South African Law Reform Commission

PROJECT 122

ASSISTED DECISION-MAKING

REPORT

DECEMBER 2015

ISBN: 978-0-621-47481-7

© Copyright South African Law Reform Commission

To Adv T M Masutha, MP, Minister of Justice and Correctional Services

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act 19 of 1973 (as amended), for your consideration, the Commission's report on assisted decision-making.

MR JUSTICE N J KOLLAPEN
ACTING CHAIRPERSON: SOUTH AFRICAN LAW REFORM COMMISSION
DECEMBER 2015

South African Law Reform Commission

The South African Law Reform Commission was established by the South African Law Commission Act 19 of 1973.

The members of the SALRC are –

Justice M Maya (Chairperson)
Judge N Kollapen (Vice-Chairperson)
Prof M Carnelley
Prof V Jaichand
Mr I Lawrence
Prof A Oguttu
Adv M Sello
Ms T Siwendu

The Secretary is Adv N Matibe. The members of the Advisory Committee for this investigation are –

Judge B Du Plessis
Prof J Bekker
Ms T Mahlangu (July 2001 – December 2014)
Adv M Meyer
Justice Y Mokgoro (designated member SALRC January 2007 – December 2011)
Ms Zubeda Seedat (designated member SALRC July 2001 – December 2006)
Dr S Selemani (July 2001 – September 2012)
Ms N Siwendu (designated member SALRC January 2014 – conclusion)
Mr L Vitus

Correspondence should be addressed to:

The Secretary
South African Law Reform Commission
Private Bag X668
Pretoria 0001

Telephone: (012) 622 6330
Fax: (012) 622 6362
E-mail: ahavenga@justice.gov.za
Website: http://salawreform.justice.gov.za

The Commission's offices are at Spooral Park Building, 2007 Lenchen Ave South, Centurion.

The project leader is Judge B Du Plessis. The researcher is Ms A-M Havenga.

Contents

Executive summary

Introduction

All of us have legal capacity: the capacity to have rights, to acquire rights and to exercise our rights. To hold, acquire and exercise rights involves making choices and decisions. Persons whose ability to make choices, to make *informed* choices, or to make *fully* informed choices are impaired and at a disadvantage. Society expects the law to address the needs of persons whose ability to make choices has been impaired.

In addressing the needs of persons with such impairment, full regard must be had to the Constitution of the Republic of South Africa, 1996. In particular, regard must be had to those persons' rights to human dignity, equality and freedom and to all the other rights enshrined in the Bill of Rights (Chapter 2 of the Constitution). Full regard must also be had to South Africa's international obligations, notably those under the United Nations' Convention on the Rights of Persons with Disabilities (CRPD), to which South Africa is a signatory. In the context of imperatives for reform, the South African Government's National Development Plan 2030 and the National Disability Rights Policy 2015 (White Paper on the Rights of Persons with Disabilities) need specific mention.

This Report concerns the manner in which South African law addresses the needs of persons whose ability to make choices, to exercise their legal capacity, has been impaired ("persons with disability"). The report also concerns the manner in which South African law should address the needs of such persons with disability.

There are statutory measures of limited application. Primarily, however, the needs of such persons with disability are currently addressed by the common law curatorship system. Involving as it does a High Court application, many – if not most – South Africans cannot afford to use the curatorship system. The Commission's investigation also shows that many people view the curatorship system as outdated and unduly paternalistic, a "one-size-fits-all" solution that tends to take over the affairs of the person with disability. The High Courts have the power to develop the common law so as to ensure that the curatorship system accords with the Constitution and the CRPD. Judicial development of the common law is, however, a notoriously slow process.

Many persons who foresee the possibility that their ability to make choices – or to make informed or fully informed choices – might be impaired in future, wish to cater for that eventuality. An obvious way of doing so is to authorise a trusted person to take care of one's affairs should one become a person with disability. Under our current law, however, such an authorisation (power of attorney) is terminated by the subsequent disability of the person who made the authorisation (the principal). It follows that under our current law a person (a principal) cannot authorise another (an agent) to take care of his or her (the principal's) affairs after he or she has become a person with disability. In this respect, South African law is out of step with comparable legal systems.

The Commission proposes the adoption of a statutory system of supported decision-making that, by its nature, gives recognition to the wide variety of needs that people with decision-making impairment have. This proposal is reflected in the draft Bill included in the report:

1. The Commission proposes substantially more affordable and less cumbersome alternatives to the curatorship system. In summary, the Commission's proposals are:
    - The introduction of certain informal support measures. Because people who are close to a person with disability (family, friends) generally cannot afford the court proceedings to appoint a curator, they tend to resort to informal practical measures to care for and support the person with disability. The aim of the proposed introduction into our law of these measures is to legalise and, importantly, also to regulate what people actually do in practice. In practice, loved ones who trust one another often also give one another access to their respective banking accounts. The proposed informal support measure allows such access to continue if the person who granted the access subsequently, as a result of disability, requires support in exercising legal capacity. The Commission envisages that these cost-effective practical measures will continue to be used widely. They allow people the freedom to assist persons with disability on a practical day-to-day basis.
    - The introduction of formal support measures with regard to property (as an alternative to the current *curator bonis),* and with regard to personal

welfare (as an alternative to the current *curator personae*). The draft Bill introduces into our law a mechanism whereby a person can apply to the Master of the High Court (instead of to the court) for the appointment of a financial supporter and/or a personal welfare supporter for a person with disability. These proposed measures will introduce into our law more affordable and less cumbersome alternatives to the appointment of a *curator bonis* or a *curator personae*.

In accordance with the strictest interpretation of the CRPD, the appointment of a financial supporter or a personal welfare supporter does not affect the legal capacity of a person with disability. Also, the powers of the Master of the High Court and of the respective supporters are structured in a manner that allows minimum invasion of the rights of the person with disability, and preserves the maximum input from the person with disability.

The Commission does not propose the abolition of the curatorship system. We have, on the strength of public consultation, for now accepted that the curatorship system is still suitable but inadequate. Our proposals seek to deal with the inadequacies of the curatorship system by providing for gaps and grey areas. We believe that the question whether the curatorship system should be retained, might be one of the matters that have to be considered under the comprehensive review of all law and legislation which needs to be undertaken by the government in terms of its obligations under the CRPD. The SALRC's proposals are not dependent on such an investigation, as there is no reason why the supplementary measures proposed in the draft Bill cannot coexist with the current curatorship system.

The Commission proposes the abolition of the current statutory system because it will, in the Commission's view, add no value once the proposed new systems are in place.

2. The Commission strongly recommends the introduction into our law of a power of attorney that is not terminated by the subsequent "disability" of the principal; that

is, we recommend introducing and regulating the *enduring* power of attorney. Granting an enduring power of attorney in particular acknowledges the right to autonomy (by allowing a person to choose who shall assist in managing his or her affairs). Therefore the Commission, in its proposed regulation of this concept, has been even more wary of unnecessary interference than was the case with regard to the other support measures proposed.

The Commission's primary objective with the above proposals is to provide for a truly comprehensive system that is affordable and accessible to all South Africans who need support in exercising their legal capacity. Pivotal in realising this objective is the Commission's recommendation that the Master of the High Court should fulfil the supervisory role, and administer the proposed system of decision-making support. The proposed system would render the high cost and cumbersome procedure of the High Court unnecessary for people who are unable to access this route, but would retain the High Court's important role as an appeal and review mechanism. Moreover, the current High Court power and procedure to appoint a curator is retained, and offers a choice to those who prefer or require this.

Another significant intention of the Commission is to give express statutory recognition to the paradigm shift with regard to persons with disabilities and elderly persons, and to their constitutional rights to equality, dignity, autonomy, and privacy. This intention is reflected in the proposed draft Bill's requirement that the support of a person in exercising his or her legal capacity must be governed by certain guiding principles.

In developing its recommendations, the Commission has attempted to obtain a suitable balance between the strong tension between, on the one hand, the need for simple measures and less intrusion and, on the other hand, the need for more formal measures to ensure protection. In developing its recommendations, the Commission has attempted to obtain a suitable balance between these two poles – while being especially wary of unnecessary interference in the private lives of persons with decision-making impairment and their families and carers. This approach is even more pronounced with regard to our recommended regulation of the enduring power of attorney, since this measure in particular acknowledges and emphasises the right to autonomy, by allowing an individual to choose who is to assist in managing his or her affairs.

With regard to the State's ensuing responsibilities, the Commission has concentrated on identifying ways in which available current State resources could be utilised, instead of recommending the creation of new structures. Costs of the proposed system to the State would relate mainly to supplementing the capacity, expertise, and availability of the Master's Division to administer the proposed measures; and to informing, training, and educating the public and service sectors to ensure that the proposed system is successfully implemented. The Commission is fully aware of the financial challenges faced by the Government in the administration of justice. However, the Commission is convinced of the necessity of its proposals, in view of the considerable hardship suffered by a disadvantaged group of our society as well as their families and carers, because of the lack of adequate and accessible provision for decision-making support.

For practical purposes, the proposed draft Bill provides for the incremental implementation of its provisions, as well as for incremental implementation by jurisdictional area. Any incremental implementation is the prerogative of government, and provision for this does not imply that the measures provided for could be implemented in a discriminatory way. Having noted this, the Commission nevertheless wants to strongly emphasise the dire public need for the implementation of the enduring power of attorney, as a first step in implementing the overall proposed measures. The Commission believes that there is also less reason for the incremental implementation by jurisdictional area of the enduring power compared with the other measures of support provided for in the draft Bill. Our reasoning is that the Master's administrative and supervisory role with regard to the enduring power is relatively limited, and is not expected to affect resources to the extent that will probably be necessary with regard to the other measures of support.

List of recommendations

The title of the investigation, as included in the SALRC's research programme and the Commission's initial research documents and consultation, referred to "assisted decision-making". The Commission's final recommendations and proposed draft Bill prefers the term "supported decision-making" based on the terminology of the CRPD. We use the term "person with disability" (as defined in the draft Bill) in our report. In the

context of decision-making support, we also refer in the report to persons with "impaired decision-making ability" or with “decision-making impairment”.

Our main recommendations are as follows (referring where appropriate to the paragraph of the report where the recommendations are discussed, and to the corresponding clause in the draft Bill on Supported Decision-making):

Fundamental issues:

1. The definition of “disability” is one of the fundamental elements of the draft Bill as it indicates the client base of the proposed measures. It is recommended that "disability" should be defined, for purposes of the measures proposed in this report, as any cognitive, developmental, mental, neurological, psychological, sensory or other impairment, which may be permanent, temporary or episodic in nature and that hinders a person’s ability in exercising his or her legal capacity on an equal basis with others. Exceptions (ie when a person should not be regarded as having a "disability"), providing for illiteracy, unreasonable decisions, and inability to communicate under certain circumstances are included in the definition. (Paragraph 4.3 – 4.20; Clause 4.)

2. Legislation dealing with decision-making support should include certain principles that give statutory recognition to the rights of persons with disability. All proceedings, actions, decisions, or support of or in respect of a person with disability in terms of the draft legislation must take place in accordance with these principles. The recommended principals are comprehensively reflected in the draft Bill. (Par 4.21 – 4.38; Clause 5.)

3. It is recommended that the Master of the High Court should fulfil the functions necessary to administer and supervise the system of decision-making support as provided for in the draft Bill. The draft Bill provides for jurisdiction of the Master in respect of persons with “disability” who is ordinarily resident within the jurisdictional area of a High Court, as well as persons who is not so resident. (Clause 99.) Comprehensive provision is made for certain general powers and duties in Chapter 6 of the draft Bill, while more specific powers with regard to the administration of the different measures of support, are included throughout the draft Bill. General powers and duties address aspects such as the need to establish and keep records; making enquiries, including

enquiries into the financial medical or social circumstances of the person in need of support; summonsing any person who may be able to provide information relating to the performance of the Master's functions; initiating the appointment of a formal supporter under certain circumstances; making interim rulings pending the disposal of proceedings; and reviewing any act or decision by a formal supporter under certain circumstances. Specific powers and duties relate to the disposal of applications for the appointment of formal supporters and the general supervision of such appointments; and performing administrative functions with regard to the enduring power of attorney, such as the registration of enduring powers. (Par 2.68, 2.77 – 2.90, 4.38 – 4.49; Chapter 6 of the draft Bill regarding general powers; relevant provisions in Chapters 2, 3, 4, and 5 of the draft Bill with regard to specific administrative and supervisory powers and duties in connection with formal and informal support; and relevant provisions in Chapter 6 in connection with the enduring power of attorney.)

Proposed alternative to the curatorship system

4. The Commission recommends that, as an alternative to the current curatorship system, a flexible system of different measures must be made available through legislation to persons with "disability" who need support in exercising their legal capacity. (Paragraphs 5.19 – 5.29.) The Commission does not recommended that the curatorship system be abolished. (Paragraph 2.71; Clause 123.)

5. The proposed legislation should provide for informal and formal measures of support. The comprehensive regulation of these matters is reflected in Chapters 2 (informal support), 3 (formal support with regard to property) and 4 (formal support with regard to personal welfare) of the draft Bill.

6. With regard to the proposed informal measure (which would not require a formal appointment), we recommend as follows: (Paragraphs 5.19, 5.26, 5.31 – 5.33, 5.38 and 5.41.)
    - Support should be available with regard to financial as well as personal welfare matters.
    - Legislation should expressly state when informal support would be allowed and when not. (Clause 6.)

- Adequate safeguards should be provided for to protect the interests of the person with disability. (Clauses 9, 10 and 11.)
- The measure should allow for reasonable expenses (incurred on behalf of a person with disability in the course of informal support), to be claimed from the person with disability. (Clause 7.)
- The informal measure should allow for the continuation of access to a bank account of a person with disability if the person who granted the access subsequently, as a result of disability, requires support in exercising legal capacity; the circumstances under which and the limited purpose for which such access may be used should be prescribed; and adequate safeguards to protect the interests of the person with disability should be provided for. (Paragraph 5.20 and 5.30; Clauses 12 – 15.)

7. The formal measures of support should provide for decision-making with regard to financial affairs as well as personal welfare. Regulation of such support should include provision for the following: (Paragraphs 5.19, 5.28, 5.36, 5.38 and 5.42.)

- Procedures for the application for the appointment of a formal supporter by the Master of the High Court, which should include requiring evidence that the person concerned is in need of support, and that the person has been given the opportunity to object to the application. (Clauses 17; 46.)
- Requirements for being appointed as a formal supporter. (Clauses18; 47.)
- The powers and duties of a formal supporter. (Clauses 22 – 33; 50 – 55.)
- Appropriate safeguards to protect the interests of the person with disability, including provision for regular accounting and reporting to the Master, and adhering to a certain standard of care in providing support. (Clauses 29, 30, 32, 34 – 37; 52 – 54, 56 – 58.)
- Procedures for the obligatory periodic review of the appointment of a formal supporter. (Clauses 38; 59.)
- Procedures for the termination or withdrawal of a formal supporter's appointment. (Clauses 39 – 44; 60 – 63.)

8. The Commission recommends that Chapter VIII of the Mental Health Care Act 17 of 2002 be repealed to prevent an overlap between the draft Bill's formal measure of support with regard to property, and the Mental Health Care Act's provision for support

with regard to the administration of financial affairs (in the form of the appointment of an administrator). Transitional provisions to ensure that the rights of persons with disability are not adversely affected should be included in the draft Bill. (Paragraph 5.20 and 5.30; Clauses 121 and 122.)

Enduring powers of attorney

9. Legislation should be enacted to enable a power of attorney to be granted which will continue notwithstanding the subsequent disability of the principal. “Disability” refers to a range of impairments that hinders a person’s ability in exercising his or her legal capacity on an equal basis with others. (Paragraphs 6.31 – 6.39; Clause 65; see also the definition of “disability” in Clause 4.)

10 The concept referred to in the previous paragraph should be known as an "enduring power of attorney". The following terms should be used in connection with the enduring power of attorney: "principal"; "agent"; "enduring power of attorney relating to property"; and "enduring power of attorney relating to personal welfare". These terms should be clearly defined in the draft Bill. (Paragraphs 6.245 – 6.250; relevant definitions in Clause 1.)

11 It should be possible to grant an enduring power of attorney in respect of property (financial affairs) as well as personal welfare matters. "Personal welfare" should include matters relating to health care and the general personal wellbeing of the principal. The draft Bill should provide that an enduring power relating to personal welfare may specifically authorise an agent to give consent on the principal’s behalf for the provision of a health service to the principal as contemplated in the National Health Act 61 of 2003. (Paragraphs 6.40 – 6.53; Clauses 66(1), 67(2) and the definition of "personal welfare" in Clause 1.)

12. An agent should be entitled to exercise authority granted in terms of a personal welfare power only when the principal’s ability to make decisions has been impaired (ie once the principal has become a person with “disability” as defined in Clause 4 of the draft Bill). (Paragraphs 6.48, 6.51 and 6.53; Clause 90.)

13. As a rule an enduring power of attorney would become effective on execution. A principal should however be able to provide in the enduring power that the power shall become effective only on the principal's subsequent "disability" as defined in clause 4 of the draft Bill. (Paragraph 6.57 – 6.65; Clause 68(d)(ii).)

14. Certain formalities should be required for the valid execution of an enduring power of attorney. The formalities in respect of enduring powers for financial affairs and for personal welfare should be the same. (Paragraph 6.72 – 6.78; Clause 66; Clauses 68 – 72 for general execution formalities).

15. An enduring power of attorney should be in writing and signed by the principal. Where the principal is physically incapable of signing (or where the principal "signs" by making a mark or placing his or her thumb print or initials only), additional requirements should apply to safeguard against abuse. (Paragraph 9.88 – 6.95; Clauses 68(1)(a), 69(a)(a), (2) and (5), and 70(1).) It is recommended that the draft Bill should exclude the Electronic Transactions and Communications Act 25 of 2002 from applying to enduring powers of attorney in certain respects. The proposed exclusion will have the effect that an enduring power will not be valid if it has been electronically executed and signed electronically. (Paragraph 6.94 – 6.95; Schedule 2 of the draft Bill.)

16. An enduring power of attorney should be witnessed by two witnesses. A "witness" must be 18 years or older at the date of execution of the power, and must not be incompetent to give evidence in a court of law. Because of possible conflict of interest, certain persons should not be allowed to witness an enduring power of attorney. (Paragraph 6.96 – 6.103; Clauses 68(1)(f), 69(1) and (4), and 71.)

17. An enduring power of attorney should be valid only if it contains a statement indicating the principal's intention that the power is either to continue to have effect notwithstanding the principal's subsequent "disability" as defined in the draft Bill; or that it shall come into effect on the principal's subsequent "disability" as defined in the draft Bill. (Paragraph 6.104 – 6.109; Clause 68(1)(d); and the definition of "disability" in clause 4.)

18. An enduring power of attorney should be valid only if the principal at the time of executing the power understood its nature and content. Confirmation that the principal had the required capacity, should be provided by way of a "certificate of execution" granted by a "certificate provider" which could be a professional person with skills relevant to providing the certificate (including a legal practitioner or health care practitioner); or someone who has known the principal for at least five years and more closely than a mere acquaintance. (Paragraphs 6.79 – 6.87; Clauses 68(1)(h) and 70.)

19. A specific mandatory form of enduring power of attorney should not be prescribed. The draft Bill should contain an example of an enduring power of attorney, to provide guidance on the legally required content of an enduring power. The example should contain explanatory notes for the information of the principal and the agent. (Paragraphs 6.110 – 6.120; Clause 68(2), Schedule 1 and the Annexure to the Schedule.)

20. The Commission recommends that pure technical grounds alone should not invalidate an enduring power. It is recommended that legislation should provide the Court with the power to declare that a document not in the prescribed form shall be a valid enduring power of attorney under certain circumstances. (Paragraphs 6.121 – 6.127; Clause 72.)

21. The person appointed as agent must be 18 years of age or older on the date of execution of the enduring power, and must not be a person who requires support in exercising legal capacity. A juristic person should also be allowed to act as agent. The draft Bill should provide that an officer of the juristic person may be nominated to perform the powers of the agent (for instance, in the case of an enduring power relating to personal welfare). The juristic person should accept liability for the acts and omissions of the individual so nominated. (Paragraph 6.221 – 6.228; Clause 73(1)(a) and (b) and 73(2).)

22. A statutory duty to act should not be imposed on an agent. The draft Bill should however refer to an agent’s general common law duty of care to be afforded a principal. The explanatory notes included in the example of an enduring power (referred to in paragraph 19 above), should provide basic information on such duty for the benefit of

the principal and the agent. (Paragraph 6.169 – 6.176; Clause 88 and the Annexure to Schedule 1.)

23. The Commission recommends that enduring powers of attorney must be registered. We recommend that an agent may not act in terms of an enduring power of attorney after the principal has become a person with "disability" (as defined in clause 4 of the draft Bill), unless the power has been registered with the Master of the High Court. An application for registration, and the decision to register, must be made in accordance with the requirements of the proposed draft legislation. These requirements include that on registration, the agent must submit evidence that the principal requires support in exercising legal capacity. The principal must have been served with a written notice of the agent's intention to register the enduring power, and may object to the application for registration. (Paragraphs 6.132 – 6.149; Clauses 77 – 81).

24. The Master must maintain proper record of all original enduring powers of attorney registered. It is recommended that a certified copy of an enduring power, endorsed by the Master to the effect that it has been registered, should be regarded as proof of the content of the power and of the fact that it has been registered. (Paragraph 6.149; Clause 80, 81, and 100.)

25. The Master should be given the discretion (before registration of an enduring power), to require security from an agent authorised under an enduring power relating to property for the proper performance of the agent's duties. (Paragraphs 6.159 – 6.165; Draft Bill, Clause 82.)

26. An agent who has been required to give security before registration of the enduring power (as referred to in the previous paragraph), should be required to compile and submit to the Master an inventory of the property and the value thereof in respect of which he or she is authorised to act. (Paragraphs 6.177 – 6.187; Clause 85.)

27. An agent authorised under an enduring power relating to property, should be compelled to keep a record of all property in respect of which he or she is authorised to

act and of all transactions in relation so such property. (Paragraphs 6.177 – 6.187; Draft Bill clause 86.)

28. An agent (whether appointed under a power related to property or personal welfare) should, at any time after the registration of the enduring power when required by the Master to do so, submit a report on the exercise of his or her authority. In the case of a power relating to property, the Master could require that the report contain a statement of monetary transactions. (Paragraphs 6.177 – 6.187; Clause 87.)

29. It should be possible for a principal to revoke an enduring power at any time when he or she understands that nature and effect of the revocation. (Paragraphs 6.189 – 6.200; Clause 91.)

30. An agent should be permitted to resign by giving written notice of the intended resignation to the persons listed for this purpose in the draft Bill. (Paragraphs 6.215 - 6.220; Clause 92.)

31. The High Court, as well as the Master, should have the power to remove an agent. This should be possible at any time after registration of the power and under certain specified circumstances only. Before removing an agent, the agent should be served with written notice of the intended removal and be given reasonable time to object to the removal. (Paragraphs 6.201 – 6.214; Clause 93.)

32. Public concerns were raised about the current validity of ordinary powers of attorney granted (in the belief that such powers will endure the future decision-making impairment of these principals), by principals whose ability has since become impaired. It is recommended that it should be possible, under limited circumstances, to apply for the validation of such powers as enduring powers of attorney in terms of the proposed draft Bill, as well as for the validation of acts performed under such powers. The validation should be possible in terms of an application to the High Court only (Paragraph 6.240 –6.244; Clauses 96 and 97.)

33. Provision should be made for a document executed in terms of foreign law to be registered as a valid enduring power of attorney in terms of the draft Bill. (Paragraph 6.232 – 6.239; Clause 98.)

Offences and penalties

34. Enforcement of the proposed measures is provided for by the creation of offences in the draft Bill. It is recommended that these should address, amongst others, any ill-treatment or wilful neglect of a person with disability by a person who has any function, duty or responsibility (in terms of the proposed legislation), in respect of the person with disability. (Clause 125.)

Proposed implementation

35. The Master of the High Court should take responsibility for ensuring that Masters Office officials receive adequate training to equip them to successfully execute the functions provided for in the draft Bill. (Paragraph 2.82; Clause 120.)

36. A monitoring mechanism in the form of an inter-sectoral committee should be established to oversee the implementation and application of the measures provided for in the draft Bill. Stakeholders that should be represented on the committee should include the Master of the High Court, the Human Rights Commission, relevant national government departments and representatives of persons with disabilities. (Paragraph 2.83; Clauses 117 – 119.)

37. The Commission is of the view that introduction of the proposed measures should be accompanied by a public awareness campaign to inform and educate the public about the availability and use of the different support measures. (Paragraph 2.81.)

Source list

Alberta Law Reform Institute **Final Report No 88** 2003
Alberta Law Reform Institute "Enduring Powers of Attorney: Safeguards Against Abuse" **Final Report No 88** Edmonton: February 2003

Alberta Law Reform Institute **Issues Paper No 5** 2002
Alberta Law Reform Institute "Enduring Powers of Attorney" **Issues Paper No 5** Edmonton: February 2002

Alberta Law Reform Institute **Report for Discussion No 7** 1990
Alberta Law Reform Institute "Enduring Powers of Attorney" **Report for Discussion No 7** Edmonton: February 1990

Alberta Law Reform Institute **Report for Discussion No 11** 1991
Alberta Law Reform Institute "Advance Directives and Substitute Decision-making in Personal Health Care" **Report for Discussion No 11** Edmonton: November 1991

Alberta Law Reform Institute **Report No 59** 1990
Alberta Law Reform Institute "Enduring Powers of Attorney" **Report No 59** Edmonton: December 1990

Alberta Law Reform Institute **Report No 64** 1993
Alberta Law Reform Institute "Advance Directives and Substitute Decision-making in Personal Health Care" **Report No 64** Edmonton: March 1993

Allain *Legal Reports No 2*
Jean Allain "Report on Treaty interpretation and the UN Convention on the Rights of Persons with Disabilities" (*Legal Reports No 2*) on behalf of Disability Action's Centre on Human Rights for People with Disabilities, School of Law Queen's University of Belfast 2009. Web 29 April 2010

Alzheimer's Disease International **Factsheet 3** April 1999
Alzheimer's Disease International "The Prevalence of Dementia" **Factsheet 3** April 1999

Alzheimer's Disease International **Factsheet 4** March 1999
Alzheimer's Disease International "The Demography of Ageing around the World" **Factsheet 4** March 1999.

Alzheimer's Disease International Policy Brief 2013-2050
Alzheimer's Disease International Policy Brief for Heads of Government "The Global Impact of Dementia 2013-2015" London December 2013 (www.alz.co.uk accessed 1/6/2015)

Alzheimer Europe **LAWNET Final Report**
Alzheimer Europe **LAWNET Final Report** (European comparison on current legislation) 1997-2000
(Internet www.alzheimer-europe.org accessed on 3/12/02)

Alzheimer Europe **LAWNET National Report: The Netherlands**
Alzheimer Europe **LAWNET National Report: The Netherlands** (European comparison on current legislation) 1997-2000
(Internet www.alzheimer-europe.org accessed on 3/12/02)

Ashton and Ward
Gordon Ashton and Adrian Ward **Mental Handicap and the Law** Sweet & Maxwell London: 1992

Atkin 1988 **New Zealand Law Journal**
WR Atkin "Enduring Powers of Attorney in New Zealand" **New Zealand Law Journal** October 1988 368-372

Australian Law Reform Commission **Discussion Paper No 39** 1998
Australian Law Reform Commission **Discussion Paper No 39** "Guardianship and Management of Property" Sydney: 1998

Benko and Fiala Unpublished
Boglarka Benko and Jan Fiala "National implementation process of the Convention on the Rights of Persons with Disabilities" Unpublished paper compiled for the Mental Disability Advocacy Centre (MDAC), Hungary 15 August 2008. Web 18 January 2010

Bhaba 2009 SAJHR
Faisal Bhaba "Disability equality rights in South Africa: Concepts, interpretation and the transformation imperative" 2009 *South African Journal on Human Rights* Vol 25 No 2 218-245

Barker **De Rebus** April 1996
Harry Barker "On General Powers of Attorney" **De Rebus** April 1996 259-260

Barnard et al
AH Barnard, DSP Cronjé and PJJ Olivier **The South African Law of Persons and Family Law** Third Edition by DSP Cronje Butterworths: Durban 1994

Bezuidenhout (Unpublished)
PJS Bezuidenhout "The Social and Economic Impact of an Ageing South African Population" (Unpublished article made available to the researcher by the author February 2002)

Boezaart in **Child Law in South Africa**
"Child Law, the Child and South African Private Law" Trynie Boezaart in **Child Law in South Africa** edited by Trynie Boezaart Juta & Co Ltd Claremon : 2009

Calitz in De Jure 2011
J Calitz " Some thoughts on state regulation of South African insolvency law" **De Jure 2011 Vol 19**

Carney 1999 **New Zealand Universities Law Review**
Terry Carney "Abuse of Enduring Powers of Attorney - Lessons from the Australian Tribunal Experiment?" 1999 **New Zealand Universities Law Review** 481-508

Census in Brief
Statistics South Africa "The People of South Africa Population Census, 1996" **Census in Brief** Pretoria: Statistics South Africa 1998

Census 2001
Statistics South Africa "Stages in the life cycle of South Africans" Pretoria: Statistics South Africa 2001

Chaffin and Guernsey *Jurist* 5 October 2007

Sally Chaffin and Katherine Guernsey "The United Nations Convention on the Rights of Persons with Disabilities" *Jurist Legal News and Research* (published by the University of Pittsburgh School of Law) 5 October 2007. Web 29 April 2010

Christie

RH Christie **The Law of Contract in South Africa** Fourth Edition Butterworths: Durban 2001

Cifuentes et al *Legal Opinion on Art 12 of the CRPD*

Santos Cifuentes et al "Implementation of the United Nations Convention on the Rights of Persons with Disabilities" Legal Opinion on Art 12 of the CRPD 21 June 2008. Web 14 December 2009

Cockrell in **Bill of Rights Compendium**

Alfred Cockrell "The Law of Persons and the Bill of Rights" in **Bill of Rights Compendium** Butterworths Durban: 1996 (with loose-leaf updates)

Cooper and Vernon

Jeremy Cooper and Stewart Vernon **Disability and the Law** Jessica Kingsley Publishers London: 1996

Council of Europe **Recommendation Continuing Powers of Attorney** 2009

Council of Europe (European Committee on Legal Co-operation) Draft Recommendations on Principles concerning Continuing Powers of Attorney and Advance Directives for Incapacity October 2009 (www.coe.int.cdcj accessed February 2014)

Creyke 1991 **Western Australian Law Review**

Robin Creyke "Enduring Powers of Attorney: Cinderella Story of the 80s" 1999 **Western Australian Law Review** Vol 21 122-148

Cronje

DSP Cronje *The South African Law of Persons and Family Law* Butterworths: Durban Third Edition 1994

Cronjé in *LAWSA*

DSP Cronjé "Persons" in The *Law of South Africa (LAWSA*) Vol 20 Part 1 (First Reissue) Butterworths: Durban 1999

Cronjé and Heaton **South African Law of Persons**

DSPCronjé and Jacqueline Heaton **The South African Law of Persons** Butterworths Durban: 1999

Cronjé and Heaton **South African Family Law**

DSP Cronjé and Jacqueline Heaton **South African Family Law** Butterworths Durban: 1999

Cronjé in **LAWSA Vol 20** Part 1

DSP Cronjé "Persons" in The **Law of South Africa (LAWSA) Vol 20** Part 1 (First Reissue) Butterworths: Durban 1999

Currie and Woolman in **Constitutional Law of South Africa**

Iain Currie and Stuart Woolman "Freedom and Security of the Person" in **Constitutional Law of South Africa** Juta & Co Ltd: 1996 (with loose leaf updates to 1999)

De Jager et al SAMJ2015

CA de Jager et al "Dementia in rural South Africa: A pressing need for epidemiological studies" SAMJ March 2015 189-190

Department of Social Development Report **Mothers and Fathers of the Nation**
Department of Social Development **Mothers and Fathers of the Nation: The Forgotten People** (Volumes 1 and 2) Report of the Ministerial Committee on Abuse, Neglect and Treatment of Older Persons 26 February 2001

Dhanda *Syracuse Journal of Int L&C* 2007
Amita Dhanda "Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future?" *Syracuse Journal of International Law & Commerce* 2007 Vol 34 No 2 429-462

De Villiers and Macintosh
JE De Villiers and JC Macintosh **The Law of Agency in South Africa** Third Edition by JM Silke Juta & Co Ltd: Cape Town 1981

De Vos in **The Principle of Equality - A South African and a Belgian Perspective**
Pierre De Vos "The Role of Equality in the South African Legal System" in **The Principle of Equality - A South African and a Belgian Perspective** edited by Lanotte et al Maklu Antwerpen: 2001 139-155

De Waal et al
Johan de Waal, Iain Currie and Gerhard Erasmus **The Bill of Rights Handbook** Third Edition Juta & Co Ltd: Kenwyn 2000

De Waal in **Constitutional Law of South Africa**
Johan De Waal "Political Rights" in **Constitutional Law of South Africa** Juta & Co Ltd: 1996 (with loose leaf updates to 1999)

De Wet in **LAWSA Vol 1**
JC De Wet "Agency and Representation" (revised by AG Du Plessis) in The **Law of South Africa (LAWSA) Vol 1** (First Reissue) Butterworths: Durban 1993

Dicey & Morris
Dicey & Morris **The Conflict of Laws** Vol 2 Eleventh Edition by Lawrence Collins et al Stevens & Sons Limited: London 1987

Dobson 2003 **BMJ**
Roger Dobson "Advances in Medical Technology Account for a Third of the Reduction in Road Traffic Deaths" **British Medical Journal** 10 May 2003 1004

Dugard
John Dugard *International Law: A South African Perspective* Third Edition Juta & Co Ltd: Lansdowne 2005

Dugard
John Dugard *International Law: A South African Perspective* Fourth Edition Juta & Co Ltd: Lansdowne 2011

Edwards in **LAWSA Vol 2**
AB Edwards "Conflict of Laws" in **The Law of South Africa (LAWSA) Vol 2** First Reissue Butterworths: Durban 1993

Elliot and Banwell

RC Elliot and E Banwell **The South African Notary** Fifth Edition revised by RC Elliot Juta & Co Ltd: Cape Town 1977

Enable

United Nations *Enable* Newsletter for the Rights and Dignity of Persons with Disabilities. Web January 2010 – July 2011

English Law Commission **Consultation Paper 119** 1991

The Law Commission **Consultation Paper 119 Mentally Incapacitated Adults and Decision-making: An Overview** HMSO London: 1991

English Law Commission **Consultation Paper 128** 1992

The Law Commission "Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction" **Consultation Paper 128** London: HMSO 1992

English Law Commission **Report No 231** 1995

The Law Commission "Mental Incapacity" **Report No 231** London: HMSO 1995 (Summary available on the Internet at http://www.lawcom.gov.uk/library/lc231/contents.htm accessed on 30/10/2002)

Erasmus et al

H J Erasmus et al **Superior Court Practice** (Formerly Nathan Barnett & Brink) Juta & Co: Cape Town (with loose-leaf updates including Service 17, 2002)

Fazel et al 1999 **BMJ**

Seena Fazet et al "Assessment of Competence to Complete Advance Directives: Validation of Patient Centred Approach" **British Medical Journal** 20 February 1999 493-497

Forsyth

Forsyth **Private International Law** Third Edition Juta & Co Ltd Kenwyn: 1996

Frolik and Kaplan

Lawrence Frolik and Richard Kaplan **Elder Law in a Nutshell** West Publishing Co St Paul, Minn 1995

Guernsey et al

Kateherine Guernsey, Marco Nicoli and Alberto Ninio **Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the World Bank** Social Protection Discussion Paper No 0712 The World Bank June 2007 (http://siteresources.worldbank.org accessed August 2009)

Guilde 1997 **Illinois Bar Journal**

Karen J Guilde "Revoking Durable Powers of Attorney for Property – Protecting Clients from Themselves" 1997 **Illinois Bar Journal** Vol 85 Nov 555-556

Heaton in **Boberg's Law of Persons and the Family**

Jacqueline Heaton "The Concepts of Status and Capacity: A Jurisprudential Excursus" and "Mental and Physical Disability: Prodigality" in **Boberg's Law of Person's and the Family** Second Edition edited by Belinda van Heerden et al Juta & Co Ltd Kenwyn: 1999 65-75 and 105-160

Herbstein and Van Winsen

L de Villiers van Winsen et al Herbstein and Van Winsen's **The Civil Practice of the Supreme Court of South Africa** Juta & Co Ltd: Cape Town 1997

HIV/AIDS and the Law
HIV/AIDS and the Law - A Resource Manual Second Edition Johannesburg: AIDS Law Project & AIDS Legal Network May 2001

Hogg et al
J Hogg et al **Health Ageing - Adults with Intellectual Disabilities: Ageing & Social Policy** Geneva: World Health Organisation 2000

Hoggett
B Hoggett **Mental Health Law** Sweet and Maxwell London: 1976

Hosten et al
WJ Hosten et al **Introduction to South African Law and Legal Theory** (Revised reprint) Butterworths Durban: 1998

HPCSA Ethical Guidelines on Research and Clinical Trails Involving Human Subjects July 2002
Health Professions Council of South Africa **Ethical Guidelines on Research and Clinical Trails Involving Human Subjects** Booklet 9 Pretoria: July 2002

HPCSA Guidelines on Seeking Patients' Consent July 2002
Health Professions Council of South Africa **Guidelines for Good Practice in Medicine, Dentistry and the Medical Sciences**: Booklet 15 (Seeking Patients' Consent: The Ethical Considerations) Pretoria: July 2002

Hutchison in **Wille's Principles of South African Law**
Dale Hutchison "Agency" in **Wille's Principles of South African Law** Eighth Edition Juta & Co Ltd Cape Town: 1991

IDA CRPD Forum *Contribution to United Nations Thematic Study on the CRPD*
International Disability Alliance (IDA) CRPD Forum "Contribution to the Office of the United Nations High Commissioner for Human Rights' Thematic Study to enhance awareness and understanding of the Convention on the Rights of Persons with Disabilities, focusing on legal measures key for the ratification and effective implementation of the Convention" Geneva 15 September 2008. Web 15 February 2010

Ineichen 2000 **Social Science & Medicine** 1673-1677
Bernard Ineichen "The Epidemiology of Dementia in Africa: A Review " 2000 **Social Science & Medicine** Vol 50 1673-1677

InfoUpdate 10/11/2006
"Traditional Health Practitioners Act" InfoUpdate No 42 10 November 2006

Ireland Law Reform Commission **Report Vulnerable Adults** 2006
Ireland Law Reform Commission Report Vulnerable Adults and the Law Report No 83 2006

Ismail **Mail&Guardainonline** 7 November 2006
Sumayya Ismail "Ancestral spirits cannot be regulated" Mail&Guardianonline 7 November2006 (http://www.mg.co.za accessed November 2006)

Jansen 2000 **European Journal of Health Law**
Sjaak Jansen "Recommendation No. R (99) 4 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults, an Introduction

in Particular to Part V Interventions in the Health Field" 2000 **European Journal of Health Law** Vol 7 333-347

Jordaan in Master's Newsletter 2002 4-5;
JH Jordaan "Master's Business Unit – A further Chapter in History" Master's Newsletter May 2002 4-5.

Josling
JF Josling **Powers of Attorney** Fourth Edition Oyez Publishing: London 1976

Joubert
DJ Joubert **Die Suid-Afrikaanse Verteenwoordigingsreg** First Edition Juta & Co Ltd: Cape Town 1979

Joubert and Van Zyl in **LAWSA Vol 17**
DJ Joubert and DH Van Zyl "Mandate and Negotiorum Gestio" (Revised by DH Van Zyl) in **The Law of South Africa (LAWSA) Vol 17** First Reissue Butterworths: Durban 1999

Kanter *Syracuse Journal of Int L&C* 2007
Arlene Kanter "The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities" *Syracuse Journal of International Law & Commerce* 2007 Vol 34 No 2 287-321

Kapp in **Protecting Judgment Impaired Adults**
Marshall B Kapp "Evaluating Decision-making Capacity in the Elderly: A Review of Recent Literature" in **Protecting Judgment Impaired Adults: Issues, Interventions and Policies** edited by Edmund Dejowski Haworth Press New York: 1990 15-30

Kerr
AJ Kerr **The Law of Agency** Third Edition Butterworths: Durban 1991

Kerr
AJ Kerr **The Law of Agency** Fourth Edition Butterworths: Durban 2006

Kentridge in **Constitutional Law of South Africa**
Janet Kentridge "Equality" in **Constitutional Law of South Africa** Juta & Co Ltd: 1996 (with loose leaf updates to 1999)

Khaw 1999 **BMJ**
Kay-Tee Khaw "How Many, How Old, How Soon?" **British Medical Journal** 20 November 1999 1350-1352

Kirkwood 2003 **BMJ**
Thomas BL Kirkwood "The Most Pressing Problem of Our Age" **British Medical Journal** 14 June 2003 1297-1299

Law Reform Commission Ireland Report *Vulnerable Adults and the Law*
The Law Reform Commission Ireland Report on *Vulnerable Adults and the Law* LRC 83-2006 Dublin

Law Reform Commission of Victoria **Report No 35** 1990
Law Reform Commission of Victoria **Report No 35 Enduring Powers of Management** Victoria, Australia: 1990

Labuschagne 1994 **Journal of South African Law**

JMT Labuschagne “Negotiorum Gestio (Saakwaarneming) as Verweer in die Straf- en Deliktereg” 1994 **Journal of South African Law** Vol 4 811-814

Labuschagne et al 2003 **CILSA**

JMT Labuschagne, JC Bekker and CC Boonzaaier “Legal Capacity of Mentally Ill Persons in African Societies” **The Comparative and International Law Journal of Southern Africa** March 2003 106-120

Lawson *Syracuse Journal of Int L&C* 2007

Anna Lawson “The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?" *Syracuse Journal of International Law & Commerce* 2007 Vol 34 No 2 563-619

Lee and Honoré

Lee and Honoré **The South African Law of Obligations** Second Edition by E Newman and DJ McQuoid-Mason Butterworths: Durban 1978

Loue 1995 **The Journal of Legal Medicine**

Sana Loue “Living Wills, Durable Powers of Attorney for Health Care, and HIV Infection” 1995 **The Journal of Legal Medicine** Vol 16 461-480

Lupton 1992 **SA Journal of Criminal Justice**

ML Lupton “*Clarke v Hurst NO, Brain NO & Attorney General, Natal* (unreported 1992 (N) A Living Will, Brain Death and the Best Interests of a Patient” 1992 **South African Journal of Criminal Justice** 342-348

Lush

Denzil Lush **Elderly Clients - a Precedent Manual** Jordans Bristol: 1996

Mahery and Proudlock

Prinslean Mahery and Paula Proudlock **Legal Guide to Age Thresholds for Children and Young People** published by the Children's Institute, University of Cape Town April 2011

Maina Statement HRC Debate March 2009

Statement by Edah Maina (Member and Vice-President Committee of Experts, UN CRPD) Interactive Debate of the United Nations Human Rights Council on “The rights of persons with disabilities” United Nations, 6 March 2009

Manitoba Law Reform Commission **Report No 83**

Manitoba Law Reform Commission **Report No 83 Enduring and Springing Powers of Attorney** Winnipeg: 1994

McQuoid-Mason and Strauss in **LAWSA Vol 17**

DJ McQuoid-Mason and SA Strauss “Medicine, Dentistry, Pharmacy and Other Health Professions” revised by McQuoid-Mason in **LAWSA Vol 17** 129- 230 First Reissue Butterworths: Durban 1999

Melish *Human Rights Brief*

Tara J Melish "The UN Disability Convention: Historic process, strong prospects, and why the US should ratify" *Human Rights Brief* 2007 Vol 14 No 2 Social Science Research Network (SSRN). Web 29 April 2010

Meyers

Teresa Schwab Meyers **How to Keep Control of Your Life After Sixty** Lexington Books Massachusetts 1998

Minkowitz *Syracuse Journal of Int L&C* 2007
Tina Minkowitz "The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from non-consensual psychiatric interventions" *Syracuse Journal of International Law & Commerce* 2007 Vol 34 No 2 405-428

Munday 1989 **New Zealand Universities Law Review**
Roderick Munday "The Capacity to Execute an Enduring Power of Attorney in New Zealand and England: A Case of Parliamentary Oversight?" 1989 **New Zealand Universities Law Review** Vol 13 June 1998 253-270

Mute The Equal Rights Review 2012
Lawrence Mute "Moving from the Norm to Practice Towards Ensuring Legal capacity for Persons with Disabilities in Kenya" **The Equal Rights Review** Vol 9 2012

National Conference of Commissioners on Uniform State Laws (Internet])
National Conference of Commissioners on Uniform State Laws "Summary" Uniform Durable Power of Attorney Act (1997 (1987))"
(Internet http://www.nccusl.org accessed on May 2003)

NDP 2030
National Planning Commission National Development Plan 2030 "Our Future Make it Work" National Planning Commission, Department: The Presidency Republic of South Africa 2012

Neethling et al
J Neethling, JM Potgieter and PJ Visser **Neethling's Law of Personality** Durban: Butterworths 1996

Neethling, Potgieter and Visser
J Neethling, JM Potgieter and PJ Visser **Law of Delict** Fourth Edition Durban: Butterworths 2001

Neskora 1997 **Louisiana Bar Journal**
Teanna West Neskora "Living Will and Health Care Powers of Attorney" 1997 **Louisiana Bar Journal** 512-515

Neuman **De Rebus** June 1998
C Neumann "Curatorship – a Test of Endurance" **De Rebus** June 1998 61-64

Newfoundland Law Reform Commission **Discussion Paper** January 1992
Newfoundland Law Reform Commission **Discussion Paper on Advance Health Care Directives and Attorneys for Health Care** (WP 6) January 1992 St John's: Newfoundland, Canada

Newfoundland Law Reform Commission **Report on Enduring Powers of Attorney** 1988
Newfoundland Law Reform Commission Report on Enduring Powers of Attorney (R2) December 1988 St John's: Newfoundland, Canada

New Zealand Law Commission **Preliminary Paper 40** 2000
New Zealand Law Commission **Preliminary Paper 40 Misuse of Enduring Powers of Attorney** Wellington: New Zealand 2000

Nova Scotia **Report on The Powers of Attorney Act** 2015

Law Reform Commission of Nova Scotia Final Report on The Powers of Attorney Act August 2015

Olaniyi 2014 International Journal Of Alzheimer's Disease
O Olaniyi et al "Epidemiology of Dementia among the Elderly in Sub-Saharan Africa" International Journal of Alzheimer's Disease Volume 2014 (2014) Article ID 195750 (http://dx.doi.org accessed 1/6/2015)

Olivier et al
NJJ Olivier, JC Bekker, NJJ Olivier (Jnr) and WH Olivier **Indigenous Law** Butterworths: Durban 1995

Oomens and Van Zutphen
Dr HCDM Oomens and Mr YLL van Zutphen **Evaluatie Wet Mentorschap** Vrije Universiteit Amsterdam: 1998

O'Shea in *Bill of Rights Compendium*
Andreas O'Shea "International law and the Bill of Rights" in *Bill of Rights Compendium* Butterworths Durban: 1996 (with loose-leaf updates)

PMG Minutes JMC Meeting 23 March 2007
Parliamentary Monitoring Group Minutes of 23 March 2007 meeting of Joint Monitoring Committee on Children, Youth and Persons with Disabilities: "Disability Convention: Briefing by Office of Status of Disabled Persons". Web 2 March 2010

PMG Minutes JMC meeting 25 May 2007
Parliamentary Monitoring Group Minutes of 25 May 2007 meeting of Joint Monitoring Committee on Children, Youth and Persons with Disabilities: "Convention on Rights of Persons with Disabilities: Briefing by the Office on Status of Disabled Persons and Department of Foreign Affairs". Web 2 March 2010

Pearson **Background Paper** Alberta Law Reform Institute 2005
Sheryl Pearson **Background Paper on Enduring Powers of Attorney** (unpublished paper prepared by Ms S Pearson, Counsel, Alberta Law Reform Institute for purposes of consultation. Provided to the researcher by the author April 2005)

Pearson **Report** Canadian Research Institute for Law and the Family 2005
Sheryl Pearson "A Critical Review of the Legislation and Reporting Practices Concerning Elder Abuse in Alberta" prepared for the Canadian Research Institute for Law and the Family March 2005, as part of the Project: Victim Focussed Services for the Elderly: Access and Effectiveness in Alberta (as referred to in The Canadian Research Institute for Law and the Family **Final Report on The Response to Elder Abuse in Alberta**: **Legislation and Victim Focussed Services** (Appendix A). Copy of full Report made available to the researcher by the author, April 2005

Pothier's Treatise on the Contract of Mandate translated by Rogers and De Wet
Pothier's Treatise on the Contract of Mandate (Traité Du Contrat De Mandat) Translated from the French of the Dupin edition by BG Rogers, the Latin passages being translated by BX De Wet Lex Patria: Johannesburg 1979

Queensland Law Reform Commission **Draft Report** 1995
Queensland Law Reform Commission **Draft Report Assisted and Substituted Decisions** The Print People: Brisbane 1995

Queensland Law Reform Commission **Report No 49** 1996

Queensland Law Reform Commission **Report No 49 Assisted and Substituted Decisions** The Print People: Brisbane June 1996

Queensland Law Reform Commission **Discussion Paper 38** 1992
Queensland Law Reform Commission **Discussion Paper No 38 Assisted and Substituted Decisions** The Print People: Brisbane July 1992

Quinn *EDF Forum Paper*
Gerhard Quinn (Director Centre for Disability Law & Policy, National University of Ireland) "An Ideas Paper" Paper delivered at the Seminar on Legal Capacity presented by the European Disability Forum Brussels 9 June 2009. Web 1 April 2010

Rautenbach in **Bill of Rights Compendium**
IM Rautenbach "Introduction to the Bill of Rights" in **Bill of Rights Compendium** Butterworths Durban: 1996 (with loose leaf updates)

Report of the Ministerial Committee on Abuse, Neglect and Ill-Treatment of Older Persons 2001
Department of Social Development "Mothers and Fathers of the Nation: The Forgotten People?" **Report of the Ministerial Committee on Abuse, Neglect and Ill-Treatment of Older Persons** Pretoria: February 2001

Roca in **Aging and the Law**
Robert Roca "Determining Decisional Capacity" A Medical Perspective" in **Aging and the Law** edited by Lawrence Frolik Temple University Press Philadelphia: 1999 216- 225

SA Baseline Country Report: UN CRPD 2013
"Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa" Report approved by Cabinet 17 April 2013 Department of Women, Children & People with Disabilities Republic of South Africa

SA Draft National Disability Rights Policy 2015
"Draft National Disability Rights Policy" General Notice 129 of 2015 in Government Gazette 38471 of 16 February 2015

SALRC **Discussion Paper 103: Review of the Child Care Act**
South African Law Reform Commission Discussion Paper 103: Review of the Child Care Act (Project 110): Pretoria 2001

SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988
South African Law Reform Commission **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** South African Law Commission: Pretoria 1988

SALRC **Report on Euthanasia and the Artificial Preservation of Life** 1998
South African Law Reform Commission **Report on Euthanasia and the Artificial Preservation of Life** South African Law Commission: Pretoria 1998

SALRC **Report on Review of the Child Care Act** 2002
South African Law Reform Commission **Review of the Child Care Act** (Project 110): **Report** Pretoria: December 2002

SALRC **Report on Sexual Offences** 2003

South African Law Reform Commission Report on Sexual Offences (Project 107): Pretoria: January 2003

Schaffer in Lexis Nexis **Family Law Service**
LI Schaffer "Young Persons" in Division E, Lexis Nexis Family Law Service Lexis Nexis: Durban (Loose Leave)

Schlesinger and Scheiner 1992 **Trusts and Estates**
Sanford J Schlesinger and Barbara J Scheiner "Estate Planning Using Powers of Attorney" **Trusts and Estates** July 1992 38-44

Schultze *Understanding the CRPD*
Marriane Schultze *Understanding the UN Convention on the Rights of Persons with Disabilities: A handbook on the human rights of persons with disabilities* September 2009. Web 29 April 2010

Scottish Executive **Making the Right Moves** 1999
Scottish Executive **Making the Right Moves** (Rights and Protection for Adults with Incapacity) Edinburgh: The Stationary Office SE**/**1999/24

Scottish Law Commission **Report No 151** 1995
Scottish Law Commission **Report No 151** 1995 **Report on Incapable Adults** Edinburgh: HMSO 1995

Scottish Law Commission **Discussion Paper 94** 1991
Scottish Law Commission **Discussion Paper Mentally Disabled Adults: Legal Arrangements for Managing their Welfare and Finances** Edinburgh: HMSO 1991

Scottish Law Commission **Report on Adults with Incapacity October 2014**
Scottish Law Commission **Discussion Paper on Adults with Incapacity** Edinburgh: Edinburgh: HMSO 2014

Sinclair in **Boberg's Law of Persons and the Family**
June Sinclair " Introduction" in **Boberg's Law of Person's and the Family** Second Edition edited by Belinda van Heerden et al Juta & Co Ltd Kenwyn: 1999 1-27

Skelton in **Child Law in South Africa**
Ann Skelton "Parental Responsibilities and Rights" in **Child Law in South Africa** edited by Trynie Boezaart Juta & Co Ltd Claremon : 2009

Strauss
SA Strauss **Doctor, Patient and the Law** Third edition JL Van Schaik : Pretoria 1991

Tanap "Inventories of the Orphan Chamber of the Cape of Good Hope" Internet)
Tanap ("Towards a New Age of Partnership") "Inventories of the Orphan Chamber of the Cape of Good Hope" http://www.tanap.net accessed March 2014).

