



**AN BILLE UM CHINNTEOIREACHT CHUIDITHE (CUMAS),
2013
ASSISTED DECISION-MAKING (CAPACITY) BILL 2013**

EXPLANATORY MEMORANDUM

Background and purpose of the Bill

The purpose of the Bill is to reform the law and to provide a modern statutory framework that supports decision-making by adults and enables them to retain the greatest amount of autonomy possible in situations where they lack or may shortly lack capacity.

The Bill changes the existing law on capacity, shifting from the current all or nothing status approach to a flexible functional one, whereby capacity is assessed on an issue- and time-specific basis. The Bill replaces the Wards of Court system with a modern statutory framework to assist persons in exercising their decision-making capacity.

The Bill provides a statutory framework enabling formal agreements to be made by persons who consider that their capacity is in question, or may shortly be in question, to appoint a trusted person to act as their decision-making assistant to assist them in making decisions or as a co-decision-maker who will make decisions jointly with them.

The Bill also provides for the making of applications to court in respect of persons whose capacity may be in question to seek a declaration as to whether those persons lack capacity and for the making of consequent orders approving co-decision-making agreements or appointing decision-making representatives.

The Bill provides for protection from liability for informal decision-makers in relation to personal welfare and healthcare decisions made on behalf of a person with impaired capacity where such decisions are necessary and where no formal decision-making arrangements are in place. It modernises the law relating to enduring powers of attorney.

The Bill also provides for the establishment of a new statutory office, the Office of the Public Guardian. The Office of the Public Guardian will supervise decision-making assistants, co-decision-makers, decision-making representatives and persons holding enduring powers of attorney.

Reform of the law on decision-making capacity is one of the actions required to enable the State to ratify the United Nations Convention on the Rights of Persons with Disabilities.

The Bill gives effect in the State to the Hague Convention on the International Protection of Adults.

Provisions of the Bill

The Bill contains 11 Parts. The following paragraphs contain a brief description and an outline of the principal reforms proposed in each Part.

PART 1

PRELIMINARY AND GENERAL

Part 1 provides standard provisions relating to citation, commencement and laying of regulations.

Section 1 (Short title and commencement) sets out the short title and citation (subsection (1)), and provides that the Minister may make orders for the commencement of various provisions of the Bill (subsection (2)).

Section 2 (Interpretation — general) is a standard interpretation section defining the primary terms referred to throughout the Bill.

Section 3 (Person's capacity to be construed functionally) makes provision for a functional definition of capacity. Capacity must be assessed on the basis of a person's cognitive ability to understand the nature and consequences of a decision in the context of available choices at the time of the decision. This time- and issue-specific approach allows for fluctuations in capacity (subsection (1)). Subsection (2) provides that a person lacks capacity to make a decision if he or she is unable to understand, retain or weigh information relevant to a decision or is unable to communicate his or her decision either directly or through a third party. The use of communication tools (such as sign-language and visual aids) does not imply that the person is unable to understand the information (subsection (3)). Subsection (4) provides that a person is regarded as having the capacity to make a decision even if he or she is able to retain the information relevant to the decision for a short time only. Subsection (5) provides that information relevant to a decision includes information about the reasonably foreseeable consequences of the available choices and of failing to make a decision. Any question as to whether a person has capacity shall be decided on the balance of probabilities (subsection (6)).

Section 4 (Circuit Court to have exclusive jurisdiction under this Act except for certain matters reserved for High Court, etc.) confers exclusive jurisdiction on the Circuit Court to deal with applications under the Bill dealing with determination of capacity, the approval of co-decision-making agreements and the appointment of decision-making representatives for persons lacking capacity (subsection (1)). Certain matters regarding enduring powers of attorney, wards of court and detention matters are reserved for the High Court. Subsection (2) also reserves to the High Court matters relating to non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment and organ donation.

Section 5 (Laying of regulations) is a standard provision that provides for the laying of any regulations made under the Bill before the Houses of the Oireachtas.

Section 6 (Expenses) is a standard provision enabling the expenses of the Minister to be paid out of moneys provided by the Oireachtas. It provides a general authority for the Minister, with the sanction of the Minister for Public Expenditure and Reform, to expend moneys provided by the Oireachtas.

Section 7 (Repeal of the Marriage of Lunatics Act 1811) repeals the Marriage of Lunatics Act 1811.

PART 2

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

Part 2 contains guiding principles which set out a general overarching framework to guide persons (and the court) in making an intervention such as assisting or making a decision on behalf of a person who lacks capacity.

Section 8 (Guiding principles) sets out the principles applying to all decisions and actions taken under the Bill in support or on behalf of a person lacking capacity (subsection (1)). It provides that capacity is always presumed unless the contrary can be shown in accordance with the provisions of the Bill (subsection (2)). It requires that a relevant person shall not be treated as unable to make his or her own decisions unless all practicable steps to help him or her make a decision have been taken without success (subsection (3)). A person shall not be considered as unable to make a decision merely by reason of making, having made, or being likely to make, an unwise decision (subsection (4)). No intervention shall be made unless it is necessary to do so having regard to the individual circumstances of the relevant person (subsection (5)). It provides that the least restrictive option with regard to the relevant person's rights and freedom of action must be taken (subsection (6)). Subsection (7) sets out the duties of the intervener when making an intervention. The intervener must permit, encourage and facilitate the relevant person to participate as fully as possible, when making the intervention, and must give effect to the past and present will and preferences of the relevant person if practicable to do so. The intervener must take into account, as far as is reasonably ascertainable, the beliefs and values of the relevant person and consider the views of anyone named by the relevant person or any decision-making assistant, co-decision-maker, decision-making representative or attorney for the relevant person. The intervener may also take into account the views of others charged with the care of the relevant person (subsection (8)). Consideration must be given to the likelihood that the person may recover capacity and to the urgency of making the intervention prior to such recovery (subsection (9)).

PART 3

ASSISTED DECISION-MAKING

Part 3 provides a statutory framework for formal agreements to be made by persons who consider that their capacity is in question, or may shortly be in question, to appoint a trusted person to act as their decision-making assistant.

Section 9 (Definitions — Part 3) provides definitions for the purposes of the Part.

Section 10 (Decision-making assistance agreement) allows a person who considers that his or her capacity is in question, or may shortly be in question, to appoint another person to assist him or her in making decisions on his or her personal welfare and/or property and affairs (subsection (1)). The appointment of a decision-maker must be made by means of a decision-making assistance agreement (subsection (2)). Subsection (3) empowers the Minister to make regulations prescribing the form and formalities of decision-making assistance agreements. Subsection (4) allows an appointer (the person whose capacity is in question) to appoint one or more decision-making assistants to replace a decision-making assistant who dies or who becomes disqualified. Subsections (5) to (10) provide for the invalidation of a decision-making assistance agreement in specified circumstances. Subsection (11) allows an appointer to vary or revoke a decision-making assistance agreement at any time.

Section 11 (Functions and scope of authority of decision-making assistants) sets out the functions and scope of authority of decision-making assistants. Decision-making authority remains with the appointer who will be actively assisted, typically by family members, relatives and carers, in accessing information, in understanding the information, in making and expressing decisions on matters specified in the agreement, and in implementing decisions made. The assistant must ascertain the will and preferences of the appointer and endeavour to ensure that the appointer's decisions are implemented (subsection (1)). Subsection (2) prohibits decision-making assistants from attempting to obtain information that is not reasonably required for the purposes of the decision without the consent of the appointer. Decision-making assistants must take reasonable steps to ensure that relevant information is kept secure and is safely disposed of when no longer required (subsection (3)).

Section 12 (Persons who shall not be appointed as decision-making assistants, etc.) prohibits persons convicted of an offence in relation to the person or property of the appointer or child of the appointer, or against whom a safety or barring order has been made in respect of the appointer or child of the appointer, from being appointed as decision-making assistant.

PART 4

APPLICATIONS TO COURT IN RESPECT OF RELEVANT PERSONS AND RELATED MATTERS

Chapter 1

Application of this Part

Section 13 (Application of this Part) stipulates that Part 4 does not apply to persons under 18 years.

Chapter 2

Applications under this Part

Section 14 (Persons who may make applications to court under this Part, etc.) requires that the relevant person and other specified persons must be notified of any applications made to the court under

this Part (subsection (1)) and that, subject to subsection (3), the person making the application must obtain prior approval of the Court before making an application (subsection (2)). Subsection (3) provides for exceptions to subsection (2) and lists persons who may make applications to the court without the court's prior approval. Subsection (4) sets out certain information that must be included in an application to the court under this Part. Subsection (5) provides for any existing decision-making assistance agreement, co-decision-making agreement or an order appointing a decision-making representative or power of attorney, to be brought to the notice of the court. Subsection (6) provides that any party to the proceedings can retain legal representation at their own expense. It also provides that where the matter at issue is the decision-making capacity of a person and a party to the proceedings applies to the Legal Aid Board for legal aid, paragraphs (c) and (e) of section 28(2) of the Civil Legal Aid Act 1995 (as amended by section 32 of the Bill) will not be applicable. This means the Legal Aid Board will not take into account the likelihood or otherwise of the application being successful nor the probable cost to the Board of granting legal aid when making a decision as to whether or not to give legal aid. It further provides that where an applicant for an order under this Part applies for legal aid and fails to qualify on financial grounds, the court may order, in the interests of justice, that where he or she incurs legal costs associated with the application, he or she may be recompensed out of the estate, if any, of the relevant person. Subsection (7) provides for rules of court to make detailed provision for proceedings under this Part. Subsections (8) and (9) allow a person who is the subject of an application to be assisted in court by a court friend if they are not legally represented or do not have a decision-making assistant, a co-decision-maker, decision-making representative, attorney or other person willing to assist them with the proceedings. Subsection (10) requires that proceedings under this Part be as informal as practicable and be held in private.

