capacity, identification of the criteria to be used when determining capacity; and the qualifications and expertise of the person(s) assessing capacity all need to be addressed.

3. Determinations on capacity should reflect the full range of human rights such as being able to put one's case, being legally assisted etc. Thus in the European Court Judgment of *Stanev v Bulgaria*[2] decided on 17 January this year, the Grand Chamber stated that the right to ask a court to review a declaration of incapacity "is one of the most important rights for the person" and falls under Article 6 of the Convention. Any substituted decision making should only arise where absolutely necessary, where supported decision making proves impossible, be both subject specific and time specific, and not a blanket system.

[1] It is useful to recall that the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity (Article 1).
[2] (Application no. 36760/06) 17 January 2012,

All guardianship type orders should be subject to automatic periodic review by a court or similar body and there should also be independent oversight to guard against abuse. Even within a system that allows for guardianship, the will and preference of the person should be reflected.

4. The legislation should be compatible with and afford no less protections than the Mental Health Act 2001 and the Criminal Law (Insanity) Act 2006 which are both being reviewed at present. Specific provisions should be introduced to ensure that a person who is the subject of a guardianship order is not arbitrarily deprived of their liberty or subject to medical treatment orders without proper procedural protections. The specific recommendations we make on "voluntary compliant patients" and children are also relevant in this context [3]

Thank you again for inviting the IHRC before the Committee today. We are now happy to take questions.

Maurice Manning
President

[3] *IHRC Policy Paper on Section 2 of the Mental Health Act 2001*, February 2010,