The Lord Chancellor's Department **Report on Making Decisions** 1999 (Internet)
The Lord Chancellor's Department **Making Decisions** (A Report issued in the light of responses to the consultation paper "Who Decides?") October 1999 (Internet)
(Internet http://www.lcd.gov.uk/family/mdecisions/indbod.htm accessed on 31 October 2002)

The Selective Voet translated by Gane

The Selective Voet Being the Commentary on the Pandectives Translated with explanatory notes and notes of all South African reported cases by Percival Gane Vol Three Butterworth & Co (Africa) Ltd Beach Grove: 1956

The State of South Africa's Population Report 2000
The National Population Unit Department of Social Development **The State of South Africa's Population Report** 2000

United Nations General Comment on Article 12
"General Comment No 1 (2014) Article 12: Equal Recognition before the law" adopted by the United Nations Committee on the Rights of Persons with Disabilities (Eleventh Session 31 March – 11 April 2014)

United Nations *Thematic Study on the CRPD*
Office of the United Nations High Commissioner for Human Rights *Thematic Study on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities* A/HRC/10/48 January 2009. Web 4 December 2009

United Nations *Treaty Collection*
United Nations *Treaty Collection* Status of Treaties, Human Rights Treaties "Convention on the Rights of Persons with Disabilities" Declarations and Reservations, Chapter 4 Par 15. Web 15 December 2009

Victoria Human Rights Law Resource Centre Unpublished
Unpublished submission by the Victoria Human Rights Law Resources Centre on "Ratification of the UN Convention on the Rights of Persons with Disabilities" to Joint Standing Committee on Treaties, Parliament Australia 5 June 2008. Web 19 January 2010

Van Duijvendijk-Brand and Wortmann
J van Duijvendijk-Brand and SFM Wortman **Compendium van het Personen- en Familierecht** Zevende Druk Kluwer-Deventer: The Netherlands 1998

Van Dokkum 1997 **Southern African Journal of Gerontology**
N van Dokkum "A Durable Power of Attorney for Older South Africans" 1997 **Southern African Journal of Gerontology** Vol 6 Part 1 17-20

Van Oosten
Ferdinand FW van Oosten **The Doctrine of Informed Consent in Medical Law** (Thesis submitted in accordance with the requirements for the degree of Doctor Legum) Pretoria: University of South Africa 1991

Van Oosten 1995 **De Jure**
FFW van Oosten "*Castell v De Greef* and the Doctrine of Informed Consent: Medical Paternalism Ousted in Favor of Patient Autonomy" 1995 **De Jure** 164-179

Van Oosten 2000 **Journal of Contemporary Roman Dutch Law**
VVW van Oosten "The Law and Ethics of Information and Consent in Medical Research" 2000 **Journal of Contemporary Roman Dutch Law** 5-31

Van Wyk C "Guidelines on Medical Research Ethics, Medical 'Experimentation' and the Constitution" 2001 **Journal of Contemporary Roman-Dutch Law** 3-22

Van Zyl
DH Van Zyl **Negotiorum Gestio in South African Law** Durban: Butterworths 1985

Victorian Law Reform Commission Final Report 24 2012
Victorian Law Reform Commission Final Report 24 Guardianship Melbourne Victoria Australia: 2012

Victorian Parliament **Enquiry into powers of attorney** 2010
Victorian Parliament Law Reform Commission **Final Report: Inquiry into powers of attorney** August 2010

Wasserberg 2002 **BMJ**
Johathan Wasserberg "Treating Head Injuries" **British Medical Journal** 31 August 2002 454-455

Western Canada Law Reform Agencies **Final Report** 2008
Western Canada Law Reform Agencies (WCLRA) **Enduring Powers of Attorney: Areas for Reform** Final Report 2008 (www.bcli.org accessed February 2011)

WFMH "Mental Health and Older People" 2013
World Federation for Mental Health "Mental Health and Older People" Occuquan VA USA 2013 (www.wfmh.org accessed 19/10/2013)

White **BMJ** 18 May 2002 1173
Caroline White "Life Expectancy is Consistently Underestimated, Say Researchers" **British Medical Journal** 18 May 2002 1173

Whitton
Linda S Whitton "Caring for the Incapacitated – A Case for Nonprofit Surrogate Decision Makers in the Twenty-First Century" 1996 **University of Cincinnati Law Review** 879-910

WHO **Report on Ageing and Intellectual Disabilities** 2000
World Health Organisation "Ageing and Intellectual Disabilities - Improving Longevity and Promoting Health Ageing: Summative Report" Geneva : WHO 2000

WHO Report on Dementia 2012
World Health Organisation "Dementia: A Public Health Priority" WHO Geneva 2012

WHO Fact sheet on Dementia March 2015
World Health Organisation Fact Sheet No 362 "Dementia" March 2015 (www.who.int/mediacentre/ accessed 1 June 2015)

Wille's Principles of South African Law
Wille's Principles of South African Law 8th Edition by Hutchinson et al Juta & Co Ltd Cape Town: 1991

Wille's Principles of South African Law
Wille's Principles of South African Law Ninth Edition by Du Bois et al Juta & Co Ltd Cape Town: 2007

Wolff in **Aging and the Law**
Kevin Wolff "Determining Patient Competency in Treatment Refusal Cases" in **Aging and the Law** edited by Lawrence Frolik Temple University Press: Philadelphia: 1999 326-336

Zimmerman

Reinhard Zimmermann **The Law of Obligations – Roman Foundations of the Civilian Tradition** Juta and Co Ltd Cape Town: 1990

LEGISLATION:

AUSTRALIA

Instruments (Enduring Powers of Attorney) Act, 1981 (Victoria)
Powers of Attorney Act, 1998 (Queensland)

CANADA

Consent to Treatment Act, 1991 (Ontario)
Enduring Powers of Attorney Act, 1991 (Alberta)
Health Care Directives Act, 1992 (Manitoba)
Personal Directives Act, 1997 (Alberta)
Powers of Attorney Act, 1979 (Ontario)
Substitute Decisions Act, 1991(Ontario)

ENGLAND

Powers of Attorney Act, 1985

NEW ZEALAND

Protection of Personal and Property Rights Act, 1988

NETHERLANDS

BW Boek 1 Titel 16 (Curatele)
BW Boek 1 Titel 19 (Onderbewindstelling ter bescherming van meerderjarigen)
BW Boek 1 Titel 20 (Mentorschap ten behoeve van meerderjarigen)
Wet op Geneeskundige Behandelingsovereenkomst (WGBO) Civil Code Title 7

SCOTLAND

Adults with Incapacity (Scotland) Act, 2000

SOUTH AFRICA

Administration of Estates Act 66 of 1965
Age of Majority Act 57 of 1972
Children's Act 38 of 2005
Criminal Procedure Act 51 of 1977
Constitution 108 of 1996
Deeds Registries Act 47 of 1937
Divorce Act 70 of 1979
Electronic Transactions and Communications Act 25 of 2002
Firearms Control Act 60 of 2000
Health Professions Act 56 of 1974
Justices of the Peace and Commissioners of Oath Act 16 of 1963
Marriage Act 25 of 1961
Mental Health Act 18 of 1973
Mental Health Care Act 17 of 2002
Mentally Ill Persons Legal Interests Amendment Act 108 of 1990

National Health Act 61 2003
National Road Traffic Act 93 of 1996
Promotion of Equality and Prevention of Discrimination Act 4 of 2000
Stamp Duties Act 77 of 1968
Sterilisation Act 44 of 1988
Taxation Laws Amendment Act 32 of 1999
Uniform Rules of Court
Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (*Government Notice* R48 of 12 January 1965 as amended)
Wills Act 7 of 1953

UNITED STATES OF AMERICA

Special Powers of Attorney for Small Property Interests Act, 1964
Uniform Health-Care Decisions Act, 1993 (http://www.law.upenn.edu Accessed January 2015)
Uniform Durable Power of Attorney Act, 1979 (Uniform Probate Code) (http://www.law.upenn.edu Accessed January 2015)

INTERNATIONAL INSTRUMENTS:
General Assembly **Resolution on Principles for the Protection of Persons with Mental Illness**, 1991

Committee of Ministers of the Council of Europe to Member States Recommendation No R (99) on **Principles concerning the Legal Protection of Incapable Adults**, 1999

United Nations **Declaration of General and Special Rights of the Mentally Handicapped**, 1971

United Nations **Declaration on the Rights of Disabled Persons**, 1975

United Nations **General Comment No 1 (2014) Article 12: Equal recognition before the law,** adopted by the United Nations Committee on the Rights of Persons with Disabilities 31 March – 11 April 2014

United Nations **International Plan of Action on Ageing**, 1982

United Nations **International Plan of Action on Ageing**, 1998

United Nations **Principles for Older Persons**, 1991

United Nations **Convention on the Rights of Persons with Disabilities,** 2006

CASE LAW:

SOUTH AFRICA

Amond Salie v Ragoon 1903 TS 100

Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commissioner and Another v President of Republic of South Africa and Another 2005 (1) SA 580 (CC); 2005 (1) BCLR 1

Blanchard, Krasner & French v Evans 2002 (4) SA 144 (T)

Bloom's Woollens (Pty)Ltd v Taylor 1962 (2) SA 532 (A)

Blower v Van Noorden 1909 TS 890

Brink v Kitshoff NO 1996 (6) BCLR 752

Bulawayo Market Co v Bulawayo Club 1904 CTR 370

Castell v De Greeff 1994 (4) SA 408 (C)

Clarke v Hurst 1992 (4) SA 630 (D)

Clover v Bothma 1948 (1) SA 611(W)

Crafford and Prinsloo 1905 TS 669

De Villiers v Espach 1958 (3) SA 91 (T)

Dhanabakium v Subramanian 1943 AD 160

Estate Watkins-Pitchford v Commissioner for Inland Revenue 1955 (2) SA 437 (A)

Esterhuizen v Administrator, Transvaal 1957 (3) SA 710 (T)

Ex parte AB 1910 TPD 1332

Ex parte Derksen 1960 (1) SA 380 (N)

Ex parte Dixie 1950 (4) SA 748 (W)

Ex parte Geldenhuys 1941 CPD 243
Ex parte Hulett 1968 (4) SA 172 (D)

Ex parte Klopper: in re Klopper 1961 (3) SA 803 (T)

Ex parte Powrie 1963(1) SA 299 (W)

Ex parte Spinazze 1985 (3) SA 650 (A)

Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC)

Hamed v African Mutual Trust 1930 AD 333

Hansa v Dinbro Trust (Pty) Ltd 1949 (2) SA 513 (T)

Harksen v Lane NO and Others 1997 (11) BCLR 1489 (CC)

Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC)

Improvair (Cape) (Pty) Ltd v Establissements Neu 1983 (2) SA 138 (C)

Kinemas Ltd v Berman 1932 AD 246

Koch v Mair 1894 11 SC 71

Krige v van Dyk's Executors 1918 AD 110

Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd 1986 (3) SA 509 (D)

Lange v Lange 1945 AD 332

Mahomed v Padayachy 1948 (1) SA 772 (AD)

Measrock v Liquidator, New Scotland Land Co Ltd 1922 AD 237

Minister of the Interior v Cowley 1955 (1) SA 307 (N)

Mitchell v Mitchell 1930 AD 217

Molyneux v Natal Land & Colonization Co Ltd [1905] AC 555 (PC)

Moseneke and Others v The Master and Another 2001(2) SA 18 CC; 2001(2) BCLR 103

Natal Bank Ltd v Natorp and Registrar of Deeds 1908 TS 1016

Nel v SAR & H 1924 AD 30

Pakes v Thrupp & Co 1906 TS 741

Pheasant v Warne 1922 AD 481

Phil Morkel Bpk v Niemand 1970(3) SA 455 (C)

Pienaar v Pienaar's Curator 1930 OPD 171

President of the Republic of South Africa and Another v Hugo 1997 (6) BCLR 708 (CC)

Prinsloo v Van der Linde and Another 1997 (6) BCLR 759 (CC)

Prinsloo's Curators Bonis v Crafford and Prinsloo 1905 TS 669

Raulstone v Radebe 1956 (2) PH F85 (N)

S v Hartman 1975 (3) SA 532 (C)

S v Makwanyane and Another 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (C)

S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC*)*

Sampson v Liquidators Union & Rhodesia Wholesale, Ltd 1929 AD 468

Shea v Legator McKenna & others [2007] JOL 21124 (D) *AMH REPORTED SINCE?* *****

Standard Bank of SA Ltd v Efroiken and Newman 1924 AD 171

Stoffberg v Elliot 1923 CPD 148

The National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC)

Theron v AA Life Assurance Association Ltd 1995 (4) SA 361 (A)

Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz 1957(4) SA 354 (W)

Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz 1958(1) SA 505 (A)

Vermaak v Vermaak 1929 OPD 13

Vermeulen v Oberholzer 1965 (1) SA PH F14 (GW)

Ward v Barrett 1962 (4) SA 732 (N)

Weber & Pretorius v Gavronsky Brothers 1920 AD 48

Williams' Estate v Molenschoot and Schep (Pty) Ltd 1939 CPD 360

Wright v Williams (1891) 8 SC 166

ENGLAND

Airedale NHS Trust [1993] 1 All ER 821

Re Farrell 529 A 2d 404 (1987)

Re K [1988] 1 All ER 358

EUROPEAN COURT OF HUMAN RIGHTS

X v United Kingdom (1982) 4 EHRR 188

HL v the United Kinddom 45508/99 [2004] ECHR 720

NEW SOUTH WALES

Ranclaud v Cabban (1988) NSW ConvR

CHAPTER 1
INTRODUCTION

1.1 This report contains final recommendations for reform, including a proposed draft Bill, with regard to the South African Law Reform Commission's (SALRC) investigation into assisted decision-making for adults whose ability to make or communicate informed decisions has been impaired (Project 122).

1.2 The SALRC has been involved in the investigation since 2001. This report follows on Issue Paper 18 and Discussion Paper 105, which were published for public comment in December 2001 and January 2004 respectively. Finalisation of the investigation was interrupted in 2009 when the South African Human Rights Commission (SAHRC) requested the SALRC to ensure that its final recommendations take into account relevant requirements of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).[1] The effect of this request on the extent and finalisation of the investigation is discussed below.[2]

1.3 The title of the investigation, as included in the SALRC's research programme and the Commission's initial research documents and consultation, referred to "assisted decision-making". The Commission's final recommendations and proposed draft Bill prefers the term "supported decision-making" based on the terminology of the CRPD. We use the term "person with disability" in our report and the proposed draft Bill (where we define "disability" with reference to certain impairments that may be permanent, temporary or episodic, and that hinders a person's ability in exercising legal capacity on an equal basis with others). In the context of decision-making support, we also refer in our report to persons with "impaired decision-making ability" or with "decision-making impairment" rather than "incapacity" or "loss of capacity". The latter terms were indeed used in Discussion Paper 105 (published before the CRPD came into force). We retain those terms were we refer to the content of our Discussion Paper or to the common law,

---

1 See Chapter 3.

2 Par 1.9 – 1.10 below.

especially in our discussions on the development of the definition of "disability" in Chapter 4, and on the enduring power of attorney in Chapter 6.

A Origin of investigation

1.4 The investigation arose after a submission by a member of the public concerning the diminishing capacity of elderly people to make informed decisions, with specific reference to the problems encountered by persons with Alzheimer's disease,[3] and the outdated and inappropriate ways in which South African law deals with this challenge.[4] Exploratory research at the time confirmed that a change to the law might be necessary, especially in view of recommendations by the Commission for the introduction of the enduring power of attorney in 1988 – a recommendation that was not promoted by the government at that time.[5] It was also established that problems related to diminished or diminishing ability to make or communicate informed decisions are not experienced only by elderly people with Alzheimer's disease but also by other persons with decision-making impairment, however the impairment is caused.

B Purpose

1.5 Making decisions is an important part of human life. By exercising choice through our decisions in matters relating to our personal welfare and financial affairs, we express our individuality and exert control over our own lives.[6] Impaired decision-making ability

---

3 A progressive neurological disease of the brain that leads to impairment in memory, thinking, behaviour and ability to perform every day activities (see par 2.7 below; and for more information SALRC **Discussion Paper 105** 2004 par 2.2).

4 Submission by Prof Jan C Bekker to the Minister of Justice and Constitutional Development 23 February 2000.

5 The Commission previously undertook an investigation to address a range of problems stemming from the inaccessibility of the curatorship system and the termination of powers of attorney on mental incapacity. The proposals in its 1988 Report regarding the introduction of the enduring power of attorney (SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988) were not implemented. See SALRC **Discussion Paper 105** 2004 par 3.28 for more information.

6 Ashton and Ward 3-7; Queensland Law Reform Commission **Draft Report** 1995 1. See the discussion on constitutional considerations in par 2.42 et seq below.

can be the result of mental illness, intellectual disability, brain injury, stroke, dementia, a specific disease, or impairment related to ageing in general. A legitimate expectation for the law is that it should establish a structure within which autonomy and self-determination are recognised and protected, while also protecting persons with decision-making impairment from abuse, neglect and exploitation. South African law does not fulfil these requirements at present. The recommendations in this Report aim to provide suitable solutions for this deficiency with regard to existing impairment as well as possible future impairment. In doing so, the Commission has taken into account relevant requirements of the CRPD.

1.6 The Commission's investigation does not cover public law matters, or capacity in the areas of delict or crime. This Report does not deal with issues of capacity relating to marriage and divorce or making a will, or with the capacity to consent to sexual intercourse; nor with the limitations the law places on certain groups of people to give valid consent thereto in order to protect them.[7] These issues are covered by the common law or specific statutory measures.[8] In some instances, they have been addressed by the Commission under other investigations.[9] The current investigation is also not concerned with the care, treatment and rehabilitation people with mental illness, or with the rights of the elderly in general. Developments in the latter two areas are embodied in the Mental Health Care Act 17 of 2002 and the Older Persons Act 13 of 2006 respectively. Certain provisions of these two Acts are indeed relevant to the current investigation and have been taken into account in developing the proposed draft Bill on Supported Decision-making.

1.7 The position of children with mental disability differs significantly from that of adults, and there is no need to address the position of children in the context of the

---

7 Consent to sexual intercourse by persons with decision-making impairment (an issue frequently raised by professional carers during consultation with the public) was covered in the SALRC's Report on Criminal Law published in 2003 and is currently dealt with in the Criminal Law (Sexual Offences and Related Matters) Amendment At 32 of 2007 which emanated from that Report.

8 See SALRC **Discussion Paper 105** 2004 par 1.7-1.9 for a summary of the law with regard to some of these matters.

9 See eg the issue with regard to sexual offences committed against persons who are mentally disabled referred to in footnote 7 above.

current investigation. Brief information on the latter group is provided in the course of the discussions below.[10]

1.8 This Report does not address the implementation of the CRPD in general. Chapter 3 reflects on the SARLC's role in the context of its investigation into assisted decision-making, with regard to the envisaged general implementation of the CRPD.[11]

C Complicating factors

1.9 The investigation was extensive and complex from the outset. In essence it dealt with two different scenarios within the context of supported decision-making: existing impairment on the one hand and possible future impairment on the other hand. In respect of the former, alternatives for the current common law curatorship system had to be found, while the latter required consideration of the possibility of introducing the enduring power of attorney into South African Law. As such, these two issues (the responsive and anticipatory measures, respectively[12]) could have been investigated and reported on separately. The Commission, however, considered that the benefit of dealing with the issue of assisted decision-making in its totality is necessary to successfully inter-relate the two aspects. Although this approach has no doubt been beneficial, the extent of the field that had to be covered and the constant need for meaningful inter-relation proved to be a particular challenge and also slowed down the process.

1.10 The request, in 2009, to take into account the CRPD considerably extended and complicated the Commission's work at a time when the investigation was for all practical considerations already at report stage.[13] The extensive consultation process that was followed to assist the Commission in developing its recommendations had to be re-opened; significant additional research had to be done, as reflected in Chapter 3 below;

---

10 Par 2.52 et seq below.

11 See par 3.87 et seq below.

12 See fn 746 below for more information on the two different responses.

13 See par 3.4 et seq below.

fundamental concepts of the draft Bill had to be re-considered and redrafted; and the effect of these changes on the entire draft Bill – and the terminology previously used – had to be considered and dealt with. Reflecting the CRPD's requirements in the draft legislation proved to be particularly challenging, as the CRPD has not yet been integrated into South African Law.[14] At the time of conducting research and consultation to serve as basis for the incorporation of the CRPD into the draft legislation under preparation, there were no existing models yet in comparable jurisdictions that could have shown the way to deal successfully with the CRPD's requirements regarding legal capacity issues. The United Nations has only in April 2014 issued its first official interpretation of the CRPD's legal capacity provisions.[15] Work being done towards giving effect to these provisions is indeed pioneering and challenging, and we believe that the following remarks made in 2012 by Lawrence Mute, Commissioner of the Kenyan National Commission on Human Rights, continue to be relevant at this stage:

> The project of preparing a single legal capacity law is weighed down by the obvious danger that Article 12 [of the CRPD] remains an extremely mysterious norm which does not lend itself easily to practical nuts and bolts interpretation. Perhaps the most certain … is that everything remains extremely fluid and challenging. Multiple questions remain unanswered and ideas for making Article 12 remain untested so much that any legislation will bear the tag of pioneering trailblazer with the consequence that trail-blazing carries: the baggage of error and missed steps. The [United Nations] Committee on the Rights of Persons with Disabilities is just now cutting its teeth by beginning to prepare a general comment or recommendation on Article 12 … . Multiple institutions at the global and national levels will continue to work on [how to make Article 12 operational] for a fair while.[16]

D Consultation

1.11 In accordance with the Commission's commitment to consult as widely as possible, much time and effort went into obtaining maximum public and expert input in the development of the Commission's final recommendations. ANNEXURES 1 to 20 of

---

14 See par 3.87 below.

15 See par 3.84 below.

16 Mute **The Equal Rights Review** 2012 146.

this Report contain the particulars of persons and bodies who responded to the Commission's research publications and took part in our workshops and consultations. The views and comments gathered represented a range of relevant interests. The Commission duly considered these contributions and incorporated the comments offered, where appropriate. This public input assisted the Commission and contributed considerably to the development of its final proposals.

1.12 An Issue Paper was published for public comment in December 2001 to initiate debate, to establish the need for reform and to obtain the public's views on possible broad approaches to reform.[17] Seventy-three written responses were received.[18]

1.13 A Discussion Paper followed the Issue Paper in January 2004.[19] Based on the response to the Issue Paper, the Discussion Paper included the Commission's preliminary proposals for an alternative to the common law curatorship system, and the introduction of the enduring power of attorney into South African Law. These proposals were embodied in draft legislation, on which public comment was requested. Thirty-seven written responses were received.[20] (Note that the Discussion Paper was published before the adoption of the CRPD.[21])

1.14 Public workshops, where the Commission's preliminary proposals contained in the Discussion Paper were explained and debated, were presented at nine centres throughout the country in March 2004.[22] The workshops were attended by 333 persons

---

17 **Issue Paper 18 Incapable Adults** (Project 122) available at http://www.doj.gov.za/salrc/index.htm. The Paper was distributed to more than 900 identified persons and bodies, and invitations for comment were published in the *Government Gazette*, the national media and on the Internet (see SALRC **Discussion Paper 105** 2004 par 3.29-3.30 for more detail).

18 See ANNEXURE 1. See also SALRC **Discussion Paper 105** 2004 par 3.30-3.36 for more information on the public response to the Issue Paper.

19 **Discussion Paper 105 Assisted Decision-making** (Project 122) available at http://www.doj.gov.za/salrc/index.htm. The Paper was distributed to more than 800 identified persons and bodies. Invitations to comment were published in the *Government Gazette*, the national media, and on the Internet (Notice 104 in ***Government Gazette*** No 25943 of 30 January 2004; see eg **Beeld** 2 February 2004 and **Die Burger** 2 February 2004; Radio Sonder Grense discussion with project leader on 4 February 2004; Info Update Issue No 4 30 January 2004).

20 See ANNEXURE 2.

21 See par 3.12 et seq below for general information on the CRPD.

22 The workshops were presented in Pietermaritzburg, Durban, Port Elizabeth, Johannesburg, Bloemfontein, George, Cape Town, Nelspruit and Potchefstroom.

and 39 written responses were received on worksheets that were distributed at the workshops.[23]

1.15 The Commission engaged in a number of other formal and informal consultations with groups and individuals. Information on participants appears in the Annexures attached to this report. The following people and organisations need to be mentioned in particular:

1 The Master of the High Court. The Masters' management and expert staff were consulted throughout and were involved in the different stages of the development of the SARLC's proposals.[24] A representative of the Masters Division was also included as a member of the advisory committee that assisted the Commission throughout the course of the investigation.[25]

2 Medical and constitutional law experts[26] and experts from the banking sector.[27]

3 Experts and government officials from the Netherlands and Scotland were consulted in October 2004 in order to assist the Commission to supplement and refine its legislative framework for an alternative to the curatorship system.[28]

---

23 The workshop discussions were based on comprehensive worksheets containing background information on the Commission's preliminary recommendations, and questions aimed at eliciting comment on issues which the Commission believed to be debatable. Attendees were invited to submit written comments on the worksheets should they wish to do so and to distribute them to a wider audience. See ANNEXURE 3 for particulars of attendees to the workshops and of respondents to the worksheets.

24 See ANNEXURE 4, 9 and 16.

25 Adv Margaret Meyer, Deputy Master and lecturer at Justice College, was included in the committee.

26 See ANNEXURE 6.

27 See ANNEXURE 20.

28 See ANNEXURE 7 for particulars of persons consulted. The Commission from the outset sought guidance in, amongst others, the Scottish and Netherlands models to develop its own recommendations for reform. The Scottish system, introduced in 2001, replaced a former intrusive system while the Netherlands system was introduced in the 1980's and 1990's to supplement its common law curatorship system. More detail of these systems and their relevance to the Commission's investigation appear in par 3.7-3.8 and 6.43-6.48 of the Commission's **Discussion Paper 105** 2004.

4 The National and Provincial Houses of Traditional Leaders.[29]

5 Although several relevant organisations took part in the Commission's workshops and offered comment, Dementia South Africa needs special reference.[30] This organisation played a continual advocating role in bringing to the Commission's attention specific problems inherent in the lives of the people it represents. It also made available information on the Commission's investigation to its constituents.

6 Government stakeholders, including the national Department of Social Development (primarily through a representative of that department on the Commission's advisory committee);[31] the national Department of Health;[32] and the Department of Women, Children and People with Disabilities.[33] The Department of International Relations and Cooperation was included in discussions on the need to legislate in accordance with the requirements of the CRPD.[34]

7 The Commission, in response to the request to take into account the requirements of the CRPD, focused on including persons with disabilities and their organisations in the additional consultation process. A general workshop was held on the compatibility of the SALRC's amended proposals, which was attended by representatives of a number of disability organisations.[35] In addition, the following organisations in particular assisted the Commission though their comment and input at that stage of the investigation: the SAHRC; the Centre for Disability Law at the University of the Western Cape; Ubuntu; and the Legal Resources Centre.[36]

---

29 Twenty-nine representatives attended the meeting where the Commission's draft proposals were explained. See particulars in ANNEXURE 10. No written comment was received in response to the Commission's invitation to attendees to respond to its proposed draft Bill (including explanatory background information) that was distributed to attendees both before and after the meeting.

30 See ANNEXURE 11.

31 The late Ms Thuli Mahlangu, Director Older Persons.

32 See ANNEXURE 13.

33 See ANNEXURE14.

34 See ANNEXURE 15.

35 See ANNEXURE 17.

36 See ANNEXURES 18 and 19.

8 Finally, advisory committee members and the researcher, throughout the investigation and on invitation, attended and gave presentations on the envisaged reform at various meetings, seminars and workshops. These events were held by support groups, residential institutions[37] and organisations representing the interests of persons with decision-making impairment – whether they be the elderly or persons with specific medical or mental conditions. This in turn resulted in continual public dialogue, which informed the formulation of the Commission's final recommendations.

1.16 An expert advisory committee was appointed by the Minister of Justice and Constitutional Development for the duration of the investigation. This committee guided the research and development of the proposed draft legislation included in this Report, and was throughout involved in the consultation process. The committee, under the leadership of Judge Ben du Plessis, consisted of Prof Jan Bekker, the late Ms Thuli Mahlangu, Adv Margaret Meyer, Dr Salumu Selemani[38] and Mr Lage Vitus. Since 2001, various members of the SALRC were designated by the Commission as members of the advisory committee. Members so included were Ms Z Seedat, Judge Yvonne Mokgoro, and Ms Thina Siwendu.

E Acknowledgement

1.17 The Commission and advisory committee would like to sincerely thank everyone who took part in the consultation process. It would in particular like to recognise the role of persons with disabilities, their families and carers; the co-operation of the Masters Division; the assistance it received from experts in South Africa, and from the Netherlands and Scotland; and the interest and support of many dedicated individuals, support groups and organisations.

---

37 See ANNEXURE 8, for instance.

38 Dr Selemani's resignation was accepted in October 2011 when he accepted a position in Canada which made it impossible for him to further partake in the work of the committee.

1.18 Adv Margaret Meyer, representative of the Masters Division on the advisory committee, took part in the Commission's formal consultations and participated in the development of the proposed draft legislation. Her extensive knowledge of practice and procedure pertaining to the common law curatorship system and its inherent problems assisted the committee and contributed to the development of its recommendations. The Commission extends its appreciation to her for her continued support and involvement, and to the Masters Division and Justice College for making Adv Meyer available to assist the Commission.

F Structure of this report

1.19 The Report consists of seven Chapters, and includes the Commission's proposed draft Bill on Supported Decision-making.

1.20 In ***Chapter 2*** we give an overview of the need for reform with reference to the current law and its problems; the national and international context in which the reform is being proposed and which influences the need for change; and a brief description of the Commission's recommendations, with its underlying motivation and envisaged cost implications. Because of the significant impact of the CRPD on the Commission's recommendations, in ***Chapter 3*** we provide comprehensive information on the CPRD, the Convention's provisions relevant to this investigation, and the Commission's suggested premise for reflecting the CRPD's legal capacity requirements. Our discussion then chronologically follows the content of the proposed draft legislation. We discuss the fundamental concepts underlying the proposed system in ***Chapter 4***. Measures for support in exercising legal capacity are dealt with in ***Chapter 5***. ***Chapter 6*** comprehensively addresses the need for introducing the enduring power of attorney into South African law, and its recommended regulation. The draft Bill on Supported Decision-making is included in ***Chapter 7***.

CHAPTER 2
NEED FOR REFORM AND OUTLINE OF RECOMMENDATIONS

Introduction

2.1 In addition to shortcomings in the current legal position and the strong public support for change, the wider context against which the investigation has been conducted emphasises the need for reform.

2.2 The past two decades have been marked by significant changes in social values and attitudes about elderly and persons with disability. A greater awareness of the needs of these groups is partly the result of the worldwide "graying" of the population, and the growth in the number of persons with disability.[39] This heightened awareness has been reflected in international instruments,[40] which in turn have influenced law reform aimed at assisted decision-making in many comparable jurisdictions.[41] The United Nations Convention on the Rights of Persons with Disabilities (CRPD), in particular, contains far-reaching requirements with regard to legal capacity issues.[42] Our investigation took place against the background of extensive investigation and law reform on issues related to assisted decision-making, including such activities in England, Scotland, Ireland and

---

39 Medical advances not only play a significant role in the greying of the population world-wide but also contribute to the rapid increase in the number of younger adults with neurological injuries who survive motor vehicle accidents (which is believed to become the third most common cause of death and disability worldwide over the next 20 years). Several studies have moreover indicated an increased incidence of intellectual disability. Refer to SALRC Discussion Paper 105 2004 par 3.10-3.12;

40 The United Nations recognised the need to protect the rights of persons with disabilities and the elderly since its earliest pronouncements on these issues (United Nations **Declaration of General and Special Rights of the Mentally Handicapped,** 1971; and United Nations **International Plan of Action on Ageing**, 1982). The principles of normalisation (i e treating persons with disabilities as much like other people as possible), respect for human dignity, and protection from exploitation and abuse, were in particular emphasised with regard to persons with disability. In respect of the elderly the principles of independence, participation, self-fulfilment and dignity were consistently highlighted in these pronouncements. Refer to SALRC Discussion Paper 105 2004 par 3.4.

41 Refer to SALRC **Discussion Paper 105** 2004 par 3.6-3.8.

42 See Chapter 3 below.

Australia over the past 20 years.[43] Similar developments have taken place in a number of European jurisdictions, including the Netherlands.[44] In some of these countries, completely new systems of assisted decision-making have been introduced. In several comparable jurisdictions the concept of the enduring power of attorney was introduced in the 1980s and has since been refined and further developed.[45] The Commission was fortunate in that it could gain from the experience in these jurisdictions.[46] More recently, the implications of the CRPD have come to be considered in a number of jurisdictions.[47]

2.3 Coupled with the above global scenario, certain developments in our own society emphasise the need for initiatives to deal with the challenges that face persons with decision-making impairment, as well as their families and carers. Such developments include the growing number of persons with decision-making impairment,[48] constitutional considerations,[49] related law and policy developments,[50] the anthropological position regarding mental illness in African societies,[51] and the growing change in the

---

43 English Law Commission **Report No 231** 1995; Queensland Law Reform Commission **Report No 49** 1996; Scottish Law Commission **Report No 151** 1995; Ireland Law Reform Commission **Report 83** 2006).

44 See Blankman et al, and Oomens et al with regard to the current systems of assistance in the Netherlands.

45 See eg New Zealand Law Commission **Report 71** 2001; Alberta Law Reform Institute **Final Report No 88** 2003; Canadian Research Institute for Law and the Family **A Critical Review of the Legislation and Reporting Practices concerning Elder Abuse in Alberta** 2005; and Hong Kong Law Reform Commission **Report on Substitute Decision-making and Advance Directives in relation to Medical Treatment** 2006.

46 Refer to SALRC **Discussion Paper 105** 2004 for an exposition of the general reform trends in comparable jurisdictions (par 3.6-3.7); a summary of the reform in Scotland, England, Australia and the Netherlands with regard to alternatives for the curatorship or other common law systems (par 3.6-3.7, 5.3-5.7, 6.43-6.48); and the development of the enduring power of attorney in certain other jurisdictions (Chapter 7 of the Discussion Paper).

47 See eg Victoria Law Reform Commission **Report 24** 2012 (Guardianship).

48 See par 2.5 below.

49 Refer to SALRC **Discussion Paper 105** 2004 par 3.13-3.19; and par 2.42 et seq below.

50 Refer to SALRC **Discussion Paper 105** 2004 par 3.20-3.22 where attention is drawn to the fact that the paradigm shift as regards persons with disability and the elderly is also reflected in the latest changes to South African policy and legislation pertaining to mental health (Mental Health Care Act 17 of 2002), national health (National Health Act 61 of 2003) and the elderly (Older Persons Act 13 of 2006).

51 The significant role of family of the person with impairment should be recognised in law reform for it to reflect the anthropological position regarding mental illness in African societies (SALRC **Discussion Paper 105** par 3.23-3.24).

demographics of South African society.[52] Previous recommendations by the Commission to introduce the enduring power of attorney were not implemented. The present investigation once again underlined the need for the enduring power of attorney, and showed that its introduction is long overdue.[53]

2.4 In the context of imperatives for reform, the South African Government's National Development Plan 2030 (NDP) and the Draft National Disability Rights Policy 2015 need specific mention. The NDP offers a long-term perspective setting out goals for poverty reduction, economic growth and transformation, and job creation.[54] The NDP acknowledges that people with disabilities face multiple discriminatory barriers, and envisages that they must have equal opportunities with others.[55] The Draft National Disability Rights Policy aims at informing the development of disability-specific legislation in South Africa, with reference to the CRPD.[56] It emphasises the need for legislation and policies to recognise the right of persons with psychosocial and intellectual disabilities to equal recognition before the law.[57] In this regard, the draft Policy refers to the need for the development of supported decision-making legislation for persons with intellectual, psychosocial, and severe communication disabilities.[58] (The White Paper on the Rights of Persons with Disabilities subsequently published further suggested that the enactment

---

52 The disparity in wealth in South Africa calls for solutions to be developed in respect of both more complex and more simplified needs as far as management of financial affairs is concerned. In the case of indigent persons with disability, measures that are financially accessible are a dire and particular need. Urbanisation, migration of young people to cities, and smaller families impact on the availability of family to care for the elderly and for persons with disability, and increase the possibility of abuse and exploitation of such persons. The cumulative disadvantages experienced by women in general (including possible discrimination in the access to health care, inheritances, social security measures and political power) make women with decision-making impairment even more vulnerable in that they probably face a greater possibility to be subjected to abuse and exploitation (refer to SALRC **Discussion Paper 105** 2004 par 3.25-3.27).

53 The Commission in 1988 in its **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** recommended, amongst others, that the enduring power of attorney should be introduced into South African Law. See also par 2.29 below.

54 NDP 2030 1, 34 and 35.

55 Ibid 52.

56 SA Draft National Disability Rights Policy 2015 10. The Policy has since been published as the White Paper on the Rights of Persons with Disabilities, GN 230 in GG 39729 of 9 March 2016.

57 Ibid 81.

58 Ibid 86.

of such legislation should coincide with the review of substitute decision-making regimes.)[59]

2.5 The uncertainty about the number of persons with possible decision-making impairment in South Africa, against the backdrop of the worldwide rise in the number of such people in need of support, is of specific concern. The 2001 Census is the most recent official record reflecting the number of persons with disabilities in South Africa.[60] The 2001 Census recorded that 5% of the total population of (then) 44.8 million people were disabled. The age profile of the disabled population showed that disability increases with age. Of the approximately 11.7 million mature adults (aged 35–65), nearly 8% were reported as being disabled, of whom 6.7 % had intellectual disability. The Census further recorded that almost 5% of the total population were elderly persons (aged 65 and above), of whom 18% were disabled. Among these disabled elderly people, 2.7% had intellectual disability and 17.6% had multiple disabilities (which could include a combination of visual, intellectual, hearing, communication, emotional, and physical disability).[61]

2.6 The South African Government's Baseline Country Report to the United Nations on the implementation of the CRPD, released in April 2013, emphasises the current lack of adequate, reliable, relevant and recent information on the nature and prevalence of disability in South Africa, and the challenges in this regard.[62] According to the Baseline Report, the most recent Census results (2011) did not include data pertaining to psychosocial, neurological and/or emotional impairments. Excluding these impairments, the impairment prevalence for the entire South African population was 10,3%.[63] The Draft National Disability Rights Policy of 2015 (referred to in paragraph 2.4 above)

---

59 White Paper on the Rights of Persons with Disabilities, GN 230 in GG 39729 of 9 March 2016 (published subsequent to the Draft National Disability Rights Policy 2015) 89.

60 The last national census was conducted in 2011. Questions on disability in this census were however replaced by general health and functioning questions, and due to a change in the questions, 2011 results cannot be compared with the previous censuses of 1996 and 2001 (SA Baseline Country Report: UN CRPD vi).

61 Census 2001 **Stages in the Life Cycle of South Africans** 1, 117, 140, 156 and 169. See also SALRC Discussion Paper 105 2004 par 3.9 – 3.12 for more information on the causes of decision-making impairment.

62 SA Baseline Country Report: UN CRPD v – x, 77.

63 Ibid vi.

indicates that Statistics South Africa has recently improved its approach of measuring disability with the aim of producing prevalence measures that are internationally comparable. The subsequently published White Paper on the Rights of Persons with Disabilities confirms the current lack of accurate data on the prevalence of disability in South Africa.[64]

2.7 Dementia[65] is now regarded as one of the major causes of disability in older people worldwide.[66] According to recent estimates there are approximately 44 million people with dementia worldwide, 60% of whom live in low- and middle-income countries. This percentage is expected to rise to 71% by 2050.[67] Little, however, is known about the prevalence of dementia in low- and middle-income countries in Sub-Saharan Africa specifically, including South Africa. Overall, earlier studies reported a lower prevalence in these countries, while more recent studies suggest that the prevalence might be similar to that in Western countries.[68] There is indeed a paucity of published research on the prevalence of dementia in South Africa. A 2010 University of the Free State pilot research study reported a higher than expected preliminary prevalence of approximately 6% in a small sample of 200 older persons in an urban black community.[69] The researchers pointed out that people in low- and middle-income countries are now living longer and the sector of those above 65 years of age (who are most susceptible to

---

64 SA Draft National Disability Rights Policy 2015 51; White Paper on the Rights of Persons with Disabilities, GN 230 in GG 39729 of 9 March 2016 (published subsequent to the Draft National Disability Rights Policy 2015) 22 et seq.

65 Dementia is a syndrome, usually of a chronic or progressive nature, caused by a variety of brain illnesses that affect memory, thinking, behavior and ability to perform every day activities. Alzheimer's disease is the most common form of dementia and possibly contributes to the majority of cases of dementia. Even in the early stage (the first year or two of the illness) a common symptom is that the person concerned will have difficulty making decisions and handling personal finances. Dementia mainly affects older people, but is not a normal part of ageing. No treatments are currently available to cure or alter the progressive course of dementia (WHO Report on Dementia 2012 2, 7, 8; WFMH "Mental Health and Older People" 2013 15-16).

66 WHO Report on Dementia 2012 2; WHO Fact Sheet on Dementia March 2015.

67 De Jager et al 2015 SAMJ 189. See also the estimates reflected in reports and information distributed by Alzheimer's Disease International (Alzheimer's Disease International Policy Brief 2013-2050 3-5) and the World Health Organisation (WHO Fact sheet on Dementia March 2015).

68 Olaniyi et al 2014 International Journal of Alzheimer's Disease par 5; De Jager et al 2015 SAMJ 189.

69 De Jager et al 2015 SAMJ 189; "Higher than expected prevalence of dementia in South African urban Black population" Media Release by the University of the Free State 21 September 2010 (www.ufs.ac.za accessed 1/6/2015).

dementia) is growing. They believe that later studies will confirm the preliminary findings of the pilot study.[70]

2.8 According to information supplied by the Chief Master of the High Court, the major users of the current common law curatorship system are people with mental illness, people with dementia, and people with acquired brain injury. The administrator procedure in terms of Chapter VIII of the Mental Health Care Act 17 of 2002 (as referred to in paragraph 2.34 below), is used less frequently and mainly by persons with mental illness or advanced-stage dementia.[71] The table below shows the number of appointments, countrywide, for *curators bonis* in terms of Rule 57 of the Uniform Rules of Court, and for administrators in terms the Mental Health Care Act, for the period 1 September 2013 to 31 August 2014.

CURATORSHIP AND ADMINISTRATOR APPOINTMENTS:

1 SEPTEMBER 2013 – 31 AUGUST 2014[72]

No	Master's Office	Number of curatorships	Number of administration
1	**Bisho**	2	3
2	**Bloemfontein**	17	7
3	**Cape Town**	196	32
4	**Durban**	24	42
5	**Grahamstown**	18	0
6	**Johannesburg**	45	97
7	**Kimberley**	5	1
8	**Mahikeng**	0	0
9	**Mthatha**	1	0
10	**Nelspruit**	0	0
11	**Pietermaritzburg**	41	2

---

70 Lisa Steyn "Dementia: SA's hidden disease" Mail and Guardian 8 October 2010 (http://mg.co.za accessed 1/6/2015). As far as we could ascertain, results of later studies, if any, have not been published at the time of preparation of this report.

71 Information on the use of the available support systems provided by Adv Margaret Meyer, Advisory Committee member on behalf of the Chief Master at the time of compilation of this report. For information on the common law curatorship system and the administrator system see par 2.26 et seq and 2.34 respectively.

72 Data released to the SALRC by the Chief Master of the High Court, March 2015.

12	**Polokwane**	0	0
13	**Port Elizabeth**	8	16
14	**Pretoria**	139	7
15	**Thohoyandou**	0	0
	TOTAL	**496**	**207**

2.9 Although reliable, formal statistical information to support the need for reform is not available in South Africa, the figures in the preceding paragraph suggest that relatively large numbers of persons access the currently available decision-making support systems. One might also assume that not all people who need this type of support currently access it. The Commission is aware that family members informally support persons with decision-making impairment in many instances. Family members also proceed with supporting such persons on the basis of ordinary powers of attorney, despite the fact that many of these powers have lapsed due to the subsequent decision-making impairment of the principal who granted the power.[73] The need for the proposed reform has, most pertinently, been brought to the Commission's attention through the contact that its advisory committee and researcher had during the extensive consultation process with family members, carers, and representatives of persons with disabilities – either through responses to the Commission's research papers, or by attendance at workshops, discussions with interest groups, and presentations to various organisations representing the interests of persons with specific disabilities relevant to decision-making impairment. This contact inevitably involved a sharing of problems and needs, and a resultant focus on the insufficiency of current law to satisfactorily meet the needs of the public. In addition, a constant stream of informal enquiries was directed to the Commission's advisory committee members and researcher by family members and care organisations, throughout the investigation, regarding the problems faced by persons with decision-making impairment. The lack of current law to adequately provide solutions has been illustrated by these enquiries on virtually a daily basis. In most instances the enquiries related to the public's need for a mechanism to plan, in advance, for future decision-making impairment. Also, the inaccessibility of the common law curatorship system because of its prohibitive costs (which places this system beyond the

---

73 The ordinary power of attorney and its shortcomings in the context of support with decision-making is discussed in par 2.40 et seq below.

reach of most South Africans) has been strongly brought to the Commission's attention. The limited application sphere of the more accessible statutory administrator procedure aggravates the problem.[74]

2.10 The Commission is satisfied that its consultation process, over an extensive period of investigation, supports the conclusion that there is an overwhelming need for the legislative reform proposed in this report.

A Current law

2.11 The current position is set out, having regard to the pivotal role that legal capacity plays in the CRPD. (We retain the common law terms in this discussion.)

1 Common law position with regard to legal capacity

"Legal capacity" in the context of "legal status"[75]

2.12 The current position regarding "legal capacity" is determined by the common law, and must be understood against the broader background of "legal status".

2.13 A person's status refers to his or her overall legal position in relation to other persons and the wider community – the aggregate of a person's rights, duties and capacities. With regard to legal capacity, four main categories can be distinguished: The capacity to have rights; the capacity to exercise rights; the capacity to litigate; and the

---

74 The administrator procedure in terms of Chapter VIII of the Mental Health Care Act, 2002 is available only to persons who are "mentally ill" or who has a "severe or profound intellectual disability" as defined in the Act. Persons who need decision-making support as a result of, for instance, a stroke, or brain injury fall outside the ambit of these definitions and the administrator procedure is thus not available to them. See par 2.34.

75 For the general legal position regarding status and capacity, see *Wille's Principles of South African Law* 145-147; Heaton in *Boberg's Law of Persons and the Family* 65-75; Hosten et al 557-561; Cronje 33-35

capacity to incur delictual or criminal responsibility. Two of these are important for present purposes:

- The capacity to *have* rights and duties ("regsbevoegdheid"). This is also referred to as "passive" legal capacity, as this capacity attaches to and is common to all persons, although the extent of rights and obligations that a person has may vary. The manner in which rights attach to a person also varies; some rights are inherent to all persons, some are conferred by the state, and others are attained through a variety of juristic acts.
- The capacity to *perform* a valid juristic act, thus acquiring rights or obligations (that is, to enter into legal transactions to which the law attaches at least some of the legal consequences willed by the party or parties performing the act). This is also referred to as "active" legal capacity or the capacity to act ("handelingsbevoegdheid") and, in contradistinction to passive legal capacity, it does not attach to every person. Some persons can exercise active legal capacity unaided, some can do so only with assistance. ("Assistance" is here used in a broad sense: some persons with a lack of full active capacity can still perform juristic acts if another person assists them, whereas others who lack active capacity cannot perform juristic acts and must be assisted by another person performing the act on their behalf.)

2.14 In terms of South African law, the status and capacities of an individual depend on, or are influenced by, a number of factors (circumstances in which the person finds him- or herself. These factors vary from one person to another. They include nationality, domicile, age, illegitimacy, adoption, mental disability, prodigality, insolvency, and marriage. Some factors (such as age) exert their influence primarily in relation to active legal capacity; others (such as legitimacy) determine the complex of rights and duties that can in law attach to the person concerned. As indicated below, mental disability in particular influences a person's capacity to perform juristic acts – that is, his or her active legal capacity.

2.15 A significant feature of legal status is that the state alone can confer, revoke, or alter the status of any person. This it does either by giving effect to certain facts over which the person whose status is in question has little or no control (such as birth, age or

mental disability); or by requiring state co-operation for entry to a particular class of persons. An example of the latter scenario is that a married couple cannot, by their own act, alter or terminate their status as married persons; this change can be effected only by the death of one spouse, or by the state in the form of a divorce order.[76]

The influence of mental disability on legal capacity

2.16 The legal capacity of persons with mental disabilities is determined by common law principles as extended by the Courts, and is not regulated by legislation. The principles are the same, irrespective of how the impairment was caused.[77] (The care, treatment, and rehabilitation of mentally ill people are governed by the provisions of the Mental Health Care Act 17 of 2002, and are not discussed in this document.)

2.17 According to common law, a person lacks active legal capacity ("handelingsbevoegdheid") if he or she is "generally unable to manage his or her affairs". With reference to specific juristic acts, a person completely lacks capacity if he or she is "incapable of understanding the nature and consequences of the particular act".[78] A person who completely lacks active legal capacity cannot perform valid legal transactions. The motivation behind this is that the use of reason is the principal requirement for taking part in legal and commercial transactions.[79] This restriction is not punitive but is aimed at protecting the person concerned against exploitation.[80]

2.18 Legal transactions entered into by persons who lack active legal capacity are void from the outset and cannot be ratified and thus validated, whether the other party was aware of the lack of legal capacity or not. A person who lacks active legal capacity

---

76 *Wille's Principles of South African Law* 147 and the sources quoted.

77 *Wille's Principles of South African Law* 218; Cronjé and Heaton 33-35, 113-121; Heaton in *Boberg's Law of Persons and the Family* 105 et seq.

78 *Pheasant v Warne* 1922 AD 481 at 488; *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A). This test was extended in *Lange v Lange* 1945 AD 332: A person is also regarded as lacking capacity if he or she indeed understood the nature and consequences of the transaction in question, but was motivated or influenced by insane delusions caused by a mental disease (see also Cronjé 106).

79 *Molyneux v Natal Land & Colonization Co Ltd* [1905] AC 555(PC) at 561.

80 Cronje and Heaton 113.

cannot enter into legal transactions even with the assistance of another, for instance his or her curator. An authorised person, in most instances a curator, must perform juristic acts on behalf of a person who has a complete lack of active legal capacity. This is so even where he or she acquires only rights and the other party incurs only duties.[81]

2.19 Whether a person lacked capacity at a certain point in time is a question of fact to be determined by the circumstances of the specific case.[82] Generally, persons are presumed to have active legal capacity until the contrary is proved.[83] A lack of capacity must be alleged and proved before a Court in order that it may decide the issue. The onus is upon the person alleging lack of capacity to prove this allegation.[84] Direct evidence of a person's mental condition at the time when he or she entered into a particular transaction is seldom available, and whether a person lacked capacity at a specific point in time mostly has to be proved through medical or psychiatric evidence.[85]

2.20 In light of the above, many persons with mental disability will as at common law lack active legal capacity. The judicial declaration (see paragraph 2.21 et seq below) that a person is "of unsound mind and as such incapable of handling his own affairs" is, however, not decisive.[86]

Judicial declaration that a person is of "unsound mind" and "incapable" of managing his or her own affairs

2.21 Under common law, the High Court has the power to declare a person to be of unsound mind and, as such, incapable of managing his or her affairs.[87]

---

81 *Molyneux v Natal Land and Colonization Co Ltd* [1905] AC 555(PC) at 561.

82 *Pienaar v Pienaar's Curator* 1930 OPD 171 at 174-175.

83 *Lange v Lange* 1945 AD 332 at 343 et seq.

84 *Pheasant v Warne* 1922 AD 481 at 489; *Vermaak v Vermaak* 1929 OPD 13 at 15, 18.

85 Cronje 105. Cf also Heaton in *Boberg's Law of Persons and the Family* 109-110.

86 *Molyneux v Natal Land and Colonization Co Ltd* [1905] AC 555 (PC) at 561; *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669 at 673; *Pienaar v Pienaar's Curator* 1930 OPD 171 at 174-175. See also Heaton in *Boberg's Law of Persons and the Family* 106.

87 *Wille's Principles of South African Law* 372; Heaton in *Boberg's Law of Persons and the Family* 106-107; Cronjé in *LAWSA* par 390-391 and the authorities referred to.

2.22 Under the heading *de lunatico inquirendo*, Rule 57 of the Uniform Rules of Court prescribe the procedure to be followed to obtain such an order.[88] The application is usually brought by next-of-kin, but can be brought by any person with a sufficient interest in the person concerned. The person against whom the declaration is claimed must be properly represented by a *curator ad litem.* The Court, after considering all the medical and other evidence, if satisfied that the person is of unsound mind and as such incapable of managing his or her own affairs, makes the declaration.[89]

2.23 In practice, a declaration under Rule 57 is usually accompanied by the appointment of a curator under the Court's common law power (referred to in paragraph 2.25 et seq below).

2.24 As stated previously, a judicial declaration that the person is of unsound mind is not decisive of whether the person has or lacks legal capacity. The question is one of fact, to be determined according to the circumstances of the particular case. A person may be found wanting in capacity although he or she has not been declared of unsound mind. Conversely, a mentally disabled person may be held bound by an act performed during a lucid interval. Judicial declaration does, however, affect the onus of proof in that it creates a rebuttable presumption of (legal) incapacity, shifting the burden of proof to the party who would hold the person bound by a transaction.[90]

2 Common law measures to supplement decision-making impairment

2.25 There are limited possibilities under current law to deal with impaired legal capacity. The High Court has the power, under common law, to supplement impaired legal capacity by appointing a curator to the person and/or property of an individual who

---

88 Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (Government Notice R48 in *Government Gazette* Extraordinary 999 of 12 January 1965 as amended).

89 Rule 57(1)-(11); see also *Wille's Principles of South African Law* 373.

90 *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 66 at 672-3. *Pienaar v Pienaar's Curator* 1930 OPD 171 at 174-5. See also Heaton in *Boberg's Law of Persons and the Family* 107; Cronje 104-105.

needs assistance. Statutory measures aimed at supplementing legal capacity are mainly found in the Mental Health Care Act 17 of 2002 (as indicated in paragraph 2,34 below). A few other Acts grant limited and specific powers with regard to assistance in specific situations.[91]

Curatorship[92]

2.26 Under common law, the High Court can appoint a curator to the person (*curator personae*) and/or property (*curator bonis*) of an individual who is incapable of managing his or her own affairs, whether by reason of mental illness or otherwise. (The latter category includes, for example, physical disability, old age, serious illness, mental weakness, or mental retardation).[93] The reason why a person cannot manage his or her own affairs is not important – the test is purely whether the person concerned is capable of managing his or her own affairs or not. There is thus no restricted number of categories of persons to whom curators may be appointed. It is not a condition precedent to the appointment of a curator that the Court should declare the person to be mentally ill.[94]

2.27 A ***curator personae*** is usually appointed to supplement an individual's lack of capacity related to his or her personal welfare, and can be appointed either generally or for specific purposes (eg to grant consent for a medical operation).[95] There are, however, limits to the scope of a *curator personae's* functions, as some acts are of too

---

91 This include, for instance, provision in the National Health Act 61 of 2003 for consent to medical treatment on behalf of a person who cannot give legally valid consent (sec 7-9); the Social Assistance Act 13 of 2004 for the South African Social Assistance Agency to nominate a person or welfare organisation to receive a social grant on behalf of an "incapacitated" individual (sec 15(3)); and in the Older Persons Act 13 of 2006 for surrogate consent to admission of an "incapacitated" older person to a facility providing accommodation and 24 hour service to older persons (sec 21(3)).