Chapter 3

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

Section 15 (Power of court to make declarations as to capacity, etc.) gives the court power to make declarations as to whether or not an individual has capacity, whether or not aided by another person. The declaration can relate to a specific decision or to decisions on such matters as are described in the declaration (subsection (1)). Subsection (2) restricts the court's jurisdiction by not allowing it to make a declaration as to whether or not a person has capacity to create or revoke an enduring power of attorney. Subsection (3) gives the court the power to make declarations as to whether or not a proposed intervention would be unlawful. However, the court cannot make a declaration as to the lawfulness of a proposed intervention if the intervener is the court or High Court or if the intervention is being taken pursuant to an order of the court or High Court (subsection (4)).

Chapter 4

Co-decision-making

Section 16 (Definitions — Chapter 4) provides definitions for the purposes of this Chapter.

Section 17 (Power of court to make co-decision-making order, etc.) applies where the court has made a declaration under this Part that

a person lacks capacity to make a decision or class of decisions on his or her own but has decision-making capacity if assisted by a suitable person (subsection (1)). Subsection (2) provides that the court may approve a co-decision-making agreement presented by the person whose capacity is in question or by any other person entitled to make an application by virtue of section 14 who has the consent of the relevant person. The court must be satisfied that the agreement was made in accordance with the provisions of this Chapter and with the will and preferences of the relevant person before approving it. A co-decision-making agreement has no legal effect unless the court has approved it by issuing a co-decision-making order. Once a co-decision-making order has been issued, the agreement can be revoked or varied only with the consent of the court (subsection (3)). Subsection (4) provides that once a co-decision-making agreement has been approved by the court, all relevant decisions (decisions on matters that are prescribed in the co-decision-making agreement) must be made jointly by the relevant person (the person whose capacity is in question) and the co-decision-maker, otherwise they are void. The relevant person and the co-decision-maker must consent to the making of a co-decision-making order. In the absence of a co-decision-making agreement, the court can make a co-decision-making order if the relevant person has capacity to appoint a co-decision-maker and there is a suitable co-decision-maker available (subsection (5)). The court may vary or discharge a co-decision-making order as of right or on application by a person entitled to make an application by virtue of section 14 (subsection (6)). Subsection (7) provides for periodic review of a co-decision-making order. The court can decline to carry out a review if it is satisfied that the review is unnecessary (e.g. if recently varied or discharged as provided for under subsection (7)) (subsection (8)). Subsection (9) provides that the court may revoke a co-decision-making order or vary the terms of an order relating to the appointment of a co-decision-maker, if the co-decision-maker acts or is proposing to act outside the scope of the authority conferred on him or her by the court. Subsections (10) and (11) allow the court to revoke a co-decision-making order or to vary the terms of an order relating to the appointment of a co-decision-maker if it is satisfied that the relevant person's capacity has improved to the extent that he or she no longer requires the support of a co-decision-maker or if the relevant person's capacity has deteriorated to the extent that he or she is unable to make decisions even with the support of the co-decision-maker. The court may also revoke a co-decision-making order or vary the terms of an order if it is satisfied that the relationship between the relevant person and the co-decision-maker has broken down to such an extent that making joint decisions is not possible. Subsection (12) allows the court, when revoking a co-decision-making order, to make further orders in respect of the relevant person.

Section 18 (Co-decision-making agreement) allows a person who considers that his or her capacity is, or will shortly be, in question, to appoint a suitable person to make joint decisions with them on matters related to his or her personal welfare and/or property and financial affairs (subsection (1)). Subsection (2) provides that a person is deemed suitable for appointment as a co-decision-maker for another person if he or she is a relative or friend of the proposed appointer (the person whose capacity is in question) and is capable of performing effectively co-decision-making functions. The appointment of a co-decision-maker must be made in a co-decision-making agreement and the agreement must be drafted in compliance with regulations made under subsection (4) (subsection (3)). Subsection (4) empowers the Minister to make regulations prescribing the form and formalities of co-decision-making agreements. The

appointer may appoint more than one co-decision-maker in a co-decision-making agreement but not more than one in respect of the same decision. The appointer may also appoint one or more co-decision-makers to replace a co-decision-maker who dies or who becomes disqualified. Subsections (6) to (10) provide for a co-decision-making agreement to be invalidated in specified circumstances, such as if the appointer and co-decision-maker get divorced. The invalidation of all or part of a co-decision-making agreement will not affect a relevant decision made prior to the invalidation (subsection (11)). Subsection (12) allows an appointer to vary or revoke a co-decision-making agreement at any time before a co-decision-making order is made. Subsection (13) provides that a relevant decision made jointly in good faith by the appointer and a co-decision-maker shall be considered to have been made by the appointer.

Section 19 (Co-decision-maker shall acquiesce in relevant decision made by appointer where certain conditions are met) provides that the co-decision-maker must acquiesce in a decision made by the relevant person and cannot refuse to sign a document required to implement the decision if a reasonable person could have made the decision and if no harm is likely to result to the relevant person or any other person from the decision.

Section 20 (Persons who shall not be appointed as co-decision-makers) prohibits certain persons from being appointed as co-decision-maker. It includes those who have been convicted of an offence in relation to the person or property of the appointer or a child of the appointer or against whom a safety or barring order has been made in relation to the appointer or a child of the appointer (subsection (1)). Subsection (2) provides for the invalidation of a co-decision-making order if a co-decision-maker is convicted of an offence in relation to the person or property of the appointer or a child of the appointer, or against whom a safety or barring order has been made in relation to the appointer or a child of the appointer. A co-decision-making order also becomes invalidated if the co-decision-maker becomes an undischarged bankrupt or is subject to a current debt settlement arrangement or personal insolvency arrangement or is convicted of fraud or dishonesty etc. Subsection (3) modifies the categories of person who may be prohibited from being appointed as co-decision-maker in respect of personal welfare decisions for an appointer. It specifies that certain categories of person may not be appointed to handle financial matters on behalf of the relevant person, such as registered bankrupts, but can be appointed to address personal welfare matters only. Subsection (4) clarifies the meaning of “owner” in subsection (1)(g) and (2)(f) to include a person who is managing a nursing home, mental health facility, or residential facility for persons with disabilities or a director, sub-director, shareholder in, or employee or agent of, a company that owns or manages such a home or facility.

Section 21 (Functions and scope of authority of co-decision-makers) sets out the functions and scope of authority of co-decision-makers. The appointer and the co-decision-maker share the authority to make relevant decisions. The co-decision-maker must advise the appointer on relevant matters and decisions and may do all things necessary to give effect to the authority vested in him or her (subsection (1)). Where a relevant decision made by an appointer and a co-decision-maker requires a document to be signed in order to implement the decision, the document is void if the appointer and the co-decision-maker do not co-sign the document (subsection (2)). Subsection (3) lists the duties and functions of a co-decision-maker including explaining relevant information and considerations relating

to the relevant decision, ascertaining the will and preferences of the appointer and assisting the appointer in communicating these preferences and in making and expressing a relevant decision. Subsection (4) prohibits co-decision-makers from attempting to obtain information that is not reasonably required for the decision or from using relevant information for a purpose other than in relation to the relevant decision without the consent of the appointer. Co-decision-makers must take reasonable steps to ensure that relevant information is kept secure and is safely disposed of when no longer required (subsection (5)). A co-decision-maker may be reimbursed out of the assets of the appointer for fair and reasonable expenses that are reasonably incurred in performing his or her duties unless the court orders otherwise (subsection (6)). Subsection (7) requires a co-decision-maker to submit an annual report to the Public Guardian on the performance of his or her functions as a co-decision-maker. Rules of court will determine the format of the annual reports by co-decision-makers. Subsection (8) places restrictions on a co-decision-maker in terms of the gifts that can be made from the appointer's property where specific provision to that effect is made in the decision-making agreement. Where a specific provision has been made for the giving of gifts, the giving of gifts is restricted to certain occasions and the value of the gift must be reasonable having regard to all the circumstances and, in particular, the size of the appointer's estate.

Section 22 (Restrictions on co-decision-makers) provides that a co-decision-maker has no power over matters where either a decision-making representative appointed by the court or a donee of enduring powers of attorney has powers to act on those matters for the relevant person.

Chapter 5

Decisions by court or decision-making representative appointed by court

Section 23 (Power of court to make orders and appoint decision-making representative, etc.) applies where the court is unable to make a co-decision-making order or has made a declaration that a person lacks capacity even with the assistance of a co-decision-maker (subsection (1)). It empowers the court to make orders either to make the decision or decisions itself (decision-making order) or to appoint a decision-making representative to do so (decision-making representative order) (subsection (2)). Subsection (3) requires the court, where it proposes to appoint a decision-making representative and no suitable person is available or willing to act in this role, to request the Public Guardian to nominate two or more persons from an established panel of decision-making representatives. The court may appoint one of the nominees to be the decision-making representative for the relevant person. In making an order under this section the court may make provision for such matters as it considers appropriate, including setting out conditions governing the role of a decision-making representative (subsection (4)). Subsection (5) provides that where powers are conferred on a decision-making representative under this section, they should be as limited in scope and duration as possible in the circumstances. The court may appoint more than one person as a decision-making representative for a relevant person and may appoint different persons for different matters (subsection (6)). Subsection (7) provides that where more than one person is appointed as a decision-making representative by the court, the court must specify how the decision-making representatives are to act jointly or separately. Subsection (8) allows

the court to make an order under this section even if an application to make such an order has not been made. The court may vary or discharge an order under this section as of right or if an application is made by a party to the proceedings (subsection (9)). Subsection (10) provides that the court may vary the terms of an order or revoke the appointment of a decision-making representative if the decision-making representative acts or is proposing to act outside the scope of the authority conferred on him or her.