92 See for a full discussion SALRC Discussion Paper 105 par 6.3-6.10.

93 *Ex parte Dixie* 1950 (4) SA 748 (W); *Minister of the Interior v Cowley* 1955 (1) SA 307 (N). See also *Wille's Principles of South African Law* 376; Heaton in *Boberg's Law of Persons and the Family* 115, 131-135; Cronjé in *LAWSA* par 390-391.

94 Cf Rule 57(1) and (13); Erasmus et al B1389-397; *Herbstein and Van Winsen* 1136-1138; *Wille's Principles of South African Law* 225, 227.

95 *Ex parte Powrie* 1963 (1) SA 299 (W); *Ex parte Dixie* 1950 (4) SA 748 (W).

personal a nature to be performed by a legal representative (eg contracting a marriage, seeking a divorce, exercising parental power and making testamentary dispositions on behalf of the person under curatorship).[96] Note also that, because it involves an inroad upon the personal liberty of the person concerned, the Courts are reluctant to appoint a *curator persona* unless the circumstances clearly require it.[97]

2.28 A ***curator bonis*** can be appointed to take care of a person's property, and to supplement the person's ability to contract. A *curator bonis* is typically appointed when an individual is found to be incapable of managing his or her own financial or property affairs.

2.29 A ***curator ad litem*** can be appointed by the Court to conduct civil legal proceedings on behalf of a person. Where the appointment of a *curator personae* or *curator bonis* is sought, the normal procedure is to apply initially for the appointment of a *curator ad litem* to assist the person concerned in the application that will follow. A *curator ad litem*, who is usually an advocate of the High Court, has no power over the person or property of the person whom he or she is appointed to represent, and his or her authority extends no further than the proceedings to which the appointment relates.[98]

2.30 Appointment of a ***curator bonis*** or ***curator personae*** involves an application to the High Court, and can be brought by a member of the person's family or someone else who has an interest in the person or his or her property.[99] There are specific procedures to be adhered to as laid down in Rule 57 of the Uniform Rules of Court. A substantial degree of evidence is required before appointing a curator. The application must be supported by, among others, affidavits by at least two medical practitioners (one of whom must be a psychiatrist) reporting on the mental condition of the person concerned.

---

96 *Ex parte AB* 1910 TPD 1332; *Estate Watkins-Pitchford v Commissioner for Inland Revenue* 1955 (2) SA 437 (A) at 458. See also Cronje and Heaton 17.

97 *Ex parte Hill* 1970(3) SA 411(C) at 413A; see also Heaton in *Boberg's Law of Persons and the Family* 140-141.

98 *Wille's Principles of South African Law 380;* see also Rule 57(10) of the Rules of Court.

99 *Ex parte Derksen* 1960 (1) SA 380 (N).

The costs of the proceedings are usually paid out of the estate of the person concnerned.[100]

2.31 The exact scope of a curator's powers and duties depends on the specific terms set out in the relevant Court order. The powers are usually more general than specific. In the case of a *curator bonis*, the duties include submitting an initial inventory of the property he or she takes control of and annual accounts of the administration of the property to the Master of the High Court.[101]

2.32 Depending on the facts of a specific case, a person under curatorship retains active legal capacity to the extent that he or she is able to exercise it from time to time. Placement under curatorship does not in itself terminate active legal capacity. The person can therefore enter into a valid legal transaction with its normal consequences if, at a given moment, he or she is mentally and physically capable of doing so; the capacity to do so remains a question of fact. In *Pienaar v Pienaar's Curator*[102] it was stated as follows in this regard:

> Here again the curator is merely appointed to assist the person in making legal dispositions in so far as such assistance is necessary, according to the nature of the incapacity in question, but the person still retains his [or her] contractual and legal capacities and the administration of his [or her] property to the full extent to which he [or she] is from time to time mentally or physically able to exercise them.

Negotiorum gestio[103]

2.33 *Negotiorum gestio* is the voluntary management, in terms of the common law, of the affairs of another person without their consent or knowledge, and without any formal appointment or mandate. Some believe that management of the affairs of a person with decision-making impairment can be justified on the basis of this concept. We have been unable to find direct authority for this application of the principles of *negotiorum gestio* in

---

100 Refer to the requirements of Rule 57.

101 Refer to the Administration of Estates Act, 1965, secs 71, 72, 77 and 78.

102 1930 OPD 171 at 174-5.

103 Refer to SALRC **Discussion Paper 105** 2004 par 6.11-6.17.

South Africa. We accept, however, that this legal institution is used informally on a wide scale, in that relatives often simply start to manage the affairs of a person with decision-making impairment.

3 Statutory measures to supplement decision-making impairment

Administration of property under the Mental Health Care Act 17 of 2002[104]

2.34 Under the Mental Health Care Act 17 of 2002, a Master of the High Court may appoint an ***administrator*** to care for and administer the property of a person with mental illness or severe or profound intellectual disability who is incapable of doing so him or herself. The Act's provision for assistance is limited in the sense that it does not provide for assistance with regard to personal welfare. The assistance is moreover available to persons with "mental illness" or "severe or profound intellectual disability" only. Persons with decision-making impairment resulting from other causes will probably not be able to make use of this measure.[105]

2.35 The powers and duties of the administrator broadly correspond with the common law powers of a *curator bonis.*[106]

---

104 Sec 59-65 of the Act.

105 Sec 1 of the Act defines "*mental illness*" as "a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis"; and "*severe or profound intellectual disability*" as "a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care". A person with decision-making impairment as a result of, for instance, brain injury might not be able to access the measure. Significantly, some also accept that "mental illness" does not include impairment related to organic brain disease such as dementia (of which the most common form is Alzheimer's Disease).

106 Mental Health Care Act, 2002 sec 65.

Support with regard to medical treatment decisions[107]

2.36 Generally speaking, where a person does not have the required capacity to consent to medical treatment, consent must in terms of common law be given by a *curator personae* appointed by the High Court to the patient concerned. The National Health Act 61 of 2003 allows surrogate consent by a person mandated in writing by the patient to grant consent, or by a person authorised in terms of any law or Court order. Where no person is so mandated or authorised, the required consent may be given by the spouse (or partner), or by certain close relatives of the patient concerned.[108] Both the common law and the National Health Act also allow for emergency treatment of persons who cannot consent.[109]

2.37 Statutory provision for decision-making assistance with regard to specific treatment procedures or circumstances includes the following:

- Consent to medical treatment for mental patients, for illness other than mental illness, may be given by a curator, spouse or certain close relatives of the patient. Alternatively, the head of the health establishment where the patient resides may grant consent.[110] (Note that we are not concerned in this Report with consent for mental health treatment of mentally ill individuals. This aspect is regulated by mental health legislation.)
- Consent to sterilisation may under specified circumstances be given by a curator, spouse, parent or guardian of the individual concerned.[111]
- Consent to termination of pregnancy may, under specified circumstances, be given by her natural guardian, spouse, or legal guardian of the individual concerned. If such people cannot be found, her *curator personae* can consent.[112]

---

107 Refer to SALRC **Discussion Paper 105** 2004 par 4.15-4.24 and 6.26-6.28.

108 Sec 6 and 7 of the Act; refer also to SALRC **Discussion Paper 105** 2004 par 4.18, 6.26-6.27.

109 Sec 7(1)(e) of the Act; see SALRC **Discussion Paper 105** 2004 par 4.15.

110 Reg 37 of the General Regulations published under the Mental Health Care Act, 2002 Government Notice No 1467 in ***Government Gazette*** 27117 of 15 December 2004. See also SALRC **Discussion Paper 105** 2004 par 4.19.

111 Sec 3 of the Sterlisation Act 44 of 1998.

112 Sec 5 of the Choice on Termination of Pregnancy Act 92 of 1996.

2.38 It should be noted that the National Health Act expressly disallows surrogate consent for participation in medical research,[113] as well as for the removal of tissue, blood and blood products from living persons.[114] Although surrogate consent for organ donation *after* death is allowed to be given by the spouse or a close relative of the deceased, it is allowed only if the deceased had not, prior to death, forbidden such consent.[115] (This scenario would not occur in the case of a deceased person who had not possessed the mental capacity to forbid organ donation.[116])

2.39 Surrogate consent for cessation of medical treatment in respect of a person with decision-making impairment, under those circumstances where cessation of treatment is currently allowed in terms of South African law in the context of terminal illness, would have to be given by a *curator personae* appointed by the High Court for this purpose.[117] Although the National Health Act 2003 confirms the right to refuse medical treatment,[118] the Act does not deal with surrogate consent on behalf of individuals with decision-making impairment in the context of terminal illness.[119]

---

113 Sec 71 of the National Health Act 61 of 2003. See also SALRC **Discussion Paper 105** 2004 par 4.20.

114 Sec 55 and 56 of the National Health Act 61 of 2003. Refer to SALRC **Discussion Paper 105** 2004 par 4.21.

115 Sec 62 of the National Health Act 61 of 2003. Refer to SALRC **Discussion Paper 105** 2004 par 4.21.

116 Refer to SALRC **Discussion Paper 105** 2004 par 4.21.

117 Refer to SALRC **Discussion Paper 105** 2004 par 4.22-4.24.

118 Sec 6(d).

119 The Commission in its Report on Euthanasia and the Artificial Preservation of Life proposed that it is desirable to gain statutory recognition for living wills, and enduring powers of attorney authorising certain end-of-life-decisions, under particular circumstances (SALRC **Report on Euthanasia and the Artificial Preservation of Life** 1998 154 et seq and 185 - the Report is available at http://www.doj.gov.za/salrc/index.htm). These recommendations have not been implemented. The matter is not revisited under the current investigation (refer to SALRC **Discussion Paper 105** 2004 par 4.24).

4 Ordinary power of attorney[120]

2.40 A power of attorney is a declaration in writing by one person (the principal) that another (the agent) shall have the power to perform, on his or her behalf, such acts as are set out in the declaration. The scope of the agent's authority is determined by the terms of the power – it can either be general and wide or limited to the performance of a specific act. Although a power of attorney is by nature and form a written document, there is no general law prescribing formalities for powers of attorney.

2.41 Under common law, a power of attorney terminates once the principal becomes "mentally incapacitated". The problems caused by this rule have led to the development in many other jurisdictions of a mechanism that survives the subsequent disability (impaired decision-making ability) of the principal, namely the *enduring* power of attorney. The Commission recommended in 1988 that the enduring power of attorney (covering financial and property-related decisions) should be introduced into our law. The government did not implement these recommendations.[121]

5 Constitutional considerations

2.42 The Constitution of the Republic of South Africa, 1996 (the Constitution) "is the supreme law of the Republic; law or conduct inconsistent with it is invalid…".[122] The Constitution, and in the present context the Bill of Rights[123] in particular, provide an overarching framework of rights and values that has a marked impact on matters of status and capacity. Mentally and physically disabled people are, together with everyone else, entitled to the full protection and empowerment of the Constitution. If any of their rights enshrined in the Bill of Rights are to be limited, this can be done only in

---

120 Ibid par 3.28 and 7.1-7.29.

121 No official reasons are available for this. However arguments raised against the introduction of the concept (including the fear for abuse of the concept; and its perceived limited application because it would not be available to persons with existing decision-making impairment) might have played a role (refer to SALRC **Discussion Paper 105** 2004 par 3.28).

122 Section 2 of the Constitution.

123 Chapter 2 of the Constituion.

accordance with the Constitution.[124] That persons with disbility are entitled to the full protection and empowerment of the Constitution is fortified by, for instance, section 9(3), which protects "anyone" against unfair discrimination on the ground of "disability" (regarded as sufficiently wide to include both physical and mental disability).[125]

2.43 The common law and current statutory position regarding legal capacity, as set out in paragraphs 2.12 et seq above, must thus conform to the Constitution and must be understood in that light. For present purposes, the values of equality and dignity that are enshrined in the Constitution's sections 9 and 10, as well as the right to bodily and psychological integrity (section 12), and the right to privacy (section 14), are of particular relevance.[126]

2.44 Section 9(1) confers the right to equal protection and benefit of the law. This provision has not yet received significant judicial attention in the disability context.[127] Generally, section 9(1) is regarded as protecting the equal worth of bearers of the right. As such, the right does not necessarily entail a right to identical treatment. It is a right to have one's equal worth with others respected, protected, promoted, and fulfilled.[128] Because their equal worth must be recognised and respected, persons who are or have been disadvantaged by circumstances beyond their control (which would include mental

---

124 Section 36 of the Constitution.

125 Cf *S v Makwanyane* 1995 (3) SA 391 (C) par [230]. See also sec 6 of the Promotion of Equality and Prevention of Discrimination Act 4 of 2000 which provides that "[N]either the State nor any person may unfairly discriminate against any person". See also the discussions by Cockrell in *Bill of Rights Compendium* 3E-43; and De Vos in *The Principle of Equality - A South African and a Belgian Perspective* 153-154.

126 Other constitutional rights relevant to persons with disabilities, which are not discussed in this report, may include the rights to freedom and security of the person (sec 12(1) provides that everyone has the right to freedom and security of the person); privacy (sec 14 provides that everyone has the right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized, or the privacy of their communications infringed); property (sec 25(1) provides that no one may be deprived of property except in terms of law of general application; and no law may permit arbitrary deprivation of property); and social security (sec 27(1)(c) provides that everyone has the right to have access to social security while sec 27(2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right).

127 While "disability" is a listed ground of equality protection, no definition of "disability" is provided in the Constitution and the Courts have yet to elucidate a theory of disability equality (Bhaba 2009 *SAJHR* 230). In the only case which reached the Constitutional Court in which disability was relied on as a ground of equality (*Hoffman v South African Airways* referred to in par 3.27 below), the Court did not pronounce on this issue (Ibid).

128 Rautenbach in *Bill of Rights Compendium* 1A-105. Compare sec 10's emphasis on "intrinsic" worth (*Ibid* A1-120) and par 3.27 below.

disability), must sometimes be treated differently from others, so as to overcome or address their disadvantage. Equality, in the context of disability, indeed often requires preferential treatment.[129] This principle is expressly recognised in section 9(2).[130]

2.45 Sections 9(3) and 9(4) prohibit unfair discrimination, whether direct or indirect, against persons with disability. In this context, "unfair" distinguishes between permissible and impermissible discrimination.[131] Measures that fail to recognise and address the needs of vulnerable groups, which would include persons with mental and physical disabilities, may be "unfair" in that they could perpetuate and exacerbate existing disadvantages.[132] By the same token, a failure to assist disadvantaged people may amount to unfair discrimination. The question whether a person or persons have been unfairly discriminated against will be answered with reference to policy considerations, including "institutional aptness, functional effectiveness, technical discipline, historical congruency, compatibility with international practice and conceptual sensitivity".[133]

2.46 The right to equality is closely related to and intertwined with the right to dignity.**[134]** According to section 10, everyone has inherent dignity and the right to have their dignity respected and protected. Whereas the right to equality protects the *equal*

---

129 Rautenbach in *Bill of Rights Compendium* 1A-105. See also Bhaba 2009 *SAJHR* 243 where he in particular discusses disability equality.

130 Sec 9(2) provides that "… to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken". The Constitutional Court has made it clear that substantive equality (which is concerned with context and result equality rather than mere neutrality) is what is required in terms of section 9. Substantive equality sometimes requires identical treatment, sometimes different treatment. Approaches that are difference-blind and enforce universal norms and values in the name of equality are often considered overly formalistic and can, at times, be discriminatory themselves (see eg *Brink v Kitshoff* 1996(4) SA 197 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par [44]. See also the discussion of sec 9 in the disability context by Bhaba 2009 *SAJHR* 233.

131 Kentridge in *Constitutional Law of South Africa* 14.5(a); De Vos in *The Principle of Equality - A South African and a Belgian Perspective* 143-145.

132 De Vos in *The Principle of Equality - A South African and a Belgian Perspective* 143-145 with reference to the Constitutional Court's interpretation in *Brink v Kitshoff NO* 1996 (6) BCLR (CC) 752, par [42] on the scope and ambit of the prohibition against unfair discrimination in the corresponding provision (sec 8(2)) of the interim Constitution (Act 200 of 1993)).

133 *The National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) at par [122]; see also De Vos in *The Principle of Equality - A South African and a Belgian Perspective* 141.

134 *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) par [41]; *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) par [31]-[33]; *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) par [50].

worth of human beings,[135] the right to human dignity protects the *intrinsic* human worth of all people.[136] People qualify to be bearers of this right simply because they are human; the right is not earned and cannot be abandoned. People who are not capable of securing their self-fulfilment, whose intellectual capacity is impaired, who cannot exercise their own judgment, or who are not aware of their own human worth are bearers of the right to human dignity.[137] Everyone's intrinsic worth is reflected by the interests protected by all the other rights in the Bill of Rights, the free exercise of which comprises manifestations of human dignity.[138] It is also reflected in the constitutional duties of the state and all other persons and institutions to respect, protect, promote, and fulfil the rights of others.[139] In this sense, human dignity constitutes the cornerstone for the protection of all other rights.[140] In *Hoffmann v South African Airways*, the right to equality was applied in the context of discrimination on the basis of HIV/AIDS (a condition that is regarded by some as a disability).[141] Ngcobo J (as he then was) underscored the importance of the link between the rights to equality and dignity:

> At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests

---

135 See par 2.44 above.

136 *Thomas v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) par [35]; *Bhe v Magistrate Kayelitsha* 2005 (1) BCLR 1 (CC) par [48]. See also Rautenbach in *Bill of Rights Compendium* 1A-120**.**

137 *S v Makwhanyane* 1995 (6) BCLR 665 (CC) pars [271], [328]; *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) par [31]; *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) par [27]. See also Rautenbach in *Bill of Rights Compendium* 1A-120.

138 Rautenbach in *Bill of Rights Compendium* 1A-120.

139 Refer to sec 7(2) and 8(2) of the Constitution.

140 *S v Makwanyane* 1995 (6) BCLR 665 (CC) pars [144], [328]-[329]; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) par [120]. See also Rautenbach in *Bill of Rights Compendium* 1A-120; and De Vos in *The Principle of Equality - A South African and a Belgian Perspective* 142-143.

141 *HIV/AIDS and the Law* 68-69.

> of the victims of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.[142]

2.47 The right to bodily and psychological integrity, as conferred in the Constitution's section 12(2), also has special significance with regard to matters pertaining to impaired ability to make informed decisions.[143] "Integrity" embraces ideas of self-determination and autonomy, and section 12(2) aims to protect a person's self-determination with regard to body as well as mind against interference by the state and others.[144] The right to self-determination stems from the value of individual autonomy, which implies that we should be left alone to make choices about the kind of lives we want to lead. The following quote referring to Dworkin clearly expresses this sentiment:[145]

> The value of autonomy derives from the capacity it protects: the capacity to express one's own character - values, commitments, convictions and critical as well as experiential interests - in the life one leads. Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent - but in any case, distinctive - personality. It allows us to lead our own lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves.

The right to privacy protected in section 14 of the Constitution is in turn related to the right to freedom protected by section 12, and similarly affects persons with decision-making impairment.

---

142 2000 (11) BCLR 1211 (CC) par [27]. Bhaba (2009 *SAJHR* 234-235) in discussing disability equality in particular, however draws attention to the Constitutional Court's judgment in *Harksen v Lane* 1998 (1) SA 300 par [50] which interrogated the role of dignity as a defining feature of substantive equality: In order to determine whether unfair discrimination has occurred, numerous factors must be considered – the impairment of dignity is but one of them.

143 Sec 12(2) provides that everyone has the right to bodily and psychological integrity. Expressly included in this is the right not to be subjected to medical or scientific experiments without informed consent (sec 12(2)(c)). In the latter regard see also par 3 of the illustrative list of unfair practices contained in the Schedule to sec 29 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which includes "[s]ubjecting persons to medical experiments without their informed consent".

144 Cf Currie and Woolman in *Constitutional Law of South Africa* 39.6(c).

145 Ibid referring to Dworkin's description (Ronald Dworkin *Life's Dominion* 1993 225) of the value of autonomy.

2.48 The rights referred to in the previous paragraphs are not absolute, and may be limited in terms of section 36 of the Constitution, but only to the extent that the limitation is reasonable and justifiable.[146] Although the Constitutional Court indicated that no absolute standards could be laid down in this regard,[147] generally speaking this would mean that "the level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be".[148] The relevance of this point, in the context of assistance with decision-making, concerns (in particular) the right to autonomy and privacy as discussed in the previous paragraph. Although the law is usually not implicated in mundane decisions of everyday life, autonomy becomes a legal issue where it is in conflict with the legitimate interest that the community has in the ways other people lead their lives. If we are concerned that the choices which other people make are not in their own interest, it may be justified for the law to intervene.[149] When individual capacity and thus autonomy are, as a matter of fact, diminished or absent as a result of illness, age, or mental incompetence, the law may become implicated in the need to make decisions on behalf of the person concerned.[150] The recognition of a constitutional right to autonomy, however, means that intervention in other people's lives must be kept to a minimum.[151] In accordance with this principle, South African legal experts addressing this issue are unanimous in the view that in cases of diminished or absent ability to exercise autonomy the legally appointed decision-maker would be required either to assist in or to substitute her or his own judgment for the autonomous judgment that would have been made by

---

146 According to sec 36(1) of the Constitution, the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

147 *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) par 104.

148 Formulation of the Constitutional Court's approach in ascertaining whether it is justified to limit an entrenched right in terms of sec 36 by O'Regan J and Cameron AJ (as he then was) in *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC*)* par 69.

149 Currie and Woolman in *Constitutional Law of South Africa* 39.6(c).

150 Ibid.

151 Ibid. The view has, eg, been expressed that the exclusion of persons with unsound mind or those who are mentally disordered from voting (see sec 8(1)(c)-(d) of the Electoral Act, 1998) perhaps constitutes unfair discrimination in terms of sec 9(3) of the Constitution and might be overbroad since some persons with mental disability may be perfectly capable of voting. It has been suggested that provision should instead be made for such persons to approach a tribunal or a Court to prove their fitness to vote (De Waal in *Constitutional Law of South Africa* 23-16(b)(iii)).

the person concerned had he or she possessed the ability to make the decision in question.[152]

2.49 As indicated above, the common law recognises various restrictions that affect persons with mental disability. The most important restriction is that any juristic act a person has purported to perform, when his or her mental condition was such that he or she could not understand or appreciate the nature and consequences of the act, is null and void *ab initio*. This is generally not regarded as an unjustified violation of any of the rights of a mentally disabled person under the Bill of Rights.[153] It is argued that any limitation of rights which flows from these restrictions is justified in terms of the logic of the common law, which proceeds from the premise that a consenting mind is a prerequisite for the performance of juristic acts.[154] If the consenting mind is not present as a matter of fact, the person with disability cannot exercise the right to perform the act and must be assisted. It is therefore, as a general proposition, unlikely that the common law restrictions on the capacity of mentally disabled people would be found to be unconstitutional.[155] Particular restrictions might, depending on the relevant facts, be found to be unconstitutional.

2.50 It is also indicated above that South African law allows for the appointment of various types of curators for persons who are found to be incapable of managing their own affairs by reason of mental disability. The appointment of a *curator bonis* (who may be appointed to protect the proprietary interests of the mentally disabled person) can probably not be said to involve a deprivation of property for purposes of section 25(1) of the Constitution,[156] because it does not deprive the mentally disabled person of the capacity to own property.[157] The concomitant order declaring that the person "is of

---

152 Currie and Woolman in *Constitutional Law of South Africa* 39.6(c); Cockrell in *Bill of Rights Compendium* 3E-50; Heaton in *Boberg's Law of Persons and the Family* 137-138.

153 Cockrell in *Bill of Rights Compendium* 3E-44; cf also Heaton in *Boberg's Law of Persons and the Family 1*05.

154 Ibid.

155 Cockrell in *Bill of Rights Compendium* 3E-44.

156 Sec 25(1) provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

157 See *Pienaar v Pienaar's Curator* 1930 OPD 171 at 174.

unsound mind and as such incapable of managing his (her) affairs",[158] however, limits the person's capacity to perform legal acts ("handelingsbevoegdheid"), and as such infringes on several rights protected in the Bill of Rights.[159] It is clear that the appointment of a *curator personae* (who may be appointed to look after the personal welfare of the mentally disabled person), could involve an interfere with the person's constitutional rights to freedom of the person,[160] privacy,[161] and security in and control over their own body.[162] However, it is argued that since these restrictions are based on a finding[163] that the person is of "unsound mind and incapable of managing his own affairs", any of the constitutional rights of a person with mental disability that are attendant upon the appointment of a curator are likely to be regarded as justified, in terms of the Constitution's general limitation clause.[164]

2.51 South African law does not restrict the placing of a person under curatorship to situations where the person has a mental disability. As indicated above, a *curator bonis* may also be appointed where the person has any other condition which renders him or her incapable of managing his or her own affairs. For purposes of this report it is unnecessary to dwell on the Court's general power to appoint a curator. This report is concerned with assisting those whose ability to make informed decisions is impaired.[165]

6 The position of children with mental disability

2.52 One of the major differences between children and adults is that adults, as a rule, are responsible for managing their own affairs and making their own legally effective

---

158 See Rule 57(1) and (10)

159 Sections 9 (protection of equality) and 10 (protection of human dignity) of the Constitution are clearly relevant.

160 Sec 12 (1) of the Constitution provides that "everyone has the right to freedom and security of the person …".

161 Section 14.

162 Sec 12(2)(b) provides that "everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body…".

163 Uniform Rules of Court r 57(10) and (11). See also par 2.21 et seq above.

164 Cockrell in *Bill of Rights Compendium* 3E-48.

165 Ibid.

decisions. Where this is not possible because of skills impairment, one expects of the law to provide a solution to the situation, as indicated in paragraph 1.5 above. By contrast, all children need assistance, although in varying degrees (as discussed below) to manage their affairs and make legally effective decisions. This is the position irrespective of whether the child concerned has a disability.

2.53 A child's parent or legal guardian[166] generally assists or acts on the child's behalf.[167] In terms of the Children's Act 38 of 2005 (the Children's Act), which codified and to some extent amended the common law concept of parental authority, a parent with "parental responsibilities and rights" fulfils this role.[168] From birth to seven years, a child (known as an *infans*) is the bearer of rights, but has limited passive legal capacity and no active legal capacity.[169] Such a child cannot conclude any juristic act, even with the assistance of his or her parent or legal guardian; hence the parent or legal guardian acts for, or on behalf of, the i*nfans*.[170] A minor (that is, a person below the age of 18 years) who is older than seven years, has limited active legal capacity (the capacity to perform juristic acts), and must be assisted by a parent or legal guardian in performing such acts.[171] The High Court, as upper guardian of all minors within its area of jurisdiction, will exercise these responsibilities and make decisions pertaining to the child in exceptional circumstances.[172] In the case of children with impaired skills, the same rules apply and no specific or additional measures are needed to assist such children.

---

166 "Parental responsibilities and rights" include guardianship. Guardianship is currently regulated by the Children's Act. In terms of Sec 18(3) guardianship includes administration of a child's property and property interests; assistance of the child in administrative, legal, and other matters; and the giving or refusing of consent required by law (sec 18(3)(a) – (c)). A guardian may also be appointed in a will by a parent who is sole guardian of a child in the event of the parent's death. The appointment must be contained in a will made by the parent (Boezaart 80-81). The High Court can also appoint a guardian to a child under certain circumstances (see sec 24 of the Children's Act).

167 For an exposition of the law in this regard, see Schaffer E64-E65 on 55-56, and E66-67 on 57; Boezaart 20-23.

168 Shaffer E29 on 19-20.

169 Boezaart 20; Schaffer E66-67 on 57.

170 Boezaart 20; Schaffer E66-67 on 57.

171 Boezaart 23; Schaffer E66-67 on 57.

172 Schaffer E22 on24. This could occur typically where special circumstances indicate that the child's life, health, or morals are threatened by the exercise of parental responsibilities and rights, or where the responsible parent is unable to fulfil his or her responsibilities (Shaffer E32 on24).

2.54 With regard to protection provided by the Children's Act, the Act's definition of "care" (in relation to a child) should be noted. In terms of this provision, "care" includes guidance and assistance with regard to education appropriate to the child's "stage of development"; guidance and assistance with regard to "decisions" to be taken by the child; guidance of the "behavior" of the child; and accommodating any "special needs" the child may have.[173] It could thus be accepted that the definition of "care" includes attending to the needs of a child with disability. It should also be noted that one of the express objects of the Act is "to recognise the special needs that children with disabilities may have".[174] In addition, "any disability a child may have" must be taken into account in applying the "best interests of the child standard" in terms of the Act.[175] The Children's Act also expressly addresses the needs of children with disabilities in its section 11. This provision requires that in any matter concerning a child with disability, due consideration must be given to, among others, the following: Providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and providing the child and the child's care-giver with the necessary support services.[176]

2.55 The Children's Act further comprehensively deals with consent for the medical treatment of children. In terms of section 129, a child over the age of 12, if he or she is of sufficient maturity and has the mental capacity to understand the implications of the treatment, may consent to medical treatment.[177] Such a child may also consent to an operation when assisted by his or her parent or guardian.[178] Section 129(7) is of particular relevance as it provides for emergency medical treatment, and treatment where the required consent cannot be obtained (eg because the parent cannot be traced or is deceased). In the case of a child over the age of 12 who has a mental disability (ie who lacks full mental capacity to consent), and is in need of care, the Minister of Health could consent in terms of section 129(7), or the emergency procedure referred to could apply. The latter arrangements would also apply in respect of a child with disability below the age of 12 who is in need of care and protection. In addition, the High Court or a

---

173 Sec 1 par (e), (f), (g) and (i).

174 Sec 2(h).

175 Sec 7(1)(i).

176 Sec 11(1)(b) and (d).

177 Sec 129(3).

178 Sec 129(4).

Children's Court could consent in all circumstances where another person may consent but where such person is unable to do so.[179]

2.56 Where a child with disability does not have a parent to fulfil the care responsibility (eg where both parents are dead and the child is not cared for, or where a child with disability is in a child-headed household), section 150 of the Act addresses the needs of children in various circumstances of neglect. Section 150 deals with "children in need of care and protection" and does not distinguish between children who do or do not have disability. The protection provided for specifically includes the needs of children who have been abandoned or orphaned and lack any visible means of support, as well as children in child-headed households.[180] Anyone who reasonably believes that a child is a child in need of care and protection may report this to the provincial Department of Social Development, a designated child protection organisation, or a policy official.[181] The matter must be investigated, and proceedings for the protection of the child must be initiated as provided for in the Act.[182] This includes, for instance, placement of the child in foster care by a Children's Court.[183]

2.57 In view of the comprehensive protection provided by the Children's Act, the Commission accepted that it would not be appropriate to deal with issues regarding children with disability in the draft Bill. Any gaps which might exist in practice with regard to decision-making support for children cannot be attributed to a deficiency in the Children's Act that could have been suitably supplemented by the Commission's proposed draft Bill.

2.58 The protective provisions of the Children's Act are afforded to all persons under the age of 18. In terms of the common law, a child below the age of 18 can attain majority by reason of entering into a "valid marriage".[184] It is debatable whether a child under the age of 18, who attained majority through a valid marriage, remains a "child" for

---

179 Sec 129(9).

180 Sec 150(1)(a) and (2)(b).

181 Sec 110(2).

182 Sec 110(4)(d).

183 Sec 155(1) and 156.

184 Boezaart 18.

purposes of the Children's Act, or whether such a child loses the protection of the Children's Act.[185] The Commission is of the view that the support measures provided for in the draft Bill should indeed be available to such children.[186] Currently, a "valid marriage" could refer to a marriage by persons under 18 years of age in terms of section 26 of the Marriage Act, 25 of 1961, whereby a boy under 18 years and a girl under 15 years can contract a valid marriage under certain circumstances. The minimum age for a valid marriage is set by the common law as 14 years for boys and 12 years for girls.[187] Boys between 14 and 17 years and girls between 12 and 14 years could thus contract a valid marriage in terms of the Marriage Act. A "valid marriage" would currently also include a marriage of children under 18, in terms of section 3 of the Customary Marriages Act, 1998, under certain circumstances. No express provision is made for persons under 18 to enter into a civil union; however, it is argued that, on the grounds of equality, it is likely that similar relief should apply to civil unions.[188]

B Problems with current law

2.59 The range of problems faced by persons with decision-making impairment and by their families and carers was reflected in the public input gathered throughout the consultation process. Clearly there are shortcomings in the current law and the procedure. Our Discussion Paper 105 comprehensively sets out these shortcomings and underlines the need for a simplified, cost-effective and flexible system, and the need to introduce into our law the enduring power of attorney.[189] The main problems are summarised below.

---

185 Mahery and Proudlock 6.

186 See cl 3 of the draft Bill. See also cls 17 (1)(b) and 46(1)(b), and the definition of "principal" (for purposes of the enduring power of attorney) in cl 1.

187 Boezaart 19.

188 Mahery and Proudlock 24; see however the contrary view held by Boezaart 18. The position regarding Muslim and Hindu marriages has not been addressed by the legislature yet.

189 Refer to **SALRC Discussion Paper 105** 2004 par 2.1-2.6, 3.2-3.39, 6.29-6.39 and 7.36-7.39.

1 Specific problems with regard to curatorship[190]

2.60 There is no doubt that the curatorship system suffers from a number of serious and frustrating difficulties, and does not fulfil the expectation for a suitable structure of decision-making assistance. Outspoken criticism from the public (in particular, family members and carers of persons with decision-making impairment) confirmed this, and indicated that the curatorship system is almost certainly under-utilised as a result. Reasons for the system's under-utilisation were comprehensively identified in our discussion paper. The major reasons are as follows:[191]

- The current procedure requires an application to the High Court. The purpose of this is to protect the person with impairment. Court applications are, however, costly and the prescribed procedure could take a long time. Moreover, the average citizen feels intimidated by the prospect of having to approach the High Court. The cost involved (which is beyond the reach of most people and is especially not warranted in the case of smaller estates) has been identified by the Commission as specifically prohibitive.[192]
- Under the current procedure, the High Court "may declare the patient to be of unsound mind and incapable of managing his own affairs".[193] The Court also has the power to make "such order …. as to it may seem meet". In the vast majority of cases, the Court either declares the person with impairment to be of unsound mind and incapable of managing his or her own affairs, or it dismisses the application. For this reason people generally perceive the curatorship system as being unduly paternalistic, as it gives insufficient recognition to the principles of self-determination and autonomy. From a constitutional point of view, the Courts will probably be called upon in terms

---

190 See also SALRC **Discussion Paper 105** 2004 par 3.32, 3.33, 3.35 and 6.29-6.39

191 See also SALRC **Discussion Paper 105** 2004 par 6.29-6.39

192 Although the current Mental Health Care Act's introduction of assistance with regard to administration of property has brought some relief in this regard, its application is limited in more than one respect as indicated in par 2.33 above. (The public's views on the Act's success in practice in respect of the limited relief that it does provide has not been canvassed at it came into operation after presentation of the Commission's public workshops. From an in principle point of view, the Commission's advisory committee found it unacceptable that under certain circumstances the final decision about the appointment of an administrator is made by the Master while the Court's involvement in the process is nevertheless retained in a lesser respect in having to make a recommendation for such appointment (sec 60(8) and 60(12) of the Act)).

193 High Court Rule 57(10).

of section 39(2) of the Constitution to develop the common law so as to promote the spirit, purport, and objects of the Bill of Rights – particularly the principles of self-determination and autonomy that are fundamental to a supported decision-making system. From a law reform point of view, the Commission has identified the need to introduce a system of supported decision-making that, by its nature, gives recognition to the wide variety of needs that people with decision-making impairment have, and does things cost-effectively.

- Many family members and care-givers perceive the curatorship system as unduly invasive of the personal rights of their loved ones, and as unduly cumbersome.
- The curatorship system is under-utilised because people perceive it as impersonal and unsympathetic to the individual needs of persons with decision-making impairment.
- Some respondents fear the possibility of abuse and exploitation of the individual with decision-making impairment, by the curator. The scope for abuse and exploitation in cases involving the management of financial affairs is perceived to be even greater than in cases involving decisions about personal care and welfare.

2 Uncertainty and complexity

2.61 Our law has no single comprehensive source dealing with decision-making impairment. Where there is indeed provision for assistance, the law has to be found in the common law as well as diverse statutory provisions dealing mainly with mental health care and national health.[194] The criteria for making use of the current measures

---

194 Refer to the discussion on the common law and statutory measures in par 2.12 et seq above.

differ from each other, and the assistance provided for also differs.[195] In some instances, the current measures overlap with each other. That is, for certain individuals with decision-making impairment there may be a choice of measures, but for other people there is no – or no *clear* – provision with regard to their needs.[196] These factors add to the uncertainty and complexity of the current situation, which in turn contributes to the inaccessibility of the law for family members and carers of persons with decision-making impairment.

2.62 The *enduring* power of attorney is not part of South African law, but many members of the public mistakenly believe it is. Our consultations revealed that most family members and carers of persons with decision-making impairment were ignorant of the fact that a power of attorney lapses when the principal's ability to make decisions become impaired.[197] It seems to be widely believed that a power of attorney signed by a person in their care will be effective until that person dies. Family and carers thus continue to act in good faith, thereby putting themselves at risk of performing unauthorised acts for which they could be held personally liable. The fact that South African law lags far behind in this respect is also largely unknown among representatives of service providers and support organisations, who frequently interact with their counterparts in comparable jurisdictions where the enduring power is part of the applicable law. This adds to the confusion, especially as the enduring power is generally regarded as the self-evident mechanism for individuals who need to provide for future decision-making impairment.

---

195 The test for making use of the common law curatorship system is that the person must be "unable to manage his or her affairs" – irrespective of the cause of the "incapacity" (impairment). While an inability to manage affairs is also the test provided for in the Mental Health Care Act, 2002 the cause of the "incapacity" is limited to "mental illness" and "severe or profound intellectual disability" (cf sec 59 and 60). The assistance in the case of common law curatorship covers financial affairs as well as personal welfare while the statutory assistance provided for in the Mental Health Care Act covers financial affairs only. (Although it has been suggested that a person who is being detained or cared for in an institution under mental health legislation will rarely require other assistance with regard to personal welfare, this situation probably contributes to the current confusion (cf SALRC **Discussion Paper 105** 2004 par 4.8 fn 200)).

196 A "mentally ill" person who cannot manage his or her financial affairs might eg be able to access assistance through the common law curatorship system as well as through the Mental Health Care Act's system of administration of property (see par2.25 et seq above). There is however no clear provision for assistance for eg a person with fluctuating or temporary decision-making impairment.

197 Refer to SALRC **Discussion Paper 105** 2004 par 7.10 and 7.24.

3 Inadequacy in breadth

2.63 In addition to problems with cumbersome and costly procedures, and its relative inaccessibility, current law does not adequately cater for the wide variety of decision-making impairments that exist in practice. The main issues are as follows:

- Current law has no formal device that provides for decision-making assistance in grey areas of impairment – for example, instances of temporary, fluctuating, or mild impairment, where there is no need to appoint a curator. (Curatorship is essentially a long-term arrangement for substantial impairment). There is in particular no formal provision for persons who are not "of unsound mind" or clearly "incapable", and who do not have large estates or complicated affairs to be administered. This group is in fact perceived as encompassing the majority of persons who are in need of protection by the law.[198] Inherent in this shortcoming is the current overly simplistic common law test for "incapacity", which is the gateway to assistance under the curatorship system. This test requires a general inability to manage affairs, whereas it has become uniformly accepted by the medical profession that capacity to make personal choices must be judged on a decision- and person-specific basis, rather than a global all-or-nothing basis, and that the individual's potential for autonomy – however limited – must be recognised.[199] Under its Rule 57(10), the High Court has the power generally to "make such order as … to it may seem meet…". In view thereof, and by virtue of its inherent jurisdiction, the High Court is able to develop a more flexible approach. Such jurisprudential development, however, is a notoriously slow process. The assistance available under statutory law, in the form of the appointment of an administrator in terms of the Mental Health Care Act 17 of 2002 is, as indicated above, available

---

198 While the Mental Health Care Act 17 of 2002 does provide for assistance with regard to smaller estates, this procedure is only accessible to those with "mental illness" or "severe or profound intellectual disability" (sec 59). See also par 2.34 above.

199 Refer to SALRC **Discussion Paper 105** 2004 par 4.4-4.5; and 4.25-4.28.

only to the "mentally ill" and to persons with "severe or profound intellectual disability".[200]

- Since the Mental Health Care Act, 2002 replaced its predecessor (the Mental Health Act, 1973), common law curatorship has been the only available measure for assistance with regard to personal welfare.[201]
- There is no clear provision for a default arrangement in situations where the available legal measures for assistance have not been utilised or put in place. As indicated above, although the concept of *negotiorum gestio* might be applicable in the latter regard, its aim is not to supplement decision-making impairment, and its applicability and parameters in this area are thus unclear.[202] It is arguable that most families and carers make use of informal (or default) arrangements. There is a need to recognise, regularise, and regulate such practices to the extent necessary.
- Every person who is currently competent is nonetheless vulnerable, to some degree, to the possibility of becoming incapable – as a result of unexpected acute illness, injury, or long-term degenerative conditions. In view of this fact, current law's total lack of providing a measure to deal with possible future decision-making impairment is probably one of the most unacceptable aspects of the present position.

4 Failure to reflect modern thinking

2.64 The current legal position in South Africa does not reflect the paradigm shift relating to persons with disabilities and elderly people that is characteristic of assisted decision-making legislation in comparable jurisdictions.[203] Traditionally, mental disability and old age have been associated with dependence. The new paradigm views persons with disability and elderly persons as active participants in an integrated society, a society that allows them to optimise their potential for independence while providing

---

200 See par 2.34 above for the Act's definitions of "mental illness" and "severe or profound intellectual disability".

201 See par 2.27 above.

202 Par 2.33 above.

203 See par 2.2 above.

them with adequate protection, care, and support. This scenario calls for measures that support and acknowledge the principles of dignity and autonomy.[204]

2.65 The current legal position likewise does not adequately reflect the democratic values of human dignity, equality, and freedom enshrined in the Constitution.[205] It is also not in line with national legislation in the areas of mental health and the elderly that have been enacted to reflect these values.[206] The right to bodily and psychological integrity conferred in section 12(2) of the Constitution is of special significance in the context of decision-making impairment.[207] This section aims to protect self-determination with regard to both body and mind against interference by the state or by other people. We earlier pointed out that the procedures under current law will, as a general proposition, probably be regarded as a justifiable limitation of fundamental rights, including the right to self-determination. The new paradigm (and the CRPD), however, requires society to explore methods that do not limit fundamental rights – or to do so to the minimum extent necessary. The shortcomings of the common law and statutory law to provide for the breadth of needs of individuals with decision-making impairment are obstacles in realising this ideal.

5 Need to reflect CRPD's "legal capacity" requirements

2.66 In view of the far-reaching effect of the request to take into account the CRPD in the Commission's proposed draft Bill, we provide a full discussion on its legal capacity

---

204 Refer to SALRC **Discussion Paper 105** 2004 par 3.2 and 3.4-3.7.

205 See par 2.42 et seq for a discussion of the constitutional considerations which impact on the need for reform.

206 Both the Mental Health Care Act 17 of 2002 (which came into operation in December 2004) and the Older Persons Act 13 of 2006 (which has not yet been fully implemented at the time of compilation of this Report) expressly recognise the international change in attitude towards persons with disability and the elderly in its emphasis on their rights to equality, dignity and privacy (see sec 8, 9 and 10 of the Mental Health Care Act; and sec 5 and 7 of the Older Persons Act). The National Health Act 61 of 2003 (which came into operation in May 2005) in addition recognises a person's right to participate in any decision affecting his of her personal health and treatment (sec 8). Refer to SALRC **Discussion Paper 105** 2004 par 3.20-3.22.

207 Sec 12(2) provides that "(E)veryone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction; (b) to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent".

provisions and their impact on our recommendations, in a separate Chapter below. For now, suffice it to say that many of the published interpretations of the CRPD conclude that the CRPD requires States Parties to the convention to recognise the active legal capacity ("handelingsbevoegdheid") of all persons with disability. As set out in Chapter 3 below, the Commission does not in this Report presume authoritatively to interpret the CRPD. It is the view of the Commission that the current law needs to be reformed so that, however the CRPD is interpreted, South African law will give effect to it.

C Outline of recommendations

2.67 The Commission proposes the adoption of a comprehensive statutory system of supported decision-making, to address the public's needs with regard to existing and possible future decision-making impairment. To realise this aim, the following steps are recommended:

- The establishment of a more affordable, more flexible, and less cumbersome system to serve as alternative to the common law curatorship system, to deal with needs with regard to existing impairment. (It is not recommended that curatorship be abolished, but that the proposed new system should be available as an alternative.[208]) The suggested alternative system should ensure that the range of needs of persons with decision-making impairment, with regard to differences in the nature, degree, and duration of the impairment, is catered for. In doing so, the system should provide for informal support (ie where the formal appointment of a supporter is not required) as well as for formal support. Formal support should be available on either a short- or long-term basis, and the system should cater for support with regard to financial affairs as well as personal welfare.
- The introduction and proper regulation of the enduring power of attorney into South African law, to cater for needs with regard to possible future impairment. The Commission's particular aim with this recommendation is to provide a person who fears that his or her mental capacity is weakening

---

208 See par 2.71 below.

(or may weaken in future), and who wants to make provision for future assistance in exercising his or her legal capacity if and when that situation arises, with a mechanism to obtain such assistance.

- Fundamental to the entire recommended system of decision-making support should be –
  - a definition of "disability" focusing on the person's need for support and not on any discriminatory perception;
  - clear principles that govern any support of a person with who needs such support; and
  - an accessible and cost-effective supervisory framework to administer the proposed system.

2.68 The Commission's primary objective with the above proposals is to provide for a truly comprehensive system that is affordable and accessible to all South Africans who need support in exercising their legal capacity. Pivotal in realising this objective is the Commission's recommendation that the Master of the High Court should fulfil the supervisory role, and administer the proposed system of decision-making support. The proposed system would render the high cost and cumbersome procedure of the High Court unnecessary for people who are unable to access this route, but would retain the High Court's important role as an appeal and review mechanism. Moreover, the current High Court power and procedure to appoint a curator is retained, and offers a choice to those who prefer or require this.

2.69 Another significant intention of the Commission is to give express statutory recognition to the paradigm shift with regard to persons with disabilities and elderly persons, and to their constitutional rights to equality, dignity, autonomy, and privacy. This intention is reflected in the proposed draft Bill's requirement that the support of a person in exercising his or her legal capacity must be governed by certain guiding principles.

2.70 The Commission's perception at the start of the investigation was that our greatest challenge in developing final proposals would be to find a proper balance in the strong tension between, on the one hand, the need for simple measures and less intrusion and, on the other hand, the need for more formal measures to ensure protection. This hypothesis was confirmed throughout the consultation process. Although

public demand was for a less cumbersome process (ie with less regulation and fewer formalities, checks and balances), there were also firm indications that proper protection of the interests of persons with decision-making impairment was non-negotiable. In developing its recommendations, the Commission has attempted to obtain a suitable balance between these two poles – while being especially wary of unnecessary interference in the private lives of persons with decision-making impairment and their families and carers. This approach is even more pronounced with regard to our recommended regulation of the enduring power of attorney, since this measure in particular acknowledges and emphasises the right to autonomy, by allowing an individual to choose who is to assist in managing his or her affairs.

2.71 Acknowledging shortcomings therein, the Commission does not recommend the abolition of the common law curatorship system or the powers of the High Court to appoint curators. Our reasons are as follows:

- The Commission does not recommend the ousting of the High Court's first instance jurisdiction in matters that may involve the status of persons with decision-making impairment.
- While the High Court procedure is cumbersome and costly, those very facets of the current curatorship system offer a high degree of certainty that the correct decision is made in relation to the person with decision-making impairment. In this regard, the regular appointment of a *curator ad litem* to represent such person is of note.
- To the extent that the current system might infringe upon constitutional rights, may be perceived as unduly paternalistic, or may infringe upon the CRPD, the High Court, the Supreme Court of Appeal, and the Constitutional Court have the power and capability to develop the current system so as not to conflict with rights or international obligations and jurisprudence.
- The public response at the time of consultation on Discussion Paper 105 was virtually unanimous in its view that the present system must be retained. By retaining the current system the views of the public are taken into account. Moreover, the public is given a choice at no additional cost to

the State. (See also the Commission's views on this aspect in the context of its discussion of the CRPD in Chapter 3 below.[209])

- Retaining the current system will afford the Master's Division the much needed opportunity to implement the proposed new system seamlessly.

D Public support for change

2.72 The Commission, throughout its consultation process, received overwhelming support for the proposed reform.

2.73 The response to the Commission's first round of consultation[210] was virtually unanimous in its opinion that common law measures of assistance are still appropriate, but are insufficient.[211] The unanswered need for the enduring power of attorney had escalated since the Commission's 1988 recommendations for its introduction, and the public input strongly confirmed that reform in this area cannot be postponed any longer. This response and the wider context against which the investigation has been conducted prompted the Commission in subsequent consultation to accept that reform is inevitable, and that only the *extent* of such reform remains to be worked out. Discussion Paper 105 thus contained proposed draft legislation for the establishment of a more accessible and cost-effective alternative to the curatorship system, which would in particular provide for support in respect of the grey areas of decision-making impairment, and for the introduction and proper regulation of the enduring power attorney.

2.74 As expected, the public response to the Discussion Paper once again provided enthusiastic confirmation that change to the law is necessary. The Commission's broad proposals for an alternative to curatorship and the introduction of the enduring power of attorney were generally welcomed and supported. The comments, however, also reflected that the legislative framework for the proposed new comprehensive system of

---

209 See pars 5.11 and 3.89 below.

210 Conducted through obtaining public comment on its Issue Paper 18.

211 Refer to SALRC **Discussion Paper 105** 2004 par 3.29-3.35 for information on the general response to the Issue Paper.

assistance would have to be further supplemented and refined to deal with public uncertainties and concerns regarding its practical application and workability. Commentators were generally more concerned about issues relating to the practical application and detail of the proposed alternative to curatorship than they were about the introduction of the enduring power of attorney. This is probably because the enduring power has been overdue in our law for so long that the enactment of the proposed legislation will serve to legitimise community practice rather than introducing an entirely new concept. Reverting to the public uncertainty and concerns regarding the practical application and workability of the proposed system, the Commission accepts that such practical application and workability are highly dependent on the capacity and effectiveness of the Master's Office. Consultations with the Chief Master and representatives of the Master's Office have assured the Commission that the Master's Office remains the appropriate office to administer the system. The effectiveness, of course, can only be judged after implementation of the system. In this context it is imperative to give effect to public view, and to leave the public with the choice of using the curatorship system.

2.75 Generally speaking, the disability sector and government stakeholders strongly supported the Commission's amended draft Bill (which was further developed in response to calls to take into account the requirements of the CRPD). Comments at this stage focused on fundamental issues – such as possible definitions of "disability" and "support", the principles guiding support in exercising legal capacity, and expressly recognising the CRPD in the proposed draft legislation – rather than practical issues. Some commentators from the disability sector indeed wanted the Commission to do more by using this opportunity to implement the entire CRPD into South African law. For reasons stated below, this request could not be acceded to.[212]

2.76 The public response to the Commission's preliminary proposals is referred to in the discussions on individual issues.

---

[212] See par 3.87 et seq below.

E Proposed implementation and cost implications

2.77 Between 2004 and 2012, a number of consultative discussions took place between the advisory committee that assisted the Commission with this investigation, and various Chief Masters who served in that capacity during this period. The Commission also had the benefit of continual input by an advisory committee member who served as representative of the Chief Master up to the time of completion of the report.[213] Since the earliest of these consultations, there has been firm support for the proposed legislative reform, and in particular for the recommendation that the Master administers the proposed measures of decision-making support.[214]

2.78 The envisaged method of implementation, public concerns regarding the Master's ability to successfully implement and administer the proposed measures, and concerns about the ability to implement the measures in rural areas have been discussed on a number of occasions with different Chief Masters. The response has, through the years, been more or less similar: the Master has the necessary structure, but not necessarily the capacity, to fulfil this role. This situation is not regarded by the Commission as sufficient reason to recommend that another institution should administer the envisaged measures. The current Chief Master has repeatedly assured the Commission of his support and intention to successfully implement the proposed measures.[215]

2.79 Through the years, Chief Masters and representatives of the Master's Division have referred to the following developments in the Master's Division (which have taken

---

213 Adv Margaret Meyer in this capacity provided constant contact between the Chief Master and the Commission. This arrangement facilitated the development of realistic recommendations.

214 Par 4.47. See however also the concerns expressed in par 4.50.

215 Minutes of a meeting with the Chief Master 5 June 2012. See Annexure 4 for information on consultation with the Chief Master.

place independently of the Commission's investigation), in support of the Master's capacity to successfully administer the envisaged measures:[216]

- The Division was restructured during mid-2000 to create specialised units with respect to certain of the Master's functions. In a number of major centres (including Pretoria, Cape Town, Bloemfontein and Pietermaritzburg), specialised curatorship units were established to deal exclusively with curatorship-related matters. The success of these units, and the expertise developed by officials who headed and served in them, have been cited by the Chief Master as the reason for preferring this method to deal with the implementation and administration of the proposed legislation once it is enacted. The Commission thus recommends that specialised units should be retained or established in Master's Offices countrywide to perform the functions provided for in the draft Bill, in order to enhance the Master's ability to successfully fulfil the envisaged role.

- In view of the fact that there are currently (ie at the time of compilation of this report), only 15 Master's Offices throughout the country, mainly in the main centres, the volume of work that might be generated by the proposed measures could be too much to carry. However, the current Chief Master envisages that developments with regard to the decentralisation of certain existing Master's Office services will form the basis for a similar decentralisation of services with regard to the proposed measures of support provided for in the draft Bill. Currently 640 Magistrate's Offices act as service points for the Master's 15 countrywide offices, as part of the "integrated case management system" which came into operation after the Moseneke[217] and Bhe[218] decisions. This system is in the process of being

---

216 Information regarding the envisaged system on which the implementation of the draft Bill will be modelled has been supplied on various occasions by Adv Margaret Meyer, Advisory Committee member and representative of the Master's Division on the Advisory Committee (see eg the Minutes of the Advisory Committee meeting of 12 March 2013); and by the current Chief Master (see eg the Minutes of a consultative meeting with the Chief Master, Adv L Basson on 5 June 2012).

217 **Moseneke v The Master** 2001(2) SA 18 (CC). Accessibility to the Master's services in rural areas has been necessitated by this decision. The decision implied that the Master (and not a Magistrate) must deal with intestate black estates where the deceased was married in terms of civil law.

rolled out by the Department of Justice and Constitutional Development in respect of matters pertaining to the administration of estates.[219] It is envisaged that a similar system will be developed to enable access to the proposed measures of decision-making support to persons with disabilities in rural areas. With regard to the application for and appointment of formal supporters in terms of the proposed draft legislation, it is envisaged that this system will in practice entail a "front office" and a "back office". The font office will receive public enquiries and applications for the appointment of formal supporters, and the requests will be sent electronically to expert back-office officials in the major centres (or a central office) for processing. These officials will be legally qualified and will provide an expert back-up service, so that the front office serves as an "entry point" only. After processing and consideration of application by back office officials, the response will be electronically transferred to the front office for relay to the member of the public. According to such planning, members of the public therefore will not have to travel to one of the 15 Master's Offices in city centres to access the Master's services, but will be able to initiate an application for the appointment of a supporter at one of the service points. However, once a supporter is appointed, it is foreseen that the administrative functions (which will require more personal contact between the appointed supporter and the Master in the relevant jurisdictional area)[220] will not be dealt with at the decentralised service point.

2.80 The proposed draft Bill provides for the incremental implementation of its provisions, as well as for incremental implementation by jurisdictional area.[221] This would make it possible for the government to introduce the draft Bill's formal measures

---

218 **Bhe and Others v Magistrate, Khayelitsha and Others** 2005(1) SA 580 (CC). According to this decision, the estates of all Black South Africans who die intestate must be administered by the Master.

219 At the time of compilation of the proposals in the advisory committee, it was foreseen that each of the 15 Master's Offices will, during the 2015/16 financial year, be rolling out the new system at eight additional service points (information provided to the SALRC's Advisory Committee for this investigation by Adv M Meyer, advisory committee member and representative of the Chief Master).

220 The lodging of accounts and reports, for instance, and enquiries by the Master in this regard would in practice necessitate interaction between the Master and the person appointed as supporter.

221 Cl 126(2).

incrementally by way of pilot projects in certain areas only, until such time as implementation problems have been fully addressed while the new system is available to the public on a limited scale. However, the Commission wants to make it clear that any incremental implementation is the prerogative of government. The Commission's intention in providing for the possibility of incremental implementation is for practical purposes only, and does not imply that the measures provided for could be implemented in a discriminatory way. Having noted this, the Commission nevertheless wants to strongly emphasise the dire public need for the implementation of the enduring power of attorney, as a first step in implementing the overall proposed measures. The Commission believes that there is less reason for the incremental implementation of the enduring power compared with the other measures of support provided for in the draft Bill. Our reasoning is that the Master's administrative and supervisory role (as provided for in the proposed draft Bill), with regard to the enduring power is relatively limited, and is not expected to affect resources to the extent that will probably be necessary with regard to the other measures of support.[222]

2.81 The Master of the High Court is aware that the current alternative to the curatorship system – that is, the appointment of an administrator by the Master in terms of Chapter VIII of the Mental Health Care Act 17 of 2002,[223] – despite being more affordable and accessible, is not optimally utilised by the public. An important reason for this under-utilisation could have been the lack of a public awareness campaign to accompany the implementation of this measure by the national Department of Health at the time. The result is that many lawyers have not been aware of this alternative, and thus could not bring it to the attention of their clients. The Commission therefore recommends that the introduction of the proposed draft Bill in practice, should it be enacted by Parliament, must be accompanied by a public awareness campaign to inform and educate the public about the availability and use of the support measures. In comparable jurisdictions, for instance Scotland and England, similar legislation has been preceded by intensive preparation on the part of the government before the new laws have been publically introduced. For several years after their introduction,

---

222 Compare the Master's powers and functions in Chapters 3 and 4 of the draft Bill (other measures of support) with the Master's lesser powers and functions with regard to the enduring power of attorney in Chapter 5 of the draft Bill.

223 See the discussion of this procedure in par 2.34 above.

comprehensive hard-copy and electronic information about current procedures and their use remain available to ensure the successful and sustained implementation of the legislation for the benefit of the public.

2.82 Enhancement of the Master's resources, especially by way of training officials to equip them to successfully execute the functions provided for in the draft Bill, will be of utmost importance to ensure a successful service to the public. The proposed draft Bill indeed obliges the Master to ensure that officials receive the necessary training – including training in the appropriate and sensitive execution of their functions.[224] Master's Office officials usually fulfil their functions in accordance with administratively prescribed standard procedures. It is foreseen that once the proposed measures have been enacted, the standard procedures will be supplemented to cover the functions provided for in the draft Bill. Uniform procedural prescripts will indeed ensure the uniform interpretation and application of the provisions of the proposed legislation in practice.[225]

2.83 It is recommended that a monitoring mechanism in the form of an inter-sectoral committee be established to oversee the implementation and application of the draft Bill

---

224 Cl 120.

225 Information provided by the Chief Master 5 June 2012.

once it has been enacted.[226] One of the functions of the committee should be to make recommendations with regard to the amendment of the legislative provisions should this be necessary. The committee should also be required to regularly report to Parliament on its monitoring functions.[227] Provision should be made for Government stakeholders and nominees from organisations representing the interests of persons with disabilities to be included as members of the proposed committee.[228]

2.84 In conclusion, the Commission is of the view that the sustained availability of the common law curatorship system, and the introduction of the informal support measure provided for in the draft Bill will serve to alleviate pressure on the Master's services that might initially occur because of possible implementation problems. (It should be noted that the informal support measure provided for in the draft Bill does not require any administrative action by the Master.)

---

226 See Cl 117-119. The recommendation is based on mutual requests from representatives of the Human Rights Commission and the Centre for Disability Law (see Annexure 18) and the Chief Master. The former suggested that provision for Parliamentary supervision of the Master, or reporting to the Human Rights Commission, on the implementation and continuous application of the measures in the draft Bill once enacted, is considered necessary. These commentators also referred us to the example of an "inter-sectoral committee" established in terms of other legislation with the aim of enhancing and monitoring implementation of new legislative procedures (see eg sections 62 – 65 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007). The Chief Master confirmed that current regular reporting by the Department of Justice and Constitutional Development to Parliament already includes information on the functions of the Masters Division; but supported the view that oversight might be necessary with regard to the implementation of the proposed measures. He, however, suggested that provision should rather be made for day-to-day control in the form of, eg an ombud. The suggestion was made in the context of an investigation that was underway at the time for the establishment of an internal control system, possibly in the form of an ombud, for certain other functions of the Master. The Advisory Committee assisting the Commission rejected the proposal of establishing an ombud for the sole purpose of the proposed new legislation. The establishment of an ombud would by necessity have cost implications, and would moreover have to be based on evidence that an internal oversight mechanism is indeed necessary. Such evidence does not exist at this stage before enactment of the proposed legislation and before its application in practice. However, it was considered that the establishment of an inter-sectoral committee (as referred to above), could fulfil the need for monitoring the implementation and application of the proposed measures. The functions of the envisaged (general) Master's ombud (once established), could in time be extended to also cover the supported decision-making measures, should they be enacted and should there be evidence of such a need in future.

227 Cl 119(1) and (2).

228 Cl 117(2). It is recommended that the National Department of Health should, amongst others, be represented on the committee (cl 117(2)(b)). The Commission noted reservations expressed in consultation with the Department (see particulars in Annexure 13) about the viability of the proposed committee in practice. In view of the expressed need for a monitoring mechanism and in the absence of suggestions for more viable alternatives, the Commission was reluctant to override the input of other stakeholders as indicated in fn 226.

2.85 With regard to costs, in developing its proposals for reform the Commission has been specifically wary of recommending a system that would ultimately not be implementable because of cost implications for the State, or for individuals who would like to make use of the new system. As indicated above, affordability and accessibility were among the Commission's major aims.

2.86 With regard to the State's ensuing responsibilities, should the proposed legislation be implemented, the Commission has concentrated on identifying ways in which available current State resources could be utilised, instead of recommending the creation of new structures. Costs of the proposed system to the Sate would relate mainly to supplementing the capacity, expertise, and availability of the Master's Division to administer the proposed measures; and to informing, training, and educating the public and service sectors to ensure that the proposed system is successfully implemented. From the public's side, the Commission attempted to make the proposed procedure as accessible as possible, by making a formal High Court based system a matter of choice, as this option of necessity involves costs related to the services of lawyers. The question of whether the public should pay a fee for the Master's services is debatable. If so, this revenue could indirectly contribute to funding the State's responsibilities.

2.87 Should the Commission's proposals be implemented, the financial implications to the State should be determined before Cabinet approval for the proposed legislation is sought. We believe that more recent developments in the Master's Division – to set up and maintain specialised units for dealing with curatorship matters, to decentralise its services to make them more accessible in rural areas as necessitated by decisions of the Constitutional Court, and to implement paperless systems of administration where possible – will go a long way in dealing with costs related to the implementation of the Commission's proposals. The latter assumption was confirmed in consultation with the Master's Division's Management echelon, and should be taken into account in determining the cost implications of our proposals.[229]

2.88 The Commission is fully aware of the financial challenges faced by the Government in the administration of justice. However, the Commission is convinced of

---

[229] Refer also to par 2.79 et seq above.

the necessity of its proposals, in view of the considerable hardship suffered by a disadvantaged group of our society as well as their families and carers, because of the lack of adequate and accessible provision for decision-making support. The reforms proposed are overdue in terms of practical needs, constitutional imperatives, and international obligations. Financial implications alone should not stand in the way of realising people's rights in this regard.

2.89 In addition, the draft Bill expressly provides for its gradual implementation. This will provide opportunities for a gradual upgrade and supplementation of the Master's current resources, where necessary.

2.90 South Africa's obligations with regard to the implementation of the CRPD are discussed in Chapter 3 below. It should be noted that in an exposition by the World Bank of its expected responsibilities with regard to the implementation of the Convention, it is anticipated that World Bank client countries (which include South Africa), will increasingly call upon the Bank to assist them in Convention-related legislative and other associated reform initiatives.[230] Referring in particular to the implications of the CRPD's legal capacity requirements, the Bank further anticipates that it is reasonable to expect that a number of client countries will need assistance in engaging in legislative reform initiatives to effect the changes inevitable in giving effect to these requirements.[231]

Report recommendations

2.91 ***For practical purposes, it is recommended that the proposed draft Bill should provide for the incremental implementation of its provisions, as well as for incremental implementation by jurisdictional area. In doing so, the Commission wants to strongly emphasise the need for the implementation of the enduring power of attorney as a first step in implementing the overall proposed measures. (Draft Bill clause 126(2).***

---

230 Guernsey et al 1.

231 Ibid.

2.92 ***It is recommended that the Master of the High Court should take responsibility for ensuring that Masters Office officials receive adequate training to equip them to successfully execute the functions provided for in the draft Bill. (Draft Bill, clause 120.)***

2.93 ***It is recommended that a monitoring mechanism in the form of an inter-sectoral committee should be established to oversee the implementation and application of the measures provided for in the draft Bill. Stakeholders that should be represented on the committee should include the Master of the High Court, the Human Rights Commission, relevant national government departments and representatives of persons with disabilities. (Draft Bill clauses 117 – 119.)***

2.94 ***The Commission is of the view that introduction of the proposed measures should be accompanied by a public awareness campaign to inform and educate the public about the availability and use of the different support measures. (Paragraph 2.81.)***

CHAPTER 3
LEGAL CAPACITY REQUIREMENTS IN THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES – IMPACT ON THE SALRC's RECOMMENDATIONS

A Introduction

3.1 The United Nations Convention on the Rights of Persons with Disabilities, 2006 (CRPD or Convention)[232] was unreservedly ratified by South Africa. Its article 12 deals with equal recognition of legal capacity,[233] and as such affects the proposed draft Bill developed for inclusion in this report.

3.2 This Chapter concludes that article 12 provides for persons with disabilities to have "active" legal capacity on an equal basis with others in all aspects of life. Such persons may require support in exercising legal capacity. The support envisaged differs according to the needs of the person concerned, and could include intensive support. Intensive support (which might in practice amount to "substitute" decision-making), should be accommodated within the "supported" decision-making model.[234] The Commission, however, does not support an approach that the CRPD requirements should take centre-stage in the concept of the enduring power of attorney which is put into place at the free will of the principal.[235] The conclusion arrived at is reflected in the proposed draft Bill on Supported Decision-making. The table at the end of this Chapter

---

232 Extensive information on the CRPD (including the text of the Convention and a "Handbook for Parliamentarians") is available on the United Nations website at http://www.un.org/disabilities/. The general information on the CRPD contained in this report was obtained through this source.

233 CRPD Art 12 "Equal recognition before the law".

234 See par 3.81 et seq below.

235 See par 6.54 et seq below.

refers to the specific requirements of the CRPD and the proposed provisions in the draft Bill that give effect to these requirements.

3.3 In view of the far-reaching effect of the request to take into account the CRPD in the Commission's proposed draft Bill, we provide a full discussion on its legal capacity provisions and its impact on our recommendations, below.

B Calls for compatibility with the CRPD

3.4 In September 2009,[236] the South African Human Rights Commission expressed concern about the possible effect of the unreserved ratification of the CRPD on the draft Bill and the SALRC's draft Report on assisted decision-making, which were being finalised at the time. In particular, the Human Rights Commission drew attention to the CRPD's article 12. The Human Rights Commission was concerned about how the provisions of the Convention would be incorporated into the draft Bill and the draft Report under preparation, and suggested that further consultation on this matter with the disability sector would be beneficial.

3.5 Subsequent consultation with representatives from the Human Rights Commission[237] and key government stakeholders (including the Department of Health; Department of Social Development; and Department of Women, Children & People with

---

236 Letter from Adv T Thipanyane, then Chief Executive Officer of the HRC, dated 2 September 2009.

237 The Researcher and Ms Meyer met with Ms Simmi Pillay (Disability Coordinator at the Human Rights Commission) on 21 October 2009.

Disabilities)[238] reflected the existence of international uncertainty and alleged controversy about the interpretation of the CRPD's article 12. Department of Health representatives, in particular, felt that certain interpretations which have been put forward internationally indicate that the proposed draft Bill – which was being finalised at the time – might not be compatible with the CRPD.[239] The Department was of the view that the draft Bill's proposed system of assisted decision-making seemed to be generally acceptable, but the Bill might need refinement to more clearly reflect the underlying philosophy of the CRPD.

3.6 When seeking government stakeholders' final support for the draft Bill in November and December 2009, we found they were reluctant to comment on the Bill because of uncertainty about the effect of article 12. Since the support of government stakeholders was necessary to enable the Commission to propose reform of the current legal position, neither the draft Bill nor the Commission's draft Report could be finalised. This impasse was the result of the pending uncertainty about the meaning of article 12 within the South African legal context, and its impact on the draft Bill.

3.7 The uncertainty and controversy hinges on the question of whether the CRPD's article 12(2),[240] where it refers to "legal capacity", refers to the capacity to *exercise* rights or merely to the capacity to *have* rights. If it refers to the capacity to exercise rights, the CRPD in fact guarantees active legal capacity to all persons with disabilities. Although

---

238 Formal meetings with representatives of the three Departments, including an SALRC Advisory Committee member, took place on *4 December 2009* (*Department of Health*: Prof Melvyn Freeman, Chief Director Non-communicable Diseases; Ms S Singh, Directorate Disabilities; Mr H Kleynhans, Directorate Legal Services; Mr Sifiso Phakati, Directorate Mental Health: Ms Elmarie Bekker, Directorate Geriatrics); *7 December 2009* (*Department Social Development*: Mr Jackie Mbonani Chief Director Welfare Services; Ms Manthipi Molamu, Mr Krish Shynmugam and Ms Sophi Mkahsibe, Directorate Disabilities; Mr Pierre Du Preez and Ms Lungile Ndlovu, Directorate Legislative Drafting; Ms Shellah Mokaba, Directorate Disability and Old Age Grants; Ms Thuli Mahlangu, Directorate Older Persons; and *8 December 2009* (Ministry *of Women, Children and People with Disabilities*: Mr Benny Paline, Chief Director Disabilities). At these meetings the respective officials were comprehensively briefed on the content of the draft Bill which, together with background information were supplied to them at preparatory meetings that took place on *6 November* (Department of Health); *11 November* (Department of Social Development); and *16 November 2009* (Ministry of Women, Children and People with Disabilities).

239 In doing so, the Department also referred the researcher to the *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities* A/HRC/10/48 26 January 2009 (see fn 9).

240 Art 12(2) provides that "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life". See the more comprehensive discussion in par 3.16 et seq below.

the measures for assistance with decision-making that were contained in the SALRC's proposed draft Bill were, at the time, based on human rights principles, the premise for creating these measures and for accessing them had focused on "incapacity" and "impairment of legal capacity", and allowed for assisted as well as "substituted" decision-making. This approach was considered to be non-compliant with the concept of "universal legal capacity" which was said to be the aim of the CRPD's article 12(2).

3.8 The issue was complicated by the fact that concrete steps to implement the CRPD by way of general legislation had not yet been taken by the South African Government.[241] Government stakeholders could thus not assist the SALRC in indicating the official interpretation of article 12. According to information submitted to Parliament preceding the ratification of the CRPD, the (now former) Department of Women, Children & People with Disabilities would be responsible for leading the implementation process.[242]

3.9 The Department of International Relations and Cooperation (DIRCO) expressed the view that there is no conflict between article 12 and current South African common law. DIRCO suggested that the Commission develop an interpretation of article 12 in the South African context in order to take the matter towards completion in the SALRC investigation.[243] The Commission proceeded with further research and consultation, which culminated in an amended draft Bill being submitted for comment to the disability sector and government stakeholders at the beginning of 2012.[244] Government stakeholders offered no further comment. Comment by the disability sector on fundamental provisions resulted in further adapting the Commission's legislative proposals.[245]

---

241 See par 3.75 et seq below.

242 PMG Minutes JMC Meeting 25 May 2007.

243 Legal opinion by the Chief State Law Adviser (International Law) Department of International Relations and Cooperation dated 2 February 2010.

244 See ANNEXURE 17 for particulars of attendees to the consultative workshop which took place on 16 February 2012.

245 See ANNEXURE 18 for particulars of consultative meetings with representatives of the Human Rights Commission, Ubuntu, the Centre for Disability Law (UWC) and the Legal Resources Centre.

C General information on the CRPD

3.10 Currently, one of the principal aims of international law is the protection of the human rights of the individual against his or her own government.[246] Although no hierarchy of sources exists, "treaties" (also referred to as "conventions" – which can be compared to legislation in the domestic sphere) are generally regarded as the primary source of international law.[247] A treaty is a written agreement between states, or between states and international organisations, operating in the field of international law.[248] Since the Second World War, numerous treaties have been signed extending the protection of international law to individuals. These human rights treaties impose varying obligations upon States Parties to provide protection to their own citizens.[249] The Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention) governs the making, observance, interpretation, validity, and termination of treaties.[250]

3.11 As indicated at the start of this report, the past two decades have been marked by significant changes in values and attitudes about persons with disabilities. The greater awareness of their needs, which is partly due to the rising number of persons with disability, had been reflected in several non-binding international instruments[251] by the time the CRPD was developed. The philosophical approach of many of these documents was, however, inconsistent with the principles of equality and full societal inclusion of persons with disability. Also, their non-binding nature meant they were often not implemented by governments. Persons with disabilities continued to be denied their human rights and were kept on the margins of society in all parts of the world. The

---

246 Dugard 308.

247 Ibid 27-28.

248 Art 2(1)(a) of the Vienna Convention. See also Dugard 406.

249 Dugard 1-3.

250 Ibid 406-407.

251 These include the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971; United Nations Declaration on the Rights of Disabled Persons, 1975; World Programme of Action concerning Disabled Persons (WPA), 1982; General Assembly Resolution on Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991; United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, 1993; Resolution No 1998/3 "Human Rights of Persons with Disabilities" (acknowledging general responsibility for persons with disabilities in its mandate); and the African Charter on Human and Peoples' Rights as referred to by Kanter *Syracuse Journal of Int L&C* 2007 580-582; and Guernsey et al 1-3, 21.

CRPD fulfils the need for a legally binding instrument which sets out the legal obligations on States to promote and protect the rights of persons with disabilities. The CRPD thus aims not to create new rights for such persons, but rather to elaborate on and clarify existing obligations for countries within the disability context, and to encourage the mainstreaming of disability throughout the public international law system.[252]

3.12 The CRPD, which consists of 50 articles, was adopted by consensus by the United Nations General Assembly on 13 December 2006.[253] Its express purpose is to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms of all persons with disabilities, and to promote respect for the inherent dignity of people with disability.[254] Several of the CRPD provisions reaffirm an array of specific civil and political, economic, social and cultural rights which persons with disabilities should enjoy on an equal basis with others.[255] As already indicated, some of these are directly relevant to the SALRC's legislative proposals on assisted decision-making. Article 12, in particular, requires States Parties to recognise that people with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. (This is discussed more comprehensively below.) The Convention further states a number of general principles, including non-discrimination and equality, setting standards that apply to the enjoyment of all rights provided for.[256] It also creates express obligations clarifying the steps that States Parties must take to promote and protect these rights.[257] Lastly, the CRPD provides for implementation and monitoring mechanisms on the international and national levels.[258] In addition, an Optional Protocol attached to the Convention establishes procedures aimed at strengthening its implementation, by allowing individuals to submit petitions to a body of independent

---

252 Guernsey et al 3; Lawson *Syracuse Journal Int L&C* 2007 565-571; Schultze *Understanding the CRPD* 19-13; Melish *Human Rights Brief* 6-8.

253 Convention on the Rights of Persons with Disabilities, GA Res 61/106, 76th plen mtg UN Doc A/RES/61/106 (Dec 13, 2006).

254 Article 1.

255 It covers a number of key areas such as accessibility, personal mobility, health, education, employment, rehabilitation, participation in political life, and equality and non-discrimination (see articles 5-30).

256 Article 3.

257 Article 4.

258 Articles 33 and 34.

experts (the Committee on the Rights of Persons with Disabilities) and giving this body authority to inquire into grave or systematic violations of the Convention.[259]

3.13 The CRPD came into force on 3 May 2008 after having received the required number of ratifications. Currently 160 States, including the European Union, are parties to the Convention, and 92 States are parties to its Optional Protocol.[260]

3.14 South Africa unreservedly ratified both the Convention and its Optional Protocol on 30 November 2007.[261]

D Legal capacity in the CRPD

3.15 How "legal capacity" is dealt with in the CRPD is reflected primarily in the provisions quoted below. The interpretation of these provisions is influenced by approaches to treaty interpretation derived from the Vienna Convention, which governs treaty making and interpretation.[262] We discuss these approaches below with particular reference to the objects and purpose of the CRPD and its drafting history. In compiling our analysis of article 12 to enable the finalisation of the Commission's proposed draft legislation, we accessed international views on the Convention's article 12 from research material available to us at the time. We also refer to some of these views below. It should be noted that the latter is provided as background information, and that South Africa is not bound by any of the views referred to.[263]

---

259 Article 1 of the Optional Protocol.

260 United Nations *Enable* "Convention and Optional Protocol Signatures and Ratifications" (accessed 16 October 2015).

261 *Enable* "Convention and Optional Protocol Signatures and Ratifications". Web 27 July 2011.

262 See par 3.10 above.

263 As far as could be ascertained at the time, there was no activity at United Nations level with regard to the interpretation of the CRPD which could be regarded as binding on South Africa (Legal Opinions supplied to the Secretary of the SALRC by the Chief State Law Adviser (International Law), Department of International Relations and Cooperation dated 22 February and 5 March 2010). The first formal guidelines on the interpretation of article 12 was released by the United Nations in April 2014, and was preceded by a draft interpretation in September 2013 which was open for public comment – see par 3.84 below.

1 Article 12 and other relevant provisions

3.16 In considering whether the SALRC's draft Bill complies with the CRPD, the latter's article 12 (which deals with equal recognition of legal capacity), no doubt has the most significant impact on the Bill's content.

3.17 Other provisions relevant to the interpretation of article 12 are the following:

- The preamble.
- Articles 1 and 2 (the introductory articles - which state the purpose of the Convention and contain some relevant definitions).
- Articles 3, 4 and 5 (articles of general application addressing general concepts, and issues relevant to the interpretation and implementation of the Convention).
- Article 33 (which deals with implementation and monitoring measures).

The relevance of these provisions with regard to the interpretation of article 12 is reflected also in the discussion of international views on article 12 in paragraph 3.62 et seq below.

Article 12: Equal recognition before the law

1. States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognise that persons with disabilities **enjoy legal capacity on an equal basis with others in all aspects of life** (emphasis added).

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

3.18 Article 12 is said to enshrine a central paradigm shift from substituted to supported decision-making and embodies the legal aspects of living independently, exercising autonomy and having the freedom to make one's own choices.[264]

3.19 The language in paragraphs 1 and 2 is largely consistent with core human rights treaties (including the International Convention on the Elimination of all forms of Racism [CERD], the International Covenant on Civil and Political Rights [CCPR] and the Convention on the Elimination of all forms of Discrimination against Women [CEDAW]). Paragraph 2 is, most importantly, similar to the CEDAW's article 15 (which however only provides for equality of legal capacity for women in **civil** matters).[265] Based on the interpretation of "legal capacity" in CEDAW's article 15, commentators conclude that reference to this concept in paragraph 2 of the CRPD covers all aspects of the capacity to act: The fact that as a person one has rights (and obligations), and the right to exercise this capacity in all aspects: civil, criminal as well as public.[266] Although this approach differs markedly from that taken in many domestic contexts, the CRPD drafters agreed to adopt article 12 with the understanding that failure to recognise the legal capacity of people with disabilities has historically deprived many people with disabilities from full enjoyment of their human rights.[267] It is of note, however, that conventions such as CEDAW deal with people who are as a matter of fact able to exercise active legal capacity. There are persons with disability who are not in that position and who need, in varying degrees, support.

3.20 The United Nations High Commissioner, in a background document prepared during the drafting process, addressed the meaning of "legal capacity" in existing human rights law treaties and in selected domestic legal systems.[268] The paper concludes that

---

264 Schultze *Understanding the CRPD* 62; EFC Final Report 41.

265 Art 15 of CEDAW provides that "States Parties shall accord women, in civil matters, a legal capacity identical to that of men …". See also Schultze *Understanding the CRPD* 63.

266 Schultze *Understanding the CRP* 63.

267 Chaffin and Guernsy *Jurist* 5 October 2007

268 United Nations *Legal Capacity Paper* par 37-38.

the terms "recognition as a person before the law" and "legal capacity" are distinct.[269] The "capacity to be a person before the law" endows the individual with the right to have their status and capacity recognised in the legal order. The concept of "legal capacity" is a wider concept that logically presupposes the capability to be a potential holder of rights and obligations, but also entails the capacity to exercise these rights and to undertake these duties by way of one's own conduct.

3.21 Paragraph 3 comprehensively provides for the support that should be put in place to support persons with disabilities to exercise their legal capacity. This provision is seen by some commentators as very specific in ensuring that there should be no loophole that would undermine the right as such, and the exercising of it through any form of substitute decision-making.[270] In contradistinction to the latter, paragraph 5 is seen as endorsing substituted decision-making (particularly through the final phrase on not being arbitrarily deprived of property).[271]

3.22 Paragraph 4 contains minimum safeguards against abuse that State Parties are required to implement within the supported decision-making framework. Such safeguards are seen to be necessary to control the effective application of any supported decision-making mechanism.[272] The fact that paragraph 4 enjoins measures that are proportional (to the need of the person with disability) and "tailored to the person's circumstances" must not be overlooked.

3.23 Some commentators opine that the conclusion that article 12(2) refers to active legal capacity is borne out by the remaining paragraphs of art 12. Providing for support and the way in which it should be rendered in articles 12(3) and 12(4) would, in their view, not make sense if the reference to "legal capacity" in article 12(2) is construed to refer to passive legal capacity or the mere ability to have rights.[273] A more nuanced approach might be called for; the need to tailor support to the circumstances may be

---

269 Office of the United Nations High Commissioner for Human Rights "Legal Capacity" Background paper prepared for meeting of CRPD AD Hoc Committee, 9 October 2009 Geneva. Web 30 April 2010

270 Schultze Understanding *the CRPD* 63.

271 Ibid.

272 EFC Final Report 93.

273 See Cifuentes et al.

seen as an injunction carefully to give appropriate support to all persons with disability, including those who, as a matter of fact, are unable to exercise active legal capacity at all.[274]

3.24 The drafting history of article 12 (which very significantly impacts on its interpretation), and international views on this article is referred to more fully below.[275]

The preamble

3.25 Consistent with other human rights conventions, the CRPD begins with a non-legally binding preamble which sets out the rationale for the Convention. It highlights the historic marginalisation and discrimination faced by people with disabilities and the nature of disability as an evolving concept. It also in particular recognises individual autonomy and independence.[276] Relevant provisions of the preamble include the following:

> The States Parties to the present Convention, …
> (a) Recalling the principles proclaimed in the Charter of the United Nations which recognise the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world, …
> (e) Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others, …
> (j) Recognising the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,
> (n) Recognising the importance of persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,
> (o) Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

3.26 Paragraph (a) is a standard clause in other United Nations human rights treaties (including the Universal Declaration of Human Rights, 1948).[277]

---

274 See par (j) of the Preamble to the CRPD which requires States Parties to the Convention to "(recognise) the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support".

275 See par 3.53 et seq.

276 Chaffin and Guernsey *Jurist* 5 October 2007.

277 Schultze Understanding *the CRPD* 16.

3.27 Paragraph (e) is important in the sense that it complements the non-definition of disability in article 1 as referred to below. According to commentators there was no consensus amongst CRPD negotiators on whether or how "impairment" and "disability", respectively, could and should be defined. The CRPD therefore gives an open description of "disability". This non-definition enshrines the social model of disability – that is, recognising that discrimination and therewith the disabling of access for persons with disabilities is largely the result of barriers of various kinds, including social and attitudinal barriers such as stereotypes, prejudices, and other forms of paternalistic or patronising treatment.[278]

3.28 The purpose of paragraph (j) is to ensure that there are no exceptions to, and escape from, ensuring that persons requiring more intensive support are not denied access and the full and effective enjoyment of all human rights.[279]

3.29 Both paragraphs (n) – of which commentators point out that the language used is new to human rights treaties – and (o) are precursors of more substantial provisions in the body of the Convention.[280] Paragraph (n), in dealing with individual autonomy, is further developed in article 3(a),[281] while paragraph (o) precedes article 4[282] in requiring involvement of persons with disabilities in policy-making processes which deal with implementation of the Convention. This concept of inclusive development of the law in accordance with the Convention is also stressed in article 33.[283]

---

278 Ibid 17.

279 Ibid. According to Shultze the provision was demanded by the IDC - an umbrella forum formed by representatives of disability organisations world-wide during the drafting process of the CRPD with the aim of coordinating the considerable campaigning and awareness-raising work undertaken by persons with disability throughout the process of negotiating the content of the CRPD. See also Lawson 2007 *Syracuse Journal of Int L&C* 588-589.

280 Schultze *Understanding the CRPD* 17.

281 See par 3.33 et seq below.

282 See par 3.36 et seq below.

283 See par 3.43 et seq below.

Article 1: Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by **all** persons with disabilities **and to promote respect for their inherent dignity** (emphasis added).

Persons with disabilities **include** those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equally basis with others (emphasis added).

3.30 Contrary to the usual practice of conveying the rationale of a treaty through its title and preamble (only), and to prevent any ambiguity of interpretation, the CRPD in article 1 contains a specific provision which expressly spells out the important goals of full and equal enjoyment of rights as well as dignity. The first paragraph of article 1 thus enshrines the goal of removing all barriers disabling the full and equal enjoyment of all human rights and freedoms.[284] The need to be mindful of the diversity of persons with disabilities, and to the fact that there are persons with disabilities who require more intensive support, are reflected in the goal to promote, protect and ensure enjoyment of rights by "all" persons with disabilities.[285]

3.31 Commentators draw attention to the fact that neither "disability" nor "persons with disabilities" is defined anywhere in the CRPD. The so-called "non-definition" in the second paragraph of article 1 is apparently the result of a lack of consensus on the content of a definition. A conclusive definition would have run the risk of leaving out people in need of protection and may become outdated; whereas not having a definition could result in the scope of protection remaining unclear, and also lead to national legislation to set the frame of application – which could in turn lead to the exclusion of many persons who should be protected by the Convention.[286] The wide scope of the current formulation nevertheless ensures the possible protection of many persons, in deference to the evolving understanding of disability as an interaction between persons with impairments and the attitudinal and environmental barriers that hinder their full and effective participation in societies, on an equal basis with others, as reflected in paragraph (e) of the Preamble.[287]

---

284 Schultze *Understanding the CRPD* 22.

285 Ibid. See also Chaffin and Guernsy *Jurist* 5 October 2007.

286 Schultze *Understanding the CRPD* 23.

287 Ibid 23-24. See par (e) of the Preamble.

Article 2: Definitions

…
"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

3.32 Commentators point out that the CRPD definition of "discrimination", in the context of disability, draws on similar provisions in a number of international human rights instruments. These include CEDAW; CERD; and the International Covenant on Economic, Social and Cultural Rights, 1966 (CESCR).[288] Most significant is the inclusion of "denial of reasonable accommodation" based on disability as a ground for discrimination, a concept borrowed from CESCR.[289] "Reasonable accommodation" is a term that was originally used in national legislation in the United States of America, in the context of employment law. It is defined in CRPD article 2 as –

> necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Article 3: General principles

The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) Non-discrimination;

(c) Full and effective participation and inclusion in society;

(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) Equality of opportunity;

(f) Accessibility; …

---

288 Schultze *Understanding the CRPD* 27.

289 Ibid 26.

3.33 Article 3 contains general principles. Commentators have remarked that General Principles are new to a core human rights treaty. Typically, such principles must be "divined" from the text by the appropriate body mandated to interpret and monitor implementation of an international treaty. However, drawing from other fields of international law and in deference to the need to ensure accessibility of the text, the drafters of the CRPD chose to include a specific article outlining the applicable principles.[290] These principles are thus seen as the founding root that spreads through all the Convention's provisions and connects the various branches. The principles are also closely linked with each other, and overall with every provision of the Convention.[291] They are perceived as guiding principles for understanding and implementing the Convention, and are intended to form the basis of changes to legislation, policy and practice in implementing the Convention.[292] Again, it must be borne in mind that there are persons who cannot make any choice at all. Such persons must be supported to the full extent of their need.

3.34 Paragraph (a), referring to dignity, autonomy and the freedom to make one's own choices, supports the right to equal recognition before the law as provided for in article 12. Commentators are of the opinion that reference to "the freedom to make one's own choices" should be seen in the context of patronising behaviour, and more so substitute decision-making processes which prevent persons with disabilities from making their own choices and decisions.[293]

3.35 Commentators further point out that the principle of "equality of opportunity" in paragraph (e) serves to reinforce the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities. The Rues define this term as "the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly persons with disabilities".[294]

---

290 Chaffin and Guernsey *Jurist* 5 October 2007.

291 Schultze *Understanding the CRPD* 29; EFC Final Report 44-46.

292 Ibid.

293 Shultze *Understanding the CRPD* 30.

294 Ibid.

Article 4: General obligations

1. States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end States Parties undertake:
   (a) to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention;
   (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities; ...

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes, concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.

3.36 Article 4 requires State Parties to give effect to the CRPD obligations within their domestic legal orders.[295] Paragraph 1 contains a general clause on obligations, which is standard to all human rights treaties. Commentators highlight the fact that the CRPD goes further than the usual requirements (which regularly call for "universal respect" or "all appropriate measures") by requiring "full realisation" of rights, and is unique in this respect.[296]

3.37 We indicated above that the General Principles in article 3 are interlinked with every other provision.[297] The close linkage between these Principles and the General Obligations in article 4 should, however, be emphasised - especially with regard to the impact that inclusion, participation, accessibility, and the other General Principles shall have on "legislative, administrative and other measures of implementation".[298]

3.38 The language of progressive realisation of rights in paragraph 2 again draws on other human rights treaties. In doing so, it perpetuates the split between immediately

---

295 EFC Final Report 46 – 52.

296 Ibid 34.

297 Par 3.33 et seq.

298 Schultze *Understanding the CRPD* 35.

enforceable rights such as non-discrimination, and progressively achievable rights such as social and economic rights.[299]

3.39 Paragraph 3 enshrines consultation, once again based on the model of other human rights treaties (including CEDAW and CERD). This provision is regarded as a reflection of the progress made in the Member States' engagement with civil society, illustrated by the unprecedented involvement of Non-Governmental Organisations (NGOs) in the structures responsible for drafting the CRPD. Paragraph 3 is seen as a crucial provision for implementing the Convention and ensuring participation for persons with disabilities through involvement in all relevant processes. Paragraph 3 also supports the article 33 requirement to include civil society in the national monitoring process.[300]

Article 5: Equality and non-discrimination

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

3.40 Article 5 addresses equality and non-discrimination, and the need to ensure that people are not subjected to discrimination on the basis of disability. The content of the first two paragraphs of article 5 is standard in various human rights treaties, including CEDAW, CERD, and the ICCPR. When read in conjunction with the definition of "discrimination on the basis of disability" in article 2, article 5 prohibits disability-based discrimination, regardless of whether the person discriminated against self-identifies as, or is considered by others to be, a person with disability. Commentators emphasise that in this regard, the CRPD approaches discrimination on the basis of disability in a manner

---

299 Ibid 38.

300 See par 3.43 et seq.

similar to approaches often seen regarding discrimination on the basis of race or ethnicity.[301]

3.41 Few people will view measures to support people with disabilities as being discriminatory. To the extent that such measures might be perceived as discriminatory, it constitutes positive discrimination and is sanctioned by paragraph 4.

3.42 Positive discrimination, or affirmative action as it is also called, is provided for in paragraph 4, where it refers to the permissibility of "specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities". Positive discrimination has been used through other human rights treaties as a viable means of ensuring the inclusion of persons who were previously excluded. Commentators thus believe that the aim with this provision is not to maintain discriminatory standards, but rather to emphasise that specific measures are part of a necessary strategy by States Parties directed towards the achievement of de facto and substantive equality.[302]

Article 33: National implementation and monitoring

1. States parties, in accordance with their system of organisation, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States parties shall, in accordance with their legal and administrative system, maintain, strengthen, designate or establish within the State Party, a framework including one or more independent mechanisms, as appropriate to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.

---

301 Chaffin and Guernsey *Jurist* 5 October 2007.

302 Ibid 42 (in referring to a discussion of similar affirmative action provisions in CEDAW).

3.43 Article 33, in addressing national-level monitoring of the implementation of the CRPD, is a unique provision for an international human rights treaty. This article stems from the historical development of human rights as international norms to rights which are real and applicable, and which should be monitored at the national level.[303] It foresees a comprehensive implementation structure in the following three bodies:

- Focal points within government
- A coordination mechanism within government
- An independent mechanism based on the Paris Principles.[304]

3.44 Paragraph 1 makes it clear that every State Party's administration is required to include a body that sees to the legal and practical implementation of the Convention's rights. In addition to ensuring the effective involvement of civil society (as required in paragraph 3), effective exchange with other bodies concerned with human rights issues should be ensured. This would include a coordination mechanism and an independent mechanism, respectively. Commentators emphasise that regular exchange with Parliament should be explicitly foreseen; and that the coordination mechanism should be included in all relevant policy-making decisions, be they legislative or national action plans.[305] The independent mechanism referred to is basically a National Human Rights Institution, as foreseen in the Paris Principles. Apart from the strong emphasis on independence, this mechanism also guarantees that the rights of persons with disabilities will be treated as mainstream human rights issues, rather than as a specialised and potentially segregated theme.[306]

---

303 Ibid 119.

304 The Paris Principles provide a framework under which every Member State should have its own national human rights institution in charge of monitoring, evaluating, protecting and promoting human rights at the national level (Schultze *Understanding the CRPD* 119 and the comprehensive discussion of these principles on 120).

305 Schultze *Understanding the CRPD* 120.

306 Ibid.

2 Approaches to treaty interpretation

3.45 The interpretation of treaties follows the same pattern as the interpretation of statutes in municipal law. There are thus different approaches and different rules of interpretation, borrowed from municipal law, that may be invoked to support an interpretation.[307]

3.46 In terms of the Vienna Convention, there are generally three approaches to treaty interpretation which have also been accepted by the International Court of Justice at some time or another:

- The textual (giving effect to the literal or grammatical meaning of words).
- The teleological (emphasising the object and purpose of a treaty in the interpretative process).
- The intention of the parties (seeking to give effect to the intention or presumed intention of the parties; this is inferred from the text and the preparatory works [*travaux preparatoires*], the historical record of the treaty, or the circumstances of its conclusion). [308]

3.47 Like municipal law, international law knows no hierarchy of rules of interpretation – in interpreting a treaty, a Court is allowed to select the rule or approach which is considered to be the most appropriate in the circumstances of the case.[309] This degree of flexibility is regarded as both necessary and desirable if international law is to be developed to meet the changing circumstances of the modern world.[310] In the past, South Africa established itself as a leading proponent of the textual approach, which by its nature supports a narrower interpretation (in contradistinction to an approach which would elevate the wider community interest and respect for human rights). More recently, South African Courts have approved a purposive approach to the interpretation

---

307 Dugard 417.

308 Art 31 and 32 of the Vienna Convention. See also Dugard 418. Art 31 recognises both the textual and teleological approaches in providing that a treaty is to be interpreted " …in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Art 32 provides that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31…".

309 Dugard 418.

310 Ibid.

of treaties for the purposes of domestic law.[311] On occasion it was also expressly recognised that the preparatory works of a convention might be invoked.[312]

3.48 With regard to the interpretation of the CRPD in particular, it has been argued that the requirement to interpret a treaty "in context" – which refers to the third approach to treaty interpretation mentioned above, places the CRPD in a unique situation. Interpreting "in context" requires one to read a specific provision in light of the overall treaty. The CRPD's unique character mandates an approach which must continually take into account its object and purpose (to be considered in terms of articles 1, 3 and 4). Interpretation of a specific provision must thus refer to the aim of fulfilling the purpose of "promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and promoting respect for their inherent dignity".[313]

3 Context, object and purpose of article 12

3.49 The CRPD is the first international treaty of the 21st century. As such it complements a number of other existing treaties adopted by the United Nations or developed by various civil society initiatives, some dating back several decades.[314] The Convention builds on these prior enactments in significant ways. It is, however, also significant in other regards. First, the CRPD is the first binding international treaty that recognises the extent to which discrimination and abuse of people with disabilities exists worldwide. Over 650 million people, or 10% of the world's population, may be considered as disabled, and discrimination against this group remains prevalent in most countries.[315] Second, it is the result of intense and ongoing participation and collaboration among many Disabled People's Organisations, Non-governmental Origanisations, and Member

---

311 Ibid 420.

312 *M V Mbashi: Transnet Ltd v M v Mbashi and Others 2003(3) SA 217 (D)* at 223 as referred to in Dugard *420*.

313 Allain *Legal Reports No 2* 7 in referring to Art 1 of the CRPD.

314 Kanter *Syracuse Journal of Int L&C* 2007 306-8; Melish *Human Rights Brief* 4-6; Lawson Syracuse Journal of Int L&C 2007 565-571.

315 Ibid.

States from various regions and countries around the world. The mantra of organisations representing the rights of persons with disability – "nothing about us without us" – was the basis for their involvement, which ensured that intimate knowledge of living with disabilities informed the content of the CRPD.[316] Finally, the Convention is significant because of its unprecedented inclusiveness during the process that brought it to fruition.[317]

3.50 The purpose of the CRPD is clearly set out in its article 1 (as reflected in paragraph 3.30 above). Generally the object and motivating purpose of the CRPD as a whole, from which context the object and purpose of article 12 must be derived, must be established against the background of deeply entrenched attitudes and stereotypes about disability. Such prejudices have rendered many of the most flagrant abuses of the rights of persons with disabilities "invisible" from the mainstream human-rights lens.[318] In this sense, although the CRPD does not create new rights, its motivating purpose is gap-filling and substantive, and its purpose is to make existing human rights law relevant to persons with disabilities, by comprehensively elaborating the full range of internationally protected human rights from a disability perspective. In this respect the CRPD represents a global consensus that the current human rights regime has proven to be ineffective at ensuring equal rights for persons with disabilities in practice.[319] Persons with disabilities experience rights violations not only in the same ways as people without disabilities do, but also – most abusively – in ways directly tied to their disabilities or in ways supposedly justified by the disability. According to Melish, "(T)hese abuses (which included being stripped of legal capacity) remain hidden, normalised through widespread assumptions that conflate disability with inability, even **incompetence"** (emphasis added).[320] The purpose of the CRPD is to address these abuses through all appropriate and reasonable measures, including the guarantee of reasonable accommodation, procedural safeguards, accessibility, and individualised proportional support where necessary.[321]

---

316 Ibid.

317 Ibid.

318 Melish *Human Rights Brief* 6-7.

319 Ibid 7. See also Lawson *Syracuse Journal of Int L&C* 2007 565-571.

320 Melish *Human Rights Brief* 7.

321 Ibid.

3.51 In another sense, but equally important, the CRPD's purpose is to bring about a fundamental paradigm shift in the way disability is conceptualised, both nationally and internationally. The CRPD aims to lead disability policy away from a "medical" or "social welfare" model, which is based on separating out persons with disabilities and placing them onto "parallel tracks" or simply excluding them from mainstream society, towards a "social" or "human rights" model that focuses on *capability.* The social and human rights models take as their main point of departure the inclusion, individual dignity, and personal autonomy of persons with disability.[322] In this sense the purpose of the CPRD is to compel States Parties to rethink the underlying assumptions upon which their policies and practices have historically been based, and to refocus policy on the societal barriers that keep persons with disabilities from full and effective participation and inclusion in all aspects of life. In the context of such a paradigm shift, governments will be required to make provision for individualised support measures and the promulgation and enforcement of procedural safeguards to secure the protection of basic rights and prevent future abuses.[323]

3.52 Turning to the subject matter of article 12 in particular, persons with disability in most jurisdictions risk being declared legally incompetent and consequently subjected to the control of a guardian.[324] In many instances, this happens without due regard to the actual capacity of the person with disability. The operation of guardianship systems has long been a cause of concern for the disability movement, as these systems in practice generally operate on the basis of "substituted" rather than "supported" decision-making

---

322 Ibid; EFC Final Report 41 et seq; Traditionally disability has been viewed, not as an equality or human rights issue, but as a medical problem located within the particular individual who has the physical, sensory, intellectual psychosocial or other impairment or condition. Improvement of the lives of persons with disabilities under this model was done through measures targeted at the person concerned (eg through medical intervention or through the provision of aids, such as eg hearing aids). The emphasis of this approach is on adapting the individual so as to enable them to function in the world around them. Although such measures can assist in maximising the independence of disabled people, there will inevitably be many disabled people who cannot be fully adapted. For such people, the medical approach to disability has little to offer beyond a lifetime of unfulfilled potential and segregation. The “social” model of disability challenges the assumption that, unless a person with impairment can be cured or corrected they must remain outside the mainstream of their societies. It rejects the perception of disability as a problem located entirely within the individual and embraces the premise of adapting society (by removing societal barriers which excludes people with disabilities from mainstream society) rather than adapting the disabled individual (Lawson *Syracuse Journal of Int L&C* 2007 571-773.

323 Ibid.

324 Lawson *Syracuse Journal of Int L&C* 2007 569.

(because guardianship is premised on "incapacity"). This scenario deprives the person with disability of the opportunity to exercise choice over fundamental matters concerning their own life, to the full extent they are capable of.[325] In many cases where guardians were appointed, the person with disability might well have been capable of making some or even all of the relevant choices, had appropriate support been available to them.[326] Against the broader purpose of the CRPD, the specific purpose of article 12 should thus be clear: It is aimed at enjoining States Parties to ensure person-specific, proportional support. It is also clearly aimed at moving away from monolithic systems of substitute decision-making to systems of supported decision-making, because supported decision-making recognises the rights of people with disabilities to equal treatment and the protection of their human rights.[327] It has been said that, against the background of centuries of experience with the concept of incapacity, article 12(2) should be seen as an attempt "to reinvent the notion of incapacity in a way that finds a better balance between freedom and protection".[328]

4 Drafting history of article 12

3.53 Controversy surrounded the drafting of article 12. The drafting history reflects that the development of this provision challenged some deeply-held beliefs about human choice and freedom. The complicated and extensive deliberations during various stages of the drafting process are comprehensively recorded in the legal literature.[329] We provide an outline of these proceedings below, with a view to ascertaining the intention of States Parties for purposes of establishing an interpretation of article 12.

---

325 Ibid. See also Dhanda *Syracuse Journal of Int L&C* 2007 446.

326 Lawson *Syracuse Journal of Int L&C* 2007 595-596.

327 Ibid 597. See also Dhanda *Syracuse Journal of Int L&C* 2007 446.

328 Quinn *EDF Forum Paper* 20.

329 For comprehensive information on the drafting history refer to Kanter *Syracuse Journal of Int L&C* 2007 297-306; Lawson *Syracuse Journal of Int L&C* 2007 595-597; and Dhanda *Syracuse Journal of Int L&C* 2007 438-456.

3.54 As indicated above, the motive for developing the CRPD stemmed from the failure of the existing human rights system to provide adequate protection to the range of persons with disabilities.[330] To rectify this failure, the United Nations General Assembly in December 2001 established an Ad Hoc Committee to consider proposals for an international convention to promote and protect the rights and dignity of people with disabilities.[331] At the same time, the United Nations invited international bodies and organisations with an interest in the matter – including intergovernmental and non-governmental organisations – to contribute to the work of the Committee. The Ad Hoc Committee set up a Working Group consisting of representatives of Member States and NGOs to prepare a draft text, which later became the basis for negotiations about the Convention. During this process, the International Disability Caucus (IDC) was formed to allow representatives of NGOs which did not have consultative status to nonetheless attend and participate in the process.[332]

3.55 The Working Group formulated the first text on legal capacity for consideration by the Ad Hoc Committee. The draft article provided for universal legal capacity, assistance in exercising such capacity for persons who experience difficulty asserting their rights, and safeguards whenever there is assistance with decision-making.[333] The main points of controversy in response to the draft centred on the meaning of "legal capacity", the provision of assistance, substituted decision-making arrangements, and safeguards against the misuse of such arrangements. The discussions of the text by the Ad Hoc Committee indeed reflected the clash between paternalism and autonomy, as follows:[334]

- In the deliberations on legal capacity, some States introduced a distinction between legal capacity *for rights* and legal capacity *to act*. Based on their national laws, these States submitted that although all persons with

---

330 See pars 3.10 et seq above. See also Kanter *Syracuse Journal of Int L&C* 2007 293-294 referring to statements by Louise Arbour, United Nations High Commissioner for Human Rights, and Ambassador Don MacKay of New Zealand, Chair of the United Nations Ad Hoc Committee charged with the development of the CRPD.

331 The Ad Hoc Committee on a Comprehensive and Integral International Convention to Promote and Protect the Rights an Dignity of Persons with Disabilities established by Resolution 56/168 (Kanter *Syracuse Journal of Int L&C* 2007 298).

332 Kanter Syracuse *Journal of Int L&C* 2007 298.

333 Dhanda *Syracuse Journal of Int L&C* 2007 438-441. (The draft article was included in the Working Group text as article 9.)

334 Ibid 438-442.

disability possessed the capacity for rights, a similar universality did not exist in relation to the legal capacity to act. This contention caused the Working Group text (which provided for universal legal capacity) to be altered through the insertion of an ambiguous footnote introducing the distinction between legal capacity for rights and legal capacity to act. The introduction of the footnote was strongly questioned by representatives of civil society and non-governmental organisations, but was not resolved.[335]

- With regard to the provision of support, the IDC suggested that the text be amended to ensure that persons with disabilities are entitled to have, or to seek, support to exercise legal capacity; and that the conditions surrounding such support should be expressly formulated. (This text itself was drafted as a duty of States Parties – which seemed to indicate that persons with disabilities might not have the final authority to decide whether to use or accept support.)[336] The IDC recommended that the text should provide for the proportionality of support to meet the person's needs; that the support should not undermine the legal rights or capacity of the person; that it must respect the will and preferences of the person; and that it shall be free from conflict of interest and undue influence.[337]
- In discussing safeguards against the misuse of arrangements for support, the concern was raised that a small number of persons with disability would not be able to function even with support, and would require others to make decisions on their behalf. It was submitted that this reality should be acknowledged in the Convention by also providing for *substituted* decision-making and for safeguards against its misuse.[338] This request was countered by the argument that providing for support proportionally to the needs of the person concerned would make explicit reference to substitution unnecessary.[339] It was further argued that even if substituted decision-making were incorporated in the Convention to cater for a very small percentage of persons, the question would arise as to what

---

335 Ibid 442-444.

336 Ibid 444.

337 Ibid.

338 Ibid 445.

339 Ibid.

> procedure will be necessary to identify such persons. If the identification were done on a case-by-case basis, such a process would render the capacity of all persons with disability open to question – merely for a questionable advantage to a small group.[340] The IDC made the contention of "questionable advantage" on the strength of studies that have evaluated the functioning of the guardianship system. These studies found that abuse was facilitated rather than prevented by guardianships.[341] The IDC emphasised that substituted decision-making is premised on the incapacity of a person with disability. Consequently, once made, arrangements for substitute decision-making allow the substitute (i e the guardian) to make all decisions on behalf of the person with disability without consulting him or her.[342] The paradigm of *supported* decision-making is thus preferable to that of *substituted* decision-making, because supported decision-making more fully recognises the right of people with disabilities to equal treatment, and the protection of their human rights. *Supported* decision-making also acknowledges human interdependence, whereas *substituted* decision-making imposes dependence – which negates human aspiration, respect, and choice.[343]

3.56 To streamline the existing draft and to capture the consensus and dissension on each article, the Chairperson of the Ad Hoc Committee subsequently issued a new working text.[344] In the Chair's text, the dispute between supported and substituted decision-making was depicted by including the option of allowing for the appointment of personal representatives as a matter of last resort. In opposition, some States stressed that as the Convention was also a political document which aimed at bringing about a paradigm shift, its message about the legal capacity of an excluded community should be unequivocal. To reflect the paradigm shift, it was necessary that the Convention

---

340 Ibid 445-446.

341 Ibid 446 and the sources referred to by the author.

342 Ibid 446.

343 Ibid.

344 Ibid 447; Letter from the Chairman of the Ad Hoc Committee, Don MacKay, to all members of the Committee dated 7 October 2005 (Ad Hoc Committee Seventh Session New York 16-27 January 2006) Web 5 May 2010 pars 1, 3, 52-54 and Annex I art 12. In this text provision for legal capacity was dealt with in article 12.

express its concern for persons with high support needs within the supported decision-making model.[345] In an attempt to handle the discord, Canada suggested that the text should neither prohibit guardianship nor endorse it.[346] The IDC, however, underscored the fact that while supported decision-making was premised on the competence of persons with disabilities, substituted decision-making was based on their incompetence; hence the two concepts could not subsist together. The IDC nonetheless took note of the concerns expressed by a number of Member States with regard to persons with high support needs, and consequently recognised the merit of the Canadian proposal.[347] It should be noted that these concerns were not limited to Member States. Some non-governmental organisations and those representing the rights of persons with disabilities continued to express the view that guardianship should be expressly permitted in some cases.[348]

3.57 In an effort to break the deadlock, certain Member States[349] proposed a new modified text for article 12. The proposed wording combined some of the safeguards required for guardianship with some of the standards desired for supported decision-making. A majority of Member States and the IDC saw in this modified text enough commonality that could enable consensus. However, just when it seemed the modified text would become the sole text for final negotiation, some States sought and obtained retention of the original Chair's text, which included the option for the appointment of personal representatives.[350]

3.58 In the final Ad Hoc Committee meeting on article 12, the modified text referred to in the previous paragraph (which does not make express reference to high-level needs, personal representation, or guardianship) emerged as the consensus text.[351] However, this text was introduced with the controversial footnote differentiating between capacity

---

345 Dhanda *Syracuse Journal of Int L&C* 2007 447-448.

346 Ibid 448.

347 Ibid.

348 Ibid 449.

349 Including the European Union, Canada, Australia, Norway, Costa Rica, the United States, and Liechtenstein (Dhanda *Syracuse Journal of Int L&C* 2007 449-450).