Section 24 (Decision-making representatives — general) provides that before appointing a decision-making representative, the court must be satisfied that the proposed decision-making representative is a suitable person to act as decision-making representative for the relevant person and to carry out the necessary tasks and duties associated with being a decision-making representative (subsection (1)). Subsection (2) prohibits certain persons from becoming decision-making representatives. Subsection (3) provides for a decision-making representative order to be invalidated if a decision-making representative is subsequently convicted of an offence in relation to the person or property of the relevant person or of his or her child, or if a safety or barring order has been made against him or her in relation to the relevant person or a child of the relevant person. The order can also be invalidated if the decision-making representative becomes an undischarged bankrupt or is subject to a current debt settlement arrangement or personal insolvency arrangement or is convicted of fraud or dishonesty etc. Subsection (4) provides that certain grounds for prohibition of appointment as decision-making representative (in subsection (2)) or invalidation of decision-making representative orders (in subsection (3)) will not apply if the decision-making representative has been appointed in respect of personal welfare matters only. Subsection (5) provides that a decision-making representative will be treated as an agent of the relevant person in relation to matters covered by the decision-making representative order. Subsection (6) entitles a decision-making representative to be reimbursed out of the assets of the relevant person for reasonable expenses in discharging his or her functions except where the court orders otherwise. The court may direct that the decision-making representative be paid a reasonable amount of remuneration for performing his or her functions as decision-making representative when those functions are carried out in connection with his or her trade or profession or in other exceptional circumstances specified in the order. Subsection (7) requires a decision-making representative to submit an annual report to the Public Guardian on the performance of his or her functions as a decision-making representative. The format of such annual reports may be determined by rules of court. The court, on appointing a decision-making representative, may require the decision-making representative to give security as it considers appropriate in relation to the proper performance of the functions of such decision-making representative (subsection (8)). Subsections (9) to (11) provide for a decision-making representative order to be invalidated in specified circumstances, such as if the relevant person and decision-making representative get divorced. The invalidation of all or part of a decision-making representative order will not affect a relevant decision made by the decision-making representative prior to the occurrence of the event that caused the invalidation (subsection (12)). Subsection (13) clarifies the meaning of “owner” in subsection (2)(g) and (3)(f) to include a person who is managing a nursing home, mental health facility, or residential facility for persons with disabilities or a director, sub-director, shareholder in or employee or agent of, a company that owns or manages such a home or facility.

Section 25 (Scope of decision-making order or decision-making representative order relating to personal welfare) outlines matters in respect of which the court may appoint a decision-making representative to make decisions on behalf of the relevant person in respect of their personal welfare. It also allows the court to make provision for such matters as it considers appropriate.

Section 26 (Scope of decision-making order or decision-making representative order relating to property and affairs) outlines matters in respect of which the court may appoint a decision-making representative to make decisions on behalf of the relevant person in respect of their property and affairs. It also allows the court to make provision for such matters as it considers appropriate (subsection (1)). Subsection (2) places restrictions on a decision-making representative in relation to the giving of gifts on behalf of the relevant person and he or she may make gifts of the relevant person's property only where specific provision to that effect is made in the decision-making representative order. Where a specific provision has been made allowing gifts to be given, the giving of gifts is restricted to certain occasions and the value of the gift must be reasonable having regard to all the circumstances and in particular the size of the relevant person's estate. Subsection (3) allows the court to grant custody, management and control of the property of the relevant person to the Public Guardian, even where a decision-making representative has been appointed. Subsection (4) requires the Public Guardian to have regard to the views of the relatives of the relevant person and any other persons the court directs if the court proposes to make an order under subsection (3). Subsection (5) allows the court to make any of its orders under subsection (3), in respect of the property of the relevant person, subject to such conditions as it considers appropriate.

Section 27 (Restrictions on decision-making representatives) sets out restrictions to the powers of a decision-making representative. Subsection (1) restricts a decision-making representative from prohibiting a person from having contact with the relevant person. Subsection (2) requires the decision-making representative to get court approval before making settlement of any part of the relevant person's property or exercising any power vested in the relevant person. Subsection (3) prevents a decision-making representative from overriding an act by an attorney who is acting within the scope of an enduring power of attorney. It also prevents a decision-making representative from exercising any power in a manner that is inconsistent with an enduring power of attorney. Subsection (4) specifies that a decision-making representative cannot refuse consent to the carrying out or continuing of life-sustaining treatment for the relevant person. Subsections (5) and (6) impose limitations on decision-making representatives in relation to the use of restraint on a relevant person. Subsection (7) provides that a decision-making representative is considered to restrain a relevant person if he or she deprives the relevant person of his or her liberty as provided for in Article 5(1) of the European Convention on Human Rights. Subsection (8) ensures that there is no conflict between the Bill and section 69 of the Mental Health Act 2001 including rules made under that section.

Chapter 6

Interim orders, reviews and expert reports

Section 28 (Interim orders) provides for emergency situations and empowers the court to make an interim order in relation to a

relevant person who is the subject of an application under Part 4 that has yet to be determined (subsection (1)). Subsection (2) limits the duration and scope of interim orders but it allows the court to renew the order if it is in the interests of the relevant person. Subsection (3) allows the court to vary or revoke an order made under this section as of right or if an application is made by a party to the application. Subsection (4) provides that this section applies to a direction the court may give under this Part as well as to any order made under this Part.

Section 29 (Review of declaration as respects capacity) provides that the court may consent to a review of a declaration as respects capacity on application to it by any of the persons specified in paragraphs (a) to (h) of section 14(3) (subsection (1)). Subsection (2) makes provision for the court to review a declaration as respects capacity at regular intervals as specified in the declaration or at intervals of not more than 12 months or 3 years if the court is satisfied that the relevant person is unlikely to recover his or her capacity. Subsection (3) specifies that the periods of 12 months and 3 years referred to in subsection (2) run from the date on which the court last reviewed the declaration. Subsection (4) empowers the court, having reviewed the capacity of a relevant person, to revoke or amend the declaration, and vary or discharge a co-decision-making order, a decision-making order or a decision-making representative order if it finds that the relevant person has the capacity to make decisions in respect of some or all of the matters specified in the order. It also requires the court, having reviewed the capacity of the relevant person and finding that the relevant person does not have the capacity to make decisions in respect of matters specified in the order, to confirm the declaration. Subsection (5) provides that a review of a declaration as respects capacity of a relevant person is not necessary if the reason for the initial application seeking a declaration of capacity is no longer of relevance.

Section 30 (Expert reports) gives the court all such powers as are necessary to assist it in making a decision on an application for a capacity declaration or when reviewing a capacity declaration (subsection (1)). Subsection (2) is an indicative list of reports that the court may ask to be furnished to it to assist it in making a decision.

Chapter 7

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

Section 31 (Notification of Public Guardian) requires the registrar of the court making the declaration or order, or giving the direction as respects capacity of a relevant person, to provide a copy of the declaration, order or direction to the Public Guardian as soon as is practicable.

Chapter 8

Legal aid in respect of applications under this Part

Section 32 (Amendment of Act of 1995) amends the Civil Legal Aid Act 1995 and provides that any party to proceedings in respect of capacity will be entitled to free legal advice provided that they qualify financially. It also provides that the Legal Aid Board will not go into the merits of the case when considering an application for legal aid in relation to proceedings under Part 4 of this Bill, which

means that a likelihood of success in proceedings and a favourable cost-benefit ratio will not be prerequisites for the granting of legal aid.

PART 5

WARDS

Section 33 (Definitions — Part 5) provides definitions for the purposes of the Part.

Section 34 (Application of this Act to wards) provides that the guiding principles set out in Part 2 apply to an action taken in respect of a ward that is equivalent or similar to an action taken under this Bill to an intervention as defined in section 2 (subsection (1)). Subject to subsection (1) sections 35 to 37 only apply to wards (subsection (2)).

Section 35 (Review of capacity of wards who are adults and discharge of wardship) provides that an adult ward or another person considered to have sufficient interest or expertise in the welfare of the ward may apply to the wardship court for a review of the capacity of the ward (subsection (1)). It further provides that the wardship court, regardless of whether or not an application for a review of capacity is made, must review the capacity of adult wards before the third anniversary of the commencement of this section (subsection (2)). Having reviewed the capacity of the ward, the wardship court must discharge the ward from wardship if he or she is found to have the capacity to make decisions in respect of all matters. The wardship court may make ancillary orders and give directions as it thinks appropriate having regard to both the discharge from wardship and the circumstances of the ward (subsection (3)). It further provides that if, following a review, the wardship court finds that the ward lacks capacity unless assisted by a co-decision-maker, or lacks capacity even if a suitable person as a co-decision-maker were made available to him or her, the wardship court must make the appropriate declaration to that effect and discharge the ward from wardship. The wardship court may make orders and take actions, such as appoint a decision-making representative, in respect of the declaration as if the wardship court were the court under Part 4. Subsection (4) applies the provisions of the Bill to wards who lack capacity, declarations, orders and other actions taken by the wardship court prior to the discharge shall be deemed to be declarations, orders etc under this Bill and as such the provisions of this Bill apply to them. Subsection (5) applies the provisions in section 14 (Persons who may make applications to court under this Part etc.) to an application to a wardship court for a review of capacity of a ward.