350 Dhanda *Syracuse Journal of Int L&C* 2007 449-450.

351 Ibid 451.

to act and capacity for rights (referred to in paragraph 3.55 above – although no negotiations or deliberations had been undertaken around the footnote.[352] The disputed footnote stated that "in Arabic, Chinese and Russian the term 'legal capacity' refers to 'legal capacity for rights' rather than 'legal capacity to act'."[353] Commentators have remarked that an analysis of the footnote text shows that it made a substantive reservation disguised as a linguistic one.[354]

3.59 Article 12, including the footnote, was adopted *ad referendum*. Commentators have remarked that the presence of the footnote showed the depth of the prejudice that persisted against persons with disabilities in general, and against people with certain disabilities in particular. The footnote was proposed in the name of particular disabilities, but for inclusion in a Convention that covered people with all sorts of disabilities.[355]

3.60 Subsequent proceedings within the Drafting Committee, which reviewed the text for linguistic consistency and clarity, provided an opportunity for Member States to interact before the full text was formally adopted. Despite strong support for deleting the footnote, in the absence of consensus the Drafting Committee returned the text to the Ad Hoc Committee without deleting the footnote.[356] Because of the extensive negotiations that had taken place within the Drafting Committee, this Committee urged the Ad Hoc Committee to consensually delete the footnote, especially as the country that had insisted on its inclusion was agreeable to its deletion. In light of this consensus, the Ad Hoc Committee agreed to delete the footnote.[357]

---

352 Ibid.

353 Ibid 453 and the sources referred to by the author.

354 Ibid 453-454.

355 Ibid 452-454.

356 Ibid. Deletion of the footnote was initiated on the basis that human rights instruments by their very nature are universal. Thus, according to proper United Nations protocol, States Parties who seek national exemptions from Conventions are free to file reservations (Ibid 453).

357 Ibid 454-455.

3.61 The pulls and pressures that had haunted article 12 at all stages of the negotiations again came to the fore when the CRPD was adopted by the General Assembly on 13 December 2006.[358] Varying interpretations of the article were proposed by different countries in making their statements.[359] For example, Canada suggested that the article only requires that denial of capacity should not happen on a discriminatory basis; and that, whilst it is not a prohibition on substitute decision-making, it does place particular emphasis on the importance of supported decision-making. Finland, on behalf of the European Union and many other countries, stressed that the concept of "legal capacity" must have the same meaning in all languages. Japan expressed the view that the concept should allow for a flexible interpretation, bearing in mind the differences in national legal systems. The IDC submitted a "global reading" of article 12, and pointed out that the Convention requires a paradigm shift – which, the IDC noted, was underlined by the deletion of the footnote from article 12. The IDC stressed that a paradigm shift is needed "since the right to enjoy legal capacity on an equal basis in all aspects, including the capacity to act, is fundamental to basic equality and participation in all aspects of life".[360]

5 Some international views on article 12

3.62 The advisory committee assisting the SALRC with this investigation, in seeking an interpretation of article 12 in the context of South African law, accessed international views on the CRPD's article 12 that were available at the time. Some of these views are referred to below.

3.63 In a publicly available legal opinion dated June 2008, a group of international disability law experts drew attention to the fact that several questions around the construction of legal capacity in the CRPD's article 12 had been raised in various

---

358 Ibid 456.

359 Ibid 455-456.

360 Ibid 456.

jurisdictions worldwide. To facilitate an understanding of article 12, the group supported the following views:[361]

> **(Article 12(2)) by extending the same rights to persons with disabilities fulfils the agency requirement (the capacity to act) of legal capacity. The nonnegotiable nature of this commitment is evidenced by the inclusion of individual autonomy, non-discrimination and equality of opportunity in the list of General Principles which States are under an obligation to uphold.** This obligation would require that the States both refrain from actions that undermine the principles and initiate efforts which would promote them. **That paragraph (2) of article 12 provides for the agency requirement of legal capacity is further borne out by the remaining paragraphs of article 12.** Thus, paragraph (3) of art 12 requires States Parties to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'. Article 12(4) concerns itself with the need to guard against the abuse of such support and does so by making provision for appropriate and effective safeguards. Article 12(5) explicitly mentions that persons with disabilities should be able to inherit, manage financial affairs and own property. Thus both on a purposive and a textual interpretation of article 12 it can be concluded that legal capacity in the CRPD has been constructed like CEDAW [United Nations Convention on the Elimination of All Forms of Discrimination against Women] to include both the capacity for rights and the capacity to act. (Emphasis added.)

3.64 A thematic study by the Office of the United Nations High Commissioner for Human Rights informed the discussion of article 12 at the CRPD's Conference of States Parties in October 2009. The thematic study had focused on legal measures required for the ratification and effective implementation of the CRPD. The study stated the following, with regard to article 12 and its status in municipal law:[362]

> Article 12 of the Convention requires States parties to recognize persons with disabilities as individuals before the law, possessing legal capacity, including capacity to act, on an equal basis with others. Article 12, paragraphs 3 and 4, requires States to provide access by persons with disabilities to the support they might require in exercising their legal capacity and establish appropriate and effective safeguards against the abuse of such support. The centrality of this article in the structure of the Convention and its instrumental value in the achievement of numerous

---

361 Cifuentes et al *Legal Opinion on Art 12 of the CRPD.*

362 United Nations *Thematic Study on the CRPD* par 43-45, 58.

other rights should be highlighted.

Article 16, paragraph I, of the International Covenant on Civil and Political Rights already requires the recognition of legal personality of persons with disabilities. The implementation of the obligations contained in article 12, paragraphs 2, 3, 4 and 5, of the Convention on the Rights of Persons with Disabilities, on the other hand, requires a thorough review of both civil as well as criminal legislation containing elements of legal competence.

In the area of civil law, interdiction and guardianship laws should represent a priority area for legislative review and reform. Legislation currently in force in numerous countries allows the interdiction or declaration of incapacity of persons on the basis of their mental, intellectual or sensory impairment and the attribution to a guardian of the legal capacity to act on their behalf. Whether the existence of a disability is a direct or indirect ground for a declaration of legal incapacity, legislation of this kind conflicts with the recognition of legal capacity of persons with disabilities enshrined in article 12, paragraph 2. Besides abolishing norms that violate the duty of States to respect the human right to legal capacity of persons with disabilities, it is equally important that measures that protect and fulfil this right are also adopted, in accordance with article 12, paragraphs 3, 4 and 5. This includes: legal recognition of the right of persons with disabilities to self-determination; of alternative and augmentative communication; of supported decision-making, as the process whereby a person with a disability is enabled to make and communicate decisions with respect to personal or legal matters; and the establishment of regulations clarifying the legal responsibilities of supporters and their liability… .

Even in States Parties where the Convention is not directly applicable, **ratification of or accession to the Convention creates a strong interpretative preference in favour of the Convention, which requires the judiciary to apply domestic law in a manner that is consistent with it**. (Emphasis added.)

3.65 A discussion paper published by the World Bank in 2007 sets out financial implications of the CRPD.[363] These are based on the Bank's interpretation of the various provisions of the CRPD. The extract below is limited to the Bank's discussion of article 12:

---

363 Guernsey et al par 4.20-4.21.

> **Article 12 … marks an important paradigm shift, as historically many societies have deprived people of their legal capacity simply on the basis of their disability.** During the negotiations **many disabled people spoke passionately about the terrible consequences faced by those deprived of their ability to exercise their legal capacity, and though some delegations expressed reservations, ultimately the AHC found the personal testimony compelling enough to warrant pursuit of a new approach**. **This new approach calls for States Parties to focus not on denying people their legal capacity, but instead on the provision of supports, where necessary, to enable persons with disabilities to exercise their legal capacity. Thus, instead of a 'spectrum of legal capacity,' with those who have it at one end and those who do not at the other, there is envisioned a 'spectrum of measures to support exercise of legal capacity,' with those requiring no such support at one end and those requiring one hundred percent support at the other**. Measures to protect against abuse of support provided are similarly scaled and proportionate to the amount of support required.
>
> Whilst Article 12 does not explicitly prohibit guardianship laws, it is anticipated that many States Parties will move away from traditional guardianship approaches, and/or utilize such procedures only in rare circumstances where an individual is in need of extensive or 'one hundred percent support.' (Emphasis added.)

3.66 The *Syracuse Journal of International Law and Commerce* in 2007 dedicated a special issue to articles that present various perspectives by disability law experts on the CPRD, and its potential to improve the lives of people with disabilities.[364] The view of Prof Amita Dhanda[365] on the foundational role of legal capacity and the interpretation of article 12 is noteworthy:[366]

> Perhaps more than any other human rights treaty, the Disability Convention has demonstrated the falseness of the dichotomy between civil-political and social-economic rights. This chasm has to be closed on both ends. Just as some civil-political rights, such as the freedom of speech and expression, are meaningless without reasonable accommodation of the physical

---

364 Syracuse University College of Law, Journal of International Law and Commerce Vol 34 No 2 (2007).

365 Professor of Law, National Academy of Legal Studies and Research, Hyberdad, India.

366 Dhanda Syracuse *Journal of Int L&C* 2007 456-460, and 460-462.

> infrastructure; other social-economic rights, such as the right to health, become oppressive without informed consent and freedom of choice.
>
> The need to establish an inclusive and universal paradigm of legal capacity is necessary so that one of the foundational prejudices against persons with disabilities is disassembled. This prejudice has to be addressed for persons with disabilities to move from systems of welfare to regimes of rights. **Without legal capacity, it will not be possible to obtain rights guaranteed under the Convention, such as the right to live in the community or the right to participate in political and public life.** (Emphasis added).

3.67 At the time of preparation of this report, the CRPD has been cited in a number of Court decisions in both Australia and the United Kingdom, although not conclusively – because the CRPD is in neither country enforceable in the same way as domestic law. However, in the decision of *Nicholson v Knaggs*, the Court used the CRPD to assist in reshaping the applicable common law.[367] Vickery J remarked as follows with regard to article 12 of the CRPD:

> **(T)he idea of 'legal capacity' as it is used in Article 12 of the CRPD, is a wider concept which entails the capacity to exercise rights and undertake duties in the course of individual conduct**. This construction becomes clear from the application of the rules for interpretation provided in the VCLT.[368] **In particular this interpretation is revealed when the Convention is construed in accordance with Article 31(1) of the VCLT and the ordinary meaning to be given to its terms, as used in their context, is applied in the light of the object and purpose of the Convention. The meaning arrived at by the application of Article 31(1) of the VCLT is confirmed by reference to the *travaux preparatoires* of the Convention, which may be used as a supplementary means of interpretation under Article 32 to confirm a meaning arrived at from the application of Article 31.**[369] (Emphasis added.)

---

367 McCallum Legal Studies Research Paper no 10/30 referring to *Nicholson v Knaggs* [2009] VSC 64 (Unreported, Vickery J 27 February 2009).

368 The author refers to the Vienna Convention on the Law of Treaties, 1969.

369 Articles 31 and 32 of the Vienna Convention, referred to by the author, are discussed in par 3.46 above.

E Suitable premise in the context of South African law

1 South Africa's unreserved ratification of the CRPD and its effect

3.68 South Africa is recognised as a sovereign independent state with full treaty-making powers.[370] International law, however, does not prescribe how a state is to exercise its treaty-making power. It is left to the municipal law of each state to determine who may enter into treaties on its behalf.[371]

3.69 Under the Constitution, the executive and Parliament share this power. In terms of section 231, the national executive has the responsibility of negotiating and signing international agreements.[372] Where an agreement is of “a technical, administrative or executive nature”, it binds the Republic on signature without parliamentary approval, but must be tabled in the National Assembly and the National Council of Provinces within a reasonable time.[373] Where the agreement does not fall within one of these categories, it "binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces".[374] DIRCO, in its legal opinion to the SALRC (referred to in paragraph 3.9 above), confirmed that the CRPD falls within the scope of the latter category.

3.70 The Constitution is premised on the Vienna Convention, which allows final consent to be bound by a treaty to be given by ratification, accession, or signature.[375] Formal agreements, particularly multilateral agreements, normally require ratification in addition to signature – which requires the representative of the state subsequently to endorse the earlier signature.[376] This provides the state with the opportunity to

---

370 Dugard 407.

371 Ibid 408.

372 Sec 231(1). According to the Constitution the executive authority of the Republic is vested in the President; and the President exercises this authority together with the other members of the Cabinet (sec 85(1) and (2)).

373 Sec 231(3). South African Government law advisers treat agreements of a routine nature, flowing from the daily activities of government departments as not requiring parliamentary approval (Dugard 409).

374 Sec 231(2).

375 Dugard 408.

376 Ibid.

reconsider its decision to be bound by the treaty, and if necessary to effect changes to its own laws to enable it to fulfil its obligations under the treaty.[377] In practice, treaties generally indicate whether ratification is required.[378] This is indeed the case with the CRPD's article 42, which expressly states that the CRPD is subject to ratification.

3.71 In terms of article 2(1)(d) of the Vienna Convention, it would be possible to become a party to a multilateral treaty while maintaining a reservation which excludes or modifies the legal effect of certain provisions of the treaty in their application to that State.[379] The reservation must, however, be compatible with the object and purpose of the treaty.[380] Currently, the latter condition is interpreted by the United Nations Human Rights Committee as rendering a reservation that is contrary to the object and purpose of a treaty as *ipso facto* null and void, irrespective of the reaction of other States.[381]

3.72 As indicated previously, South Africa became a signatory to the CRPD on 30 March 2007, and unreservedly ratified the CRPD as well as its Optional Protocol on 30 November 2007.[382]

3.73 Ratification followed the approval, in terms of section 231(2) of the Constitution, of the CRPD by the National Assembly and the National Council of Provinces on 5 June 2007.[383] In the course of deliberations by government officials briefing Parliament at the time, the political significance of South Africa being amongst the first countries to sign

---

377 Ibid.

378 Ibid.

379 See also Dugard 409-414.

380 Art 19(c) of the Vienna Convention. See also Dugard 410-111.

381 Dugard 412-413.

382 United Nations *Treaty Collection: Status of CRPD.*

383 Approval was granted on the strength of a Report by the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Children, Youth and Disabled Persons (JMC). The Report consists of the following: "The (JMC), having considered the request for approval by Parliament of the (CRPD) and its Optional Protocol, referred to it, recommends that the House and the Council, in terms of section 231(2) of the Constitution, approve the said Convention" (Parliament of the Republic of South Africa Announcements, Tablings and Committee Reports Monday 28 May 2007 p 920). According to the Minutes of Proceedings in both the National Assembly and the National Council of Provinces, the JMC's recommendation to approve the CRPD was adopted without debate (Republic of South Africa Minutes of Proceedings of National Assembly Tuesday 5 June 2007, No 28-2007, Fourth Session Third Parliament; and Republic of South Africa Minutes of Proceedings of National Council of Provinces Tuesday 5 June 2007, No 16-2007, Fourth Session Third Parliament).

the CRPD was emphasised.[384] The respective roles of the government departments concerned with the implementation of the CRPD were clarified.[385] The Convention's provisions dealing with "legal capacity" were not in particular brought to the attention of Parliament. The possibility of reservations with regard to a CRPD provision to deal with education for people with disabilities was discussed, but was not supported in view of the significance of ratification without reservations.[386] The official reason for ratification is evident from an explanatory memorandum from the (former) Office on the Status of Disabled Persons (OSDP) to the President, which described the purpose of the CRPD and its Optional Protocol, and the intention of the Government to sign the two instruments. The memorandum, dated 27 February 2007, states that –

> South Africa considers this Convention important because of its commitment to ensuring that the promotion and protection of human rights are a reality for all as encapsulated in our Constitution which supports … the democratic values of human dignity, equality and freedom.

The memorandum also emphasised that South Africa was involved, from the start, in the Convention's drafting and negotiation process.[387]

3.74 The effect of unreserved ratification is that South Africa is bound, in terms of international law, by the entire text of the CRPD to the extent of the obligations it has promised to fulfil and abide by vis-à-vis other States Parties to the CRPD.[388] Failure to observe the provisions of the CRPD may thus result in South Africa incurring responsibility towards other signatory states.[389] This has been confirmed by DIRCO in its legal opinion referred to above.[390] Note, however, that the CRPD only becomes part of South African law once it has been enacted into law in South Africa (see paragraph 3.75 below).

---

384 PMG Minutes JMC Meeting 25 May 2007.

385 Ibid.

386 Ibid.

387 Copy of Explanatory Memorandum to The President from Benny S Palime, Director OSDP, dated 27 February 2007 attached to PMG Minutes JMC Meeting 25 May 2007.

388 Cf Dugard 62.

389 Ibid.

390 Pr 3 of the Opinion dated 2 February 2010.

2 Status of the CRPD in South African municipal law

3.75 In terms of the Constitution, an international agreement or treaty does not become part of South African domestic law until it is enacted into law by national legislation.[391] (This requirement is not applicable to "self-executing" treaties – which constitute law in the Republic unless the treaty is inconsistent with the Constitution or an Act of Parliament.[392]) "National legislation" includes an Act of Parliament; subordinate legislation made in terms of an Act of Parliament; and legislation that was in force when the Constitution took effect and is administered by the national government.[393] DIRCO, in its legal opinion to the SALRC (referred to in paragraph 3.9 above) confirmed (without expressing itself on whether the CRPD is "self-executing"), that an Act of Parliament or other form of "national legislation" would be required, in addition to ratification, for the incorporation of the CRPD into South African law.[394] As indicated above, a treaty that has been signed and ratified, but not enacted into local law (as is currently the case with the CRPD), is nonetheless binding on South Africa at the international level. Failure to observe its provisions could result in South Africa incurring responsibility towards other signatory states.[395]

3.76 Three principal methods are generally employed by the legislature to transform treaties into municipal law. The provisions of a treaty may be embodied in the text of an Act of Parliament; or may be included as a schedule to a statute; or an enabling Act of Parliament may give the executive the power to bring a treaty into effect in municipal law by means of proclamation or notice in the *Government Gazette*.[396] Mere publication of a treaty for general information does not result in it becoming part of our municipal law.[397]

---

391 Sec 231(4). See also Dugard 60-61.

392 Sec 231(4). Whether a treaty is "self-executing" centres around the question whether existing law is adequate to enable the Republic to carry out its international obligations without legislative incorporation of the treaty (Dugard 62). This is a problematic issue and no general guidelines are available to settle the question whether a treaty is "self-executing" – each case will have to be decided on its own merits with due regard to the nature of the treaty, the precision of its language and the existing South African law on the subject in question (Ibid).

393 Sec 239 of the Constitution.

394 Legal Opinion dated 2 February 2010 par 6 and 7.

395 Cf Dugard 62.

396 Ibid.

397 Ibid 61.

3.77 A draft National Disability Rights Policy, based on the CRPD, was released in February 2015 by the Department of Social Development. The purpose of the Policy is to update and replace the government's Integrated National Disability Strategy, which was released in 1997 with a view to establish a basis for disability legislation.[398] The new Policy is envisaged to form the basis for the development of disability-specific legislation in South Africa.[399]

3.78 In South Africa, national law is supreme unless that law itself provides that the provisions of international law shall be supreme. The South African Constitution is the supreme law of the land.[400] The Constitution, however, clearly intends that the Constitution and South African law shall be interpreted to comply with international law, particularly in the field of human rights.[401]

- First, the common law presumption requiring a Court to interpret legislation in compliance with international law,[402] is given constitutional form in section 233, which provides that "**when interpreting any legislation**, every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconstant with international law" (emphasis added).
- Second, the Bill of Rights, which is modelled on international human rights conventions, is subjected to a special interpretative regime. Section 39 expressly requires that **when interpreting the Bill of Rights,** a Court or tribunal or forum "must consider international law".[403] In this regard the Constitutional Court has indicated that even non-binding international law, such as conventions to which South Africa is not a party, should be taken into account.[404]

---

398 See par 2.4 above. (The Policy has since been published as the White Paper on the Rights of Persons with Disabilities, GN 230 in GG 39729 of 9 March 2016.)

399 Ibid.

400 Sec 2 of the Constitution. See also O'Shea in *Bill of Rights Compendium* 7A-5.

401 Dugard 64. See also Bhaba 2009 *SAJHR* 229.

402 Dugard 52-53.

403 Sec 39(1)(b).

404 *S v Makwanyane* 1995 (6) BCLR 665 (CC) par [35]; See also Dugard *International Law* 65-66.

- It is further accepted that the Courts may use a treaty to which South Africa is party but which has not been incorporated into municipal law (as is currently the case with the CRPD), to interpret an ambiguous statute.[405]

3.79 In terms of the Constitution, South African Courts have the power to judicially review legislation.[406] It is thus inevitable that international law will be invoked as a guide to statutory interpretation and also as a challenge to the validity of legislation.[407] Such challenges can be direct or indirect. As a direct challenge, for instance, it could be argued that the procedures for ratification and incorporation of a treaty under section 231 of the Constitution have not been followed. In an indirect challenge, international law may be invoked to support an interpretation in favour of the unconstitutionality of a statute. The latter point is of specific relevance in the context of the SALRC's proposed draft Bill.

3.80 Thus, even if the CRPD is not directly incorporated into South African law by way of "national legislation", or while it has not yet been incorporated, its provisions still have to be taken into account in the sense that they will have interpretative value. In the event of a genuine conflict, however, national legislation or the Constitution will prevail.[408]

3 SALRC's premise in taking into account CRPD's Article 12

3.81 Against the background of the information supplied in the preceding paragraphs, there doubtless is strong support for an interpretation of the CRPD's article 12(2) to the effect that it provides for persons with disabilities to enjoy "active legal capacity" on an equal basis with other people, in all aspects of life. Active legal capacity here refers to the capacity to exercise rights and undertake duties. There also is substantial support for the view that article 12 recognises that certain people are, as a matter of fact, unable to exercise active legal capacity, and that such persons must be supported to the full extent of their needs. The support given to such persons must always be case-specific and

---

405 Dugard 66.

406 Sec 172.

407 Dugard 67.

408 O'Shea in *Bill of Rights Compendium* 7A-6.

proportional. The SALRC has not been mandated to advise on a definitive interpretation of the CRPD. Without submitting that that is the correct interpretation, we have premised our recommendations thereon that article 12(2) provides for a universal legal capacity, which has been extended to all persons with disabilities.

3.82 In terms of its unreserved ratification of the CRPD, South Africa is bound by the CRPD's provisions on the international level, and failure to observe these provisions could result in South Africa incurring responsibility towards other signatory States.[409] The CRPD, however, only becomes part of South African law once it has been enacted into our law (which has not been done yet).[410] In spite of this, the Constitution clearly intends that South African law – including the Constitution – be interpreted to comply with international law, particularly in the field of human rights. Even if the CRPD is not directly incorporated into South African law, or while it has not yet been incorporated, its provisions will thus have to be taken into account in the sense that they will have interpretative value.[411] This point has been borne in mind in developing the SALRC's proposals on supported decision-making.

3.83 The SALRC, in premising its recommendations on the interpretation which favours article 12(2) to refer to active legal capacity, notes the following points as being relevant to the proposals for law reform on supported decision-making:

- An analysis of the object and purpose of the CRPD shows that it is widely accepted that the CRPD's central purpose is to bring about a fundamental paradigm shift in the way disability is conceptualised.[412] The CRPD's article 1 refers expressly to the fact that the CRPD aims to promote the "full" enjoyment of all human rights by all persons with disabilities.[413] It has been said that the CRPD aims to compel States Parties to rethink the underlying assumptions upon which their policies and practices have been based historically, and to refocus policy on the barriers that prevent

---

409 Par 3.74 above.

410 Par 3.75 et seq above.

411 Par 3.80 above.

412 Par 3.49 et seq.

413 See the discussion of article 1 in par 3.30 et seq above.

persons with disabilities from full and effective participation and inclusion in all aspects of life.[414] Guardianship systems have been cited as an example of a historically unacceptable and oppressive method which generally operates on the basis of "substituted" rather than "supported" decision-making, and which has deprived persons with disability of the opportunity to exercise choice over fundamental matters concerning their own lives. Against the wider purpose of the CRPD, the specific purpose of article 12 is seen as a movement away from systems of substituted decision-making to systems of supported decision-making, which would more fully recognise the rights of people with disabilities to equal treatment and the protection of their human rights.[415]

- The drafting history of article 12 reflects that the adoption of the paradigm of universal capacity was questioned because it was feared that it did not adequately address the concerns of persons with high support needs.[416] (It was submitted that a small number of persons would not be able to function even with support, and would require others to make decisions on their behalf, and that the CRPD should acknowledge this reality by making provision for substituted decision-making alongside supported decision-making.) Owing to this apprehension, article 12(3) was drafted to place an obligation on State Parties to make provision for support. It was further agreed that because the CRPD is a political document and its message on legal capacity should be unequivocal, to make the paradigm shift which was lobbied for, the needs of persons with high support needs should be addressed within the "supported" decision-making model (even though such support might in some instances, depending on the nature of the impairment, in practice amount to "substitute" decision-making). In this regard it was argued that while "supported" decision-making is premised on competence, "substituted" decision-making is premised on incompetence – and hence the two concepts could not exist together (in the text of the CRPD). This argument is understandable from a symbolic point of view,

---

414 See par 3.51 et seq above.

415 See par 3.52 and 3.65 above.

416 See the full discussion on the drafting history in par 3.53 et seq above.

> and this statement clarifies that what the CRPD aims for is a shift in emphasis. It should also be noted that "guardianship" is not prohibited by the CRPD; this was the result of a compromise: While it was recognised that certain people would need this measure of support (implying "substitution" rather than "support"), the direct inclusion of guardianship was symbolically not acceptable. The problem was addressed not by prohibiting guardianship, but by making provision for safeguards to protect people with disabilities when support in the form of guardianship is in fact necessary.[417]

- The CRPD intends to reflect a change in emphasis from dependence to non-dependence, and from incompetence to competence. This shift is necessary so that one of the foundational prejudices against persons with disabilities – their not being able to exercise rights – is disassembled. **It is this change in emphasis which should be reflected in the SALRC's proposed draft legislation, whether by way of terminology used in the proposed draft Bill, or by the content of in-principle provisions included in the Bill.**

3.84 The Commission's premise is in accordance with the first formal guidelines on the interpretation of article 12 and its effects, released by the United Nations in April 2014.[418] Extracts from the "Draft General Comment" on article 12 state as follows:

> Article 12 of the Convention affirms that all persons with disabilities have full legal capacity. Legal capacity has been prejudicially denied to many groups throughout history, including women (particularly upon marriage), and ethnic minorities. However, persons with disabilities remain the group whose legal capacity is most commonly denied in our legal systems worldwide. **The right to equal recognition before the law requires that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others.** Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make

---

417 The safeguards are included in art 12(4). See par 3.18 et seq above.

418 United Nations General Comment on Article 12. The General Comment was preceded by a draft General Comment issued in September 2013 for public comment. The General Comment can be accessed at http://www.hochr.org.

fundamental decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities, has in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment and the right to liberty.[419] …

All persons with disabilities including those with physical, mental, intellectual or sensory impairments can be affected by denial of legal capacity and substitute decision-making. However, **persons with cognitive or psychological disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity**. **The Committee[420] reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights in Article 12.** All practices that in purpose or effect violate Article 12 must be abolished to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.[421] …

Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors ... Under Article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.[422] **…**

Legal capacity is an inherent right accorded to all people, including persons with disabilities. As noted above, it consists of two strands. The first is legal standing to hold rights and to be recognised as a legal person before the law…. The second is legal agency to act on those rights and to have those actions recognised by the law. It is this component that is frequently denied or diminished for persons with disabilities…. Legal capacity means that all people, including persons with disabilities, have legal standing and legal

---

419 Our extract refers to par 8 of the General Comment.

420 The authors of the General Comment refer here to the United Nations Committee on the Rights of Persons with Disabilities.

421 Our extract refers to par 9 of the General Comment.

422 Our extract refers to par 13 of the General Comment.

agency simply by virtue of being human. Therefore, both strands of legal capacity must be recognised for the right to legal capacity to be fulfilled; they cannot be separated. The concept of mental capacity is highly controversial in and of itself. Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.[423]

In most [States] … **the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequentially removed**. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach)… In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.[424] …

`

…**'Support' is a broad term that encompasses both formal and informal support arrangements, of varying type and intensity**.[425] …

The type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities. This is in accordance with article 3(d) [of the CRPD], which sets out 'respect for difference and acceptance of persons with disabilities as part of human diversity and humanity' as a general principle of the Convention. At all times, including crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.[426] …

States Parties' obligation to replace substitute decision-making regimes by supported decision-making requires both the abolishment of substitute decision-making regimes and the development of supported decision-

---

423 Our extract refers to par 14 of the General Comment.

424 Our extract refers to par 15 of the General Comment.

425 Our extract refers to par 17 of the General Comment.

426 Our extract refers to par 18 of the General Comment.

making alternatives. **The development of supported decision-making systems in parallel with the maintenance of substituted decision-making regimes is not sufficient to comply with Article 12 of the Convention.**[427] **…**

A supported decision-making regime comprises various support options which give primacy to a person's will and preferences and respect human rights norms. It should provide protection for all rights, including those related to autonomy … and rights related to freedom from abuse and ill-treatment. Furthermore, systems of supported decision-making should not over-regulate the lives of persons with disabilities. While supported decision-making regimes can take many forms, they should all incorporate certain key provisions to ensure compliance with Article 12 of the Convention, including the following:

(a) **Supported decision-making must be available to all**. A person's level of support needs (especially where these are high) should not be a barrier to obtaining support in decision-making;
(b) **All forms of support in the exercise of legal capacity, including more intensive forms of support, must be based on the will and preference of the person,** not on what is perceived as being in his or her objective best interests;
(c) A person's **mode of communication must not be a barrier** to obtaining support in decision-making, even where this communication is unconventional, or understood by very few people;
(d) Legal recognition of the support person(s) formally chosen by a person must be available and accessible, and States have an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring support in the community. **This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge an action of a support person if they believe that the support person is not acting in accordance with the will and preference of the person concerned;**
(e) In order to comply with the requirement, set out in article 12, paragraph (3), of the Convention, for States Parties to take measures to 'provide access' to the support required, States Parties must ensure that **support is available at nominal or no cost** to persons with disabilities and that a lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;

---

427 Our extract refers to par 28 of the General Comment.

(f) **Support in decision-making must not be used as justification for limiting other fundamental rights of persons with disabilities,** especially the right to vote, the right to marry or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty;

(g) The person must have **the right to refuse support and terminate or change the support relationship at any time;**

(h) **Safeguards must be set up** for all processes related to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person's will and preferences are respected;

(i) The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.[428]

… The right to reasonable accommodation in the exercise of legal capacity is separate from, and complementary to, the right to support in the exercise of legal capacity. States Parties are required to make any necessary modifications or adjustments to allow persons with disabilities to exercise legal capacity, unless it is a disproportionate or undue burden. Such modifications or adjustments may include, but are not limited to, access to essential buildings such as Courts, banks, social benefit offices, and voting venues; accessible information regarding decisions which have legal effect; and personal assistance. The right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate or undue burden. The State has an absolute obligation to provide access to support in the exercise of legal capacity.[429] (Emphasis added.)

3.85 It is recommended in this Report that the concept of the enduring power of attorney should be introduced into South African law through the proposed draft Bill on Supported Decision-making. With regard to the relevancy of the CRPD and the effect of the above interpretation of 'support', some people have suggested that the CRPD's principles should also be reflected in the application of the enduring power after the person who granted the power becomes a person in need of support in exercising legal

---

428 Our extract refers to par 29 of the General Comment.

429 Our extract refers to par 34 of the General Comment.

capacity.[430] The context of the enduring power is, however, very different from measures put in place by the State to assist persons with disability, in that its critical feature is an arrangement made by a person at a time when he or she has the capacity to deal with a possible future need for assistance. Making such arrangements is clearly an important expression of personal autonomy, and the Commission believes that the CRPD should not be applied to such autonomous arrangements.

3.86 The scope of existing law that touches on legal capacity is much wider than the subject matter addressed in the SALRC investigation. We do not express ourselves on the interpretation of article 12 with regard to other matters – such as, for instance, compulsory medical treatment, detention or institutionalisation in terms of the Mental Health Care Act of 2002, or criminal liability. These are separate matters which should be dealt with under a general review of South African law as envisaged by the CRPD.[431]

F Limited role of the SALRC with regard to the comprehensive implementation of the CRPD

3.87 The CRPD requires a comprehensive overview of relevant South African law in order to facilitate its implementation.[432] It was indeed indicated during Parliamentary briefings preceding the ratification that, although the State Law Advisers at the Department of Justice and Constitutional Development certified that South African law is not in conflict with the CRPD, it was not stated that South African law fully complies with the CRPD.[433] Hence, it seems inevitable that changes to the law will be necessary. This has been confirmed by the then Department of Women, Children and People with Disabilities in its first Baseline Report to the United Nations on the Implementation of the CRPD in 2013.[434] Furthermore, the National Disability Rights Policy, published in

---

430 See the views of the Victorian Equal Opportunity and Human Rights Commission in this regard expressed as comments on the Victoria Law Reform Commission's Information Paper on Guardianship, January 2009 Web 30/7/2010.

431 See par 3.87 below.

432 United Nations *Thematic Study on the CRPD.*

433 PMG Minutes JMC Meeting 25 May 2007.

434 Baseline Country Report: UN CRPD 80.

February 2015, confirms that the Government envisages major legislative and policy review towards domesticating the CRPD.[435]

3.88 Some commentators from the disability sector submitted that the Commission should, in its draft Bill on Supported Decision-making, include a general implementation of the CRPD into South African Law. However, affecting far-reaching changes to the law to this end – even within the ambit of the CRPD's article 12 – does not fall within the SALRC's mandate for the investigation on assisted decision-making. It is also not the task of the SALRC within the greater government administration. The CRPD expressly prescribes the measures to be set up by States Parties towards implementation:

- Article 33(1) makes provision for 'the designation of one or more focal points within government' for matters relating to its implementation; and for the 'establishment of a coordination mechanism within government' to facilitate action in different sectors and at different levels.
- Article 33(2) further provides that States Parties should establish a framework, including one or more independent mechanisms, to promote, protect and monitor implementation.[436] As indicated in paragraph 3.73 above, the former OSDP (later the Department of Women, Children and Persons with Disabilities) in briefing the relevant Parliamentary Committee at the time, during the discussions preceding ratification, emphasised the steps that will be necessary for implementation, and confirmed that it will take the lead in this regard.
- Article 33(3) moreover requires that civil society, 'in particular persons with disabilities and their representative organisations' should be involved in this process.[437]

---

435 According to the draft National Disability Rights Policy published in February 2015 (Notice 129 in GG 38471 of 16 February 2015) a major legislative and policy review across all government departments and municipalities is envisaged as well as the development of transversal disability rights legislation towards the domesticating the CRPD (draft National Policy par 1.1 p 30). The draft National Policy emanated from the office of the Minister of Social Development and it is expected that the national Department of Social Development will drive this initiative. (The Policy has since been published as the White Paper on the Rights of Persons with Disabilities, GN 230 in GG 39729 of 9 March 2016. See par 2.4 above.)

436 See the discussion of article 33 in par 3.43 et seq above.

437 Ibid.

3.89 The question of , for instance, whether the current curatorship system should be repealed or is still suitable, is not dealt with in our investigation. The Advisory Committee for this investigation has, on the strength of public consultation, for now accepted that the curatorship system is still suitable but inadequate.[438] The SALRC's proposals seek to deal with the inadequacies of the curatorship system by providing for gaps and grey areas. In terms of common law, the High Court has the power to declare someone incapable.[439] This decision often goes hand-in-hand with the appointment of a curator. Repealing the Court's power to appoint a curator would thus potentially also affect the Court's power to declare someone incapable. Whether it is necessary to amend the common law with regard to judicial declaration in order to reflect the paradigm shift brought about by the CRPD is not part of the SALRC investigation, and we do not express ourselves on that point. This might be one of the matters that have to be considered under the comprehensive review of all law and legislation which needs to be undertaken by the government in terms of its obligations under the CRPD's article 33, and which is indeed foreseen by the government in its first Baseline Country Report to the United Nations on the Implementation of the CRPD.[440] The SALRC's proposals are not dependent on such an investigation, as there is no reason why the supplementary measures proposed in the draft Bill cannot coexist with the current curatorship system.

G Relevant CRPD requirements as reflected in Draft Bill on Supported Decision-making

3.90 The table below lists the provisions in the draft Bill on Supported Decision-making which reflect relevant CRPD requirements. The Bill is included in Chapter 7 of this report.

---

438 SALRC Discussion Paper 105, 2004 par 3.29 et seq.

439 See par 2.21 et seq above.

440 Baseline Country Report: UN CRPD 2013 80.

CONVENTION REQUIREMENTS	REFLECTION IN DRAFT BILL ON SUPPORTED DECISION-MAKING
Art 12(1) and (2) • **Persons with disabilities have the right to recognition as persons before the law** • **Persons with disabilities to enjoy legal capacity on equal basis with others**	• **Preamble** • **Cl 4 Disability defined**
Art 12(3) • **Sates Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising legal capacity**	• **Long title** • **Preamble** • **Cl 2 (Objects of Act)** • **Measures provided for in Chapter 2 (Informal support in exercising legal capacity)** • **Measures provided for in Chapter 3 (Formal support in exercising legal capacity with regard to property)** • **Measures provided for in Chapter 4 (Formal support in exercising legal capacity with regard to personal welfare)** • **Less directly: Measure provided for in Chapter 5 (Enduring power of attorney)**

Art 12(4)
• **All measures relating to exercise of legal capacity required to provide for safeguards to prevent abuse – generally**
	• **General principles in rendering support (Cl 5)**
	• **Informal support (Cl 6-15)**
	  ○ **Limitation on when informal support may be provided (Cl 6(1) and (2))**
	  ○ **Limitation on expenditure in connection with informal support (Cl 7)**
	  ○ **Prohibition on using threat or force (Cl 8)**
	  ○ **Restrictions with regard to property (Cl 9)**
	  ○ **Restriction with regard to personal welfare (Cl 10)**
	  ○ **Restriction vis-à-vis formal support (Cl 6(2))**
	  ○ **Person rendering support to keep records (Cl 11)**
	  ○ **Extent of continuing authority to access bank account limited (Cl 12(2))**
	  ○ **Records in respect of continuing authority to access bank account required (Cl 13)**
	  ○ **Provision for withdrawal of continuing authority to access bank account (Cl 14)**
	  ○ **Provision for termination of continuing authority to access bank account (Cl 15)**
	• **Formal support (property) (Cl 16-44)**
	  ○ **Application procedure includes medical evidence and consent by person with disability and relatives (Cl 17(2)(g) and 17(3))**
	  ○ **Financial supporter to be "suitable" (Cl 18(2))**
	  ○ **Support may be provided only in terms of letter of appointment setting out powers of supporter**

	(Cl 20(3) and 22) ○ **Financial supporter to give security on appointment (Cl 21)** ○ **Financial supporter to submit inventory of property to be administered (Cl 24)** ○ **Prohibition on disposal of property not in inventory (Cl 25)** ○ **Financial supporter to deposit money to be administered in separate bank account, and submit information regarding such account to Master when requested (Cl 26)** ○ **Financial supporter to notify Master of change of address and circumstances (Cl 27)** ○ **Financial supporter to keep appropriate records of support provided (Cl 29)** ○ **Annual reporting by long-term financial supporter to Master is obligatory (Cl 30(2))** ○ **Financial supporter to allow Master to inspect securities held on behalf of person with disability (Cl 31)** ○ **Financial supporter has "fiduciary duty" and "duty of care" in providing support (Cl 32)** ○ **Financial supporter prohibited from using threat or force (Cl 34)** ○ **Financial supporter to adhere to certain restrictions with regard to administration of property of person with disability (eg may only alienate, mortgage or purchase property of person with disability under certain circumstances) (Cl 35)** ○ **Financial supporter may not substitute another person to act in his/her place (Cl 37)** ○ **Financial support subject to obligatory periodic review by Master (Cl 38)** ○ **Person receiving support may apply for termination of support (Cl 40)** ○ **Master and Court may withdraw appointment of financial supporter under certain circumstances (Cl 41)** • **<u>Formal support (personal welfare) (Cl 45-63)</u>** ○ **Application procedure includes medical evidence and consent by person with disability and relatives (Cl 46(2)(g) and 46(3))** ○ **Personal welfare supporter to be "suitable" (Cl 47(2))** ○ **Support may be provided only in terms of letter of appointment setting out powers of supporter (Cl 49(3) and 50)** ○ **Personal welfare supporter to notify Master of change of address and circumstances (Cl 51)** ○ **Master may require personal welfare supporter to keep record of support provided (Cl 52)** ○ **Master may require personal welfare supporter to submit report on support provided (Cl 53)** ○ **Personal welfare supporter has "fiduciary duty"**

	and "duty of care" in providing support (Cl 54) ○ **Personal welfare supporter prohibited from using threat or force (Cl 56)** ○ **Personal welfare supporter may not substitute another person to act in his/her place (Cl 58)** ○ **Personal welfare support subject to obligatory periodic review by Master (Cl 59)** ○ **Person receiving support may apply for termination of support (Cl 61)** ○ **Master and Court may withdraw appointment of personal welfare supporter under certain circumstances (Cl 62)** • **<u>Powers of the Master aimed at protection of the rights of persons with disability</u> (Cl 99-116)** ○ **Master may make enquiries, including enquiries at the request of the person with disability (Cl 102 and 103)** ○ **Master may request information from any person which contains or is suspected to contain relevant information (Cl 104)** ○ **Master may summon any person to be questioned under oath in connection with a matter under consideration (Cl 106)** ○ **Master must notify Deeds Office of any immovable property included in a financial supporter's inventory. No transaction may be registered against such property without the consent of the Master or the Court (Cl 107)** ○ **Master may request the Court to compel a financial or personal welfare supporter to perform his/her duties (Cl 108)** ○ **Any person, including a person with disability, may lodge an objection against any decision or act by a financial or personal welfare supporter with the Master for review (Cl 112)** • **<u>Powers of the Court</u>** ○ **Every appointment made or decision taken by the Master in terms of the draft Bill is reviewable by the Court at the instance of any interested person, including the person with disability concerned (Cl 113)** • **<u>Offences and Penalties</u>** ○ **Refer to the list of offences created in Cl 125**
Such safeguards must specifically ensure that measures relating to the exercise of legal capacity – • **respect the rights, will and preferences of the person** • **are free of conflict of interest and undue influence**	• **Refer to the general principles in rendering support (Cl 5(2)(g))**

• **are proportional and tailored to the circumstances of the person with disability** • **apply for the shortest time possible** • **are subject to regular review by competent, independent, impartial authority or judicial body** • **are proportional to the degree to which such measures affect the person's rights and interests**	• **Refer to the general principles in rendering support (Cl 5(2)(j))** • **Refer to the general principles in rendering support (Cl 5(2)(f) and (e))** • **Refer to the general principles in rendering support (Cl 5(2)(d) and(e))** • **Refer to the review procedures provided for in respect of appointments for financial supporters (Cl 38) and personal welfare supporters (Cl 59)** • **The principle of proportionality of safeguards is applied throughout the Bill:** ○ **eg stricter reporting requirements are applicable in respect of long-term financial support compared with short-term financial support – compare Cl 30(1) and (2)** ○ **eg stricter reporting requirements are applicable in respect of financial support compared with personal welfare support – compare Cl 30 with Cl 53**
<u>Art 12(5)</u> **Appropriate and effective measures should be taken to ensure equal rights to own or inherit property, to control financial affairs, to have equal access to bank accounts or mortgages and other forms of financial credit; and shall ensure that persons with disabilities are not arbitrarily deprived of their property**	• **In terms of S A common law, all persons including persons with disabilities have equal rights to own and inherit property** • **The appointment of a financial supporter in terms of the draft Bill will ensure the protection of these rights** • **The draft Bill expressly provides that a financial supporter has a fiduciary duty, and duty of care, in providing support to a person with disability (Cl 32)** • **The draft Bill contains express provisions restricting certain actions of a financial supporter with regard to the property of a person with disability (see eg Cl 35)**

CHAPTER 4
FUNDAMENTAL ASPECTS

A Introduction

4.1 The following three elements underpin the entire system of support to persons with disability in exercising their legal capacity, as recommended in this report:

- A definition of person with "disability" – which will in turn define the client base of the proposed legislation.
- Clear principles that govern any support of a person with disability in exercising his or her legal capacity in terms of the draft Bill on Supported Decision-making.
- An accessible and cost-effective supervisory framework to administer the proposed system of formal support.

Our recommendations with regard to these elements are discussed below. Because of the importance of the definition of "disability", and of the general principles governing support in terms of the draft Bill, these aspects are discussed with comprehensive reference to the background provided in Discussion Paper 105. Discussion Paper 105 forms the basis from which the final recommendations have been developed.

4.2 Relevant requirements of the CRPD have been taken into account in developing the Commission's final recommendations on the definition of "disability". This is also reflected in the change in terminology from "incapacity" to "disability", as reflected in the final recommendations. "Incapacity" was the term used in the Commission's Discussion Paper 105 (before the CRPD came into force). This term is retained below in references the Commission's initial research, the Discussion Paper recommendations (which were made before the CRPD came into force), and the public comment thereon; and also in references to the Masters powers as set out in the Administration of Estates Act 66 of 1965.

B Persons with "incapacity"

1 Need for change in defining "incapacity"

4.3 We indicated in Chapter 2 above[441] that the general common law test for capacity is the ability to manage one's affairs. It is the threshold requirement for retaining the power to make legally valid decisions. In accordance with this, inability to manage one's own affairs is the decisive test for the appointment of a curator to act as a substitute decision-maker. At the start of this investigation, the Commission posed the question whether this test is still appropriate while it has been widely accepted that "capacity" is function-specific rather than a holistic concept. Should the law not reflect this? In particular, would the common law test still be appropriate as base for new supported decision-making measures, which would aim to recognise incapacity as function-specific (requiring, for instance, measures dealing with temporary or fluctuating loss of capacity, or with incapacity in relation to specific decisions only)?

4.4 In the course of reform in comparable jurisdictions, it was submitted that the common law test is vague; that its simplistic nature fails to address the general problems of identifying incapacity; that it provides no detailed criteria for incapacity; and that it does not take into account functional ability and the potential for autonomy.[442] In these jurisdictions, it was accepted that capacity is function-based, and that the test for capacity should be defined accordingly. This approach would allow for the formation of a suitable base for new measures to be developed to accommodate this premise.

4.5 The majority of commentators on Issue Paper 18 agreed with the above criticisms. Many of them emphasised that the common law approach is "all or nothing"; that it is too limited and simplistic; that it is no longer appropriate in all respects; that the law should acknowledge that capacity fluctuates even within a single individual; that different degrees of assistance with the affairs of persons with incapacity should thus be

---

441 See par 2.12 et seq.

442 Cf English Law Commission **Consultation Paper 119** 1991 44-45.

provided for, and that the test for capacity should reflect this complex reality. Some respondents believed that the current test is unacceptable as it focuses on inability only and does not take into account any potential for self-reliance. There was relative agreement amongst respondents that whether capacity is expressly defined or not, and however it is defined, the law should recognise degrees of competency and the focus should be on functional impairment. In this regard, the Commission was referred to definitions from other jurisdictions, which define "capacity" in terms of "the act in question". In addition, it was suggested that the current concept of incapacity needed to be widened to cover temporary incapacity, and incapacity resulting from physical disability and illiteracy. A small minority submitted that there is no need to define the concept of capacity, and that there is no need for lay people to understand the current common law definition, because that definition is applied exclusively by the Courts. These respondents pointed out that status matters – as matters of utmost importance – are dealt with by the common law and the Courts, and that this should remain so; new definitions and mechanisms would intrude on this discretion.

4.6 Discussion Paper 105 supported the criticism of the current position. The Commission stated that it believed that the common law test, although still appropriate in some cases, is not sufficiently flexible. In particular, the common law test does not recognise temporary incapacity; does not clearly accommodate fluctuating capacity; and is not function-specific. These are issues that need to be addressed in new supported decision-making measures. The development of new measures that recognise function-based incapacity would inevitably require a test for capacity based on a more suitable premise. Moreover, a specific new test would clearly indicate to the public when new statutory measures can be applied. With regard to the criticism that new definitions would limit or intrude on judicial discretion regarding status matters, the Commission pointed out that the measures to be developed in the course of this investigation are not aimed at changing the status of persons in respect of whom such measures will be applied. Such an approach would be in accordance with constitutional principles and international practice regarding intervention in the affairs of persons with incapacity. Any new definition would, moreover, apply only for purposes of such new measures, and will thus not intrude on the common law and the Courts' discretion regarding change of status.

2 Different approaches

4.7 The following question was posed in Discussion Paper 105: How should capacity (or incapacity) be defined? In other words, what should the ground or test for "incapacity" be? Although the underlying principle that capacity is function-based has been widely accepted, different jurisdictions followed different approaches in defining capacity or incapacity for purposes of supported decision-making legislation. We indicated in Discussion Paper 105 that the approach followed is largely dictated by the nature of the specific measures developed. In some jurisdictions, the definition is regarded as a threshold to indicate the general "client group" provided for by the legislation. In others, the definition is added to or slightly altered in the course of the legislation, to fit a specific measure being provided for. Some jurisdictions enacted comprehensive definitions, whereas others preferred a simplified approach. Where comprehensive tests are used, the details varied considerably.[443]

4.8 Many jurisdictions define "capacity" in terms of cognitive functioning. Cognitive ability is the ability to arrive at a decision by manipulating or processing information, and making a choice. Because of this salience, cognitive ability is usually the point of departure in formulations of "capacity". In some formulations, cognitive ability refers to the capacity to understand the *nature* and to foresee the *consequences* of decisions. In others, the concept hinges on a person's ability to understand *information* relevant to the decision, and to appreciate the *reasonably foreseeable* consequences of a decision.[444]

4.9 Where comprehensive tests for capacity or incapacity have been developed, some or a combination of the following elements has been included in such tests, in addition to the requirement of cognitive ability:[445]

1 Coupling of the cognitive test with a mental disability precondition (ie requiring that the inability to function is the result of mental disability, illness, or disorder).

---

443 See SALRC **Discussion Paper 105**, par 4.31 et seq.

444 Ibid.

445 Ibid.

2 Indicating the amount and complexity of information that the person might need to be able to understand (eg by requiring that the person need only understand information conveyed in broad terms and simple language).[446]

3 Considering the outcome of the decision (eg by providing that behaviour, or intended action, which differs from that of an ordinary prudent person is not in itself evidence of a lack of capacity). It is argued that this would provide a safeguard against unnecessary interference in the lives of people who are merely deviant or eccentric.[447]

4 Including a true choice test (ie regarding incapacity to be present if a person understands the information relevant to taking the decision, but is unable to make a true choice in relation to that information).[448] In this regard it is argued that a person's will could be overborne by actions of others, or could be overborne as an effect of the person's mental disorder, so that the decision arrived at is not a "true" decision.[449]

5 Including an inability to communicate the decision in question (eg by providing that a person should be considered unable to make the decision in question, if he or she is unable to communicate it to others who make reasonable attempts to understand it).[450] This approach recognises that some people has an inability to communicate rather than the incapacity to make decisions, and that in some situations it is unclear whether the inability pertains mainly to decision-making or to communicating. It aims, in particular, to cover inability resulting from physical disabilities or inability that is not ascribable to one or more specific conditions.[451]

4.10 In some jurisdictions, an express presumption of competence operates alongside a test for capacity, or is formulated as part of the general principles that should govern intervention (as discussed in the next Chapter).[452] The legislation sometimes also

---

446 English Law Commission **Consultation Paper 128** 1992 28.

447 Ibid.

448 Ibid 31-32.

449 Ibid.

450 Ibid 34-35.

451 Ibid.

452 Queensland Law Reform Commission **Report No 49** Vol 2 28. See also par 4.11 (subpar 3) below.

contains an indication of the standard of proof necessary to rebut the presumption of competence. It is generally accepted that the ordinary standard applicable in civil law (proof on a balance of probabilities) should apply.[453]

4.11 Some practical examples of tests for capacity or incapacity formulated in legislation in other jurisdictions are as follows:

1 In both England[454] and Scotland,[455] complex tests (containing several of the elements referred to in the previous paragraph) have been suggested by the law reform bodies concerned. In both countries, the tests are based on cognitive functioning, and emphasise inability to make a decision as well as inability to communicate any decision made. In both cases the inability must stem from mental disability and must be function-specific. In both cases, the definition serves as a general threshold for application of the proposed legislation; this provides for formal intervention in the affairs of persons with incapacity, and legalises informal assistance.

2 In New Zealand, various tests (based on cognitive impairment) apply in respect of different measures of intervention. The tests seem to be directly linked to the specific measures – in contradistinction to the position in

---

453 English Law Commission **Consultation Paper 119** 1991 103-104 and **Consultation Paper 128** 35.

454 According to the recommendations a definition of what it means to be "without capacity" should consist of the following elements:

"(1) A person should be regarded as unable to make a decision if at the material time he or she is -

(a) unable by reason of mental disability to make a decision on the matter in question; or

(b) unable to communicate a decision on that matter because he or she is unconscious or for any other reasons.

(2) An 'inability to make a decision' means -

(a) an inability to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision; or

(b) an inability to make a decision based on that information.

(3) Mental disability' means 'a disability or disorder of the mind or brain, whether permanent or temporary which results in an impairment or disturbance of mental functioning'" (English Law Commission **Report 231** 1995 par 1.3-1.4).

455 Sec 1(6) of the Adults with Incapacity (Scotland) Act 2000 defines "incapable" (with regard to a specific decision or act described in the Act) as "incapable of acting; making decisions; communicating decisions; understanding decisions; or retaining the memory of decisions, … by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise)".

England and Scotland, where a single test serves as a general threshold for application of the legislation.[456]

3 In Queensland in Australia, a simplified test was recommended. Although the recommended test emphasises the inability to both make and communicate decisions, it does not require that such inability must stem from mental disability.[457] The test further clearly implies that if a decision can be made with "assistance" (ie assistance by an "informal decision-maker" such as a family member), there is no need for recourse to the procedures provided for by legislation. The measure provided for by the legislation consists of the appointment of various types of substitute decision-makers by a tribunal or other official body. "Informal assistance" is not covered by the legislation. In Queensland it was recommended that the test should operate alongside an express presumption of capacity (which was included in the proposed legislation as one of the principles governing intervention in the affairs of persons with incapacity).[458]

4 In the Netherlands, an additional system, which is less formal and intrusive than the existing system of curatele, was established to operate parallel to the existing system of curatele. The existing system was not abolished – unlike in England, Scotland and Queensland. The codified common law test

---

456 The Court can eg make a “personal order” (a specific instruction requiring an action to be taken in respect of a specific part of an incapacitated person’s care and welfare) only if the person concerned –“lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences of decisions in respect of matters relating to their personal care and welfare; or have these capacities but totally lack the capacity to communicate decisions about their personal care and welfare”.

The Court can appoint a “welfare guardian” (someone to make and implement decisions on behalf of a person in relation to all aspects of their personal care) only where the person concerned –

“lacks wholly or partly, the capacity to make or communicate decisions about an area or areas relating to their personal care and welfare” (Information on the Protection of Personal and Property Rights Act, 1988 supplied by the Family Court of New Zealand available on the Internet at http://www.courts.govt.nz).

457 According to the Law Reform Commission’s recommendations a person has “decision-making capacity” for a specific decision if “the person is capable, whether with or without assistance, of understanding the nature and foreseeing the effects of the decision; and communicating the decision in some way”. A person has “impaired decision-making capacity” in respect of a specific decision “if the person does not have decision-making capacity for the decision” (Queensland Law Reform Commission Report **No 49** 1996 Vol 2 176).

458 The proposed presumption was formulated as follows: “An adult is presumed to have the capacity to make the adult’s own decisions” (Queensland Law Reform Commission **Report No 49** 1996 Vol 2 28).

of inability to manage one's own affairs, which operates in respect of curatele, was in effect retained, but was further developed to expressly accommodate the elements of temporary incapacity and incapacity related to physical condition. The measures of "bewind" (management of financial affairs) and "mentorschap" (management of personal and welfare affairs) can be instituted where a person, as a result of his or her physical or mental condition, is temporarily or permanently incapable of managing such affairs.[459] These tests are formulated against the following background: an appointment for a "bewindvoerder" or "mentor" can be made by a judicial officer, who must exercise his or her discretion as to whether "the person concerned can manage his or her affairs". However, the new tests clearly address the need to acknowledge that capacity can fluctuate or be temporarily lost. The tests are based on the premise that the intervention provided for may only be used if less formal arrangements (which the law does not regulate) are inadequate.[460]

4.12 As indicated in paragraph 4.5 et seq above, commentators who were in favour of a new definition of "incapacity" in general suggested that such definition should be function-based and should deal with fluctuating and temporary incapacity. Apart from this, the comments reflected the following[461]:

1 There were several suggestions, in particular from the medical fraternity and social services professions, for specific and comprehensive definitions based on a cognitive test. Proponents of this approach in general submitted that the definition should provide a uniform assessment scale, known to all,

---

459 The new measures of "bewind" and "mentorschap" can be instituted where a person, as a result of his or her physical or mental condition, is temporarily or permanently incapable of fully managing his or her financial affairs (in the case of "bewind"); or incapable or has difficulty in managing his or her non-financial affairs (in the case of "mentorschap") (our translations). While the application of "curatele" required that the person should be unable to manage his or her affairs "wegens een geestelijke stoornis" the new measures require that the inability should be caused by "lichamelijke of geestelijke toestand" (BW Title 16 sec 1:378; BW Title 19 sec 1:431; and BW Title 20 sec 1:450; see also Van Duijvendijk-Brand and Wortmann 195-196, 219-220 and 226-227).

460 Van Duijvendijk-Brand and Wortmann 219-220.

461 These comments were discussed with reference to the individual commentators in **Discussion Paper 105** par 4.36 et seq.

with specific criteria – which should be clear and should not allow for discretion. Many of these respondents emphasised that it is nearly impossible to capture assessment of capacity in a simple and short definition. Others, while not denying this challenge, stressed the need for a user-friendly definition. Some respondents from the social service professions specifically emphasised that the law should allow more input from their professions in determining capacity. Respondents in favour of the cognitive test approach suggested that the following elements should be reflected in a test for incapacity:

- A finding or diagnosis of mental disability, or a clinical condition, and the status of that condition (eg fluctuates; is stable; is temporary or permanent). In other words, a mental disability precondition.
- The influence of the person's clinical condition on his or her judgment (ie a cognitive test). Some respondents included a requirement that the ability to make a *rational* decision should be part of the test for capacity.
- Whether the person was vulnerable to being influenced (ie a "true choice" test).
- Difficulty in communicating decisions. Some commentators specifically referred to the inability to communicate as a result of illiteracy, and suggested that persons who are exploited because of their illiteracy should be regarded as a vulnerable group, and this group should be protected by new measures.
- The influence of cultural beliefs and practices on decision-making should be taken into account.

2 Other respondents preferred a more simplified test. Respondents in this category emphasised the need for new measures to deal essentially with cases of incapacity that are not currently covered by the legal definition of "incapacity". In other words, cases where assistance is needed, but without a finding that the person is unable to manage his or her affairs for reasons related to or stemming from mental disability or a specific disorder or condition. It was argued in this regard that it is emotionally traumatising for all concerned to institute proceedings whereby the person who needs

assistance could be classified or categorised as being mentally ill. Tests or definitions based on a diagnosis of mental illness or disorder should thus be avoided. In this context, it was suggested that a simple definition that allows intervention in respect of persons "who require assistance with decision-making or administration of assets" should suffice.

3 Some members of the legal fraternity who commented preferred a broad and vague test, where the assessment of capacity would be left to the discretion of the High Court and based on evidence by medical experts. These respondents were generally in favour of retaining the current common law test of inability to manage affairs. For instance, the view was expressed that definitions of mental capacity which would on the one hand create a sort of yardstick by which the mental capacity of persons are measured and which on the other hand would limit the discretion of the relevant person determining the question of mental capacity in a particular case, would not serve the interests of society in general. A proper judicial discretion has to be exercised and that judicial discretion must not be limited by a number of so-called mechanisms and definitions which cannot make provision for every individual or situation.

4 Another view submitted was that it would be very difficult, indeed *too* difficult, to develop a satisfactory definition, because capacity depends on so many variables and a definition would have to cover too many possibilities. This group submitted that no attempt should be made to strictly define the concept.

5 It was also pointed out that the nature of the measures to be developed (its permanence, extent, and nature), should determine the content of the test for capacity or incapacity.

Discussion Paper recommendation and comment

4.13 The Commission, at the time, was in favour of expressly defining "incapacity" for purposes of any new supported decision-making measures. We conceded that although it will be difficult to formulate a suitable test, doing so is probably necessary to clearly

identify persons in respect of whom any recommended measures will apply. As indicated, the Commission preferred a function-based definition, which should cover temporary incapacity and fluctuating incapacity. In addition, for reasons indicated earlier in this Chapter,[462] in Discussion Paper 105 the Commission favoured a definition based on a clear cognitive test – rather than a vague test similar to that of the common law. The Commission, however, believed that the cognitive test should be formulated as simply as possible and should refer mainly the following elements:

- ability to *assimilate* the facts necessary to arrive at an informed, rational decision;
- ability to base a *rational* decision on the facts; and
- ability to *communicate* the decision to others.

For the following reasons, the Commission was not in favour of requiring that the incapacity concerned must be the result of "mental illness" or a specific diagnosis:

- To avoid complex definitions of "mental illness" which are inaccessible to the lay person. In addition, to avoid the difficulties related to the classification of specific conditions, and differences of opinion on whether certain conditions can be classified as "mental illness" or not. As indicated at the start of this Report , the Commission aims to introduce measures that will benefit persons with decision-making impairment, regardless of how the impairment was caused.
- To accommodate persons who are currently excluded from utilising existing measures because they do not fit the labels of "mentally ill" or "incapable of managing affairs".
- To move away from discriminatory labeling of persons by finding or declaring them incapable or mentally ill. In addition, the Commission wanted to avoid subjecting such persons and their families to the traumatising procedures which traditionally formed the basis of such findings.

4.14 The Commission, at the time, also agreed that illiteracy should not be considered a cause of incapacity. We were also concerned that the influence of cultural beliefs and practices on decision-making should not lead to a person being regarded as

---

462 See the criticism of the common law test referred to in par 4.4 et seq.

incapacitated.[463] Our view at the time was that these exceptions were to be included in any proposed definition of "incapacity".[464]

4.15 Respondents were generally in agreement that the definition should be wide and that it should not be limited by a mental disability precondition, as there could be other reasons for incapacity (eg neurological disorders). The majority of respondents, however, had strong concerns regarding the formulation of the cognitive test[465] and the exclusionary clauses of the definition.[466] Several detailed suggestions were made for the further refinement of these clauses. With regard to the cognitive test, the criticism was mainly that the test is too subjective in certain respects, as it required that the person concerned must be unable to make a "rational" decision.[467] It was also interesting to note that certain professionals from the medical and social service professions recommended that the definition of incapacity should include that the incapacity should be "demonstrable". Respondents noted the implied overlap of the Commission's proposed

---

463 Cf also par 4.9 above (subparagraph 3),where it is submitted that the outcome of the decision should not by itself be evidence of lack of capacity.

464 The following formulation was proposed in **Discussion Paper 105** (cl 4):

"(1) An adult is an adult with incapacity if at the time a decision needs to be made he or she is unable, temporarily or permanently and irrespective of the cause –

(a) to make the decision for him- or herself on the matter in question; or

(b) to communicate his or her decision on that matter.

(2) An adult is unable to make a decision for him- or herself as contemplated in subsection (1)(a) if he or she is unable -

(a) to understand or retain the information relevant to the decision; or

(b) to make an informed, rational decision based on that information.

(3) An adult must not be regarded as unable to understand the information referred to in subsection (2)(a) if he or she is able to understand an explanation of the information in broad terms and in simple language.

(4) An adult must not be regarded as unable to make a decision referred to in subsection (2)(b) merely because he or she makes a decision which would not be made by a person of ordinary prudence.

(5) An adult must not be regarded as unable to communicate his or her decision referred to in subsection (1)(b) unless all practicable steps to enable communication of the decision has been taken without success".

465 See cl 4(2) in footnote 464 above.

466 See cl 4(3) to (5) in footnote 464 above.

467 See cl 4(2)(b) in footnote 464 above.

draft Bill with the Mental Health Care Act 17 of 2002.[468] Many remarked that the ideal long-term solution would be for the two procedures to be merged, for the sake of uniformity and to avoid confusion. We recommend below that the overlapping provisions of the Mental Health Care Act be repealed.[469]

3 Impact of the CRPD, further comment and evaluation

4.16 One of the major consequences of taking into account the requirements of the CRPD was the need to reflect its approach with regard to defining "disability". This holds true for both the terminology and the fundamental content in the Commission's draft Bill on Supported Decision-making. Our Discussion Paper 105 was premised thereon that "adults with incapacity" would use the proposed measures of "assisted decision-making". The CRPD required measures to be put in place to address the need of "persons with disability" for decision-making support, while "disability" was defined in terms of certain impairments that may hinder the exercise of legal capacity on an equal basis with others.

4.17 In our comprehensive discussion in Chapter 3 on the CRPD and its requirements, we pointed to the difficulty and lack of consensus that surrounded the drafting of the definition of "disability" in the CRPD.[470] The CRPD concluded with an open description of "disability" in its Article 1, rather than a formal definition. Article 1 states that –

> [P]ersons with disabilities include those who have long-term physical mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

This open description is complemented by the Preamble to the CRPD, as follows:

> (e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and

---

468 The proposals overlapped in the sense that the Mental Health Care Act provides in its Chapter VIII for the appointment of an administrator to care for and administer the property of a person with "mental illness" or "profound intellectual disability".

469 See par 5.22; and the draft Bill, cls 121, 122 and Schedule 2.

470 See par 3.27 and 3.31 above.

> attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.[471]

4.18 Our analysis in Chapter 3 acknowledges that the non-definition enshrines the social model of disability – that is, recognising that discrimination and therewith the disabling of access for persons with disabilities is largely the result of barriers of various kinds, including social and attitudinal barriers such as stereotypes, prejudices, and other forms of paternalistic or patronising treatment.[472]

4 Proposed definition of "disability"

4.19 The Commission carefully considered additional comments on our proposed redrafted definition.[473] We then developed a final proposed definition of "disability" referring to various types of impairments, coupled with the barriers which may hinder full and effective participation on an equal basis with others. The formulation of our final proposed definition is based clearly within the scope of the CRPD and follows the non-discriminatory terminology of the CRPD definition. In addition, comment by representatives of the South African Human Rights Commission and the Centre for Disability Law persuaded the Commission, for the sake of clarity, to include in the definition its original exceptions referred to in paragraph 4.14 above, but in slightly amended form.[474] It be noted that the definition provided for implies that a person with physical disability would be included in the definition only to the extent that such physical disability in practice hinders the person concerned in exercising his or her active legal capacity.

Report recommendation

---

471 Preamble to the CRPD, par (e).

472 Par 3.27.

473 The redrafted definition, to comply with the requirements of the CRPD, was submitted together with the rest of the redrafted Bill for information and comment to government stakeholders and representatives of disability organisations on 12 February 2012 (see par 1.15 (subpar 7) above, and Annexures 18 and 19 below).

474 For the content of the original exclusions see cl 4(3) to (5) of the original draft Bill in fn 464 above.

4.20 ***The Commission recommends that "disability" should be defined, for purposes of the measures proposed in this report, as any cognitive, developmental, mental, neurological, psychological, sensory or other impairment, which may be permanent, temporary or episodic in nature and that hinders a person's ability in exercising his or her legal capacity on an equal basis with others. A person should not be regarded as having a disability –***

- ***if he or she is able to understand an explanation of the information relevant to the exercise of his or her legal capacity in a way that is appropriate to his or her circumstances;***
- ***merely because in exercising his or her legal capacity he or she is taking or has taken unreasonable decisions; or***
- ***by reason of an inability to communicate his or her decision pertaining to the exercise of his or her legal capacity unless all reasonable steps to enable him or her to do so have been taken without success. (Draft Bill, clause 4.)***

C Principles governing support in exercising legal capacity

4.21 As indicated in Chapter 2, people with disability are entitled to respect for their human dignity and to assistance to become as self-reliant as possible.[475] At the same time they are entitled to be protected from neglect, abuse, and exploitation. This premise is embodied in relevant international instruments[476] and in the Constitution.[477] The question whether and to what extent such people require support in exercising their legal capacity involves a balance between their right to the greatest possible degree of autonomy and their need to be protected. It is generally accepted that legislation dealing with supported decision-making should expressly embody principles that give statutory

---

475 See par 2.42 et seq.

476 See par 3.11 above.

477 See par 2.42 et seq.

recognition to the rights of persons with disability. Such principles should bind those who determine whether a person needs support and if so, the extent of the support required. They should also bind a supporter in assisting a person with disability to exercise his or her legal capacity.[478]

1 Typical principles

4.22 The principles that should underpin support of persons with disability have been the subject of much debate in jurisdictions where reform has been effected.[479] In view of the wide variety of situations that can arise, opinions differ on the suitability and applicability of some of these principles. The demarcation between the principles is moreover not always particularly clear; some overlap, and others are to some extent pulling in different directions. This scenario reflects the conflict between self-determination and paternalism, rights and welfare, autonomy and protection.[480] Principles that have gained recognition in other systems include the following:[481]

1 Best interests[482]

The best interests approach is basically derived from child-care law, and presents a more paternalistic and possibly restrictive approach. The decision taken is that which the supporter thinks is best for the person concerned. In some jurisdictions, criticism against the paternalistic nature of this principle has been overcome by fleshing it out through requiring that a person's best interests should be established with reference to specific factors. These factors then incorporate some of the other – more acceptable – principles (eg by requiring that best

---

478 Cf eg Queensland Law Reform Commission **Discussion Paper No 38** 1992 1-3.

479 English Law Commission **Consultation Paper 119** 1991 101.

480 Ibid 108.

481 See in general English Law Commission **Consultation Paper 119** 1991 101-110; Scottish Law Commission **Report No 151** 1995 19-25; Queensland Law Reform Commission **Discussion Paper No 38** 1992 1-6 and **Report No 49** 1996 5-12; Jansen 2000 **European Journal of Health Law** 333-340.

482 See in general English Law Commission **Consultation Paper 119** 1991 105-107; Scottish Law Commission **Report No 151** 1995 20-21.

interests must be ascertained with reference to the wishes of the person concerned).[483] Other jurisdictions seem to have retained the principle in essence, but refrain from expressly referring to it (eg by requiring that any intervention must "benefit" the person concerned).[484] As discussed earlier in this report, South African constitutional law experts have expressed the view that the best interests approach – based as it is on protective, paternalistic, and conservative notions – does not fit with the underlying premise of self-determination and respect for personhood enshrined in the Constitution, and is therefore unacceptable.[485]

2 Substituted judgment[486]

The substituted judgment standard prefers the decision that the person with disability would have made had he or she been competent to do so. Guidance as to what the person is likely to have decided in a particular situation can be provided by consultations with the person and his or her family, friends, and carers. The principal advantage of this approach is its implicit respect for the autonomy of the individual, and it is generally considered preferable to the best interests test. South African constitutional law experts agree with this opinion.[487] It has been pointed out that the substituted judgment approach is, however, not appropriate in every situation. For example, it would be difficult or impossible to apply in the case of a person with severe intellectual disability. Significant decisions in such a person's life will invariably have been taken by others, and any choices made by him or her will have been from a very restricted range of options; it would thus be difficult to draw firm conclusions about the views or values such a person would have held if not severely skills impaired. Any decision will therefore involve a process of speculation, or will inevitably be influenced by the supporter's view of what will be best for the person concerned.

---

483 English Law Commission **Report No 231** 1995 par 1.3; The Lord Chancellor's Department **Report on Making Decisions** 1999 (Internet).

484 See eg the Scottish Law Commission's use of a principle referred to as "benefit to the incapable adult" (Scottish Law Commission **Report No 151** 1995 20-21). See also par 4.25 below.

485 Cockrell in Bill of Rights Compendium 3E-34. See also SALRC Discussion Paper 105 par 3.18.

486 See in general English Law Commission **Consultation Paper 119** 1991 105-108; Queensland Law Reform Commission **Discussion Paper No 38** 3; Heaton in **Boberg's Law of Persons and the Family** 137-138; Cockrell in **Bill of Rights Compendium** 3E-34.

487 See par 3.18 of SALRC **Discussion Paper 105** for comprehensive information.

In the latter instance, the distinction between the best interests and the substituted judgment standards might become "little more than a matter of language".[488] The substituted judgment test is more appropriate in respect of someone who once had full capacity. However, even in this case it might be problematic; for instance, if the person with disability was throughout his or her earlier life a notoriously bad judge of certain matters. Allowing some degree of "censorship" by those applying the test, or introducing an element of reasonableness in such a situation, detracts from the very purpose behind adopting this standard, and in practice the outcome would probably not differ much if the best interests standard was applied.[489] However, some argue that even so, emphasis on the substituted judgment standard would be symbolic of the respect for human individuality – which might have a value greater than its practical effect.[490] Others argue that to overcome the limitations of the substitute judgment standard, it could be replaced with the principle of "least restrictive intervention" in cases where its application is impossible.[491]

3 Normalisation[492]

This standard has been expressed in a variety of ways, and is also referred to as *maximum preservation of capacity* or *encouragement of self-reliance.* It follows from the fact that differing degrees of decision-making impairment exist, and that impairment can vary over time. It implies in particular that a measure of protection should not result in an automatic or complete removal of legal capacity, and recognises that people who have a severe mental or intellectual disability may still have ways of communicating their preferences on matters within their competence. Basically it aims to treat persons with decision-making impairment as much like other people as possible, and to encourage such persons – as far

---

488 English Law Commission **Consultation Paper 119** 107.

489 Ibid 107-108.

490 Ibid 108.

491 Queensland Law Reform Commission **Discussion Paper No 38** 1992 5. See further down in this paragraph for information on the “least restrictive intervention” approach.

492 See in general English Law Commission **Consultation Paper 119** 1991 102-103; Queensland Law Reform Commission **Discussion Paper No 38** 3; Scottish Law Commission Report **No 151** 1995 22; Jansen 2000 **European Journal of Health Law** 336.

as possible – to make decisions for themselves by using their existing skills and developing new skills. In doing so, it emphasises the autonomy of the person concerned. Note that this requirement cannot be made absolute, as it would be unreasonable to require supporters to encourage persons with rapidly deteriorating skills to acquire new skills. Also, it would be impractical for persons with a very high degree of skills impairment to exercise existing skills. Some persons, moreover, grant enduring powers of attorney in order to be relieved of the burden of managing their affairs, and would not welcome an encouragement to exercise their existing skills.

4 Presumption of competence[493]

This principle requires that questions about whether – and to what extent – support is necessary should be approached on the basis that the person is capable of making his or her own decisions, until the contrary is proved. It implies that although a person may have impaired skills with regard to certain matters, this should not be used as criterion to allow support. The standard of proof required would normally be the balance of probabilities. Some argue, however, that in view of the drastic consequences of an adverse finding, the criminal standard of proof beyond reasonable doubt would be more appropriate.[494] It should be noted that the presumption of competence can only operate alongside a clear system for determining "incapacity".[495]

5 Least restrictive intervention having regard to the purpose of the support[496]

This principle is also known as that of *necessity and subsidiarity.*[497] It is considered by certain experts[498] to be one of the key principles that should

---

493 See in general English Law Commission **Consultation Paper 119** 1991 103-104; Queensland Law Reform Commission **Discussion Paper No 38** 1992 3.

494 English Law Commission **Consultation Paper 119** 1991 104.

495 Ibid.

496 See in general English Law Commission **Consultation Paper 119** 1991 104; Queensland Law Reform Commission **Discussion Paper No 38** 1992 4; Scottish Law Commission **Report No 151** 21-22; Jansen 2000 **European Journal of Health Law** 335. Note that in some jurisdictions this principle is being formulated as the “minimum necessary” intervention. Those who favour “least restrictive” intervention argue that the latter is preferable as it focuses on the practical results of an intervention (Scottish Law Commission **Report No 151** 1995 21).

underpin support of persons with disability. It implies that where a person requires support to make decisions, this should be done in such a way as to cause the least restriction of the rights of that person while at the same time providing adequate protection. In practice, this approach would mean that support should be provided on an "as needs" basis only; that in appropriate situations it should take the form of support rather than intervention; and that wherever possible the views of the person concerned should be sought and taken into account in determining what is necessary. In some jurisdictions, this principle has led to a preference for informality rather than compulsory support. In recommendations by the Council of Europe, for instance, "subsidiarity" expressly refers to the requirement that a response by means of legal measures should be subsidiary to a response by means of the use of informal arrangements or the provision of support.[499] In other jurisdictions, it signified the development of concepts of limited authority to supporters, which must be tailored to meet the particular needs of the individual concerned.[500] It is noteworthy that often this principle incorporates the substitute judgment principle (ie decisions by a supporter should be based on what the person concerned would have decided, had he or she been competent to do so).[501]

6 Proportionality[502]

This principle requires that where a measure of protection is necessary, it should be proportional to the needs of the person concerned. That is, it should be tailored to the individual circumstances of the case.[503] The protective measure should therefore minimally restrict the legal capacity, rights, and freedoms of the

---

497 Cf Recommendation No R (99) 4 of the Committee of Ministers of the Council of Europe to Member States on Principles Concerning the Legal Protection of Incapable Adults, 1999 (Jansen 2000 **European Journal of Health Law** 335).

498 Jansen 2000 **European Journal of Health Law** 335.

499 Recommendation No R (99) of the Committee of Ministers of the Council of Europe to Member States on Principles concerning the Legal Protection of Incapable Adults, 1999, principle 5.

500 Cf English Law Commission **Consultation Paper 119** 1991 104; Queensland Law Reform Commission **Discussion Paper No 38** 1992 4.

501 Ibid.

502 Jansen 2000 **European Journal of Health Law** 336.

503 See eg Principle 6 of the Council of Europe Recommendations.

person concerned, which is consistent with achieving the purpose of the intervention. This principle clearly overlaps with the principles of normalisation and of least restrictive intervention (discussed above).

7 Consultation[504]

Support of a person with decision-making impairment can substantially affect the lives of people who are in existing supportive relationships with that person. Recognition should therefore be given to the importance of preserving such relationships by requiring that these people are consulted. This requirement should, however, not be so onerous as to be unworkable. Some jurisdictions thus require that the degree of consultation should be appropriate to the scale of the proposed support to be rendered (ie consultation is not required in respect of every minor matter). In jurisdictions where this principle applies, the following persons usually have to be consulted:[505] the nearest relative; the primary carer of the person; any curator (or similar person appointed by a tribunal or the Court to manage the affairs of the person concerned); any agent under an enduring power of attorney; any person whom the Court or a relevant tribunal has directed to be consulted; and any other person appearing to have an interest in the welfare of the person with decision-making impairment or in the proposed rendering of support. Note that such consultation is usually required in addition to ascertaining the past and present wishes of the person concerned.

---

504 See in general Queensland Law Reform Commission **Discussion Paper No 38** 1992 5; Scottish Law Commission **Report No 151** 1995 22-23.

505 Cf eg sec 1 of the Adults with Incapacity (Scotland) Act 2000.

2 Examples of trends in comparable jurisdictions

4.23 Trends in other jurisdictions indicate that a set of governing principles is usually included in legislation, rather than a single principle. Such principles usually apply throughout supported decision-making legislation, and are not limited to exercising powers in relation to specific types of decisions only.[506]

4.24 Law reform recommended in England provides for a single principle, that of best interests. However, this principle is broken down into a number of factors that should be taken into account whenever something has to be done or a decision made in supporting a person with decision-making impairment. The Law Commission believed that although the best interests test and the substituted judgment test are often presented in opposition to each other, they need not be mutually exclusive. The Commission favoured a compromise whereby the best interests test is modified by other (more acceptable) requirements. The following four factors have to be taken into account in ascertaining what is likely to be in a person's best interests:[507]

- Ascertainable past and present wishes of the person.
- The need to permit and encourage the person to participate, or to improve his or her ability to participate, in anything done for him or her and any decision affecting him or her.
- If it is practicable and appropriate to consult the following people, their views on the person's wishes: any person named by the person concerned; any person engaged in caring for or interested in the person's welfare (eg a spouse, partner in a permanent life partnership, relative, or friend); the agent under an enduring power of attorney granted by the person; and any person appointed by the Court to administer the person's affairs.
- Whether the purpose for which any action or decision is required can be as effectively achieved in a manner less restrictive of the person's freedom of action.

---

506 See eg Scottish Law Commission **Report No 151** 20; English Law Commission **Report No 231** 1995 par 1.5.

507 English Law Commission **Consultation Paper 128** 1992 111-13 and **Report No 231** 1995 par 1.5.

Broadly speaking, this approach combines the principles of best interests, substituted judgment, normalisation, least restrictive intervention, and consultation (all discussed above). However, the United Kingdom Government, after further consultation, indicated its intention to add to the Law Commission's proposed list the following two factors to be taken into account in determining best interests:

- Whether there is a reasonable expectation of the person recovering from impairment to make the decision in the reasonably foreseeable future.
- The need to be satisfied that the wishes of the person were not the result of undue influence.

It was also suggested that the list of factors should not be applied too rigidly, and should not exclude consideration of any relevant factor in a particular case.

4.25 In Scotland, legislation provides that there shall be no intervention in the affairs of a person unless the intervention *will benefit* the person and such benefit cannot reasonably be achieved without the intervention.[508] The intervener should have to weigh the intervention against the benefit; the more serious the intervention, the greater the benefit that should result from it.[509] The Scottish Law Commission argued that the best interests approach is too vague; that it does not give enough weight to the views of the person concerned, especially those views expressed while still capable; and that it is wrong to equate pesons who previously had capacity with children, as the best interests standard was traditionally developed in the context of child law. The Commission therefore avoided referring expressly to "best interests".[510] In addition to the benefit requirement, the following principles – which broadly correspond with the four factors recommended by the Law Commission England – are provided for:[511]

- Where an intervention is to be made, it shall be the least restrictive option in relation to the freedom of the person, consistent with the purpose of the intervention.

---

508 Adults with Incapacity (Scotland) Act 2000 sec 1(2).

509 Scottish Law Commission **Report No 151** 1995 20-21.

510 Ibid.

511 Adults with Incapacity (Scotland) Act 2000 sec 1(3)-(5).

- In determining if and what intervention is to be made, account shall be taken of the present and past wishes and feelings of the person concerned; the views of the nearest relative and the primary carer of the person; the views of any guardian or agent acting under an enduring power of attorney who has powers in relation to the proposed intervention; the views of any person whom the Court has directed to be consulted; and the views of any other person appearing to have an interest in the welfare of the person concerned or in the proposed intervention.
- Any person exercising substitute decision-making powers shall encourage the person with impairment to exercise whatever skills he or she has concerning his or her property, financial affairs, or personal welfare; and to develop new skills.

As in England, this approach includes most of the typical principles referred to above – that is, benefit or best interests, substituted judgment, normalisation, least restrictive intervention, and consultation.

4.26 The Queensland, Australia Law Reform Commission followed a somewhat different approach in recommending an extensive list of principles to be complied with by every person or body who performs functions or exercises powers under substitute decision-making legislation. These principles include some of the typical principles referred to above; that is, providing for a presumption of competence; and requiring encouragement of self-reliance, maximum preservation of capacity, least intrusive intervention, and assistance appropriate to the needs of the person concerned. They also include some general human rights and social principles, namely recognition of the rights to equality, dignity, and privacy; recognising the person with decision-making impairment as a valued member of society; encouraging such person to participate in community life; and maintaining the person's cultural and linguistic environment and values.[512]

4.27 The Council of Europe, in its Recommendations dealing specifically with principles that underpin intervention in the affairs of persons with impaired decision-

---

512 Queensland Law Reform Commission Report **No 49** 1996 Vol 1 30-43 and Vol 2 28-31 (cls 21-31 of the proposed draft legislation).

making ability, similarly combines some of the typical principles referred to above with human rights principles. Its drafters, however, indicated that the key principles in the Recommendations are the following: respect for human dignity; necessity and subsidiarity; maximum preservation of capacity; and proportionality.[513]

3 Trends in related South African legislation

4.28 Relevant underlying principles reflected in South African legislation dealing with mental health care and the status of the elderly, respectively, are as follows:

- The Mental Health Care Act, 2002 generally emphasises the best interests approach, by providing that "in exercising the rights and in performing the duties set out in this [Act], regard must be had for what is in the best interests of the mental health care user".[514] The Act does not define "best interests". The rights and duties referred to, however, reflect further underlying principles in the areas of both human rights and principles specific to the issue being legislated for; these include the following:[515] equality;[516] respect for human dignity and privacy;[517] maximum preservation of capacity;[518] and proportionality.[519]

---

513 Jansen 2000 **European Journal of Health Law** 335-336. The Recommendations contain 10 basic principles. The others are: flexibility in legal response; publicity (apparently preservation of the right to privacy); procedural fairness and efficiency; paramountcy of interests and welfare of the person concerned; respect for wishes and feelings of the person concerned; and consultation (Ibid 342-344).

514 Sec 7(2). See also sec 3(a)(i) which lists as one of the objects of the Act the following: " … to regulate the mental health care in a manner that makes the best possible … services available to the population … efficiently and in the best interest of mental health care users …". The National Health Act, 2003 although only relevant as regards surrogate decisions in the context of consent to medical treatment, also emphasises the "best interests" principle (sec 6(a)).

515 Principles relevant to the current investigation are referred to only. Others include eg consent to treatment (sec 9); protection from exploitation and abuse (sec 11); a determination of mental health status must be based on factors exclusively relevant to that person's mental health status and not on socio-political or economic status, cultural or religious background or affinity (sec 12(1)); and mental health care users must normally be informed (in an appropriate manner) of their rights before treatment is administered (sec 17).

516 Unfair discrimination on the basis of mental health status is prohibited and care and treatment given must be in accordance with standards equal to those applicable to other health care users (sec 10).

517 Sec 8(1).

518 Services must be provided that improve the mental capacity of the user to develop to full potential and to facilitate his or her integration into community life (sec 8(2)).

- The Older Persons Act, 2006 in its preamble places special emphasis on the right to human dignity. The Act itself concentrates on principles specific to the subject being legislated for.[520] Significantly, one of the general principles underpinning the legislation is the assumption, until shown otherwise, that older persons are competent to make informed choices and decisions about their own lives.[521]

4 Finding a suitable approach

4.29 Respondents to the Commission's Issue Paper 18, at the time, were adamant that support of a person with "incapacity" (as referred to in Discussin Paper 105), should be allowed only on the basis of clear principles. Although many of the responses were apparently influenced by respondents' various professional perspectives (for instance medical, legal, or social services), much emphasis was in general placed on constitutional principles.[522] Of these, respondents generally believed that the rights to equality, autonomy, and dignity are of particular significance. Other principles mentioned included the following:

- Support should take place only on the ground of objective evidence that the person concerned cannot manage his or her affairs. Some commentators, mostly from the medical fraternity, indicated that this should be medical evidence (ie evidence based on a clinical assessment of competency, or of a specific diagnosis). Others believed that support should take place only after authorisation by a Court.[523]

---

519 Treatment and care must be proportionate to the mental health status of the user and may intrude only as little as possible (sec 8(3)).

520 Sec 4 of the Older Persons Act, 2006.

521 Sec 4(b). Other principles include the right to live safely and without fear of abuse; the right to be treated fairly and be valued independently of economic contribution; and the right to have access to employment, health welfare, transportation, social assistance and other support systems without regard to economic status (sec 4(a), (c) and (d)).

522 See the discussion on constitutional considerations in par 2.42 et seq.

523 This view broadly reflects preference for the principle of necessity, and for working with a presumption of competence.

- Formal support should take place only on application of the person concerned or someone on his or her behalf; or where risks to the person concerned or others are involved; or where otherwise necessary.[524]
- Support should recognise the unique needs of every person with incapacity.[525]
- Support should empower persons with incapacity.[526]
- Support should be aimed at the protection of the person concerned.[527]
- Support should allow for the freedom of choice by the person concerned.[528]

4.30 The Commission at the time agreed that support of a person with incapacity should take place only on the basis of clear principles; and that such principles should, in accordance with international and national trends, be included in any new legislation on supported decision-making.

4.31 We also needed to address the question of whether only one principle was required, or a range of principles. It is clear from the background information (discussed above) that a single principle would not suffice, although it could have the advantage of providing clarity and simplicity. There was no single principle referred to in the relevant literature that clearly and fully covered all situations in which persons with incapacity find themselves and in which support would be necessary. However, providing for an extensive range of principles – including principles specific to the issue to be legislated for, as well as all applicable constitutional principles – might be confusing. In accordance with the need for legal certainty and clarity, the Commission's aim would be to keep any legislation to be developed on supported decision-making as clear and simple as possible. The Commission at the time therefore believed that a clear test or guidelines for support would be preferable rather than a compilation of all the constitutional, social, and other principles that could possibly apply to all situations. Although constitutional principles are of utmost importance, the concept of constitutional supremacy (as

---

524 Reflecting preference for the principle of necessity.

525 Mainly reflecting preference for the principle of proportionality.

526 Reflecting preference for the principle of normalisation.

527 Broadly reflecting preference for the principle of least restrictive intervention.

528 Broadly reflecting preference for the substituted judgment principle.

expressed in section 2 of the Constitution) in any event dictates that the rules of the Constitution are binding on all branches of the government, and have priority over any other rules made by the government.[529] Any law or conduct that is not in accordance with the Constitution, for either procedural or substantive reasons, will therefore not have the force of law.[530] In addition, section 8 of the Constitution provides that the Bill of Rights has supremacy over all forms of law and binds all branches of the state and, in certain circumstances, also private individuals. Moreover, respect for human rights is clearly reflected in the typical principles favoured by other jurisdictions. Against this background, the Commission preferred (at the stage of developing the Discussion Paper) to follow the examples of the English and Scottish Law Commissions, which abided by a single principle defined in terms of a number of core concepts specific to the issue under legislation.

4.32 What should the governing principle be? In practice, different degrees of support are appropriate in different circumstances, and there are bound to be differing opinions about the most suitable degree of intervention in any particular case.[531] The right balance could possibly be found in the following comments on Issue Paper 18, by the Johannesburg Bar Council:

> Any legislative reform that is undertaken should have as its primary objective the *protection of the interests of incapable adults*, with the least possible intrusion upon the right of such persons in a manner which is cost effective, efficient, and practical, and which allows as much participation as possible by the incapable adult's family members and close associates. (Emphasis added.)

This balance is largely also reflected in the prominence given to certain principles in international instruments, reform in other jurisdictions, relevant South African legislation, and suggestions by respondents to Issue Paper 18. The Commission therefore suggested that the following principles should possibly be included in its proposed draft legislation:

---

529 Sec 2 provides that the Constitution "is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be led".

530 ***Executive Council of the Western Cape Legislature v President of the Republic of South Africa*** 1995 (4) SA 877 (CC) par 62. See also De Waal et al 8.

531 Cf English Law Commission **Consultation Paper 119** 1991 109.

- Best interests – or a similar principle of beneficence. It is debatable whether "protection of the interests of incapable adults" as quoted above conveys or means something different from "best interests of incapable adults". The Commission, in its Discussion Paper 105, submitted that criticism against the "best interests" principle in the context of supported decision-making can be dealt with by clearly defining "best interests" in terms of constitutionally acceptable concepts, for purposes of the proposed legislation. This approach would also deal with other criticism that has been raised – albeit with regard to the protection of children's rights – against the principle, namely that it fails to provide a determinate standard.[532] The Commission at the time emphasised that its support for the best interest" principle is not meant to not convey any paternalistic or conservative notions. We emphasised that the basis for any support in terms of the proposed draft legislation should in particular embody the principles of protection of autonomy and self-determination. The Commission stated that by identifying core concepts in terms of which "best interests" should be applied and interpreted, the right basis for intervention would be established.
- Least restrictive intervention (ie necessity and subsidiarity).
- Substituted judgment.
- Normalisation (ie maximum preservation of capacity).
- Proportionality.
- Consultation.

In response to the need for new measures to reflect the complexity of South African society, the Commission suggested that decision-making support should take into account the importance of maintaining the cultural environment and values or beliefs of a person who is (or will be) supported. South Africa is a multicultural society, and people from different cultural backgrounds are influenced by differing values when making decisions. They might also have, within their own traditions, ways of overcoming problems. Recognition must be given to systems of support that operate in different ethnic or cultural

---

532 Cf De Waal et al 416.

communities.[533] Although this sentiment is contained somewhat indirectly in the principle of subsidiarity, the Commission believed it should be given prominence by expressly referring to it. Finally, the Commission did not recommend that the presumption of competence should be included as one of the principles to govern support. The presumption of competence is already part of our law, and merely restating it would be unnecessary and undesirable.[534]

Discussion Paper recommendation and comment

4.33 It was recommended in Discussion Paper 105 that the core principle to govern the support of a person with "incapacity" under the proposed new legislation should be that such support must be in the best interests of that person. It was further suggested that "best interests" should be defined in terms of the following:

- Where an intervention is to be made, it must be the least restrictive option in relation to the freedom of the person, consistent with the purpose of the intervention.
- No intervention should take place unless it is necessary, taking into account the individual circumstances and needs of the person concerned. In deciding whether a measure is necessary, account should be taken of any less formal arrangements that might be made and any assistance which might be provided by family members or other people.
- Any person exercising functions under the new legislation in relation to an person, must, as far as reasonable and practical, encourage the person to participate or improve his or her ability to participate, as fully as possible, in anything done for him or her or in any decision affecting him or her.
- Any intervention must take into account the importance of maintaining the cultural environment, values, and beliefs of the person concerned.
- In determining whether an intervention is needed, and if so what intervention, account must be taken of –

---

533 Cf the emphasis on this need in legislation developed by the Queensland Law Reform Commission (**Report No 49** 1996 38-40).

534 See par 2.19 on the presumption of competence.

- the ascertainable past and present wishes and feelings of the person;
- the views of other people whom it is appropriate and practical to consult, including –
  - any person named by the person concerned as someone to be consulted;
  - any person engaged in or interested in the welfare of the person – such as a spouse, partner in a permanent life partnership, relative, friend or carer;
  - any curator, manager, or mentor appointed by the Court or the Master;
  - an agent appointed under an enduring power of attorney who has powers in respect of the proposed intervention;
  - any person whom the Court or the Master has directed to be consulted; and
  - any other person who appears to have an interest in the welfare of the person concerned or in the proposed intervention.

The above principles should not exclude consideration of any relevant factor in a particular case.

4.34 Respondents commenting on Discussion Paper 105 agreed with using the concept of "best interests" as central principle to give statutory recognition to the rights of persons in need of support.

4.35 Although there were some concerns about the detail of the proposed principle, respondents supported the content given to "best interests" as indicated in par 4.31 above.[535] The concerns mainly focused on the requirement that the views of certain others must be taken into account, without guidance being provided as to whose views must receive precedence in the case of conflicting views. Respondents were satisfied that the content of the principle was suitably expressed in constitutional terms. It was noticeable that throughout the Commission's consultation process, respondents often

---

535 The Commission's proposal was reflected in cl 5 of the draft Bill included in SALRC **Discussion Paper** 105.

referred to the best interest principle as a central departing point for interpreting the provisions of the draft Bill. This centrality and focus on a concrete principle was indeed what we had intended.

4 Impact of the CRPD: further comment and evaluation

4.36 The above preliminary proposals were amended subsequent to the request by the South African Human Rights Commission to take into account the CRPD's legal capacity requirements.[536] In particular, the Commission deleted the concept of "best interests" as the unifying principle from the proposed guiding principles, because of its perceived underlying notions of paternalism. In the context of the CRPD, the National Department of Health (in particular) commented negatively on the use of the best interest concept as a unifying principle to guide the support of persons with disability.

4.37 The CRPD requirement, as reflected in its article 12(4), that certain standards must be adhered to in rendering support to persons with disability, affirms the Commission's original initiative to include a provision with guiding principles in the proposed draft legislation.

4.38 The Commission, in further developing the principles, reverted to the list of principles included in article 12(4) of the CRPD.[537] Most of these, however, had already been included previously in giving content to the unifying principle of "best interests". The following additional principles were added in the amended provision:[538]

- Proportionality of assistance vis-a-vis needs of the person concerned.
- Respecting the rights, preferences, and will of the person concerned.
- Action or support must be free from conflict of interest and undue influence.

---

536 See par 3.4 et seq above.

537 See the discussion of article 3 in par 3.33 et seq above.

538 See cl 5(2)(f), (g), and (j).

4.39 No adverse comment was received on the content of the amended provision in subsequent consultation with government stakeholders and representatives from the disability sector.[539]

Report recommendation

4.40 ***The Commission recommends that the proposed draft legislation should include certain principles that give statutory recognition to the rights of persons with disability. It is recommended that all proceedings, actions, decisions or support of or in respect of a person with disability in terms of the draft legislation must –***

- ***be in accordance with the right of the person not to be unfairly discriminated against;***
- ***be in accordance with the person's right to be treated equitably and fairly;***
- ***be in accordance with the person's right to inherent dignity;***
- ***recognise the person's right to individual autonomy and independence;***
- ***be necessary with regard to the person's needs and circumstances;***
- ***be proportional to the person's circumstances;***
- ***respect the rights, preferences, and will of the person;***
- ***take account of the cultural environment, values, and beliefs of the person;***
- ***encourage the fullest possible participation of the person;***
- ***be free from conflict of interest and undue influence;***
- ***in so far as they are ascertainable, take account of the person's past and present wishes and feelings in relation to the support;***
- ***in so far as it is reasonable and practicable to do so, where any views in relation to the support have been made known to the person providing the support, take account of the views of certain third***

---

539 See par 1.15 (subpar 7) for information, and Annexures 18 and 19.

parties (including the spouse, relatives, and primary carer of the person with disability). (Draft Bill, clause 5.)

D Administrative and supervisory framework

1 Identifying a suitable framework: The Master of the High Court

4.41 At present the Master of the High Court plays a central role in the application, appointment, and supervisory processes in respect of *curators bonis* and *curators personae.*

4.42 It is trite that a notion of the Master as being the protector of the rights of vulnerable persons – including widows, orphans, and persons who cannot manage their own affairs – has been part of South African legal history for centuries. This image of the Master as a type of "paterfamilias" originated in the centuries-old tradition of oversight over the administration of estates,[540] which to this day is one of the major functions of the Master.

4.43 The history of the institution of the Master (the original "Weesmeester") in South Africa originated in 1674 in the creation of the Orphan Chamber ("Weeskamer"), which functioned as one of the sections of the administrative system in the Cape at that time.[541] The Chamber's function, namely to administer the monies of orphans, was regulated by statute as of 1828, when these functions came to be regarded as of such public utility that the Chamber should be placed under permanent and more determinate regulation. The Chamber's functions changed and were amplified through the years. The institution

---

540 The establishment of the Orphan Chamber at the Cape of God Hope arose out of the need to provide for the collection and administration of the property of persons who died intestate and left heirs who were absent from the Colony or who were under age (Tanap "Inventories of the Orphan Chamber of the Cape of Good Hope" Internet).

541 See Calitz in *De Jure* 2011 par 3.1-3.2; Jordaan *Master's Newsletter* May 2002 4-5.

of the "Master of the Supreme Court" replaced the Orphan Chamber in 1833 after a Charter of Justice was issued to revise the judicial system under the second British occupation of the Cape of Good Hope in 1828.[542] At the time, the Minister of Justice appointed a Master for every provincial division of the Supreme Court (now the High Court). With the establishment of the Union of South Africa in 1910, four different sets of control over the administration of estates existed. A unified Act was enacted in 1913 – The Administration of Estates Act 24 of 1913 – which remained in operation until 1967 when the current Administration of Estates Act of 1966 came into effect. Both these Acts provided the Master with express administrative functions and powers in respect of the appointment by the Court of *curators bonis* and *curators personae*.[543]

4.44 The institution of the Master of the High Court is currently a branch of the Department of Justice and Constitutional Development. It serves the public in respect of the following matters:[544]

- The administration of estates of deceased and insolvent persons.
- The registration of wills.
- The registration of trusts.
- Supervising the administration of estates of minors and legally "incapacitated" persons.
- Administration of the Guardians Fund, in which unclaimed monies and certain funds of minors and "incapacitated" persons are held in reserve.
- The appointment of impartial and capable persons as executors, trustees, curators, liquidators, and administrators (the latter in terms of Chapter VIII of the Mental Health Care Act 17 of 2002).

---

542 Calitz *De Jure* 2011 par 3.1-3.2; and Tanap “Inventories of the Orphan Chamber of the Cape of Good Hope” Internet.

543 Administration of Estates Act, 1913; Administration of Estates Act 1966.

544 Calitz *De Jure* 2011 par 3.1-3.2.

4.45 The Masters and their staff are specialists in the fields of all the above-mentioned matters, and their role in the effective and rapid settlement of those matters is essential. The Master's staff is in daily contact with the public and relevant professionals, including practising attorneys, chartered accountants, experts attached to trust companies, boards of executors, and commercial banks and other financial institutions. The Master is these days increasingly called upon in an advisory capacity.

4.46 The current Office of the Master acts as a "creature of statute", and possesses only those powers which the statute accords, whether expressly or by necessary implication.[545] The current institution of the Master is defined and appointed in terms of the Administration of Estates Act, 1966. The Act (and before it the Administration of Estates Act 24 of 1913) expressly provides the Master with powers and duties with regard to the administration of legally "incapacitated" persons.[546] The Mental Health Care Act, 2002 likewise allocates similar powers to the Master.[547]

4.47 The Commission had close contact throughout the investigation with a number of persons who served in the position of Chief Master. This communication was necessary to obtain affirmation not only for the proposed draft measures of support, but also to confirm the Commission's view that the Master of the High Court would be the suitable institution to fulfil the envisaged administrative and supervisory role in terms of the proposed draft legislation. Chief Masters have consistently said that the Master has the institutional background to deliver the services envisaged, and have emphasised that the administration of the curatorship system is indeed currently one of the Masters' main functions. They supported the Commission's view that the Master of the High Court is best placed within the government system to fulfil the role envisaged in the draft Bill, and confirmed that no viable alternatives currently exist.

---

545 **The Master v Talmud** 1960(1) SA 236 (C). **Die Meester v Protea Assuransiemaatskapply Bpk** 1981(2) SA 29. See Calitz *De Jure* 2011 par 3.1-3.2 on the general historical development of the office of the Master.

546 See secs 76(1)(b) and 86-93 of the 1966 Act.

547 In terms of Chapter VIII of the Mental Health Care Act, 2002 the Master may appoint an administrator to care for and administer the property of a person who is mentally ill or a person with severe or profound intellectual disability (see par 2.34 above).

Discussion Paper recommendation, comment and evaluation

4.48 The Commission consequently, in Discussion Paper 105, recommended that the Master of the High Court should fulfil the administrative and supervisory role envisaged

in the proposed draft Bill. The Commission emphasised at the time that it believed that the the existing supervisory framework for curators (ie the Master of the High Court, with recourse to the High Court as a last resort) should be utilised rather than creating new frameworks that might complicate implementation of the proposed legislation. Creating a new supervisory framework would also have cost implications.[548]

4.49 The draft Bill in Discussion Paper 105 provided for a range of powers and duties for the Master to administer and supervise the proposed measures of support.[549] In addition, the rest of the Bill contained powers that are more specific with regard to, for instance, the appointment of financial and personal welfare supporters (then referred to as managers and mentors) for persons who need support in exercising legal capacity;[550] and the registration of enduring powers of attorney.[551]

4.50 Comments addressed the general issue of allocation of the supervisory role to the Master rather than the specific powers granted to the Master in the draft Bill. Respondents were generally almost unanimous in their concern about the Master's capacity to successfully fulfil the important administrative and supervisory role imposed by the draft Bill. The successful implementation of the legislative recommendations will be heavily dependent on the Master and his staff. Some respondents emphasised that this implies that the successful implementation of the legislation rests with a party over whom other stakeholders have no control. Some saw this as perhaps the most risky inherent weakness of the draft Bill, but they accepted it as unavoidable because the only

---

548 SALRC **Discussion Paper 105** par 6.49.

549 Cls 88 – 94 of the draft Bill in SALRC **Discussion Paper 105**.

550 See the Master's powers with regard to the appointment and supervision of managers and mentors in Chapters 4 and 5 of the draft Bill in SALRC **Discussion Paper 105**.

551 See the draft Bill in SALRC **Discussion Paper 105**, cls 76-87.

alternative – supervision by the Court – was deemed unacceptable mainly because of cost implications. Concern was in general expressed about the limited number of Masters Offices, and how these offices would be able to deal with the expected workload that would be generated by the Commission's proposals. Other concerns included the (then) non-availability of Masters Offices in rural areas; the Master's perceived or real lack of expertise; and the lack of properly trained and sufficient staff to cope with the duties imposed by the proposed legislation. The South African Human Rights Commission in particular emphasised its view that the Masters Division needs to receive sufficient resources and capacity to ensure that the proposed Bill will be implemented appropriately.

4.51 In addressing stakeholder concerns, the Commission considered but rejected suggestions for the creation of an ombud, or internal administrative review process. The Commission addressed concerns about the successful implementation of the legislation by including provision for the establishment of an inter-sectoral committee, which would consist of the Chief Master, relevant government stakeholders, and representatives of the South African Human Rights Commission and the disability sector.[552] More recent developments in the Masters Division will also go a long way in dealing with the current public concerns. These developments include setting up and maintaining specialised units to deal with curatorship matters; decentralising the Masters Division services to make them more accessible in rural areas, as necessitated by decisions of the Constitutional Court; and implementing paperless systems of administration where possible. Information about developments in the Masters Offices in the latter regard is provided in paragraphs 2.77 to 2.90 of Chapter 2 of this report.

---

552 See par 2.83 (cl 117 – 119 of the draft Bill).

4.52 As regards the specific powers provided for, these powers and duties have been developed in conjunction with expert officials attached to the Masters Division, and reflect best practices which have been established over a period of many years. The recommended powers and duties of the Master as reflected in Chapter 6 of the draft Bill include all the general, investigative, and supervisory powers considered to be necessary to administer the proposed system of supported decision-making provided for in the draft Bill.

Report recommendation

4.53 ***It is recommended that the Master of the High Court should fulfil the functions necessary to administer and supervise the system of decision-making support as provided for in the draft Bill. The draft Bill provides for jurisdiction of the Master in respect of persons with "disability" who is ordinarily resident within the jurisdictional area of a High Court, as well as such persons who is not so resident. (Draft Bill clause 99.)***

4.54 ***Comprehensive provision is made for certain general powers and duties in Chapter 6 of the draft Bill, while more specific powers with regard to the administration of the different measures of support, are included throughout the draft Bill. General powers and duties address aspects such as the need to establish and keep records; making enquiries, including enquiries into the financial medical or social circumstances of the person in need of support; summonsing any person who may be able to provide information relating to the performance of the Master's functions; initiating the appointment of a formal supporter under certain circumstances; making interim rulings pending the disposal of proceedings; and reviewing any act or decision by a formal supporter under certain circumstances. Specific powers and duties relate to the disposal of applications for the appointment of formal supporters and the general supervision of such appointments; and performing administrative functions with regard to the enduring power of attorney, such as the registration of enduring powers. (Par 2.68, 2.77 – 2.90, 4.38 – 4.49; Chapter 6 of the draft Bill regarding general powers; relevant provisions in Chapters 2, 3, 4, and 5 of the draft Bill with regard to***

specific administrative and supervisory powers and duties in connection with formal and informal support; and relevant provisions in Chapter 6 in connection with the enduring power of attorney.)