Section 36 (Public Guardian and wards who are adults) enables a wardship court to transfer the supervision of existing adult wards to the Public Guardian.

Section 37 (Public Guardian and wards who are minors) enables a wardship court to transfer the supervision of existing (subsection (1)) or future (subsection (2)) wards under the age of 18 years to the Public Guardian.

PART 6

ENDURING POWERS OF ATTORNEY

Chapter 1

Interpretation, application and characteristics of enduring power

Section 38 (Interpretation — Part 6) provides definitions for the purposes of the Part (subsection (1)). Subsection (2) provides that an application to the High Court under this Part must be made in a summary manner. Subsection (3) provides that a person who agrees to an enduring power of attorney will be presumed to have capacity in relation to matters under this Part.

Section 39 (Application of this Part, etc.) Subsections (1) and (2) provide that the provisions of this Part do not apply to an enduring power of attorney created under Part II of the Powers of Attorney Act 1996 except where the instrument creating such a power has not been registered under section 10 of the 1996 Act before the commencement of this section, and that Part II of the 1996 Act does not apply to an enduring power of attorney created under this Part of the Bill or an enduring power of attorney created under the 1996 Act that has not been registered under section 10 of that Act before the commencement of this section. Subsection (3) provides that this Part applies only to an enduring power of attorney created after the commencement of this section and to an enduring power of attorney created under Part II of the 1996 Act that has not been registered under section 10 of that Act before the commencement of this section. Subsection (4) provides that, following the commencement of the section, no further enduring powers of attorney may be created under the 1996 Act.

Section 40 (Characteristics of enduring power) defines an enduring power of attorney within the meaning of this Part as a power of attorney that contains a statement by the donor that the donor intends the power to be effective at any subsequent time when the donor lacks capacity or may shortly lack capacity to look after his or her personal welfare and/or property and affairs, and that complies with the provisions of this section and any regulations made under it (subsection (1)). Subsection (2) allows an enduring power of attorney created under this Part to relate to a donor's property and affairs and personal welfare or both and the instrument creating the power may appoint one or more persons to be an attorney in respect of those matters. Subsection (3) allows the Minister to make regulations on various matters concerning enduring powers. Subsection (4) provides that regulations made under subsection (3) may include a requirement that the enduring power of attorney contain various statements. Subsection (5) allows a donor when creating the enduring power to appoint one or more persons to act as an attorney if an appointed attorney dies, declines to act or is disqualified from acting as an attorney. Subsection (6) provides that a power of attorney is not an enduring power of attorney unless, at the time the instrument is executed, the attorney has attained the age of 18 years, has not been convicted of an offence in relation to the person or property of the donor or the person or property of the donor's child, is not a person against whom a safety or barring order has been made in relation to the donor or child of the donor, is not an undischarged bankrupt or currently in a debt settlement arrangement or personal insolvency arrangement, has not been convicted of an offence involving fraud or dishonesty or has not had a declaration made against him or her under section 150 of the Companies Act 1990 or is not or was not subject to a disqualification order under Part VII

(Disqualifications and Restrictions: Directors and other Officers) of the Companies Act 1990. It allows a trust corporation within the meaning of section 30 of the Succession Act 1965 to be appointed as an attorney. Subsection (6)(b) prohibits the owner or registered provider (and certain persons connected with him or her) of a nursing home, mental health facility, or residential facility for persons with disabilities, in which the donor resides, from being an attorney, subject to certain exclusions. Subsection (7) makes provision for a power of attorney to be invalidated or cease to the extent that it relates to an attorney who becomes bankrupt or is convicted of an offence against the donor or his or her property or the donor's child or the child's property, or against whom a barring order is made in relation to the donor or child of the donor, or who is convicted of an offence involving fraud or dishonesty or who has a declaration made against him or her under section 150 of the Companies Act 1990 or becomes the subject of a disqualification order under Part VII of the Companies Act 1990. Subsection (8) specifies certain categories of person who can hold powers of attorney on personal welfare decisions but not on property and financial matters. Subsection (9) provides that a power of attorney that gives the attorney a right to appoint a substitute or successor cannot be an enduring power. Subsections (10) and (11) provide that if the attorney is the spouse or civil partner of the donor, the enduring power will lapse, unless provided otherwise in the power, if the marriage or civil partnership is subsequently annulled, dissolved, or a decree of judicial separation or a written agreement to separate is entered into, by the spouses or the civil partners as the case may be, or if the spouses or civil partners separate and cease to cohabit for a continuous period of 12 months or if a barring or safety order is made against the attorney in relation to the donor or vice versa. Subsection (12) makes provision for an enduring power of attorney in favour of a cohabitant donor to lapse, unless provided otherwise in the power, if subsequently the cohabitants separate and cease to cohabit for a continuous period of 12 months. Subsection (13) provides that a registered enduring power will not cease to be in force if the court exercises any of its powers under Part 4. It also provides that an enduring power that has not been registered will be invalidated when the court exercises any of its powers under sections 17(2) or 23(2) in respect of the donor concerned. Subsection (14) provides that a disclaimer of an enduring power that has not been registered by the attorney will not be valid except on notice to the donor. The invalidation of all or part of an enduring power under subsections (7), (10), (11) or (12) will not effect a relevant decision made by the attorney concerned for the donor prior to the occurrence of the event that caused the invalidation (subsection (15)). Subsection (16) defines an owner, such as of a nursing home, on whom certain restrictions are placed in terms of decisions on the personal welfare and property of a donor, as provided for in subsections (6)(b) and (7)(c).

Chapter 2

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

Section 41 (Scope of authority of attorneys under enduring power — personal welfare decisions) provides that an enduring power may give general authority to the attorney to act in relation to all, or a specified part, of the personal welfare of the donor (subsection (1)). Subsection (2) limits the authority of the attorney to making decisions on healthcare only in circumstances where the donor lacks capacity or the attorney reasonably believes that the donor lacks

capacity. In relation to healthcare, the attorney can consent to the giving or refusing of treatment but cannot refuse life-sustaining treatment. Subsection (3) allows a donor to apply conditions and restrictions in the instrument that creates the enduring power to a general authority he or she confers on an attorney. Subsection (4) sets out the conditions where an attorney may restrain a donor. Subsection (5) defines “restrains” for the purposes of this section. Subsection (6) provides that an attorney is considered to do more than restrain a donor if he or she deprives the donor of his or her liberty as provided for in Article 5(1) of the European Convention on Human Rights. Subsection (7) provides that subsections (4) to (6) shall not constrain the generality of section 69 of the Mental Health Act 2001 or of rules made under that section.

Section 42 (Scope of authority of attorneys under enduring power — property and affairs of donor) provides that an enduring power may, subject to any conditions or restrictions, give general authority to the attorney to act in relation to all, or a specified part, of the property and affairs of the donor or may confer on the attorney a general authority to do specified things or take decisions on specified matters (subsection (1)). Where general authority is conferred by a donor on an attorney, the attorney has the authority to do anything on behalf of the donor that the donor can lawfully do, subject to the restrictions set out in subsection (4) (subsection (2)). Subsection (3) provides that, subject to any conditions or restrictions in the enduring power, the attorney may act for his or her own benefit or that of any other person only to the extent that the donor might be expected to provide for his or her or that person’s needs. Subsection (4) provides that the attorney may make gifts of the donor’s property only where specific provision to that effect is made in the enduring power. Where a specific provision has been made for the giving of gifts, the giving of gifts is restricted to certain occasions and the value of the gift must be reasonable having regard to all the circumstances and in particular the size of the donor’s estate.

Section 43 (Coming into operation and survival of enduring power) provides that an enduring power will not come into effect until it has been registered (subsection (1)). Subsection (2) allows an attorney, once he or she has applied for registration, to take action under the enduring power to maintain the donor, to prevent loss to the donor’s estate, to maintain the attorney or other persons so far as the donor might be expected to do so or to make a personal welfare decision that cannot be reasonably deferred until the application has been determined. Subsection (3) gives protection to third parties. It provides that a transaction between a person and an attorney who purports to be, but is not, acting under subsection (2) will be valid unless that person knows that the attorney has not acted in accordance with subsection (2).

Chapter 3

Registration of enduring power and related matters

Section 44 (Functions of High Court prior to registration) enables the High Court, before the registration of the enduring power, to exercise any powers it could exercise on registration if it has reason to believe that the donor may lack, or shortly may lack capacity. An application to the High Court under this section may be made by any interested party whether or not the attorney has made an application for registration of the instrument.

Section 45 (Application for registration) places the onus on the attorney to make an application to the Public Guardian for registration of an enduring power if he or she has reason to believe that the donor lacks or may shortly lack capacity (subsection (1)). Subsection (2) requires an attorney to comply with the notification procedures set out in Schedule 1 before making an application for registration. Subsection (3) allows the attorney to refer to the High Court for its determination of any question concerning the validity of the power, prior to making an application for the registration of the power. Subsection (4) enables the High Court to accept a certificate to the effect that a donor lacks or may shortly lack the capacity to manage his or her own property and affairs or to look after his or her personal welfare, signed by a registered medical practitioner or other suitable person, as evidence of capacity. Subsection (5) sets out the penalties that may be imposed should a person who, in an application for registration of a power, knowingly makes a statement that is false in a material particular.