CHAPTER 5
PROPOSED MEASURES FOR SUPPORT IN EXERCISING LEGAL CAPACITY

A Introduction: Practical relevance of current common law and statutory measures for persons with decision-making impairment

5.1 The common law and statutory measures, set out in Chapter 2 above, find application in the various areas of decision-making impairment in the following ways:

1 *Supplementation of impairment in respect of decisions related to financial affairs:* The following possibilities are available:

- Application to the High Court for the appointment of a *curator bonis* under common law in respect of a person who is mentally ill and/or unable to manage his or her financial and property affairs.[553]
- Application to the Master for the appointment of an administrator for care and administration of property in terms of the Mental Health Care Act 17 of 2002. This measure is available only in respect of persons with "mental illness" or a "severe or profound intellectual disability" as defined in the Act.[554]

2 *Supplementation of impairment in respect of decisions related to personal welfare:* The only possibility currently available is to apply to the High Court for the appointment of a *curator personae* under common law. We indicated in Chapter 2 above that the Mental Health Care Act does not provide for supplementation of capacity with regard to personal welfare matters. This is probably because the stated object of care and treatment

---

553 See par 2.25 et seq above.

554 See par 2.36 et seq above.

under mental health legislation is to ensure that the person's personal needs are adequately provided for.[555]

3 *Supplementation of impairment in respect of decisions related to medical treatment:* The following possibilities are available:

- Application to the High Court for the appointment of a *curator personae* under common law specifically for this purpose. The person concerned will have to be mentally ill and/or unable to manage his or her personal affairs.[556]
- Proxy consent in terms of the National Health Act 61 of 2003 by a person mandated to consent, or a person authorised in terms of any law or a Court order.[557]
- Statutory provision for proxy consent with regard to specific treatment, or under specific circumstances (including consent to sterilisation; termination of pregnancy; and medical treatment of mental patients, for illness other than mental illness).[558]

B The need for alternatives to address deficiencies in respect of the currently available measures of support

5.2 Criticism of the current position is mainly aimed at the curatorship system.

5.3 In our discussion on the need for reform in Chapter 2, we highlighted in general the problems with regard to the entire system of decision-making support currently available to persons with decision-making impairment.[559] With regard to curatorship in

---

555 Ibid.

556 See par 2.26 and 2.27 above.

557 See par 2.36 above. Compare cl 67(2) of the draft Bill (in terms of which a principal may authorise an agent to give consent for the provision of a health service to the principal as contemplated in section 7(1)(a)(i) of the National Health Act), which cross-refers to the relevant provision in the National Health Act

558 See par 2.37 above.

559 See par 2.59 et seq above.

particular, experts, practitioners, or commentators expressly referred to the following problems, some of which we also referred to in our discussion above:[560]

- The appointment of a curator in almost all instances involves a High Court application, which can be expensive and prolonged.
- The paternalistic nature of the current system deters many from utilising it. In practice, the person with decision-making impairment invariably has very little say in the choice of curator, because by the time a curator is appointed, the decision-making skills of the person might be impaired to such an extent that he or she is likely to be considered incapable of expressing an informed view as to the choice of curator.
- Although there are many safeguards and controls of the curator's functions through the Master's Office and the Court, there remains – as with any fiduciary relationship – the potential for abuse, neglect or maladministration.

From the curator's point of view, the following factors add to the difficulties experienced:

- The time-consuming process of preparing the required annual account, which must be submitted by the curator to the Master, often renders the curator's statutory fee insufficient.
- A *curator bonis*, despite being limited to administering the property of the person concerned, cannot avoid also becoming involved in time-consuming activities relating to the day-to-day personal needs of the person, where these are financially related. In practice, the curator (who is often an attorney) is invariably called upon by family members for guidance and reassurance.

5.4 The Commission in Issue Paper 18 departed from the premise that the curatorship system is probably not utilised to any great extent. Comments were requested on the reasons for this under-utilisation, in order to identify problems that need to be addressed through law reform. Some members of the legal fraternity questioned this premise. Family and carers of persons with decision-making impairment

---

560 Cf Neumann 1998 **De Rebus** 61-64; Barker 1996 **De Rebus** 259-260; Van Dokkum 1997 **Southern African Journal of Gerontology** Vol 6(1) 17-20.

were however particularly outspoken in their criticism of the curatorship system. Generally, the following reasons were advanced for the under-utilisation of curatorship:

- The costs involved in a High Court application to have a curator appointed are beyond the reach of most people. This is believed to be the main reason why the curatorship system (both *curator personae* and *bonis*) is not used.
- The prescribed procedure is complex and cumbersome. It is perceived as intimidating and too sophisticated.
- The procedure is not known, especially in rural communities.
- People fear dealing with a heartless, bureaucratic, and unsympathetic system.
- The procedure is time-consuming, whereas assistance with regard to the management of financial or personal welfare affairs is immediately needed.
- People widely mistrust the curatorship system. Curators are perceived to be strangers who have no or little personal interest in the well-being of the person concerned. There is general ignorance among the public as to whether the Court will appoint a family member to act as curator, and suspicion that family members will as a rule not be appointed. Family members of persons with decision-making impairment often believe they are best suited to fulfill the role of decision-making supporters for their loved ones, and therefore usually resent the appointment of strangers.
- People are aware of the dangers of the relative irrevocability of the erosion of personal rights currently implied in the appointment of a curator.
- People fear invasion of their privacy, and fear abuse by curators.

5.5 Specific reasons advanced for reluctance to have a *curator personae* appointed include the following:

- In practice, families and carers tend to take responsibility for decisions relating to personal care and welfare of persons with decision-making impairment. They usually do so in ignorance of the fact that they do not have legal authority to act on behalf of the person concerned.
- Unwillingness and antagonism on the part of family and carers to institute a procedure that would have far-reaching effects with regard to the status of

the person concerned. Application for the appointment of a curator is generally regarded as a step that involves trauma for all concerned.

5.6 Specific reasons advanced for reluctance to have a *curator bonis* appointed include the following:

- The procedure is not suitable for small estates (ie the lack of assets does not justify the cumbersome procedure and costs to have a *curator bonis* appointed).
- In the case of small estates, for instance where a disability grant is the only income of the person concerned, family or carers in practice administer the financial affairs of the person.
- In the case of large estates, where there is a harmonious family setting with goodwill towards the person concerned, a standard power of attorney is invoked; this then becomes "enduring" when necessary, even though the agent is not legally authorised to act.[561]

5.7 The information supplied by respondents indicates that needs in respect of personal welfare and financial affairs overlap to a great extent. However, the following problems were specifically highlighted in respect of personal welfare:

- There is a public perception that the current system strips the person with decision-making impairment of decision-making power. The law should clearly recognise the necessity for a more flexible system that would allow for the least restrictive intervention into the affairs of the person concerned. The law should thus truly recognise the concept of "supported" decision-making.
- Persons appointed as *curator personae* frequently do not have the knowledge to ascertain the personal and health-care needs of the person who requires support. It was suggested that a personal welfare supporter should be familiar with the nature of the impairment of the person concerned to be able to make realistic decisions.

---

561 See par 2.40, 2.41 and 2.62 above.

- Where family members are appointed as *curators personae*, they might not always have the knowledge to take specific decisions. A system of additional assistance should be available to them.
- *Curators personae* sometimes take decisions that are in conflict with the wishes of the person concerned.
- The law should address the need for a simple, informal system of supported decision-making with regard to personal care and welfare.
- Abuse and exploitation of the person concerned by the *curator personae*, sometimes occurs.

5.8 The following problems were specifically noted by respondents with respect to management of financial affairs:

- The scope for abuse and exploitation in the management of financial affairs is perceived to be even greater than for decisions regarding personal care and welfare. The need for proper control measures is thus imperative.
- Overzealous curators who are overcautious in their administration of the assets, to the detriment of the person with decision-making impairment, can cause problems. This is especially true if the curator is a family member who stands to inherit those assets.

5.9 It is clear from the discussion in the preceding paragraphs that the common law curatorship system does not fulfil all expectations for a suitable structure of supported decision-making. The main reasons for this inadequacy are as follows:

- Most significantly, the curatorship system does not sufficiently recognise the constitutional right to bodily and psychological integrity conferred in section 12(2) of the Constitution. This section embraces ideas of self-determination and autonomy with regard to body and mind, against interference by the state and others.[562] This factor alone would be sufficient imperative for reform.

---

562 See the discussion on constitutional considerations in par 2.42 et seq above.

- The curatorship system reflects a paternalistic approach and gives little recognition to the principles that – as indicated in Chapter 4 below – should be fundamental to any supported decision-making system.
- Curatorship provides a very limited choice of decision-maker, in providing for the mainly long-term appointment of a single person to deal with the affairs of a person with decision-making impairment.
- Curatorship is also extremely inflexible with regard to the extent of the decision-making powers conferred upon the curator. One reason why people are reluctant to use the system is that the powers conferred on a curator are often far wider than necessary to meet the needs of the person concerned.
- Inherent in the current procedure is that it requires an application to be made to the High Court. Although the purpose of this requirement is to protect the person with decision-making impairment, the disadvantages in terms of costs, inaccessibility, prolonged procedure, formality, and potential for intimidation and trauma can outweigh the intended advantage.

C Options for reform

5.10 As a starting point, the Commission developed possible options for reform, with the aim of providing for measures of support that would overcome the deficiencies pointed out in the preceding paragraphs. In doing so, the Commission considered the public's views and needs as expressed in their comments on Issue Paper 18. We also took guidance from other jurisdictions which have addressed similar criticisms with regard to existing systems of decision-making support.

1 Guidelines emerging from comments

5.11 Commentators on Issue Paper 18 at the time shared relative consensus that the curatorship system should be retained, as it could still be appropriate under certain circumstances. For instance, where complete control over a large and complex estate is desired, people preferred the judicial oversight that the curatorship system entails. It should, however, not be retained as the *only* avenue for supported decision-making. Alternatives should be developed alongside the curatorship system to cater for its shortcomings. (Note that we are not concerned in this Chapter with the alternative of introducing the concept of the enduring power of attorney. The public overwhelmingly supported this alternative, and the Commission recommends in Chapter 6 below that it should be introduced into our law.)

5.12 There were differences of opinion among commentators on Issue Paper 18 with regard to the nature and extent of the alternative/s to be developed. Commentators were divided on the possibilities submitted to them. These possibilities included the following: Designated decision-making procedures where legislation identifies supported decision-makers; decision-making by a multi-disciplinary committee or tribunal; and advocacy. No clear guidelines emerged from the comments, except that the differences of opinion possibly indicated that different measures are needed to deal with varying circumstances. In spite of these differences of opinion, the following common needs emerged from the comments, and we used them as guidelines in developing a proposed alternative system:

- An alternative system should be more affordable than the current curatorship system; and it should also be less sophisticated, more informal, and more accessible.
- An alternative system should place more emphasis on the need for support with decision-making in the area of personal welfare matters. In this regard the role of family and carers should be formalised as potential supporters, and the role of professional social workers should be recognised.
- Despite the need for reduced formality, strong control measures should still form part of the support process.

- There is a definite need for an informal arrangement that will serve as default to legalise day-to-day decisions taken by family and carers on behalf of persons with decision-making impairment.

2 Examples from other jurisdictions

5.13 Various methods have been used in other jurisdictions to address problems similar to those identified above. These differ vastly in approach and detail. We broadly discuss the approaches taken in England, Scotland, Queensland (Australia), and the Netherlands – all of which the Commission referred to at the time of developing possible alternatives for public comment. These examples sowed the seeds for possible alternatives that were developed for inclusion in Discussion Paper 105 at the outset of the investigation. As the investigation progressed and was informed by further and more recent research, public consultation, and (ultimately) the requirement for compatibility with the CPRD, we refined the details with regard to individual procedures. However, the Commission's initial idea of a range of measures catering for different circumstances remained constant, and constitutes the broad basis of the alternative system included in the proposed draft Bill on Supported Decision-making.

5.14 The legislation in England and Scotland represents some of the most comprehensive laws passed in the area under discussion. The proposals for reform in Queensland, in our view, represent innovative practical methods for surrogate decision-making not used in England and Scotland. The Netherlands' position is interesting and relevant, as alternatives were developed to operate within an existing legislative framework without abolishing or replacing that framework, as was done in the other three jurisdictions. In England, Scotland, and Queensland, the change was brought about through a single comprehensive piece of legislation. In all three of these systems, new measures included provision for decision-making in the areas of financial affairs, personal welfare, and medical treatment. In all three jurisdictions, introducing the concept of enduring power of attorney – or expanding and refining the concept if it had already been introduced – formed part of this single step. The method followed in the Netherlands differed in that an alternative to the existing *curatele* (which was more or less similar to curatorship in South African law) was developed alongside *curatele*

without abolishing *curatele*. In the Netherlands, the new measures also operate within the existing legal framework regarding proxy decision-making for medical treatment (which is regulated separately); proxy decision-making in respect of mentally ill persons (which is also regulated separately); and *volmag* (power of attorney, which is also regulated separately).

5.15 The Commission noted the following interesting alternatives that were developed in England.[563] A "general authority to act reasonably" was provided for, which would typically operate as default arrangement where no enduring power has been granted, and where the other measures provided for in the legislation had not been made use of. This measure was intended to validate acts undertaken for the personal welfare or health care of a person who is without capacity or is reasonably believed to be "without capacity".[564] Extensive provision for surrogate decision-making in respect of medical treatment was made. The proposed system further provided for "decision-making by the Court" in the areas of financial affairs, personal welfare and health care.[565] A new Court, the Court of Protection, was created for this purpose. It has specific jurisdiction to make "one-off" decisions on behalf of persons with "incapacity" under certain circumstances; to appoint a "manager" to deal with financial support; and to resolve disputes regarding decision-making support.

5.16 In Scotland, the Adults with Incapacity (Scotland) Act 2000 was passed after recommendations by the Scottish Law Commission. This Act creates a graded system of proxy decision-making, ranging from introducing enduring powers of attorney to giving carers or professionals the authority to act, to the appointment by the Court of a short-term intervener or a long-term guardian.[566] As in England, extensive provision is made for proxy decisions regarding medical treatment. The system created is surrounded by monitoring as well as complaints and appeals procedures, the latter involving various regulatory bodies – including a new office of Public Guardian, which lies within the Supreme Courts (roughly comparable to the office of the Master of the High Court in

---

563 The Commission's recommendations have been incorporated to a large extent in the Mental Capacity Act, 2005.

564 English Law Commission **Report No 231** 1995 (Summary) par 1.6 – 1.11.

565 Ibid par 1.34- 1.41.

566 See in general Scottish Executive **Making the Right Moves** 1999 6-10.

South Africa). The Public Guardian must, among others, keep register of Court appointments of surrogate decision-makers and enduring powers of attorney; supervise and monitor financial powers of surrogate decision-makers; and investigate complaints relating to their management of finances.[567] The specific measures of support provided for include the express provision for "access to funds", which makes it possible for carers and certain other individuals to apply to the Public Guardian for authorisation of payments for a time-limited period, from an individual or organisation (such as a bank holding the funds of the person with incapacity).[568] This provision is intended to meet the need for a simple system to allow cash withdrawals or to make payments from bank accounts of persons with incapacity. The Public Guardian will monitor such arrangements. To meet the need of many persons with small estates that do not justify the appointment of a guardian, or people who are cared for in establishments and have no-one else to act on their behalf, provision is made for "management of resident's funds and property by private care establishments". A further measure provided for to deal with practical day-to-day situations, where continual management of the financial or personal welfare affairs of the person concerned is unnecessary, is a one-off "intervention order". The intervention order is granted by a lower Court.[569] To manage the affairs of a person with incapacity over an extended period of time, provision was made for the appointment of a "guardian", who may exercise any combination of financial and personal welfare powers.[570] The guardian is appointed by a lower Court for an initial period of three years, which may be renewed for a further five years. It is envisaged that guardians will normally be members of the family of the person with incapacity; and that the Court will define the guardian's powers in accordance with limitations provided for in the Act.

5.17 In Queensland, Australia, the Law Commission recommended a scheme of proxy decision-making based on differentiating between "assisted" decision-making (involving someone *assisting* a person to make his or her own decisions), versus "substituted" decision-making (involving someone *making* a decision for a person). This system also differentiated between certain types of decisions, including personal welfare, health care,

---

567 Ibid.

568 Ibid 13-15.

569 Ibid 24-28.

570 Ibid.

financial, and legal decisions; and certain "excluded decisions" or "special consent decisions" (which are, respectively, excluded from decision-making by others or require consent by a tribunal).[571] "Substitute decision-makers" are of three kinds: a chosen substitute (authorised under an enduring power of attorney); a statutorily authorised substitute; and an appointed substitute. The type of decision dictates the level of assistance or substitution allowed by the proposed legislation. The recommendations provided that a multi-disciplinary tribunal should be created to supervise the scheme. Interestingly, the proposed system allows a family member (from an enumerated list) or close friend to make health care decisions (excluding consent to sensitive treatments) on behalf of the person concerned under a statutorily default arrangement. These statutorily authorised default decision-makers' powers do not extend to financial decisions.[572]

5.18 In the Netherlands, two mechanisms for lower-level substitute decision-making were created by legislation alongside a system of *curatele* (which broadly corresponds with the South African curatorship system). These mechanisms provide for management of financial affairs (*beskermingsbewind*) and management of personal welfare (*mentorschap*), respectively. They can be instituted by order by a *kantonrechter* (equivalent to a magistrate in the South African context) on application by the person with incapacity or his or her relatives. The *kantonrechter* has the power to decide whether the person concerned should rather be placed under *curatele,* if a high degree of supervision of the person and/or his or her affairs is necessary. The test for the appointment of a *bewindvoerder* or *mentor* is whether the person concerned "is incapable of managing his or her affairs". The main difference between the effect of *curatele*, *bewind*, and *mentorschap* is that under *curatele* the person concerned is completely deprived of legal capacity and may not independently perform juristic acts; under *bewindstelling,* the person concerned may not independently take decisions about his or her financial affairs, but retains the capacity to take personal decisions; and under *mentorschap,* the person concerned may not independently take decisions about personal care and medical treatment. It is interesting to note that *bewind* is publicly registered whereas *mentorschap* is not required to be publicly disclosed.[573]

---

571 Queensland law Reform Commission **Report No 49** 1996 Vol 2 23-24.

572 Ibid Vol 2 23-24.

573 See in general Oomens and Van Zutphen 2-7.

D Developing an alternative system

5.19 With the information supplied in this Chapter as background, in particular with regard to the needs reflected in the comments, the Commission in Discussion Paper 105 suggested the establishment of a multi–level system as an alternative to the curatorship system. The proposed system would contain the following broad elements:

1 A default arrangement (to be referred to as "a general authority to act") to legalise the informal day-to-day decisions made to support persons with decision-making impairment. This measure should be available where none of the other more formal measures proposed, or any of the existing common-law or statutory measures, has been utilised. The following specific preliminary recommendations were made:[574]

- It was proposed at the time that the "general authority" should be developed on the model of the common law concept of *negotiorum gestio* (as set out in paragraphs 2.33 above).
- The measure should enable "anyone" (and not only "nearest relatives" or "family") to support a person with decision-making impairment. The reason for this is that one of the Commission's aims was to make provision for support measures for persons who have no family or in respect of whom family members are unwilling or unavailable to assist with decision-making.
- It was initially recommended that the measure should be restricted to support with regard to personal welfare. In this regard it was believed that, because any action taken in support of a person with decision-making impairment under a general authority will by its nature be unsupervised, it would be undesirable to extend such support to decision-making with regard to financial affairs because of the obvious danger of misuse and abuse of the authority.

---

574 Refer to par 6.49 of SALRC **Discussion Paper 105**; and cl 6-10 of the draft Bill in the Discussion Paper.

- The general authority should allow for run-of-the-mill expenses to be incurred and paid for on behalf of the person with decision-making impairment.
- It was further proposed that the general authority should allow for a person who has signing powers in respect of a bank account of his or her spouse, whose decision-making becomes impaired, to retain this power after the impairment of the spouse. Safeguards should be built into the process to protect the interests of the spouse with impairment (eg by requiring that the signing power must have existed at the time of impairment, and that the power can be used only for specific limited purposes, such as payment of reasonable living expenses of the spouse concerned.)
- It was suggested that the informal support envisaged should clarify the position of parents to act as surrogate decision-makers for their major children with impaired decision-making capacity. It was suggested that this could be done by granting such parents an "automatic" appointment as the formal supporter under certain circumstances.
- It was suggested that the general authority should cover situations where a statutory decision-making supporter has not been appointed, or where an enduring power of attorney has not been granted.

2 A short-term measure to allow for one-off decisions to be made on behalf of persons with decision-making impairment. This measure would be based on the models in England and Scotland described above,[575] and the Commission referred to it as a "specific intervention order". It was suggested that legislation should allow the Master, or any suitable person, to make such one-off decision in respect of the personal welfare or financial affairs of the person concerned. It was further suggested that this proposed one-off appointment would be preferable to the long-term options

---

575 See par 5.14 et seq above.

suggested below, especially in circumstances where long-term support is not yet necessary.[576]

3 Long-term measures to specifically serve as alternatives to the common law measures of *curator bonis* and *curator personae*. In this regard, the Commission suggested that legislation should make it possible to appoint a "manager" to care for and manage the property of a person with decision-making impairment; and for a "mentor" to take care of the personal welfare decisions of the person concerned. It was believed that the Master should, however, always have the discretion to refer a matter to the High Court for the appointment of a *curator*. We suggested that the powers and duties of the manager and mentor, supervisory measures (for instance the submission of accounts or reports), restrictions on their authority, and termination of their appointments must be developed. These aspects should be based on current requirements and best practices in respect of curators and administrators who are appointed in terms of Chapter VIII of the Mental Health Care Act 17 of 2002,[577] as set out in Chapter 4 of the Administration of Estates Act, 1965. With regard to authority to consent to medical treatment on behalf of a person with decision-making impairment, it was suggested that a mentor should be able to give consent in accordance with the provisions of the National Health Bill, 2003 (now the National Health Act 61 of 2003). It should be noted that the National Health Act does not provide for surrogate consent to refuse the carrying out or continuation of life-sustaining treatment.[578]

4 A suitable administrative and supervisory framework, within which the respective persons providing support would operate, must be established. In addition, suitable safeguards to sufficiently protect the interests of persons who need support should be included in proposed draft legislation. It was suggested at the time that the existing supervisory framework for curators (ie the office of the Master of the High Court, with recourse to the

---

576 Refer to par 6.49 of SALRC **Discussion Paper 105** and cl 11-21 of the draft Bill in the Discussion Paper.

577 See par 2.34 above for information on this procedure.

578 These proposals were set out in par 6.49 of the Discussion Paper and reflected in cl 22-69 of the draft Bill in the Discussion Paper.

High Court as a last resort) should be utilised, rather than creating new frameworks that might complicate the implementation of the proposed legislation.[579]

5.20 One of the Commission's main aims in developing the proposed measures was to keep them as simple and accessible as possible. With this in mind, we suggested in Discussion Paper 105 that the same procedure should be prescribed for applications to appoint persons to act in terms of specific intervention orders and applications to appoint managers and mentors. Because of the obvious similarities in purpose, the Commission initially considered modelling the proposed administrative application procedure for the appointment of supporters on that prescribed for the appointment of an administrator[580] under sections 59 to 64 of the Mental Health Care Act 17 of 2002. In developing the proposed draft legislation, however, this procedure was found to be unnecessarily complicated.[581] On the basis of informal discussions with a representative of the Masters Office, we developed the application procedure contained in our proposed draft Bill on the model in section 56A of the former Mental Health Act 18 of 1973 (which procedure had not been included in the Mental Health Care Act, 2002 and had since been repealed).[582] The latter procedure was generally regarded as fulfilling the requirements of simplicity, practicality, accessibility, and affordability.

Discussion Paper recommendation, comment and evaluation

5.21 Discussion Paper 105 recommended that a multi-level system of what was referred to at the time as "substitute" decision-making, broadly described in the paragraphs above, be introduced by legislation as an alternative to the curatorship

---

579 See 6.49 of SALRC **Discussion Paper 105** and cl 88-94 of the draft Bill in the Discussion Paper.

580 See par 2.34 above for information on the administrator procedure.

581 The procedures referred to are set out in detail in par 6.21 of the Discussion Paper.

582 This procedure basically involved an application to the Master without the need for the involvement of lawyers, and the submission of the minimum amount of documentation to enable the Master to exercise his or her discretion as to whether to make an appointment.

system. The detail of the proposal was reflected in the provisions of the Draft Bill contained in Discussion Paper 105.[583]

5.22 In embodying the above proposals in legislation, one of the main questions that arose was how to deal with any overlap between the draft Bill in Discussion Paper 105 and certain similar (but inadequate) provisions in the Mental Health Care Act 17 of 2002. As indicated in paragraph 2.34 above, the Mental Health Care Act already provides for the appointment of an administrator to care for and administer the property of persons with "mental illness" and persons with "severe or profound intellectual disability" as defined in that Act.[584] Because of the wide definition of "incapacity" in the draft Bill included in Discussion Paper 105, the measures proposed in the Discussion Paper would indeed be available to such persons.[585] This was particularly true of the proposed formal measure of a “manager” (which could in terms of the draft Bill be appointed to manage the financial affairs of an adult with incapacity). It was unclear to the Commission, at that stage, whether the overlap should be allowed or avoided. The proposed draft Bill could be expressly excluded from applying to the "client base" of the Mental Health Care Act. In that case the Master, who also fulfils the supervisory role with regard to applications for the appointment of an administrator under the said Act, would have to decide in respect of every application (for the appointment of the envisaged “manager”), whether or not the person in need of support belongs to the client base of the Mental Health Care Act. The Commission foresaw difficulty with such an approach, especially in view of the complex definitions of "mental illness" and "severe or profound intellectual disability" in the Mental Health Care Act. It was submitted on a preliminary basis in the Discussion Paper that the two pieces of legislation could co-exist, and that the legislator could in time consider whether a uniform arrangement would suffice. If so, this might take the form of the wider, simpler, and more accessible approach proposed by the Commission.

5.23 Generally speaking, commentators supported the Commission’s in-principle proposals for a multi-level alternative to the curatorship system. The problems and

---

583 See cls 6 – 69 of the proposed draft Bill in SALRC **Discussion Paper 105**.

584 Ibid.

585 See par 4.13 et seq above and cl 4 of the draft Bill in SALRC **Discussion Paper 105**.

concerns raised focused mainly on the practical application and suitability of the measures and administrative procedures provided for. To an extent the Commission had expected this response, as new developments for alternatives to traditional systems of support had by then only fairly recently been introduced in other jurisdictions. The practical workability and success of such systems had still to be conclusively proved at the time of publication of the Discussion Paper in 2004.

5.24 The public response in many instances also reflected the strong tension between the need for simple measures and less intrusion on the one hand, and the need for more formal measures that would ensure protection of the person concerned on the other hand. The Commission's initial perception that its greatest challenge in developing final proposals would be to find a proper balance between these two poles was strongly confirmed by the responses to the proposals contained in Discussion Paper 105.

5.25 The concept of a multi-level system of support was welcomed in particular because of its potential for formal as well as informal arrangements. The public experienced this proposal as signifying an increase in protecting persons with decision-making impairment, recognition of individual rights, and better provision for all socio-economic groups. Some respondents also pointed out that the proposed system is congruent with the transient nature of many mental illnesses and the less deterministic stance that should thus be adopted in assuming long-term decision-making impairment. With few exceptions, respondents also agreed with the proposal that the curatorship system should not be abolished but that the new system should operate as an alternative to it. It was generally believed that this dual approach would ensure that cases that might not suitably be dealt with by the proposed new measures would still be sufficiently covered.

5.26 Many respondents regarded the proposed informal measure (referred to as the "general authority" in Discussion Paper 105) as probably the most important concept from the point of view of society at large, as it would regulate what actually happens in practice.[586] Although the vast majority of respondents supported the concept, there was also concerns as to its practical application and its general "looseness". These concerns

---

[586] See cl 6 – 10 of the draft Bill in **SALRC** Discussion Paper 105.

included uncertainty about the practical application of the concept of reimbursement of expenditure incurred on behalf of the person with decision-making impairment as provided for in the draft Bill. The “general authority” as proposed in Discussion Paper 105 would moreover be unsupervised. Commenting on this, the view was expressed that there seems to be no point in "legalising" day-to-day decision-making if there are no checks and balances put into place to regulate it. It was also submitted that given the other forms of support provided for in the draft Bill, the open-ended and potentially abusive informal support as provided for is perhaps not necessary. Several possibilities were suggested to strengthen the control. These included:

- Restricting the general authority to a specific category of persons, for instance family members, carers, and social workers attached to service organisations; or "associates" as defined in the Mental Health Care Act 17 of 2002 (which implies that the person acting must have a substantial interest in the person to be supported or must have substantial contact with the person).[587]
- Registering the general authority with the Department of Social Development.
- Limiting the application of the authority to persons who are "in danger" – be it personal or financial danger.
- Requiring two persons to act together as supporters.
- Limiting authorised expenses to a certain amount, or to a proportion of the total income of the person to be supported.
- Requiring that persons who act in terms of the general authority must keep record of the expenses incurred in supporting the person concerned, should an audit be requested by the Master or the Court.

Respondents differed about which of these possible safeguards would better prevent abuse. The following main concerns were also raised about the “continuing signing power” which was drafted as part of the proposed informal support:

- It was submitted that the continuing signing power on bank accounts should not be limited to "spouses", but should include any person who was granted signing powers before the impairment of the person concerned. It should be

---

587 See sec 1 of the Mental Health Care Act 17 of 2002.

noted that the Banking Council of SA did not held this view. The Council suggested that where persons other than a spouse had signing power (which lapsed on decision-making impairment), this should be remedied by introducing the enduring power of attorney.

- Commentators believed that the limitation on using the continuing signing power for payment of expenses "related to the common household that had directly before the decision-making impairment of such person been paid out of his or her bank account" was too restrictive. It was submitted that the proposed measure does not accommodate the financial deterioration of the spouse of the person with decision-making impairment, or the reciprocal duty of maintenance between spouses. It was suggested that there is a need for continuing signing powers in respect of board and lodging in a care facility, for instance, or for relocating after the decision-making ability of one of the spouses has become impaired.

5.27 We do not refer here to the comment received on the “automatic” appointment of parents, and on the concept of the "intervention order", as these two measures (discussed in paragraph 5.19 above), were subsequently deleted to ensure compliance with the requirements of the CRPD.[588]

5.28 Respondents generally supported the concept of the formal level of supported decision-making as proposed.[589] Single respondents submitted that the appointment of managers and mentors should as a rule be combined and not separated. These resondents generally believed that it is practically impossible to separate personal welfare and financial decisions. Several suggestions were made with regard to refining the detail of the initial recommendations for formal support:

- Respondents were strongly divided with regard to the duties imposed on the manager and mentor, especially those of the manager. The tension between the need for simple and effective measures on the one hand, and the need for protection of the person concerned on the other, was perhaps illustrated most evidently in the public’s response to this issue. Family

---

588 See par 5.34 and 5.35 below.

589 See cls 22 – 69 of the draft Bill in **SALRC** Discussion Paper 105.

members were almost unanimous in the opinion that the duties imposed are too stringent; remind them of the unacceptable characteristics of the curatorship system; will hamper them in caring for their loved ones; are unnecessarily intrusive; and will force them to incur additional costs, because they will have to employ professionals to assist them in fulfilling these duties. However, professional people – some of whom daily face problems relating to the abuse of elderly persons or persons with decision-making impairment by family members – were adamant that the proposed duties should not be relaxed. Some suggested that a compromise could be reached by relaxing the duties imposed in the case of smaller estates (eg where assets to be administered are below a minimum of R500,000).

- Respondents were also divided on the proposals regarding periodic "renewal" of the appointment of formal supporters. These views are not referred to further, as the renewal procedure has been deleted from the draft Bill and replaced with the CRPD's requirement for review of all appointments of supported decision-makers.

5.29 All comments were considered. The in-principle system of different levels of support, as suggested by the Commission in Discussion Paper 105, survived these comments. However, the draft Bill was then significantly further developed to address the issues raised in the comments, and to deal with the practical details of the administrative procedures necessary to establish and supervise the suggested support measures. Some of these amendments were later overtaken by our extensive further amendment of the draft Bill to reflect the requirements of the CPRD. The procedures initially developed in connection with the appointment of decision-making supporters in the draft Bill were based mainly on the model of procedures prescribed for the appointment and supervision of curators in terms of the Administration of Estates Act 66 of 1965. The reason for this was that Masters Office officials are familiar with these processes, while this knowledge would also assist in the successful implementation of the new measures, should they be enacted. The aim was to make use of established best practices but to further develop these guided by information on processes provided for in other jurisdictions, where necessary.

5.30 With regard to the overlap between the Mental Health Care Act's provisions for the appointment of an administrator and the Commission's proposed formal appointment of a financial supporter referred to in paragraph 5.22 above, comments favoured the repeal of Chapter VIII of the said Act. This preference was especially evident in the later stages of developing the final draft Bill. The possibility of repeal was discussed throughout with representatives of the Department of Health, especially after the ratification of the CRPD (because the Chapter VIII provisions were also not fully compatible with the CRPD requirements).[590] After consideration of the final version of the proposed draft Bill, the Department supported the repeal of Chapter VIII. The Department was satisfied that in terms of the final draft Bill, at least the same protection as provided for in Chapter VIII of the Mental Health Care Act will be available to persons with "mental illness" or "severe or profound intellectual disability".[591] In drafting transitional provisions, the Commission aimed to ensure that such persons in respect of

---

590 Referred to in par 1.15 (subpar 6) and ANNEXURE 13. Chapter VIII of the Act perpetuates the application of the dated provisions of the Administration of Estates Act, 1965 in its section 65. Although relevant powers and duties of curators as prescribed by the Administration of Estates Act have also been included in the Commission's proposed draft Bill (with regard to the financial supporter), these powers and duties are tempered by the general principles in cl 5 of the draft Bill. See also fn 589 below.

591 The support for the repeal was granted by the Minister of Health in correspondence dated 22 June 2015 with the SALRC Secretary. The draft Bill's suggested formal appointment of a financial supporter does not differ in principle form the appointment of an administrator in terms the Mental Health Care Act's Chapter VIII. The two aspects in respect of which the procedures differ are related to the reflection of the CRPD in the Commission's proposed draft Bill/ These are the following:

- The draft Bill in its cl 5 contains a set of general principles to be taken into account in the actions and proceedings with regard to the appointment of a supporter; and in the actual rendering of support by the financial supporter. These are a combination of human rights principles and principles required by article 12(4) of the CRPD.
- The draft Bill complies with the CRPD's requirement for review procedures (see article 12(4) of the CRPD and cl 38 of the draft Bill).

whom administrators have been appointed in terms of the Mental Health Care Act, will not be adversely affected.[592]

E Impact of the CRPD

5.31 The draft Bill as described above was amended extensively to reflect relevant requirements of the CRPD. This was done in accordance with the Commission's premise in taking into account the CRPD's Article 12 (the legal capacity provision).[593] The concept of different measures to cater for different support needs of persons with decision-making impairment was retained in principle, but with certain amendments. The CRPD requirements necessitated changes, especially, to the concept of informal support (the "general authority"; the "continuing signing power on bank accounts"; and the "automatic" appointment of parents of a minor who becomes an adult person with disability.) All of the in-principle changes concerned a stronger emphasis on non-discrimination, and a greater recognition of the rights of persons with disability, in providing for measures to support such persons in the exercise of their legal capacity on an equal basis with others. The broad changes effected to reflect the CRPD, are referred to below.

---

592 See cl 122 of the draft Bill. In terms of the Commission's suggested approach, all administrators appointed in terms of the Mental Health Care Act shall be deemed to be financial supporters on the day of commencement of the proposed legislation. This would imply that the previously appointed administrators are bound by the requirements of the new legislation as regards their powers and duties. It is submitted that this approach would, for the following reasons, not detrimentally affect previously appointed administrators: The only difference in practice with regard to the procedures applicable in terms of the proposed new legislation is the added provision for obligatory review of appointments in terms of cl 38 of the draft Bill. This could indeed require the administrator (deemed to have been appointed as financial supporter) to be more cautious in administering of the estate of the person with disability – which would, however, be to the advantage of the person with disability. Remuneration of the administrator (deemed to have been appointed as financial supporter) could be affected as the draft Bill provides for the assessment of the remuneration of the financial supporter according to a prescribed tariff. It is envisaged that the prescribed tariff will not be set without consultation with stakeholders. Finally, an administrator (deemed to have been appointed as financial supporter) would, in terms of the proposed draft Bill have the opportunity to resign should it be unacceptable to proceed under the proposed new legislation (cl 39 of the draft Bill does not restrict or limit the right to resign in any way.) The transitional provisions in cl 122 further deals with pending applications in terms of the Mental Health Care Act at the date of commencement of the proposed draft Bill; with the date for the annual lodging of accounts and regular review under the draft Bill; security granted by the administrator in terms of the Mental Health Care Act; and records and documents in possession of the Master which relates to the administrator appointment.

593 See par 3.81 above.

5.32 The default arrangement proposed, referred to as the "general authority" in Discussion Paper 105 is retained in the final proposed draft Bill but with a change in terminology. The measure is referred to as "informal support" in the draft Bill. Because people who are close to a person with decision-making impairment (family, friends), generally cannot afford the Court proceedings to appoint a curator, they tend to resort to informal practical measures to care for and support the person with disability on a day-to-day basis. The aim of the proposed measure is to legalise, and importantly, to regulate what people actually do in practice. It is envisaged to be a truly informal measure not requiring a formal appointment (which is now clearly stated in clause 6(3)). To clarify when informal support may lawfully be provided, the draft Bill was amended to specify under what circumstances informal support would be allowed and not allowed.[594] The ambit of the measure, previously limited to personal welfare matters, was expanded to include support with regard to financial matters.[595] The inclusion of financial matters should, however, not result in, or be seen to be, a general power of attorney to handle financial matters where no such power exists. The Commission therefore suggest that, to retain the balance between less interference on the one hand, and sufficient protection of the interests of the person concerned on the other, the safeguards with regard to informal support should be extended. This was done by adding restrictions with regard to property matters,[596] and requiring the supporter to keep sufficient records in order to justify the support provided, should this be necessary.[597] The limitation included in Discussion Paper 105 with regard to giving or refusing consent required for medical treatment in terms of the National Health Act 61 of 2003 (as referred to in paragraph

---

[594] Cl 6(1), and (2), respectively.

[595] This approach is in accordance with the CRPD requirement in its article 12(4) that support should be proportional and tailored to the circumstances of the person concerned. Ie informal support (whether of a personal welfare or financial nature) should always be possible except where the person's circumstances require otherwise. This approach is also in accordance with what is currently taking place in practice: Relatives and other supporters provide informal assistance to persons who need such support – without institutional interference. Where there is no abuse of the supporting role, or of the person in need of support, such informal arrangements should be allowed to continue – whether they are of a personal welfare or financial nature.

[596] Cl 9. The aim of the restrictions provided for is to prevent the informal supporter from granting support with regard to major financial matters, or matters that might entail financial risk. Where such support is indeed necessary, it should rather be provided by a person formally appointed by the Master (in terms of the formal measures of support included in the draft Bill), in which case the more extensive safeguards provided for will better protect the interests of the person with disability.

[597] Cl 11.

2.36 above), is retained.[598] We also confirm our recommendation in Discussion Paper 105 that the informal supporter should be allowed to recoup expenditure involved in such support under certain circumstances. This principle is more clearly defined in the final recommended provisions.[599]

5.33 In practice, loved ones who trust one another often give one another access to their respective banking accounts. We recommend that such access should, for practical purposes, be allowed to continue if the person who granted the access subsequently, as a result of disability, requires support in exercising legal capacity. The circumstances under which and the limited purpose for which such access may be used should be prescribed. The Commission is of the view that the access should be allowed primarily for the payment of the reasonable living expenses of the person who originally granted the authority or of the common household of that person and his or her spouse, if any. Safeguards to protect the interests of the person with disability in the form of measures to terminate the access, should also be provided for.[600]

5.34 The concept of "automatic" appointment of parents of a minor who becomes an adult person with disability (as referred to in paragraph 5.19), was deleted in our final

---

598 Justification for the restriction remains unchanged: Sec 7 of the National Health Act already provides for the spouse and certain close relatives to consent to medical treatment on behalf of a person who cannot consent and who did not in writing mandate another person to consent (sec 7(1)(b)); for such a person to be treated in an emergency where consent cannot be obtained (sec 7(1)(d) and (e)); and for consent to be granted in terms of a court order or any other law (sec 7(1)(a)(ii)). To grant an informal supporter the authority to consent to medical treatment would thus not be necessary, as most people who cannot consent would be covered by the provisions of the National Health Act's section 7. We also believe that the Bill should not authorise an informal supporter (who might not be the spouse or close relative of the person with disability) to, *in his or her capacity as informal supporter*, consent to eg a major operation - not only because of the possible health risks and consequences involved but also because of the financial implications. If consent to medical treatment is necessary and the consent provisions of the National Health Act are inadequate, a personal welfare supporter could be formally appointed by the Master in terms of the draft Bill to grant the necessary consent (see cl 50(2)(a)). The formal appointment, in respect of which additional safeguards apply in terms of the draft Bill, will provide protection against abuse of this authority. These safeguards include the following: The person must formally apply and be appointed to consent to medical treatment (cl 50(2)(a)); the Master may require such a formally appointed personal welfare supporter to report to the Master on any decision/s taken (cl 53); the personal welfare supporter's decision could be set aside by the Master (cl 112); and the offences and penalties provided for in the draft Bill (cl 125) would be available.

599 Cl 7. See also par 5.19 above. These expenses are limited to reasonable expenses incurred in the course of informal support and may be claimed only if they were necessary and useful in relation to the support provided; and were suitable in relation to the standard of living of the person with disability and also in relation to the actual requirements of the person at the time.

600 Cl 12-15 of the proposed draft Bill. Refer also to the original "authority in relation to singing power on bank account" provided for in cl 9 of the Discussion Paper Draft Bill.

recommendations, as it could be seen as perpetuating a paternalistic relationship between a parent and an adult “child” with disability. This would be contrary to the premise of the CRPD.[601] The Department of Health, in their request that the draft Bill be aligned with the CRPD, in particular highlighted this concept (as provided for in Discussion Paper 105 at the time0, and expressed doubt about its desirability.[602] In view of the expansion of the "informal support" measure in the final proposed draft Bill (to cover both financial and personal welfare matters), there also seemed to be no reason to maintain the concept of "automatic” appointment of parents, as support would be available to such adults under the broad informal measure of "informal support" as proposed.[603]

5.35 The "specific intervention order", (referred to in paragraph 5.19), in the form of a separate and independent shorter-term measure included in the Discussion Paper draft Bill, was deleted. This is because the principle of proportional support in the CRPD implies that proportional support should be inherent in any support measure provided for. [604] There is thus no need for an independent, separate measure for short-term support. The solution should rather be to have a financial or personal welfare supporter appointed for a specific (shorter-term) purpose. In the amended draft Bill, the possibility

---

601 The Commission noted the following remarks of the International Disability Alliance:

"All children, including those with disabilities, have an evolving legal capacity, which at birth, begins with full capacity for rights, and evolves into full capacity to act in adulthood. Children with disabilities have the right to have their capacity recognized to the same extent as other children of the same age, and to be provided with age- and disability-appropriate supports to exercise their evolving legal capacity. Parents and guardians have the rights and responsibility to act in the best interests of their children while respecting the child's evolving legal capacity, and the state must intervene to protect the legal capacity and rights of children with disabilities if the parents do not do so, in accordance with the Convention on the Rights of the Child. *The parents' or guardians' rights to act on behalf of their children cease when the child reaches the legal adult age. This must be the same for all persons to avoid classifying people with disabilities as children at an older age than others"* (Our emphasis) (IDA CRPD Forum "Contribution to the Office of the United Nations High Commissioner for Human Rights' Thematic Study to enhance awareness and understanding of the Convention on the Rights of Persons with Disabilities, focusing on legal measures key for the ratification and effective implementation of the Convention" Geneva 15 September 2008 pars 7 and 8 p 59).

602 Par 3.5 above.

603 The extended safeguards provided for in respect of the informal support measure in our final proposals (cl 7 – 11 of the draft Bill) would also provide additional protection where adult "children" are supported in terms of this measure.

604 Art 12(4) of the CRPD; refer to par 3.16 above for a discussion of Art 12.

of providing shorter-term support has thus been expressly included in the two measures for longer-term formal support (financial support and personal welfare support).[605]

5.36 The concept of formal, longer-term support with regard to financial and property matters, and personal welfare matters, respectively (as referred to in paragraph 5.19 above), were mainly retained as in Discussion Paper 105 with amendments to the terminology and other smaller or technical details. In line with the terminology of the CRPD, support should be provided by a "financial *supporter*" or "personal welfare *supporte*r" in terms of the amended draft Bill, instead of by a "manager" or "mentor" (the latter terms were used in Discussion Paper 105[606]). As indicated in the previous paragraph, the possibility of requiring shorter-term support for a specific purpose was expressly included into both these formal measures.[607] It is recommended that the proposed draft Bill provide for the application procedures for the appointment of a formal supporter[608] (which should include a requirement for evidence that the support is necessary,[609] and that the person concerned has consented to the application or has

---

605 See eg cl 19(2), 22(1)(a) and 30(1) in respect of a financial supporter, and 48(2) and 50(1)(a) in respect of a personal welfare supporter. Note that in respect of both financial and personal welfare support, it is recommended that the application for the appointment of a supporter expressly states the particulars regarding the support required (cl 17(1)(d) and 46(1)(d) of the draft Bill) which information would indicate whether the support is needed for a shorter- or longer-term purpose. The need to regulate specific (shorter-term) support by way of less formal procedures (ie requiring less control by the Master) has also been dealt with in our final recommendations (see eg cl 24 and 26 in respect of the financial supporter where the two clauses referred to does not require submission of an inventory or opening of bank accounts in the case of shorter term support.)

606 See the draft Bill included in Discussion Paper 105, Chapters 4 and 5 respectively. These provisions have been included to reflect the CRPD's emphasis on protection of the right to autonomy.

607 Cls 16 – 44 and 45 –63 of the draft Bill. Refer specifically to cl 22(1)(a) which empowers the Master to authorise the financial supporter appointed to make *specific* decisions, or perform a *specific* act or acts in respect of the property of the person with disability; and cl 50(1)(a) which provides for a corresponding appointment of a personal welfare supporter.

608 See cls 17(1) and 46(1) respectively. As regards the requirements for making an application, it is recommended that a person below the age of 18 who has entered into a valid marriage should also be allowed to apply for the appointment of a formal supporter (see par 2.58). Although this was always the intention, the draft Bill now also clarifies the view that a person requiring support should be able to apply for the appointment of a formal supporter by expressly referring to this in cls 17(1) and 46(1). This is in accordance with the CRPD's premise that a person with disability is never without (active) legal capacity. This approach took cognisance of the possibility of fluctuating impairment. Having said this, the Commission nevertheless emphasises its view that it would be preferable for a person who still has sufficient decision-making ability to rather execute an enduring power of attorney as the enduring power in particular acknowledges the right to autonomy by allowing a person to choose who shall support him or her in managing his or her affairs.

609 In view of the CRPD's move away from the medical model of disability, and away from emphasis on medical defects in the person who needs support, it was believed to be undesirable to restrict evidence on the basis of which an application for the appointment of a formal supporter could be

been given opportunity to object to it[610]); requirements for being appointed as a formal supporter;[611] suitable safeguards to protect the interests of the person with disability concerned;[612] and termination of the appointment.[613] A significant additional issue

---

granted, to medical evidence. Other relevant social and health care practitioners would be able to provide information on the social circumstances and ability of the person concerned to deal with decisions affecting his or her financial matters and personal welfare (see cls 17(2)(g), 46(2)(g) and the definition of "health care practitioner" in cl 1 of the draft Bill). What is relevant is that the Master has access to "external" evidence (not necessarily medical evidence) to assist in making a decision on whether the appointment of a supporter is necessary. Should the information be insufficient, the Master has the discretion in terms of the proposed draft Bill to require additional information (cls 17(4) and 46(4)).

610 Cls 17(3) and 46(3).

611 The Commission in this regard specifically heeded the comments of family of persons with decision-making impairment. The draft Bill, amongst others, therefore requires that in determining whether a person is suitable for appointment as a formal supporter, preference must be given to the express preference of the person with disability concerned, except where good cause exists for not giving effect thereto. The person to be appointed must be aware of the circumstances of the person with disability; and must be accessible (cls 18 and 47). We recommend that a juristic person could also be appointed as supporter (cls 18(1, 20, 47(1) and 49). The reasons are similar to those for allowing a juristic person to be appointed as agent as set out in par 6.224.

612 Specific safeguards provided for in the case of a financial supporter include requiring security for the proper performance of duties under certain circumstances (cl 21); requiring submission of an inventory of the property in respect of which the supporter is appointed and prohibiting the disposal of any property not in the inventory (cl 24 and 25); requiring obligatory keeping of records of the support provided and obligatory annual reporting and accounting to the Master (cl 29 and 30). Specific safeguards in the case of personal welfare support include provision for a “unanimous consent” requirement to guide against possible deprivation of liberty where a personal welfare supporter consent to the admission of an older person with disability to a residential facility as contemplated in the Older Persons Act 13 of 2006 (cl 50(2) and (3)). The Commission noted that secs 34 and 36 of the Mental Health Care Act 17 of 2002 provides sufficient protection for persons who are admitted to care facilities under that Act. (This safeguard was modeled on developments in Scotland where reform was considered following a decision by the European Court of Human Rights (***HL v the United Kinddom*** 45508/99 [2004] ECHR 720) which made it clear that if a person enters residential facilities in which they are being deprived of their liberty, the fact that they themselves do not have capacity and so cannot consent to their own admission means that a lawful authorisation process is required (Scottish Law Commission **Report on Adults with Incapacity** October 2014.) General safeguards, that apply in the case of the financial and personal welfare supporters, include requiring a certain standard of care in providing support (cls 32 and 54); prohibiting the use of threat or force or influencing the person with disability (cls 34 and 56); and prohibiting the appointed supporter to substitute any other person to act as supporter for the person concerned (cls 37 and 58).

613 It is recommended that the proposed draft Bill provides for the possibility of a financial supporter or personal welfare supporter wishing to resign (cls 39 and 60); for termination of the supporter on application of the person supported (cls 40 and 61); and for withdrawal of the appointment of a formal supporter by the Master or the Court under certain circumstances (cl 41 and 62).

provided for, in order to reflect the CRPD's express requirement in this regard, is the provision for periodical review of the appointment of formal supporters.[614]

5.37 Other provisions that affect the support measures, and which were also amended in the process of taking into account the CRPD in further developing the draft Bill, have been discussed elsewhere in this report. The changes with regard to the definition of "disability" (to identify the client base of the proposed draft legislation) and the general principles applicable in rendering support are of major importance.[615]

5.38 A list of provisions in the draft Bill on Supported Decision-making, which reflect the requirements of the CRPD, are included in Chapter 3 above.[616]

Report recommendations

---

614 Cls 38 and 59 of the draft Bill. The CRPS's art 12(4) requires that as one of the safeguards against abuse, supported decision-making measures should be subjected to "regular review by a competent, independent and impartial authority or judicial body". The Discussion Paper draft Bill indeed provided for the concept of review in the form of a "renewal" process, coupled with limited periods of appointment of formal supporters. Commentators, although acknowledging the purpose of the proposed renewal, regarded the recommended process as too complicated, time consuming and not cost effective as it consisted of a complete repeat of the original application for appointment. The Master also cautioned that a renewal process should not involve an unbearable additional administrative burden. The procedure now provided for in the final draft Bill aims to be an uncomplicated procedure that distinguishes between obligatory periodic review initiated by the Master at three year intervals (unless the Master determines a shorter period), and unscheduled reviews that could be initiated at any time by the person with disability, the Master or any interested person as necessary (cls 38(1) and 59(1)). The purpose of the review procedure will mainly be to ascertain whether an appointment (of a formal supporter) is still needed; and whether the person appointed is still suitable to fulfill this role. However, it is suggested that the Master be given a wide discretion in disposing of the review (cls 38(4) and 59(4)). The way in which the review is to be conducted is not prescribed – so as to ensure flexibility – but left to the Master to determine in accordance with the circumstances of a particular case. Burdensome requirements would make the review process inaccessible for both the Master and the public (cl 38(3) and 59(3)). It is recommended that the Master conduct the review. Other options considered but rejected included the relevant Cabinet Minister (the Minister of Justice and Constitutional Development), a special tribunal, or the Court. While a family court would ideally be suitable to do the review, this option is currently not available. The creation of a special tribunal is not viable mainly because of cost implications. The Minister's decisions would be informed by the Master (and would thus not be truly independent) and requiring the Minister to undertake the proposed reviews would moreover not be practical. With regard to possible review by the High Court, it was noted that the High Court's decisions, currently, in matters pertaining to curators are informed by the Master. It is submitted that the CRPD's requirement for an independent reviewer will be sufficiently met by the draft Bill's provision for the possibility of judicial review of decisions taken by the Master (cl 113).