Section 46 (Registration of enduring powers) deals with the Public Guardian's power to register, or refuse to register, an enduring power. Subsection (1) requires the Public Guardian to register the instrument if the application has been made in compliance with section 45. This requirement is subject to subsection (2). Subsection (2) sets out the exceptions to subsection (1), namely that the Public Guardian shall not register the power if a valid objection is received from a person who is entitled to notice within five weeks from the date the notice was given; if persons entitled to notice under the Bill have not been notified or if there is reason to believe that appropriate enquiries by the Public Guardian might bring to light evidence on which a valid objection could be made. If any of these exceptions apply, the Public Guardian must first carry out whatever enquiries he or she thinks appropriate before deciding on the application. Subsection (3) sets out what are valid grounds for objection. Subsection (4) provides that where the Public Guardian receives a valid objection or is satisfied that there are valid grounds for making the objection to the registration of the power, the Public Guardian must apply to the High Court for a determination as to whether the instrument should be registered. Subsection (5) allows the High Court to direct an instrument to be registered despite its not being in compliance with section 40 or regulations made under that section where it is satisfied that the donor intended the power to be effective during any period where he or she lacks capacity, that the power was not executed as a result of fraud or undue pressure, that the attorney is suitable to be an attorney of the donor and in the interests of justice it is desirable that the instrument be registered.

Section 47 (Effect and proof of registration) sets out the effect of registration. Subsection (1) provides that a revocation of power will not be valid unless it is confirmed by the High Court under section 49(4); a disclaimer by the attorney will not be valid except on notice to the donor and with the consent of the High Court; and once registration has taken place the donor cannot extend or restrict the power nor can he or she give a valid consent or instruction by which the attorney will be bound. Subsection (2) provides that subsection (1) applies for so long as the instrument is registered, regardless of whether or not the donor lacks capacity for the time being. Subsection (3) requires the Public Guardian to supply attested copies to the donor and anyone to whom notice was given before registration was applied for. Subsection (4) provides that copies of an enduring power attested by the Public Guardian will be evidence of its contents and of its registration. Subsection (5) provides that subsection (4) is without prejudice to any other method of proof that is recognised by law.

Section 48 (Register of enduring powers of attorney and reports following registration) requires the Public Guardian to maintain a register of enduring powers of attorney that have been registered (subsection (1)). Subsection (2) allows members of the public to inspect the register free of charge. Subsection (3) enables the Public Guardian to issue an attested copy of a registered enduring power of attorney to a person who has good and sufficient reason to be issued with a copy. Subsection (4) requires the attorney under a registered enduring power to submit a report as to the performance of his or her functions under the enduring power to the Public Guardian every 12 months. The report must include details of all expenses and remuneration paid or reimbursement to each attorney for the donor concerned and the form of the report shall be determined in rules of court.

Chapter 4

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

Section 49 (Functions of court as respects registered enduring power of attorney) details the functions that the High Court may exercise once an enduring power has been registered. Subsection (1) provides that the High Court may exercise the functions specified in subsections (2) to (6) where an application has been made to it by the donor, the attorney, the Public Guardian or any other interested party. Subsection (2) provides that the High Court may determine any question as to the meaning or effect of the instrument. The High Court may give directions with respect to the personal affairs and the management or disposal of the donor's property or affairs. It can also decide on the rendering of accounts and on the production of records kept by the attorney, and on the remuneration and expenses of the attorney. The High Court may require the attorney to furnish information or documents in his or her possession; give any consent or authorisation to act; authorise the attorney to act for his or her own or others' benefit outside the limitations of section 42(4) and, where appropriate, to relieve the attorney either wholly or partly from any liability incurred or which may have been incurred as a result of a breach of duty by the attorney. Subsection (3) sets out the circumstances in which the High Court must notify the Public Guardian of its directions, requirements, consent or authorisation made under subsection (2) and requires the Public Guardian to monitor the giving of effect of such directions, requirements, etc., by the attorney. Subsection (4) provides that the donor or someone acting on his or her behalf, on notice to the attorney, may apply to the High Court to revoke the instrument. The High Court will confirm the revocation of the power if it is satisfied that the donor has done whatever is required by law to effect this and also if it is satisfied that at the time of the purported revocation the donor was capable of revoking the power. Subsection (5) sets out the circumstances where the High Court may direct the Public Guardian to cancel the registration of an instrument. Such cancellation may be where the High Court confirms the revocation of the power under subsection (4) or consents to a disclaimer under section 47(1)(b). It can also be cancelled if the High Court is satisfied that the donor has, and is likely to continue to have, capacity, or where the power has ceased to be in force because the donor or attorney die or becomes bankrupt, or the court is satisfied that the power was not valid and subsisting when registered or that the attorney is unsuitable to be the donor's attorney, or that fraud or undue pressure was used to make the donor grant power of attorney, or if the court is satisfied that there is any other good and sufficient reason to do so.

Subsection (6) provides that where the High Court directs that registration of an instrument be cancelled because the attorney is deemed unsuitable or where fraud or undue pressure was used to induce the donor to create the power, the court shall by order revoke the power. Subsection (7) provides that where a registration has been cancelled under subsection (5) (other than when the cancellation has been due to the court being satisfied that the donor is likely to continue to have capacity), the instrument must be delivered up to the Public Guardian to be cancelled unless the court directs otherwise.

Section 50 (Revocation of enduring power of attorney) allows a donor to revoke a registered enduring power at any time provided he or she has the capacity to do so (subsection (1)). Subsection (2) enables the Minister to make regulations concerning the revocation of enduring powers of attorney.

Chapter 5

Miscellaneous

Section 51 (Protection of attorney and third person where registered power invalid) provides protection for acts done by an attorney and transactions between an attorney and a third party where either a registered enduring power did not create a valid enduring power or the power ceased to be in force and where neither the attorney nor the third party was aware of either circumstance at the time of those acts or transactions. Subsection (1) sets out the parameters to which subsections (2) and (3) apply, namely, that they shall apply where the invalid enduring power has been registered, whether or not it has been cancelled when the transaction involving the third party took place. Subsection (2) concerns the protection to the attorney in the circumstances outlined in subsection (1). It provides that where an attorney acts pursuant to an enduring power of attorney he or she will not incur any liability unless he or she is aware that the instrument did not create an enduring power or that it ceased to be in force after the registration or had been cancelled. Subsection (3) concerns the protection of the third party to a transaction under the instrument. It provides that where a transaction occurred under the authority of the enduring power, which at the time was invalid, the transaction shall be deemed a valid transaction unless the third party was aware of the invalidity of the instrument by reason of his or her knowledge of a factor outlined in subsection (2). Subsection (4) deals with subsequent transactions between any third party involved in the original transaction with the attorney and a subsequent purchaser, where that purchaser's title depends on whether the original transaction was valid by virtue of subsection (2). In such cases validity is presumed if the original transaction took place within 12 months of the date of the registration of the instrument or if the third party involved in the original transaction makes a statutory declaration before or within three months of the completion of the subsequent purchase, that he or she had no reason at the time of the original transaction to doubt that the attorney had the authority to dispose of or deal in the property. Subsection (5) is a technical provision adapting section 18 of the Act of 1996 to make it apply to the particular characteristics of enduring powers as provided for in the Bill. Subsection (5) ensures that section 18 of the Act of 1996 will apply so as to protect the attorney and the third party even where the revocation of an enduring power has been confirmed by the High Court, provided that they do not know that the High Court has confirmed the revocation. They will also be protected if they have knowledge of a revocation that has not been so confirmed

because such a purported revocation is of no effect. Subsection (6) defines the meaning of the word “purchaser”. It has the meaning assigned to it by section 18 of the Act of 1996 which states that “purchaser” means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who, for valuable consideration, acquires an interest in any property; and includes also an intending purchaser.

Section 52 (Joint and several attorneys) and Schedule 2 contain provisions about the application of Part 6 to joint, and joint and several attorneys. Subsection (1) allows for the donor of an enduring power to appoint more than one person as an attorney. Such multiple appointments may be made either jointly or jointly and severally. Subsection (2) specifies that the Bill applies to joint attorneys collectively as it applies to a single attorney, subject to subsection (3) and Schedule 2. Subsection (3) provides that with regard to joint and several attorneys, where one dies, lacks capacity or is disqualified, the remaining attorney or attorneys may continue to act unless the instrument creating the enduring power provides to the contrary. Subsection (4) provides that the Bill applies to joint and several attorneys with the modifications set out in subsections (5) to (8). Subsection (5) provides that a failure by one attorney to comply with the requirements of creating an enduring power will disqualify that attorney only and not otherwise affect the power. Subsection (6) provides where one or more attorneys nominated under a power, but not both or all, applies to have an instrument registered, any of the attorneys may then act under the power pending a decision on the application. Notice must be given to the other attorney or attorneys of the application for registration and an objection to the registration may be made in respect of any attorney, whether or not he or she was party to the application for registration. Subsection (7) provides that where a valid objection under section 46(3) has been established in respect of an attorney or attorneys or a power, it shall not invalidate the instrument in respect of another joint or several attorney or attorneys against whom no objection has been made and as such the Public Guardian cannot refuse to register the instrument. However the Public Guardian must qualify the registration in the manner prescribed. Subsection (8) provides that where, under section 49(5)(c), (e) or (f), the High Court may cancel the registration of the instrument, it shall not do so if an enduring power subsists in respect of a joint and several attorney, or attorneys, who are not affected by those provisions. However, the Public Guardian must qualify the registration in accordance with an order of the High Court.

PART 7

INFORMAL DECISION-MAKING ON PERSONAL WELFARE MATTERS

Section 53 (Informal decision-making on personal welfare of relevant person) allows a person referred to as an “informal decision-maker”, who is not a decision-making assistant, co-decision-maker, decision-making representative or attorney, subject to conditions and limitations set down in sections 53 and 54, to take or to authorise the taking of action in respect of a relevant person on personal welfare, healthcare or treatment except in relation to non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment or the donation of an organ by the relevant person or closely connected matters (subsection (1)). Subsection (2) provides protection for acts done or authorised by the informal decision-maker. It provides that where an informal decision-maker acts in compliance with the Bill,

he or she will not incur any liability that he or she would not have incurred if the relevant person had the capacity to consent to the action and had given consent to the informal decision-maker to take or to authorise the taking of the action. Subsection (3) entitles an informal decision-maker to be indemnified by the relevant person for any action taken or authorised that incurs expenditure. It also entitles the informal decision-maker to reimburse himself or herself out of the relevant person's money for expenditure incurred if he or she has possession or control of money belonging to the relevant person. Subsection (4) requires an informal decision-maker to keep a record of all expenditure incurred and money received. Subsection (5) provides that nothing in this section relieves an informal decision-maker, or a person authorised by an informal decision-maker to take an action in respect of a relevant person, of his or her civil or criminal liability for loss or damage arising from his or her negligence in taking the action or authorising the taking of the action. Subsection (6) applies the rules on restraint to an informal decision-maker as they apply to a decision-making representative as provided for under subsections (5) to (8) of section 27.

Section 54 (Limitations to informal decision-making) provides for limitations to the actions an informal decision-maker may take. Subsection (1) prevents an informal decision-maker from doing an act that under this Bill is the reserve of the High Court. Subsection (2) prevents an informal decision-maker from taking action that conflicts with a decision made by the relevant person with the assistance of a decision-making assistant or a decision made jointly with a co-decision-maker or a decision made by a decision-making representative or attorney of a relevant person. Subsection (3) provides that this section does not prevent an informal decision-maker from taking action if the relevant person requires life-sustaining treatment or if the relevant person's health would seriously deteriorate if action were not taken.

PART 8

PUBLIC GUARDIAN

Chapter 1

Appointment, functions and terms and conditions of Public Guardian

Section 55 (Appointment of Public Guardian) provides for the appointment of the Public Guardian by the Courts Service (subsection (1)). Subsection (2) specifies that the Courts Service, in considering a person for appointment as Public Guardian, must satisfy itself that the person has the appropriate experience, qualifications, training or expertise to effectively perform the functions of the office. Subsection (3) is a standard provision stating that members of either House of the Oireachtas, the European Parliament or a local authority are not eligible for appointment as the Public Guardian.

Section 56 (Functions of Public Guardian) sets out the objectives (subsection (1)) and functions of the Public Guardian (subsection (2)). Subsection (3) allows the Public Guardian, in carrying out his or her functions, to consult with any person who has any functions in relation to the care or treatment of the relevant person. It also requires such persons to give the Public Guardian all information, reports and assistance relating to the care or treatment as may be reasonably requested by the Public Guardian (subsection (4)). Rules

of court may make provision relating to the Public Guardian and the performance of his or her functions. They may deal with the giving of security by and may in particular make provision for the giving of security by decision-making representatives for relevant persons and the enforcement and discharge of security so given (subsection (5)). Subsection (6) enables the Public Guardian to instruct a special visitor or general visitor, as defined in section 59, to examine and take copies of records, including health records, relating to a relevant person and to interview the relevant person. Subsection (7) prohibits the Public Guardian from directing a general visitor to examine and take copies of any health record of a relevant person unless the general visitor is a registered medical practitioner.

Section 57 (Terms and conditions of Public Guardian) sets out the terms and conditions of employment of the Public Guardian. The Public Guardian will hold office for a period of 6 years and may be reappointed to the office for a second or subsequent term (subsection (1)). Subsection (2) empowers the Courts Service, with the approval of the Minister and following consultation with the Minister for Public Expenditure and Reform, to set the terms and conditions under which the Public Guardian will hold office. The Public Guardian will be a civil servant and a member of staff of the Courts Service (subsection (3)).

Chapter 2

Staff of Office of Public Guardian

Section 58 (Staff of Office of the Public Guardian) provides that the persons who are staff of the Office of Public Guardian are staff members of the Courts Service and as such the provisions of Part V of the Courts Service Act 1998 apply to them (subsection (1)). Subsection (2) makes provision for the Public Guardian to exercise his or her functions (other than those specified in section 63) by or through any member of the staff of the Courts Service assigned to the Office of the Public Guardian. Subsection (3) allows the Public Guardian to revoke a delegation of functions made under subsection (2). Subsections (4) and (5) provide for the Courts Service, with the approval of the Minister and the consent of the Minister for Public Expenditure and Reform, to appoint staff to the Office of the Public Guardian and to determine the number and grading of staff. Subsection (6) designates the Courts Service as the appropriate authority (within the meaning of the Public Service Management (Recruitment and Appointments) Act 2004 and the Civil Service Regulation Acts 1956 to 2005) in relation to staff of the Office of the Public Guardian. Subsections (7) and (8) permit the Courts Service to engage and pay specialist advisers whom the Public Guardian considers necessary. Prior approval of fees due to an adviser is required from the Minister and the Minister for Public Expenditure and Reform (subsection (8)).

Chapter 3

Special visitors, general visitors, court friends and panels

Section 59 (Special visitors and general visitors) allows the Public Guardian to appoint a person to be a special visitor or a general visitor (subsection (1)). Subsection (2) specifies that a special visitor must be a registered medical practitioner or possess other relevant qualifications and have particular knowledge, expertise and experience, as respects the capacity of persons. Subsection (3) provides that a general visitor is a person who, in the opinion of the Public Guardian, possesses relevant qualifications, expertise or

experience that will assist the Public Guardian in performing his or her supervisory functions in relation to decision-making assistants, co-decision-makers, decision-making representatives and attorneys for relevant persons. The appointment of a person as a special visitor or a general visitor is subject to such terms and conditions as the Minister, with the consent of the Minister for Public Expenditure and Reform, may deem appropriate (subsection (4)).

Section 60 (Court friends) allows the Public Guardian to appoint a court friend to assist the relevant person in court proceedings. It requires the Public Guardian to appoint a court friend to assist the relevant person where the relevant person has not instructed a barrister or solicitor and there is no decision-making assistant, co-decision-maker, decision-making representative, attorney or court friend to assist the relevant person in the course of a hearing (subsection (1)). Subsections (2), (3), (4) and (5) outline the functions of a court friend. Subsection (3) allows a court friend to examine and take copies of records, including health records, relating to a relevant person and to interview the relevant person in private. Subsection (4) provides that a court friend may not examine and take copies of any health record of a relevant person unless he or she is a registered medical practitioner. Subsection (5) requires the court friend to assist and support the relevant person in court and to promote the interests of the relevant person in court if the relevant person is not attending the hearing. Subsection (6) allows a court friend to attend and represent the relevant person at meetings, consultations or discussions, in connection with an application under Part 4. Subsection (7) provides that the appointment of a person as a court friend is subject to such terms and conditions as the Minister, with the consent of the Minister for Public Expenditure and Reform, may deem appropriate. Subsection (8) allows a suitable person who is willing and able to assist a relevant person during the course of a court hearing in relation to an application under Part 4 to carry out the same functions as a court friend. Subsections (2) to (6) apply to the person assisting the relevant person in court as they would apply to a court friend.

Section 61 (Panels to be established by Public Guardian) requires the Public Guardian to establish panels of suitable persons willing and able to act as decision-making representatives (subsection (1)), special visitors (subsection (2)), general visitors (subsection (3)), and court friends (subsection (4)) from which the Public Guardian must nominate persons to be appointed as decision-making representatives, special visitors, general visitors and court friends, as the case requires.

Chapter 4

Reports by Public Guardian and codes of practice

Section 62 (Reports by Public Guardian) makes provision for the preparation and submission of annual reports and other reports by the Public Guardian to the Board of the Courts Service and the subsequent submission of the reports to the Minister (subsections (1) and (2)). Subsection (3) requires the Public Guardian to submit to the Board of the Courts Service within 2 years of the establishment of the Office of the Public Guardian a report on the effectiveness of the Office, of the adequacy of the functions assigned under this Act to the Public Guardian and any recommendations as to how to improve the effectiveness of the Office. The report must subsequently be submitted by the Board of the Courts Service to the Minister together with any recommendations the Board wishes to make in relation to it (subsection (4)). The Public Guardian must, at

the end of each 5 year period, commencing with the date of the establishment of the Office of the Public Guardian, submit a report reviewing the general performance of the objectives and functions of the Public Guardian in the previous 5 years. Subsection (6) allows the Public Guardian to make any other reports that he or she considers appropriate for drawing to the Board's or the Minister's attention matters that in his or her opinion should be the subject of a special report. It also provides for copies of the reports to be laid before both Houses of the Oireachtas by the Minister (subsection (7)).

Section 63 (Codes of practice) enables the Public Guardian to prepare and publish a code of practice, to request another body to prepare a code of practice, or to approve a code of practice drafted by another body. Subsection (1) provides definitions for the purposes of the section. Subsection (2) allows the Public Guardian to prepare and publish a code of practice or to request another body to prepare a code of practice or to approve a code of practice drawn up by another body to guide persons involved in assisting persons who lack capacity in decision-making, including decision-making assistants, co-decision-makers, decision-making representatives, court friends and healthcare professionals. Subsection (3) is an indicative list of bodies and persons whom the Public Guardian may consult when drafting or approving a code of practice. The Public Guardian must provide a draft of a code that it wishes to publish or approve to appropriate persons and bodies (which may include those listed in subsection (3)). The Public Guardian must invite those persons and bodies to make representations in writing and must consider any representations made and make amendments as appropriate (subsection (4)). Subsection (5) requires the Public Guardian, prior to the publication or approval of a code of practice, to get the consent of the Minister, following consultation with the Board of the Courts Service. For codes of practice relating to healthcare, the Office of the Public Guardian must get the consent of the Minister, following consultation with the Minister for Health and the Board of the Courts Service. Subsection (6) requires the Public Guardian when he or she publishes or approves a code of practice to publish a notice to that effect in *Iris Oifigiúil*. The notice must specify the persons or classes of persons for whom the code is providing guidance, the date on which the code comes into effect and details of the location of where a copy of the code may be viewed. Subsections (7) and (8) require that a copy of each code of practice published or approved must be posted on the website of the Public Guardian and be accessible to members of the public. Subsection (9) allows the Public Guardian to amend or revoke a code of practice. It also allows the Public Guardian to withdraw approval for a code of practice. Subsection (10) provides that prior to amending, or revoking or withdrawing approval from a code of practice, the Public Guardian must consult with appropriate bodies and persons and get the consent of either the Minister, following consultation with the Board of the Courts Service, or of the Minister following consultation with the Minister for Health and the Board of the Courts Service, depending on whether the code relates to healthcare matters or not. Subsection (11) provides that where the Public Guardian amends, or revokes, or withdraws his or her approval of a code of practice, a notice to that effect must be published in *Iris Oifigiúil*. It also sets out the information that should be included in the notice. Subsection (12) makes provision for codes of practice to be admissible in legal proceedings. Subsection (13) places a duty on any person performing a function under this Act to have regard to a relevant code of practice published or approved by the Public Guardian. Subsection (14) requires a court, tribunal or body to take account of compliance or of non-compliance with codes of practice

where they exist. Subsection (15) provides that a code of practice published or approved by the Public Guardian for the purposes of court friends shall apply to other persons allowed by the court to assist the relevant person during the course of a hearing (as provided for in section 14(8)).

Chapter 5

Courts Service to manage Office of Public Guardian

Section 64 (Amendment of section 5 of Act of 1998) makes provision for the Office of Public Guardian to be managed by the Courts Service.

PART 9

DETENTION MATTERS

Section 65 (Definitions — Part 9) provides definitions for the purposes of the Part.

Section 66 (Panel of independent consultant psychiatrists to be established by Courts Service) makes provision for the Courts Service to set up a panel of suitable consultant psychiatrists willing and able to carry out medical examinations for the purposes of this Part.

Section 67 (Detention-related safeguards) deals with the possibility of a person who lacks capacity being detained involuntarily if he or she is suffering from a mental disorder. In such cases the procedures provided for in the Mental Health Act 2001 shall be followed.

Section 68 (Review of detention orders in certain circumstances (approved centres)) provides for a review, as soon as possible, of wardship of court orders detaining a person in an approved centre (subsection (1)). Subsection (2) provides that on first review under subsection (1) the court, if satisfied that the person is suffering from a mental disorder, may order the continued detention of the person in the original approved detention centre or an alternative approved centre, for a period of up to 3 months. On a second or subsequent review the court may extend that period up to 6 months. Subsection (3) requires the wardship court to review the continued detention of the person concerned before the expiration of the period referred to in subsection (2) and on being satisfied that the person concerned is suffering from a mental disorder may direct that the person shall continue to be detained in that centre or an alternative approved centre subject to the 6 month restriction set out in subsection (2). Subsection (4) provides that if the wardship court determines that a person is no longer suffering from a mental disorder he or she shall be discharged from detention. Subsections (5) and (6) provide that on a review the wardship court shall hear from the treating consultant psychiatrist and from an independent consultant psychiatrist as to whether the concerned person is in fact suffering from a mental disorder.

Section 69 (Review of detention orders in certain circumstances (non-approved centres)) provides for a review, as soon as possible, of wardship of court orders detaining a person in a non-approved centre (subsection (1)). Subsection (2) provides that on first review under subsection (1) the court, if satisfied that the person is suffering from a mental disorder, may order the continued detention of the person in the original institution or an alternative approved centre, for a period of up to 3 months. On a second or subsequent review

the court may extend that period up to 6 months. Subsection (3) requires the wardship court to review the continued detention of the person concerned before the expiration of the period referred to in subsection (2) and on being satisfied that the person concerned is suffering from a mental disorder may direct that the person shall continue to be detained in that institution or an alternative approved centre subject to the 6 month restriction set out in subsection (2). Subsection (4) provides that if the wardship court determines that a person is no longer suffering from a mental disorder he or she shall be discharged from detention. Subsections (5) and (6) provide that on a review the wardship court shall hear from the treating consultant psychiatrist and from an independent consultant psychiatrist as to whether the person concerned is in fact suffering from a mental disorder.

PART 10

CONVENTION ON INTERNATIONAL PROTECTION OF ADULTS

Part 10 gives effect in the State to the Hague Convention on the International Protection of Adults and makes related provision as to the private international law of the State.

Chapter 1

Preliminary

Section 70 (Interpretation — Part 10) provides for a standard interpretation section that defines certain words and phrases imported from the Convention (subsection (1)). A reference in this Part is a reference to an Article of the Convention (subsection (2)). Subsection (3) provides that this Part and the Convention must be construed in accordance with the Constitution. Subsection (4) allows the High Court to have regard to the Explanatory Report on the Convention by Mr. Paul Lagarde in interpreting this Part and the Convention.

Section 71 (Convention given effect) provides that this Part gives effect in the State to the Convention and makes related provision as to the private international law of the State.

Section 72 (Countries, territories and nationals) defines country to include a territory that has its own system of law (subsection (1)). Subsection (2) provides that where a country has more than one territory within its own system of law, reference to the country in relation to one of its nationals is to the territory with which the national has the closest connection.

Section 73 (Protective measures) provides an indicative list of measures that may be taken to protect the person or property of an adult that may be defined as “protective measures” (subsection (1)). Subsection (2) provides that where a measure of like effect to a protective measure is taken in relation to a person before he or she reaches the age of 18 this Part will apply to the measure only when he or she has reached 18.

Section 74 (Central Authority) provides for the functions of the Central Authority under the Convention to be carried out by the Public Guardian (subsection (1)). A communication to the Central Authority in relation to the State should be sent to the Public Guardian (subsection (2)).

Chapter 2

Jurisdiction of competent authority

Section 75 (Scope of jurisdiction) sets out the scope of the High Court's jurisdiction in relation to the exercising of its functions under this Part and the Convention (subsection (1)). It provides for a definition of "habitually resident" for the purposes of this section (subsection (2)).

Section 76 (Provisions supplementary to section 75) makes provision for the High Court to also exercise its functions under this Part in relation to an adult if he or she is an Irish citizen and Article 7 of the Convention has been complied with. Article 7 allows for concurrent subsidiary jurisdiction. The authorities of a Contracting State of which the adult is a national, have jurisdiction to take protective measures if they consider that they are in a better position to assess the interest of the adult. There are certain conditions attached to exercising jurisdiction under Article 7 and these must be adhered to. Subsection (3) allows the High Court to exercise its functions under this section if it agrees to a request under Article 8 of the Convention. Article 8 allows the authorities of a Contracting State to request the authorities of another Contracting State to take measures for the protection of the person or property of the adult.

Section 77 (Exercise of jurisdiction) applies where jurisdiction is exercisable in respect of Articles 9 to 11 of the Convention in connection with a matter which involves a Convention country other than the State (subsection (1)). It allows the High Court to carry out any duty imposed on it as a consequence of such jurisdiction being conferred on it. Articles 9 to 11 allow the authorities of a Contracting State in which the property of the adult is situated to take measures to protect the property even if the adult is not habitually resident in the state where the property is located. Subsection (3) applies Article 12 to the exercise of jurisdiction in relation to such matters. Article 12 ensures that any protective measure taken in respect of Article 5 to 9 remains in force even when the basis for the jurisdiction of the authority is no longer valid.

Section 78 (Provisions supplementary to section 77) provides that a reference in this Part to the exercise of jurisdiction under this Part is to the exercise of functions under this Act as a result of Chapter 2.

Chapter 3

Applicable law

Section 79 (Applicable law) provides that the High Court in exercising jurisdiction under Chapter 2 of this Part shall apply the law of the State. However, in relation to the protection of the person or property of the adult, the Court may apply or take into consideration the law of another State with which the situation has a substantial connection.

Section 80 (Provisions supplementary to section 79) provides that where a protective measure is taken in one Contracting State but implemented in another, the conditions of the implementation are governed by the law of the other state.

Section 81 (Enduring powers of attorney, etc.) provides for applicable law in relation to enduring powers of attorney.

Section 82 (Disapplication or modification of enduring power of attorney, etc.) allows the High Court, in exercising its jurisdiction under this Part, to disapply or modify an enduring power that is not exercised in a manner sufficient to guarantee the protection of the person or the property of the person (subsection (1)). In circumstances where the law applicable to the enduring power is not the State's law then the High Court must, so far as it is possible, take into consideration the law of the other country (subsection (2)).

Section 83 (Drawing up of enduring power of attorney which falls within section 81(6)(b)) allows for regulations that relate to the formalities for drawing up an enduring power of attorney as provided for in Part 6 of the Bill to apply with modifications in relation to an enduring power that falls within section 81(6)(b) (any other power of like effect).

Section 84 (Protection of third parties) applies where a third party enters, in good faith, into an agreement with a person who would be entitled to act as a representative of an adult under the law of the state where the transaction is concluded (and where both parties are present in the same state) but is not entitled to act as the adult's representative under the law as designated by the provisions of Chapter III of the Convention. It preserves the validity of the transaction and provides protection to a third party who has acted in good faith, unless the third party knew, or should have known, that the law as designated by Chapter III applied.

Section 85 (Mandatory rules) provides that, where the High Court is entitled to exercise jurisdiction under this Part, the mandatory provisions of the law of the State apply regardless of any system of law that would otherwise apply in relation to the matter. It permits the implementation of State mandatory provisions of law, even if the adult's protection has been arranged according to another State's law.

Section 86 (Public policy) provides that nothing in this Part requires or enables the application in the State of a provision of law from another country that would be manifestly contrary to public policy.

Chapter 4

Recognition and enforcement

Section 87 (Recognition) sets out the criteria for the recognition of a protective measure taken under the law of another country in the State and also the criteria for the disapplication of this section.

Section 88 (Application to High Court for declaration on protective measure) allows an interested person as of right to apply to the High Court for a declaration as to whether a protective measure taken under the law of another country is to be recognised in the State.

Section 89 (Provisions supplementary to sections 87 and 88) provides that for the purposes of sections 87 and 88 the High Court is bound by the findings of fact on which the authority of the state where the measure was taken based its jurisdiction.

Section 90 (Enforcement) allows an interested person to apply to the High Court for a declaration as to whether a protective measure taken and enforceable under the law of another country is enforceable in the State (subsection (1)). Subsection (2) requires the

High Court to make a declaration if the measure was taken on the ground that the adult is habitually resident in the other country or on a ground mentioned in Chapter II of the Convention unless section 87(1) or (2) have been disapplied as a result of section 87(3), (4) or (5). Subsection (3) provides that a declaration under this section is enforceable in the State as if it were a measure of like effect taken by the High Court.

Section 91 (Measures taken in relation to those aged under 18) provides for the recognition of previous measures taken under the 1996 Convention on the Protection of Children for the protection of a child or the property of a child and the possible continuation and implementation of those measures under the Protection of Children (Hague Convention) Act 2000. It is to avoid a break in protective measures when a child reaches the age of 18.

Section 92 (Review of measures taken outside State) provides that the High Court may not review the merits of a measure taken outside the State except where it is required to do so under this Part in order to establish whether the measure complies with this Part.

Section 93 (Rules of court) allows for rules of court to make provision about an application to the High Court in relation to the recognition or enforceability in the State of a measure taken in another country.

Chapter 5

Co-operation

Section 94 (Proposal for cross-border placement) applies where it is proposed to place an adult in an establishment in a Convention country other than the State (subsection (1)). Subsection (2) provides that the Central Authority in the State must consult with the Central Authority or other competent authority in the other country about the proposed placement. The Central Authority in the State must send a report on the adult and a statement of reasons for the proposed placement to the Central Authority or other competent authority in the other country. If the Central Authority or competent authority in the other country opposes the proposed placement within a reasonable time, the proposed placement may not be proceeded with (subsection (3)).

Section 95 (Proposal received by Central Authority under Article 33) provides that if the Central Authority in the State receives a proposal from another Convention country under Article 33 to place an adult in an establishment, the placement must proceed unless the Central Authority in the State opposes it within a reasonable time.

Section 96 (Adults in danger, etc.) applies if the High Court has taken or is considering taking protective measures in relation to an adult who is in serious danger and who resides in another Convention country (subsection (1)). The High Court must arrange for the Central Authority in the State to tell the Central Authority or other competent authority in the other country of the danger and the measures taken or under consideration (subsection (3)).

Section 97 (Circumstances in which co-operation is prohibited) provides that the Central Authority may not request from, or send to, a Central Authority or other competent authority in a Convention country information in accordance with Chapter V of the Convention in relation to an adult if it thinks that to do so would endanger the

adult or his or her property or would amount to a serious threat to the liberty or life of a member of the adult's family.

Chapter 6

Miscellaneous

Section 98 (Certificates) provides that a certificate given under Article 38 of the Convention by an authority in a Convention country is, unless the contrary is shown, proof of the matters contained in it. Article 38 of the Convention provides that a Contracting State where a measure has been taken or a power of representation confirmed may deliver to the person entrusted with protection of the adult's person or property, a certificate indicating the capacity in which that person is entitled to act and the powers conferred.

Section 99 (Powers to make further provision as to private international law) allows the Minister to make regulations to enable the Convention to be given better effect in the State.

Section 100 (Exceptions) provides that nothing in this Part, or in regulations made under section 99, applies to any matter to which the Convention, as a result of Article 4, does not apply. Article 4 of the Convention provides that the Convention does not apply to maintenance obligations, the formation, annulment and dissolution of marriage or any similar relationship, property regimes in respect of marriage or any similar relationships, trusts or succession, social security, public measures of a general nature in matters of health, measures taken in respect of a person as a result of penal offences committed by that person, decisions on the right of asylum and on immigration, or measures directed solely to public safety.

Section 101 (Regulations) provides that a reference to regulations in this Part is to regulations made for the purposes of this Part.

Section 102 (Commencement) provides that sections 76, 77, 87(2) and (5), 98 and Chapter 5 in this Part have effect only if the Convention is in force in accordance with Article 57 of the Convention.

PART 11

MISCELLANEOUS

Section 103 (Clinical trials) provides that nothing in the Bill gives anyone the authority to give consent on behalf of the person who lacks capacity to be a participant in a clinical trial.

Section 104 (Patients whose treatment is regulated by Part 4 of the Act of 2001) ensures that there is no conflict between this Bill and the Mental Health Act 2001. If a patient is being treated under Part 4 of the Act of 2001 then nothing in this Bill authorises a person to give a patient treatment for mental disorder or to give consent to a patient being given treatment for a mental disorder.

Section 105 (Payment for necessary goods and services) requires a person who lacks capacity who has entered into a contract for the sale of goods or services to pay the supplier a reasonable sum for the goods or services supplied, subject to the goods or services being suitable to the person's condition in life and actual requirements (subsection (1)). Subsection (2) deletes reference to mental

incapacity in section 2 of the Sale of Goods Act 1893 in relation to capacity to buy and sell because subsection (1) now provides for this.

Section 106 (Consent and capacity in specific matters) retains the law in force concerning capacity in certain contexts.

Section 107 (Application under Part 4, 6 or 9 to be heard in presence of relevant person or person concerned) provides that an application to the court for a declaration in respect of capacity or an enduring power of attorney must be heard in the presence of the relevant person unless: it would not cause an injustice to do otherwise, such attendance would have an adverse effect on the health of the relevant person, the relevant person is unable to attend for a good and substantial reason or the relevant person is unwilling to attend (subsection (1)). Subsection (2) provides that a review under Part 9 of a detention order must be heard in the presence of the person concerned subject to the same provisions listed in subsection (1).

Section 108 (Wills) provides that, subject to subsection (2), the law concerning the capacity of a person to make a will remains unchanged by the Bill (subsection (1)). Subsection (2) gives the High Court, acting on its own motion or that of the Public Guardian, the power to alter a will where exceptional circumstances have arisen since the testator lost testamentary capacity and the interests of justice so demand.

Section 109 (Appeals) allows a decision from the Circuit Court exercising any jurisdiction under this Bill to be appealed to the High Court and any decision made by the High Court under this Bill to be appealed to the Supreme Court on a point of law only (subsection (1)).

Section 110 (Lunacy Regulation (Ireland) Act 1871 to cease to have effect) provides that the Lunacy Regulation (Ireland) Act 1871 will cease to have effect from the commencement of the Bill except for on-going cases. Subsection (2) preserves the validity of any existing decision under the 1871 Act but allows for decisions to be reopened under Part 5.

Section 111 (Amendment of section 26A of Courts (Supplemental Provisions) Act 1961) amends the 1961 Act to allow Specialist Judges to perform and exercise the functions, powers and jurisdiction conferred on the Circuit Court by this Bill in relation to capacity matters.

Section 112 (Amendment of Civil Registration Act 2004) provides for the amendment of the Civil Registration Act 2004 to include as an impediment to marriage or civil partnership a lack of capacity to consent to the marriage or civil partnership, and further provides that objections on such grounds must be accompanied by a Circuit Court declaration to this effect under section 15(1).

Section 113 (Offences) provides that the ill-treatment or the wilful neglect of a relevant person by a decision-making assistant, a co-decision-maker, a decision-making representative, attorney or informal decision-maker is an offence and sets out the penalties.

Section 114 (Review of this Act) requires the Minister to review the functioning of the Act before the 5th anniversary of the date of enactment of the Act.

SCHEDULE 1

Schedule 1 deals with applications for registration of an enduring power of attorney. *Part 1 (Duty to give notice to donor and other persons)* sets out who should receive notice of an intention to register an enduring power of attorney. *Part 2 (Contents of notices)* outlines the information that must be included in the notice. *Part 3 (Duty to give notice to other attorneys)* provides that an attorney, before making an application for registration under a joint and several power, must give notice of intention to do so to any other attorney under the power who is not joining in making the application. *Part 4 (Supplementary)* provides that for the purpose of this schedule, a notice given by post may be sent by prepaid registered post to the usual or last known place of residence of the person to whom it is to be given and the date of postage shall be taken as the date of the notice.

SCHEDULE 2

JOINT ATTORNEYS

Schedule 2 contains provisions about the application of Part 6 to enduring powers of attorney to joint, and joint and several attorneys. It provides that reference to the execution of the instrument in section 40(6) is when the second or last attorney executes the instrument and specifies where in the text references to the attorney should be read as including references to any attorney under the power.

SCHEDULE 3

CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS

Schedule 3 appends a copy of the Hague Convention on the International Protection of Adults.

NOTE — This document is provided for guidance only and does not purport to be a legal interpretation.

*Department of Justice and Equality,
July, 2013*