615 See par 4.16 – 4.20, and 4.36 – 4.40 above.

616 See par 3.90.

5.39 ***The Commission recommends that, as an alternative to the current curatorship system, a flexible system of different measures must be made available through legislation to persons with "disability" who need support in exercising their legal capacity. As indicated in par 2.71 above, and for the reasons given there, the Commission does not recommended that the curatorship system be abolished. (Draft Bill clause 123.)***

5.40 ***The proposed legislation should provide for informal and formal measures of support. The comprehensive regulation of these matters is reflected in Chapter 2 (informal support), 3 (formal support with regard to property) and 4 (formal support with regard to personal welfare) of the draft Bill.***

5.41 ***With regard to the proposed informal measure (which would not require a formal appointment), it is recommended that –***

- ***support should be available with regard to financial as well as personal welfare matters;***
- ***legislation should expressly state when informal support would be allowed and when not; (Draft Bill clause 6.)***
- ***adequate safeguards should be provided for to protect the interests of the person with disability concerned; (Draft Bill clauses 9, 10 and 11.)***
- ***the measure should allow for reasonable expenses (incurred on behalf of a person with disability in the course of informal support) to be claimed from the person with disability; (Draft Bill clause 7.)***
- ***the informal measure should allow for the continuation of access to a bank account of a person with disability if the person who granted the access subsequently, as a result of disability, requires support in exercising legal capacity; the circumstances under which and the limited purpose for which such access may be used should be prescribed; and adequate safeguards to protect the interests of the person with disability should be provided for. (Draft Bill clauses 12 – 15.)***

5.42 ***The formal measures of support should provide for decision-making with regard to financial affairs as well as personal welfare. Regulation of such support should include provision for the following:***

- ***Procedures for the application for the appointment of a formal supporter by the Master of the High Court, which should include requiring evidence that the person concerned is in need of support, and that the person has been given the opportunity to object to the application. (Draft Bill clauses 17; 46.)***
- ***Requirements for being appointed as a formal supporter. (Draft Bill clauses 18; 47.)***
- ***The powers and duties of a formal supporter. (Draft Bill clauses 22 – 33; 50 – 55.)***
- ***Appropriate safeguards to protect the interests of the person with "disability", including provision for regular accounting and reporting to the Master of the High Court, and adhering to a certain standard of care in providing support. (Draft Bill clauses 29, 30, 32, 34 – 37; 52 – 54, 56 – 58.)***
- ***Procedures for the obligatory periodic review of the appointment of a formal supporter. (Draft Bill clauses 38; 59.)***
- ***Procedures for the termination or withdrawal of a formal supporter's appointment. (Draft Bill clauses 39 – 44; 60 – 63.)***

5.43 ***The Commission recommends that Chapter VIII of the Mental Health Care Act 17 of 2002 be repealed to prevent an overlap between the draft Bill's formal measure of support with regard to property, and the Mental Health Care Act's provision for support with regard to the administration of financial affairs (in the form of the appointment of an administrator). Transitional provisions to ensure that the rights of persons with disability are not adversely affected should be included in the draft Bill. (Draft Bill, clauses 121 and 122.)***

CHAPTER 6
ENDURING POWERS OF ATTORNEY

A Introduction

6.1 Under a contract of mandate, a person possessing active legal capacity ("handelingsbevoegdheid")[617] can appoint ("mandate" or "instruct") another person to perform a wide variety of tasks or acts.[618] Until the mandated person has performed the mandated act, a mandate can – as a general proposition – be terminated (revoked)

---

617 As with any contract, persons who have limited active legal capacity ("beperkte handelingsbevoegdheid") can also enter into a contract of mandate but only with the assistance of a guardian, curator or the like who can supplement the lack of full legal capacity.

618 Per Joubert (Van Zyl), LAWSA (1st re-issue), Vol 17 paras 1 and 2.

freely by the person who gave the instruction.[619] Of specific interest for present purposes is the contract of agency (representation), a type of mandate.[620] Under a contract of agency, one person (the principal) authorises (mandates) another (the agent) to perform a juristic act on his or her (the principal's) behalf.[621] A juristic act is one whereby a legal relationship, such as a contract, is created. A power of attorney is a written mandate whereby a principal authorises (mandates) an agent to act on his or her behalf.[622]

6.2 Under common law, (and retaining the common law terms in setting out this position), if a principal "loses active legal capacity", he or she can no longer perform juristic acts.[623] An agent cannot perform a juristic act that the principal him or herself cannot validly perform. Moreover, in such event the principal looses his or her ability to control the actions of the agent and to terminate, if necessary, the agent's authority. Accordingly, at common law, the agent's authority terminates by operation of law when the principal loses the active legal capacity required for the ostensibly authorised juristic act.[624] By the same token, a power of attorney terminates once the principal's decision-making ability is impaired. Under our law as it stands, therefore, persons who fear that their mental capacity is weakening or may be weakened, (ie that their decision-making ability might be impaired) and who want to appoint someone to act on their behalf if and

---

619 Ibid par 16(g).

620 Per De Wet (Du Plessis), LAWSA, Vol1, par 100.

621 De Wet in **LAWSA Vol 1** par 100-101; Joubert 1-3; De Villiers and Macintosh 1, 38-41; Kerr 3-4. An act of representation must not be confused with the contract of agency. The concept of representation is not a contract but the legal institution by which one person takes the place of another and acts for him or her in juristic acts. The contract of agency in terms whereof a representative (agent) is appointed is a contract which regulates the relationship between principal and agent and which can create rights and duties for the principal and the agent. Although as one of its consequences the agent may be empowered to act as the representative of the principal, the relationship remains contractual and should not be confused with cases of purely juristic representation - eg that of parent and minor child (De Villiers and Macintosh 13-15). From a theoretical point of view it should be noted that there are two different approaches to the treatment of the law of agency by South African legal authorities: The one approach is to combine the treatment of the rules relating to the contract of mandate with the rules relating to representation and considering them all as falling under the "contract of agency" (as eg by De Villiers and Macintosh). The other approach (adopted by De Wet) is to treat separately those rules of agency which are rules of the contract of mandate on the one hand, and representation and authority on the other hand (De Villiers and Macintosh 13-15; Kerr 6-10; De Wet in **LAWSA** Vol 1 par 100). This does not affect the applicable legal principles discussed in this Chapter. Where necessary reference will nevertheless be made to the difference in approach in the footnotes.

622 See the discussion of the common law in par 6.7 et seq below.

623 See par 6.54 for the Commission's approach regarding the effect of the CRPD on the concept of the enduring power of attorney.

624 See par 6.24 et seq below.

when that situation arises, cannot for that purpose utilise a contract of agency, including a power of attorney. Family and caregivers of persons with decision-making impairment are often under the erroneous impression that a power of attorney signed by a person in their care will be effective until that person dies. Such family members and caregivers then continue to act under an authority that has in fact terminated.

6.3 The problems caused by the common law rule that a power of attorney terminates on decision-making impairment have led to the development of a mechanism that survives the subsequent impairment of the principal. This concept is the enduring power of attorney, which in some legal systems is referred to as a "durable" or "continuing" power of attorney.[625] The impetus for this development in many jurisdictions was the introduction, in the 1950s, in Virginia in the United States of America of legislation on enduring powers of attorney; and the enactment in 1964 of a United States Model Act in this regard.[626] These events were followed by the United States Uniform Probate Code, 1969, which contained a blueprint for enduring power legislation.[627] Enduring powers of attorney legislation, based on these models, exist in all fifty states and Washington DC in America.[628] These developments were followed by a spate of recommendations by law reform bodies in Australia, England, and Canada.[629] One of the most developed schemes is found in Britain,[630] with simpler approaches existing in Ontario, Canada[631] and Victoria, Australia.[632] Different models vary depending on the

---

625 Van Dokkum 1997 **Southern African Journal of Gerontology** 17 et seq; Barker 1996 **De Rebus** 259 et seq; Neuman 1998 **De Rebus** 63-64.

626 The Special Power of Attorney for Small Property Interests Act (Creyke 1991 **Western Australian Law Review** 123).

627 The main future of the Uniform Probate Code as far as it concerned enduring powers of attorney, was that it provided for survival after incompetence if the language of the instrument indicated this to be the principal's intent. The popularity of the single subject of enduring powers led to a separate Uniform Durable Power of Attorney Act which in 1979 replaced and amended the relevant provisions of the Uniform Probate Code (sec 5-501 to 5-505). The latter Act polished the concept in regulating the relationship between a later Court appointed trustee or other fiduciary; and allowing the agent to exercise the power on the death of the principal if its exercise is in good faith and without knowledge of the death. The Uniform Durable Power of Attorney Act is currently under amendment (according to draft amendments that have been published in April 2003) (Creyke 1991 **Western Australian Law Review** 123; Alberta Law Reform Institute **Report for Discussion No 7** 1990 10; National Conference of Commissioners on Uniform State Laws [Internet]; Amendments to Uniform Durable Power of Attorneys Act 1979 [Internet]).

628 Schlesinger and Scheiner 1992 **Trusts and Estates** 38.

629 Creyke 1991 **Western Australian Law Review** 123-124.

630 Cf the Powers of Attorney Act 1985.

631 Cf the Powers of Attorney Act 1979.

view taken of the need for safeguards to protect the interests of the principal.[633] Updating of enduring power of attorney legislation has received attention in New Zealand, Hong Kong, Ireland, Victoria (Australia), and Nova Scotia, Canada.[634] The latter activities concentrated mostly on dealing with misuse and abuse of enduring powers and strengthening safeguards to protect the interests of the person granting the power.[635] In Canada, recommendations for reform also included joint recommendations by law reform bodies in certain provinces to attain uniformity of key statutory provisions on enduring powers across these provinces, in order to facilitate mobility rights of persons who rely on such powers.[636]

6.4 As indicated in Chapter 1 above, the Commission recommended in 1988 that the enduring power (covering financial and property-related decisions and including the possibility to grant a conditional power of attorney) be introduced into South African law. The government did not implement these recommendations. This fact supported the need for the current investigation.

6.5 The Commission in its Discussion Paper 105 once again recommended that the enduring power of attorney be introduced into South African law.[637] This preliminary recommendation was reflected in the draft legislation included in the Discussion Paper.[638] The preliminary recommendation was met with overwhelming support from stakeholders and commentators. In the course of consultation on the Discussion Paper,

---

632 Cf the Instruments (Enduring Powers of Attorney) Act 1981.

633 Atkin 1988 **New Zealand Law Journal** 368.

634 Hong Kong Law Commission **Report Enduring Powers of Attorney** 2008; Ireland Law Reform Commission **Report Vulnerable Adults** 2006; Western Canada Law Reform Agencies **Final Report** 2008; Victorian Parliament Law Reform Committee **Powers of Attorney** Final Report **2010**; Nova Scotia Law Reform Commission **Report on the Powers of Attorney Act** 2015.

635 Alberta Law Reform Institute **Analysis of Current Legislation that impact on safeguarding donors from abuse and neglect,** 2005.

636 The Consortium of Western Canada Law Reform Agencies (WCLRA) was born out of a common desire to encourage harmonization of the laws of the four western provinces (Alberta, Manitoba, British Columbia and Saskatchewan) where uniformity would be beneficial. The Report on Enduring Powers of Attorney: Areas for Reform was published in 2008 as a result of this desire. Because the formalities and content of enduring powers were not uniform across provinces, an agent could encounter difficulties dealing with the principal's affairs when the principal owns property in, or moves to, a province other than the province where the enduring power was made (Western Canada Law Reform Agencies Final Report 2008 10-13).

637 See SARLC **Discussion Paper 105**, Chapter 7.

638 Chapter 6 of the draft Bill in SALRC in **Discussion Paper 105**.

the proposed regulation of the enduring power was further developed and refined. The possible impact of the CRPD was also considered, after the Human Rights Commission requested that the SALRC take into account the provisions of the CRPD in making its proposals for law reform.

6.6 The analysis below includes information on the current law regarding ordinary powers of attorney in South Africa, the position in certain comparable jurisdictions, and the Commission's 1988 recommendations as premise for the recommended reform. Comment on our Issue Paper 18 and Discussion Paper 105 assisted us to further develop our proposals for the regulation of the enduring power. We address the need for change and the advantages and disadvantages of the enduring power, and refer to the possible impact of the CRPD on the introduction of the concept. Our views on the introduction and regulation of the enduring power are reflected in our final recommendations ("Report recommendations"). The "Report recommendations" are reflected in the draft Bill included in Volume 2 of this report.[639]

B Background: Current South African law on ordinary powers of attorney

6.7 No person has the inherent power to perform juristic acts on behalf of another; he or she must have legal authority to do so.[640] The most common source of authority is authorisation by the principal.[641] Authorisation is not in itself a contract but rather a unilateral juristic act – an expression of will by the principal that the agent shall have the power to conclude juristic acts on his or her behalf. Through authorisation, the principal

---

639 See mainly Chapter 5 of the proposed draft Bill on Supported Decision-making, but also the relevant fundamental provisions and the general powers of the Master in Chapter 6.

640 De Wet in **LAWSA Vol 1** par 112; De Villiers and Macintosh 2-3, 15, 38-39; Joubert 90 et seq; Kerr 69, 92 et seq. Lack of authority may, however, in appropriate circumstances be cured by ratification (see par 6.22 below).

641 De Wet in **LAWSA Vol 1** par 113; Kerr 69 et seq.

not only empowers the agent to act, but also indicates to third parties his or her will to be bound by acts performed by the agent.[642]

6.8 Authorisation can be made in any manner in which a person can declare his or her will to another; that is, by spoken or written word, or even tacitly by conduct.[643] When authorisation takes place by written document, it is usually referred to as a power of attorney. A power of attorney is a declaration in writing by one person that another shall have the power to perform on his or her behalf such acts as are described in the written document.[644] Generally, the practical purpose of a power of attorney is to furnish the agent with a document setting out the agent's powers, for production as authority to third parties with whom the agent is to deal. A power of attorney often also constitutes the source of the agent's powers.[645] The document evidencing a power of attorney is normally held by the agent so that it may be produced when required as evidence of authority to act.[646]

6.9 Authorisation can also come about by operation of law. This is the case, for instance, where the Court appoints a curator to the person or property of another.[647] The curator does not derive his or her authority from the will of the person with decision-making impairment, but from an appointment.[648] The difference between an agent acting under a power of attorney and a person acting as curator through an appointment by the Court is that an agent is authorised to act in the name of the principal, whereas a curator acts in his or her own name for the benefit of another – usually a peson with decision-making impairment.[649]

---

642 De Wet in **LAWSA Vol 1** par 113-114; Joubert 90-94; Hutchison in **Wille' s Principles of South African Law** 596 et seq; Kerr 6 et seq.

643 Ibid. Whether tacit authority exists or not is a question of fact dependent on the intention of the principal, which is to be inferred form his or her words and conduct and from admissible evidence of the surrounding circumstances.

644 De Wet in **LAWSA Vol 1** par 116; Joubert 98; Kerr 70. See also De Villiers and Macintosh 133-135; Van Dokkum 1997 **Southern African Journal of Gerontology** 17 et seq; Barker 1996 **De Rebus** 259 et seq; Neuman 1998 **De Rebus** 63-64.

645 De Wet in **LAWSA** Vol 1 par 114; Joubert 168-169; Kerr 70; Josling 8.

646 Josling 30.

647 De Wet in **LAWSA** Vol 1 par 113; Hutchison in **Wille's Principles of South African Law** 597-598; Joubert 10, 99. Cf also the discussion on the curatorship system in par 2.24 et seq above.

648 Ibid.

649 Ibid. See also Van Dokkum 1997 **Southern African Journal of Gerontology** 17.

1 Requirements

6.10 The requirements for a valid power of attorney may be summarised as follows:[650]

1 The principal must, when granting the power, have contractual capacity or be properly assisted (eg in the case of a minor).

2 The act authorised by the power of attorney must be physically possible.

3 Execution of the power must be in accordance with the law (ie only lawful acts can be made the object of a valid power of attorney).

4 Any prescribed formalities must be complied with.

5 Any suspensive condition to which execution of the power has been made subject must be fulfilled. A power of attorney may therefore be granted with the intention that it will become legally effective only when a future condition is fulfilled.[651]

6 The agent must be legally competent to act as agent.

2 Requisite capacity of the parties

The principal

6.11 Because authorisation (ie executing or granting a power of attorney) is a juristic act, a person who has no capacity to perform juristic acts cannot authorise another to perform juristic acts on his or her behalf. The test is whether the person is "capable of understanding the nature and consequences of the particular act". It follows that a

---

650 Joubert 94 et seq; De Villiers and Macintosh 48 et seq.

651 Joubert 102.

person who is unable to understand the nature and consequences of granting a power of attorney cannot validly execute such a power.[652]

6.12 Whether the person granting the power of attorney was mentally capable of doing so at the time is a question of fact, to be determined by the circumstances of the particular case.[653] Generally, persons are presumed mentally capable until the contrary is proved, so that the onus of proving that a transaction is vitiated for want of mental capacity normally rests on the party alleging this.[654] When executed by someone lacking capacity, a power of attorney is completely void (not just voidable); that is, no contract ever came into existence, and all transactions entered into under it are treated as nulleties.[655]

The agent

6.13 Because an agent performs juristic acts on behalf of another, a person who has *no* capacity to perform juristic acts can no more conclude a juristic act for another person than for him or herself.[656] The agent binds not him or herself but the principal. Thus, a person of *limited* capacity, such as a minor, can act as agent.[657]

6.14 A person acting as an agent need not be a lawyer, and is usually a family member, partner, or close friend of the principal. A juristic person (an entity other than an

---

652 ***Pheasant v Warne*** 1922 AD 481 with reference to ***Molyneux v Natal Land Company*** 1905 AC 555. It has been held for instance that a power of attorney cannot be granted by someone who, because her mental faculties have been impaired by old age, had not been in a position to understand what the particular legal proceedings instituted against her were about (***Vermeulen v Oberholzer*** 1965 (1) SA PH F14 (GW)). See also Joubert 96; De Wet in **LAWSA Vol 1** par 115; De Villiers and Macintosh 57 et seq; Heaton in **Boberg's Law of Persons and the Family** 105-106; Josling 43; Munday 1998 **New Zealand Universities Law Review** 254.

653 ***Pienaar v Pienaar's Curator*** 1930 OPD 171 at 174-175. See also Heaton in **Boberg's Law of Persons and the Family** 107; Christie 282- 285; De Villiers and Macintosh 57-59.

654 ***Pheasant v Warne*** 1922 AD 481. See also Heaton in **Boberg's Law of Persons and the Family** 107; Christie 282- 285; De Villiers and Macintosh 57-59.

655 ***Phil Morkel Bpk v Niemand*** 1970(3) SA 455 (C) at 456F-G. See also Heaton in **Boberg's Law of Persons and the Family** 106; Christie 282-285; De Villiers and Macintosh 57-59.

656 De Wet in **LAWSA Vol 1** par 104; De Villiers and Macintosh 65 et seq; Joubert 102; Kerr 55, 255.

657 Ibid. The agent must have sufficient understanding to act on behalf of the principal. However, as he or she is not bound by the juristic act concluded on behalf of the principal the agent need not have capacity to act and to litigate.

individual human being upon which the law confers legal personality) can also be appointed as agent under certain circumstances.[658] A juristic person can act only through its members, the result of such action being that only the juristic person acquires rights and incurs duties – not its members in their personal capacity. Examples of juristic persons are companies, banks, co-operatives, and voluntary associations.[659]

6.15 A principal can appoint two (or more) persons together as agents to execute the same transaction.[660] If it is intended that they should act in concert in performing the mandate, their authority is "joint", and only by their joint action can they bind the principal. If it is intended that one of them shall have the power to perform the mandate singly, their authority is said to be "joint and several" and the act of one will bind the principal. Whether the authority is joint, or joint and several, is a matter of construction dependent upon the terms of the power of attorney and the circumstances of the case in question.[661] In case of doubt, the authority is presumed to be joint.[662]

3 Types of powers of attorney

6.16 Powers of attorney can be either general or special:[663]

- A general power of attorney is one in which the agent is authorised to act on behalf of the principal generally (ie in all matters where the principal can be represented);[664] or generally in transactions of a particular kind; or

---

658 A juristic person has the same capacity to contract and to acquire, hold and dispose of rights as an individual, so far as is compatible with its nature, within any general or special rules defining its powers, and within the objects and terms of its particular constitution (cf Lee and Honoré 10).

659 See in general on the nature and legal capacity of juristic persons **Wille's Principles of South African Law** 55, 241-246; Cronjé in **LAWSA Vol 20** Part 1 par 341-342; de Villiers and Macintosh 63; Sinclair in **Boberg's Law of Persons and the Family** 4-6.

660 Joubert 103-10; De Villiers and Macintosh 120-123.

661 Ibid.

662 Joubert 104.

663 De Wet in **LAWSA Vol** 1 par 116; Joubert 104 et seq; De Villliers and Macintosh 143-146; Hutchison in **Wille's Principles of South African Law** 594; Kerr 71; Van Dokkum 1997 **Southern African Journal of Gerontology** 17.

664 Note that, as indicated in par 6.20 below, there are certain matters which do not admit to representation.

generally in relation to a particular business. A general power usually involves some measure of continuity of service.[665] It also implies that the agent has authority, within reasonable limits, to do whatever is normally incidental to executing his or her mandate.[666]

- A special power of attorney expressly authorises an agent to perform a specified act or acts, or to represent the principal in one or more specified transactions, but does not involve continuity of service.[667] Normally the authority to act under a special power is limited to the precise terms in which it is given.[668]

4 Formalities

6.17 A power of attorney is by nature and form a written document. Although in this sense a power of attorney can be described as a formal document, there is no general law prescribing formalities for powers of attorney as such. There are, however, formal requirements for powers of attorney granted for specific purposes (eg powers of attorney for the performance of acts in a deeds registry, and powers of attorney used in connection with legal proceedings).[669] Formalities required in these instances include signing and witnessing of the power, and filing of the power with officials such as the Registrar of the High Court.[670]

---

665 De Villiers and Macintosh 144.

666 ***Nel v SAR & H*** 1924 AD 30.

667 De Villiers and Macintosh 144.

668 ***Nel v SAR & H*** 1924 AD 30.

669 Joubert 98; De Wet in **LAWSA** Vol 1 par 118; Hutchison in **Wille's Principles of South African Law** 596-597; De Villiers and Macintosh 98-99; Kerr 58, 163. See eg the requirements in secs 20 and 50 of the Deeds Registries Act 47 of 1937 requiring that a conveyancer shall not execute a deed of transfer or mortgage bond before the Registrar of Deeds unless he or she is authorised by power of attorney to act (see the discussion by West 1997 **De Rebus** 107 et seq); and Rule 7 of the Uniform Rules of Court requiring an attorney to be authorised by a power of attorney to set down a civil appeal on behalf of his or her client (see the discussion by LJ Gering et al in **LAWSA Vol 3** Part 1 211).

670 See eg sec 95 of the Deeds Registries Act 47 of 1937 which requires witnessing of a power of attorney that authorises acts pertaining to immovable property; and rule 7 of the Uniform Rules of Court requiring that the power of attorney in question must be signed and duly executed and filed with the Registrar of the High Court.

6.18 Powers of attorney were previously subject to stamp duty.[671] Since 1999 this has no longer been required.[672]

5 Scope and extent of agent's authority

6.19 The scope and extent of the agent's authority are determined by the authorisation (where applicable) of the terms of the power of attorney.[673] The terms of a power have to be construed in accordance with the rules governing the interpretation of juristic acts in general, as there are no rules of construction that apply only to authorisations.[674] Broadly speaking this would imply that where the terms are clear, the ambit of the agent's authority is restricted to powers expressly conferred or necessarily incidental to the due performance of the mandate.[675] Where more than one possible meaning can be attached to the wording of the power, the reasonable (and not the restrictive) interpretation will be adopted.[676] In exercising his or her authority, the agent will be in a relationship with the principal, which gives rise to particular obligations and duties at common law.[677] These include the duty to show a specific degree of care and diligence in dealing with the affairs of the principal; a duty to disclose relevant facts; a duty to keep accounts and submit them to the principal; and a duty to show the utmost good faith in dealing with the principal and on his or her behalf.[678]

---

671 Sec 3 read with Sch 1(19) of the Stamp Duties Act 77 of 1968.

672 Sec 14(1) of the Taxation Laws Amendment Act 32 of 1999.

673 ***Measrock v Liquidator, New Scotland Land Co Ltd*** 1922 AD 237. Joubert 104-105; De Wet in **LAWSA Vol 1** par 120; De Villiers and Macintosh 126.

674 De Wet in **LAWSA Vol 1** par 120; Kerr 71 et seq. For the specific rules of interpretation and the case law governing them see the discussions by De Wet in **LAWSA Vol 1** par 120; and Joubert 104-106. These rules include, amongst others, the following: a power to do something includes the power to do it according to established custom regarding similar transactions; the greater includes the lesser; where there is express authority, a wider, implied authority is not readily inferred; and in any juristic act, an ambiguous statement is interpreted against the person who formulated it.

675 ***Nel v SAR & H*** 1924 AD 30. See also De Villiers and Macintosh 133; Joubert 104-106; Kerr 77 et seq.

676 ***Mahomed v Padayachy*** 1948 (1) SA 772 (AD) at 778-779. See also De Villiers and Macintosh 133-134; Joubert 105; Kerr 73.

677 De Villiers and Macintosh 326 et seq; Joubert 211 et seq; Kerr 135 et seq.

678 Ibid. As regards the duty to exercise care and diligence, in terms of common law "reasonable" care is required (Kerr 136). The duty to act in good faith entails that the agent must conduct the affairs of

6.20 In general, all types of juristic acts can be concluded by an agent on behalf of a principal, except where the law requires that the principal acts in person. The following are examples of specific exceptions:[679]

- Where the act is of a personal nature, in the sense that the identity and personal attributes of the performer of the act are of material importance to another person who has a legal interest in the performance of that act. For instance, no valid marriage can be contracted by means of a representative,[680] and an agent cannot make a will on behalf of a principal.[681]
- Where an individual is required by his or her office, or by statute, to perform the act in person. For instance, the right of a citizen to vote at a public election cannot be delegated through a power of attorney.[682]

6 Legal effect of representation through a power of attorney

6.21 When an agent performs a juristic act (eg enters into a contract) on behalf of a principal, the rights and duties arising from that act are those of the principal and not of the agent – although the act itself is performed by the agent.[683] In other words, if the agent has the requisite authority, it is the principal and not the agent who is a party to a contract concluded in terms of the mandate. A properly authorised agent who validly

---

the principal in the interest of the principal and not for his or her own benefit – this duty emphasises the fiduciary (ie trust) relationship between the agent and principal (Kerr 141). The duty to account entails that the agent is obliged to account for everything in his care in good faith (Kerr 153). The duty to disclose relevant facts requires that the agent is bound to give the principal all the information which a reasonable man in the agent's position would be expected to give (Kerr 139).

679 De Villiers and Macintosh 68-74; De Wet in **LAWSA Vol 1** par 105; Joubert 4, 96-98; Kerr 55-56.

680 Sec 29(4) of the Marriage Act 25 of 1961.

681 Sec 2(1)(a)(i) and (v) of the Wills Act 7 of 1953. Cf also sec 4 of the Act providing that any person aged 16 or more years may make a will unless he or she is mentally incapable of appreciating the nature and effect of his or her act; and that the burden of proving that the person was mentally incapable rests on the person who alleges it.

682 Sec 38(2), 39 and 88 (a) and (b) of the Electoral Act 73 of 1998.

683 De Wet in **LAWSA Vol 1** par 101; Joubert 1-3, 26; De Villiers and Macintosh 1; Kerr 299; Van Dokum 1997 **Southern African Journal of Gerontology 17**.

enters into a contract on behalf of another is therefore protected from any liability arising from that contract.[684]

6.22 If the agent has no authority to act, as is the case where the authority ceased as a result of the principal's decision-making impairment, the principal acquires no rights and incurs no duties, unless he or she subsequently ratifies (ie validates)[685] the act done on his or her behalf.[686] However, as ratification is a juristic act, a person who has no capacity to conclude juristic acts cannot validly ratify an act concluded on his or her behalf.[687]

6.23 Where an agent purports to be authorised to enter into a contract but acts without the requisite authority (for instance where the principal's ability to make decisions is impaired), the other party to the contract can hold that agent liable for breach of "warranty of authority".[688] The extent of the agent's liability depends on various factors.[689]

---

684 ***Blower v Van Noorden*** 1909 TS 890. See also De Wet in **LAWSA Vol 1** par 101; Joubert 76; De Villiers and Macintosh 558 et seq; and the authorities and case law quoted by the authors.

685 "Where one person does an act professedly as agent on behalf of another, but without authority, and that other confirms and adopts that act, he is said to have ratified it thereby clothing it with authority and brining into existence the consequences of a duly authorised act" (De Villiers and Macintosh 282).

686 ***Wright v Williams*** (1891) 8 SC 166*;* ***Pakes v Thrupp & Co*** 1906 TS 741. See also De Wet in **LAWSA Vol 1** par 119, 125-126, 138-142; De Villiers and Macintosh 282 et seq; Joubert 163; Hutchison in **Wille's Principles of South African Law** 598; Van Dokkum 1997 **Southern African Journal of Gerontology** 17.

687 De Wet in **LAWSA Vol 1** par 127; Joubert 155, 157.

688 ***Blower v Van Noorden*** 1909 TS 890; De Wet in **LAWSA Vol 1** par 138-140; De Villiers and Macintosh 584-586; Kerr 302 et seq; Van Dokkum 1997 **Southern African Journal of Gerontology** 17. "Warranty of authority" refers to a promise or guarantee, or *implied* promise or guarantee, by the agent that he or she has authority to represent the principal (De Wet in **LAWSA Vol 1** par 138-140). Two scenarios can arise in this regard: Where the agent knows (or should know) of the principal's incapacity; and where the agent does not know of the incapacity:

- If the agent knows of the incapacity he or she will be liable – subject, however, to the rule as to equal knowledge on the side of the third party and subject to the rule that there is no liability for an incorrect representation of law. This is, where the third party knows all the facts which are known to the agent and is in as good a position as the agent to draw the proper inferences as to the agent's authority, then no *implied* warranty arises (***Hamed v African Mutual Trust*** 1930 AD 333). Likewise, if the agent made a representation of law which was incorrect (eg if the agent states that his principal, although mentally ill, can enter into a specific contract) the agent incurs no liability because an opinion as to the law put forward by an agent can not as a general rule found an action, even if false, because both parties are presumed to know the law (***Sampson v Liquidators Union & Rhodesia Wholesale, Ltd*** 1929 AD 468).

Under certain circumstances, the third party can prevent a principal (on whose behalf the agent purported to act) from denying liability on that contract. In the latter instance the principal would then have an action against the agent for acting without authority.[690] This situation will rarely, if ever, arise in a case where the principal has lost his or her mental capacity.

7 Termination of authority

6.24 An agent's authority to act under a power of attorney can come to and end in a number of ways, including the following:[691]

1 If authority was granted to perform a specific act, the authority lapses once the act has been performed.

2 If authority was granted for a specified period of time only, the authority lapses with expiry of such period.

3 Authority lapses on the death or change of status of the agent; and also on the death or change of status of the principal.

4 Authority may be terminated by revocation by the principal, or by renunciation by the agent.

Change of status of the principal and revocation by the principal are of special relevance, and are discussed in more detail below.

- If the agent has no reason to know of the principal's incapacity, is he or she taken to warrant the capacity? It has been submitted that even in this instance the agent will be liable if the incapacity is of such a nature that the principal is incapable of giving valid authority to the agent to make the contract. Where the principal's incapacity is not an incapacity to make the contract, but merely an incapacity to perform some incident of the contract, then the agent will not be liable (De Villiers v Macintosh 586). *(We have retained the terminology used by the authors.)*

689 The agent will have to make good to the other party the damages resulting form the implied warranty (***Blower v van Noorden*** 1909 TS 890).

690 De Wet in **LAWSA** 116; Van Dokkum 1997 **Southern African Journal of Gerontology** 17.

691 De Wet in **LAWSA** 118-123; Joubert 131-140; De Villiers and Macintosh 611 et seq; Kerr 239 et seq; and the authorities and case law quoted by the authors.

Change of status of the principal

6.25 As indicated in paragraph 6.11 above, for a power of attorney to be valid, the person granting the power must have contractual capacity. Under common law, the authority of the agent is terminated by any change of status that affects the principal's capacity to perform the authorised act.[692] The reason for this stems from the nature of the principal– agent relationship: A principal cannot authorise an agent to perform a juristic act that the principal him or herself cannot perform. It follows that if the principal has lost the capacity to enter into transactions, then the agent will likewise have lost that capacity.[693]

6.26 There is little modern authority on this issue. Current South African legal experts attribute the common law rule largely to the 1957 decision in *Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz*[694] and the views of Voet[695] and Pothier.[696]

---

692 See in general the discussions by De Wet in **LAWSA** Vol 1 par 122; Joubert 96, 133; De Villiers and Macintosh 611, 627-633; Lee and Honoré 163; Kerr 255; van Dokkum 1997 **Southern African Journal of Gerontology** 17 et seq; Barker 1996 **De Rebus** 259 et seq; Neuman 1998 **De Rebus** 63-64. See also SALC Report **on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 27-29.

693 Ibid. Cf also Atkin 1988 **New Zealand Law Journal** 368.

694 1957(4) SA 354 (W) at 356-357. See also De Wet in **LAWSA Vol 1** par 119; De Villiers and Macintosh 628; Joubert 133; Lee and Honoré 163.

695 According to Voet mandate (which was the equivalent in Roman law of the modern power of attorney [Joubert 92]) is ended by revocation. Revocation can happen under certain circumstances and "(s)ometimes too revocation is presumed to have taken place as when one who had given a mandate for payment has changed his condition or status by becoming a slave instead of a free man, a person permanently banished instead of a citizen, or a free man instead of a slave ... Nay again if a person has gone bankrupt it seems that we should say that a mandate is deemed to have been revoked by that very fact ..." (**The Selective Voet** translated by Gane Vol 3 p 212). Although Voet does not expressly refer to insanity, this passage has been referred to as authority for termination of agency by way of insanity by Joubert (133) and De Villiers and Macintosh (628). The Appeal Court in Tucker's case could also find nothing wrong with counsel for the respondent relying on this passage (at 511). Counsel for the respondent argued that "the authority of an agent is revoked by any change in the status of the principal, such as insolvency, death and marriage of a female principal. This is so because the principle applies that where a change of this nature occurs in the principal he can no longer act for himself. The agent, whom he has appointed can similarly no longer act for him; see ... Voet 17.1.17. ... Insanity and prodigality constitute a change in status of this description" (counsel's argument recorded on p 508 of the reported case).

6.27 In Tucker's case, which was confirmed on appeal,[697] the defendant was a woman married in community of property. She was a public trader, and as such she could with the express or tacit authority of her husband incur liabilities that could bind the joint estate. The defendant's husband became "mentally incapacitated" and thus "lost" his active legal capacity. The question was whether she could in the circumstances continue to bind the common estate. The Court, *per* Williamson J, approached the case on the footing that the wife's position was akin to that of an agent. It was held that –

> In this case there was no actual revocation. But mandate or agency is also revoked impliedly by certain circumstances: one is of course death. But it is stated in De Villiers & Macintosh ... that a change of status also impliedly revokes the authority of an agent ... . It seems to me here that the general proposition that a change of status, for instance, a declaration of insolvency or declaration of insanity or anything of that nature, terminates an agency, and that general proposition does apply also to the quasi agency position of a wife, and that thus when the wife in this case continued to conduct her business as a public trader, after her husband's change of status, she did so without his authority inasmuch as her agency to bind the joint estate had been revoked.[698]

The wife in the Tucker case, incidentally, was also the *curatrix* of her husband. For a reason that is not presently relevant, the Court held that she could not in that capacity bind the joint estate. On appeal, Hoexter JA confirmed this view, as follows:

> The second legal proposition advanced by appellant's counsel was that the consent of the husband which is required by a wife to enable her to carry on business as a public trader, if the consent is given before the husband's

---

696 According to Rogers and De Wet's translation of Pothier's **Traité Du Contrat De Mandat** (par 111) Pothier held the view that "[A] change in circumstances affecting the person of the mandant, before the mandatory has executed the mandate, terminates the mandate no less than if the mandant had died. This happens for the same reason as for his death. For example, if the mandant is a woman, and if …; or if the person has, since the mandate, been formally certified insane and come under the authority of a keeper; then these persons, because of their changed circumstances, have become incapable of prosecuting the business with which they entrusted their respective mandataries, without the authority of the husband or the keeper; and it follows that the mandataries are no longer in a position to carry out their business on their behalf and in their place, until such time as the act of procuration is renewed either by the husband or by the keeper" (**Pothier's Treatise on the Contract of Mandate** translated by Rogers and De Wet 64-65). See also for reliance on this passage Lee and Honoré 163; and the discussion in SALC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 26-27.

697 1958(1) SA 505 (A) at 511.

698 1957(4) SA 354 (W) at 356-357.

> insanity, continues to be effective after his insanity. Counsel rightly admitted that when a sane husband permits his wife to carry on business as a public trader, his consent is a continuing one which he may, however revoke at any time, and he was quite unable to persuade us that an insane husband could continue such consent. Nor were we able to find any fault with the statement of WILLIAMSON J that the wife, in carrying on business as a public trader, was acting as the agent of her husband ... and that her agency was terminated by the insanity of her husband.[699]

6.28 Although Pothier[700] (and Williams J in the passage quoted from Tucker's case above) refers to a "declaration of insanity", such declaration is no prerequisite for the termination of a power of attorney: "It is the fact of becoming mentally ill and not a declaration of mental illness which has this effect".[701] This view is in accordance with accepted law that a judicial declaration that a person is mentally ill is not decisive of whether the person's intellectual capacity is sufficiently affected to warrant the deprivation of his or her active legal capacity.[702] As discussed in paragraph 2.19 above, whether the capacity to perform juristic acts has been impaired will have to be answered according to the circumstances of the particular case, and the onus of proving that a transaction is vitiated for want of mental capacity normally rests on the party alleging it.

Revocation

6.29 The general rule in South African law is that a power of attorney is revocable. As a general proposition, an agreement between a principal and an agent to the effect that the power will be irrevocable does thus not deprive the principal of his or her right to withdraw the power of attorney at any time.[703] To revoke the power, the principal must

---

699 1958(1) SA 505 at 511.

700 See the quoted passage in footnote 694 above.

701 Joubert 133 (our translation from the Afrikaans text).

702 ***Molyneux v Natal Land & Colonization Co Ltd*** 1905 Ac 55 (PC) at 561; ***Pheasant v Warne*** 1922 AD 481 at 490; ***Lange v Lange*** 1945 AD 322; ***Raulstone v Radebe*** 1956 (2) PH F85 (N). See also Heaton in **Boberg's Law of Persons and the Family** 106-107; De Wet in **LAWSA Vol 1** 118; Joubert 133; Cronjé and Heaton **South African Law of Persons** 113-115.

703 ***Clover v Bothma*** 1948 (1) SA 611(W); ***Ward v Barret*** 1962 (4) SA 732 (N) at 737. The position of an agent *in rem suam* may be different but is not now of relevance.

be able to conclude a juristic act, that is, be mentally competent (ie decision-making ability must not be impaired).[704]

6.30 Some South African authorities believe there are certain exceptions where a power of attorney may be granted irrevocably.[705] This view led the Commission to raise the possibility, in its 1988 report, that there might already be provision in our law for granting an enduring power.[706] In considering this question, we pointed to conflicting opinions on whether authority can be given irrevocably.[707] Ultimately, we concluded as follows:

> ... whatever the position may be, our law does recognise … [certain] exceptions [where a power of attorney may be granted irrevocably], but they are regarded as 'exceptional phenomena which occur casuistically in specific cases'.[708]

C Time for change

---

704 A mandate is in generally revocable at the principal's will (De Villiers and Macintosh 616).

705 De Villiers and Macintosh 614-619 and the cases cited by the authors; Kerr 246 et seq; Joubert 136-140 and the cases cited by the author. The exceptions are said to include the following:

- Where the power was granted for the purpose of protecting or securing some interest of the agent or was given by way of security (***Ward v Barrett*** 1962 (4) SA 732 (N) at 737).
- Where the power is part of a contract between principal and agent (***Ward v Barrett*** supra at 737).
- Where the power was given to secure the performance of a promise made by the principal to the agent (***Koch v Mair*** 1894 11 SC 71 at 83; ***Natal Bank Ltd v Natorp and Registrar of Deeds*** 1908 TS 1016).

Cf however, De Wet in **LAWSA Vol 1** 120-123 who does not agree with these exceptions and expresses the view that they have developed under the influence of concepts of English law, namely that where "an authority is coupled with an interest ... or where it is part of a security" the power is irrevocable. Although Voet (17.1.17) argues that a *procuratio in rem suam* coupled with cession is irrevocable, De Wet holds the opinion that such an act does not constitute an authorised act of representation but mere cession - the cessionary (agent) acquires the cedent's right to certain personal rights.

706 Cf the discussion in SALC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 29-30.

707 The Commission referred to the views of on the one hand Van Jaarsveld (**Suid-Afrikaanse Handelsreg** Vol 1 Second Edition Johannesburg: Lex Patria 1984 201) recognising such exceptions; and on the other hand De Wet and Yeats (JC De Wet and AH Van Wyk **Kontraktereg en Handelsreg** Fourth Edition Durban: Butterworths 1978 107) criticising these exceptions as having been developed under the influence of concepts in English law.

708 Referring to Joubert 140. See also Joubert 137.

1 The concept of the "enduring" power of attorney

6.31 In the late 1980s, few subjects elicited as much attention from law reform bodies as the enduring power of attorney. This attention was the result of similar problems with regard to lack of supported decision-making devices as those currently being experienced in South Africa. The early developments have since been taken further and initial legislation introducing the concept has been revisited and refined.[709] The refinement in many jurisdictions resulted in additional safeguards being built into the process to protect the interests of the principal, and extending the concept to cover not only financial affairs but also personal welfare and health care matters. In developing its recommendations for the introduction of the enduring power into South African law, the Commission is in the fortunate position of having been guided by the extensive reform done in comparable jurisdictions.

6.32 Different terms are used in different jurisdictions for the concept of enduring power, the different types of enduring power, and the persons granting and executing the power. In the discussion below we use "enduring power of attorney" for the instrument; "principal" for the person granting the power; and "agent" for the person executing the power. The latter two terms are in accordance with South African common law terminology. We discuss the terminology in respect of the "conditional" or "springing" power in paragraph 6.58 and 6.64 below.

2 Advantages and disadvantages of the enduring power

6.33 There are several reasons for the growth in popularity of enduring powers of attorney, and the response in jurisdictions that have considered its introduction has been

---

709 See Alberta Law Reform Institute **Final Report No 88** 2003 37 et seq for a summary of measures adopted in respect of enduring powers in the Canadian and Australian jurisdictions, England, Scotland, Northern Ireland, New Zealand and California.

swift.[710] The most important reason for this trend is that the enduring power provides a means to legitimising community practice. There seems to be a commonly-held belief among family and carers of persons with decision-making impairment that they are entitled to continue to operate an ordinary power of attorney despite the impairment of the principal. Another main advantage commonly attributed to the enduring power is that the endurance of the power overcomes the problem of delay associated with Court or other proceedings related to securing a responsive measure to address decision-making impairment. An agent can act immediately upon a principal's impairment, to handle emergency needs without awaiting authorisation. Note, however, that this advantage would have a lesser impact in jurisdictions where registration of the enduring power is required.[711] Other advantages of the enduring power include the following:[712]

1 It is less restrictive of the rights of the person concerned. It allows persons to plan for a future in which they might not be able to take care of their own interests. When a person has the foresight to make arrangements for his or her impending decision-making impairment, it is most unsatisfactory if the law frustrates that planning. Although the need for the concept is particularly pressing in a "graying" population, an enduring power may also be created by younger people as a precaution against unexpected illnesses or accidents, and could be considered in the same context as making a will.

2 It acknowledges and emphasises the right to autonomy, by allowing the principal to choose who is to manage his or her affairs in the event of impairment. It is in fact the only way in which a person may nominate his or her own supportive decision-maker.

3 It is a device that has the virtues of simplicity and cheapness, in contrast to the more complex, cumbersome judicial or administrative proceedings to secure public representation or support. The enduring power is especially

---

710 The advantages and disadvantages of enduring powers of attorney have been recorded extensively in legal literature and in the publications of other law reform bodies. See eg van Dokkum 1997 **Southern African Journal of Gerontology** 17 et seq; Barker 1996 **De Rebus** 259 et seq; Neuman 1998 **De Rebus** 63-64; Creyke 1991 **Western Australian Law Review** 122 et seq; Schlesinger and Scheiner 1992 **Trusts and Estates** 41; Scottish Law Commission **Discussion Paper 94** 1991 247 et seq; Pearson **Background Paper** Alberta Law Reform Institute 2005 1; Western Canada Law Reform Agencies **Final Report** 2008 2, 7; Council of Europe **Recommendation Continuing Powers of Attorney** 2009 18-19; Victorian Parliament Law Reform Committee **Powers of Attorney** Final Report **2010** 22 et seq.

711 See par 6.132 et seq below.

712 Refer to the sources in footnote 710.

useful in situations where the extent and value of the assets of the principal do not warrant the expense associated with mechanisms such as curatorships and trusts. Because of its relative simplicity, and the possibility of the availability of a standard or model form, the preparation and execution of an enduring power of attorney can generally be accomplished at minimal cost.

4 A valid enduring power of attorney may prevent the Courts or other public authorities from intervening in the principal's affairs. Public supervision with regard to the affairs of a person with decision-making impairment can thus be minimized to a large extent, and granting an enduring power of attorney could be a way of maintaining relative confidentiality in respect of a person's economic and financial affairs.

5 It is a flexible mechanism in that it can be tailored to the individual needs and wishes of the principal.

6 It is a convenient mechanism. For example, an agent who has been managing the affairs of an elderly relative under an ordinary power of attorney will be familiar with the affairs of the principal, and is presumably trusted by the principal. Such an agent is likely to be most suited to continue in this management role after the onset of the principal's decision-making impairment.

7 It is often difficult to determine at what point a principal becomes incapable. An elderly person, with Alzheimer's disease for instance, may have periods of lucidity alternating with periods of confusion. This pattern can continue for years. Permitting an agent who has been appointed with this possibility in mind to start operating the power on its execution, and to continue to operate the power whether the principal is competent or not, avoids the need to determine at exactly what point in time the person can be regarded as incapable of managing his or her affairs.[713]

8 Utilising the enduring power would reduce demands on public resources, in that it would reduce the pressure on alternative mechanisms already in place (eg the curatorship system) or those still to be developed. Utilising the enduring power would reduce the workload of the Courts and public

---

713 Cf however, the position with regard to conditional powers discussed in par 6.57 et seq below.

offices which would administer and supervise the establishment of responsive measures.

9 It avoids initiating public proceedings for the establishment of responsive measures of support which are seen by the public, especially family members of the person with decision-making impairment, as unpleasant and stigmatising to that person.

10 If a suitably informal but sufficiently monitored system of enduring power of attorney is put in place, it could encourage family and carers of persons with impairment, who might be intimidated by the more complex formal measures of support, to undertake the care of the principal. If this can be achieved, the enduring power of attorney would fulfil a social role which reflects the needs of our time.

6.34 There are, however, criticisms of the concept because of the inherent risks it could pose. These are summarised below.

1 The most obvious challenge is that legal decision-making is an ongoing and dynamic process, which requires competence and capacity at the time of making a decision. This reality leads to the criticism that the idea of an enduring power is misconceived.[714] In this regard it is argued that there is no certainty whether the power granted still reflects the intention of the principal at the time when the power has to be executed. Proponents, however, argue that because the enduring power is at least a formal statement of the *past* wishes of the person with decision-making impairment, it is unlikely to be at odds with what the person would have wished to occur with the benefit of hindsight, and that the enduring power could thus indeed provide fidelity to values of personal choice and autonomy.[715] Proponents also point out that the disadvantage discussed here does not detract from the fact that the concept can provide persons

---

714 Van Dokkum 1997 **Southern African Journal of Gerontology** 19; Carney 1999 **New Zealand Universities Law Review** 485.

715 Carney 1999 **New Zealand Universities Law Review** 485.

with impairment with an inexpensive and effective means of carrying out their wishes once they have lost the ability to do so themselves.[716]

2 The second main objection against the concept is that current law regarding ordinary powers of attorney requires no formalities to act as safeguard once the power has been executed. In the case of an enduring power, where the principal might lack the ability to even comprehend that the agent is either exceeding or abusing his or her mandate, this could provide ample opportunity for abuse and exploitation of such a principal.[717] This problem is, however, not unique to enduring powers, and is also a consideration in the appointment of supporters in terms of responsive measures.[718] Moreover, abuses are not the fault of the law but the consequence of human nature. In legal systems where the enduring power has been introduced, various effective and accessible mechanisms have been provided for to prevent or address abuse.[719] Experience in other systems has shown that the main remedies for abuse of enduring powers could lie in the correct choice of supervisory regime,[720] coupled with the education of professionals involved with enduring powers.[721] Other remedies could include providing for proper requirements with regard to witnessing of the power; testing of the principal for competence before executing the power; and accountability of the agent.[722]

---

716 Van Dokkum 1997 **Southern African Journal of Gerontology** 19. See also the related advantages listed in par 6.33 et seq above.

717 Van Dokkum 1997 **Southern African Journal of Gerontology** 18-19. Research done in Australia in 1994 found, for instance, that of 100 applications for review (by tribunal) of enduring powers only 1 in 5 were found to be free of abuse; nearly 30% were found to have been signed by persons lacking capacity at the time; and an equivalent group were found to have been signed by a person with capacity, but were no longer being administered in the interests of that person and were thus revoked by the tribunal. Reasons for this state of affairs did not only include abuse, but also lack of adequate legislative procedures and lack of knowledge of the prescribed procedures on the side of legal practitioners and others advising persons on the execution of enduring powers (Carney **New Zealand Universities Law Review** 494). See also Western Canada Law Reform Agencies Fianl Report 2008 3; Pearson Report Canadian Research Institute for Law and the Family 2005 19; Council of Europe Recommendation Continuing Powers of Attorney 2009 19.

718 Van Dokkum 1997 **Southern African Journal of Gerontology** 18-19.

719 Cf the safeguards discussed in par 6.66 et seq below.

720 A tribunal with guardianship as well as financial management adjudicative powers is suggested by some as being the ideal (Carney 1999 **New Zealand Universities Law Review** 494).

721 Carney 1999 **New Zealand Universities Law Review** 494-495.

722 Ibid.

3 Thirdly, the enduring power will generally be of use only to persons who can plan ahead for a time when their decision-making skills may become impaired. Those whose decision-making skills are already impaired will not be able to take advantage of the enduring power, and will probably have to fall back on the responsive measures of support.[723] The enduring power will also not provide a solution in respect of those persons who postpone the granting of a power until it is too late, and those who are not prepared to leave their personal affairs in the hands of others.[724] Its application would therefore be limited. Proponents, however, submit that these arguments are not sufficient reason to deny persons to whom the enduring power might be useful with such a solution. They also point out that advanced medical technology has led to diagnoses of dementia and other terminal illnesses taking place earlier. This has resulted in a vastly increasing need for the development of legal mechanisms to enable persons who wish to plan in advance to indeed do so.

6.35 The second and third points of criticism recorded above were also raised against the Commission's 1988 proposals for the introduction of the enduring power.

3 The need to introduce the enduring power into South African law

Discussion Paper recommendation, comment and evaluation

6.36 In the Commission's Discussion Paper 105, it was recommended that legislation should be enacted to enable a power of attorney to be granted which will continue

---

723 Atken 1988 **New Zealand Law Journal** 372; Schlesinger and Scheiner 1992 **Trusts and Estates** 38.

724 Cf Carney 1999 **New Zealand Universities Law Review** 487.

notwithstanding any "mental incapacity" of the principal.[725] This recommendation was made before the ratification of the CRPD.

6.37 The current need and support for the enduring power is overwhelming, even more so than in 1988 when the Commission made a strong case for introducing the concept.[726] The concept has been in place in many other jurisdictions for many years, and its proven advantages by far outweigh the perceived disadvantages.[727] Of particular significance – and this was confirmed by the response to both Issue Paper 18 and Discussion Paper 105, and through consultation and discussion with members of the public – is that introducing the legal concept will legitimise practices that are already occurring in the community. The fact that family and carers currently handle the affairs of persons with decision-making impairment notwithstanding their lack of lawful authority to do so, and thus expose themselves to personal liability, is entirely unacceptable. Formally introducing the concept would moreover provide legal certainty. In the latter regard, earlier in this report we pointed to the current confusion created by the lack of recognition of the enduring power in South African law.[728]

6.38 The Commission does, however, share the concern expressed by the public about the possibility of abuse that might be inherent in allowing another individual control, however limited, over the affairs of the principal. By the very nature of the endurance of the power, the principal would not be able to properly supervise the agent after his or her loss of decision-making skills. Although experience of reform in other jurisdictions shows that proper safeguards could minimise this risk, creating suitable safeguards requires the fine balance referred to in Chapter 1 of this report. This balance must meet the need for simple measures and less intrusion on the one hand, and the need for more formal measures that would ensure protection of the principal on the other hand. In developing its final recommendations, the Commission sought to achieve this balance. The Commission believes that its proposed draft Bill establishes an accessible, cost-effective procedure free from onerous administrative burdens for the creation of an

---

725 SALRC **Discussion Paper 105** par 7.40.

726 SALRC **Report on Enduring Powers of Attorney** 1988.

727 See par 6.33 et seq above.

728 See par 2.62 above.

enduring power, while at the same time providing for the necessary supervision to sufficiently protect the interests of the principal.

Report recommendation

6.39 ***The Commission recommends that legislation should be enacted to enable a power of attorney to be granted which will continue notwithstanding the subsequent disability of the principal. "Disability" refers to a range of impairments that hinders a person's ability in exercising his or her legal capacity on an equal basis with others. (Draft Bill, clause 65; see also the definition of "disability" in clause 4.)***

4 The need to extend the concept of the enduring power of attorney to personal welfare matters

6.40 We said at the beginning of this Chapter that in several jurisdictions where the enduring power of attorney has been introduced, the concept has subsequently been further developed to allow for authorisation with regard to personal welfare and health care matters. On the basis of this apparently necessary development, the Commission

explored the possibility of providing principals with this option, when the concept is introduced into South African law.

6.41 What would be regarded as "personal welfare" and "health care"?

- Typically, "personal welfare" decisions include decisions that concern accommodation (eg where to live); association (eg with whom to live and whom to see or not to see); participation in social, educational, and employment activities (eg which social activities to engage in; whether to have education or training; and whether to work, and if so, where and in what occupation); and legal matters (eg applying for housing, medical and other benefits, and whether to leave the country).[729] As in South Africa, the law in jurisdictions referred to in this Chapter views certain decisions as being too personal in nature to delegate (eg decisions about marriage; divorce; adoption of a child; sexual relations; and whether or how to vote). Decisions of this nature are usually excluded from enduring powers or other forms of advance decision-making for personal welfare.[730]
- "Health care" is usually regarded as any examination, procedure, service, or treatment that is done for therapeutic, preventative, palliative, diagnostic or other health-related purposes; and typically involves whether to consent to treatment of such a nature.[731] In some jurisdictions, "personal care and welfare" is defined broadly as "any matter of a non-financial nature that relates to an individual's person" – which would include health care.[732]

6.42 Discussion Paper 105 indicated that the common law position on whether an ordinary power of attorney can be used for decisions regarding *personal welfare* seems unclear.[733] With regard to the question of whether a principal can authorise an agent in

---

729 Cf English Law Commission **Consultation Paper 128** 1992 68; Alberta, Canada Personal Directives Act, 1997.

730 See eg Scottish Law Commission **Discussion Paper 94** 1991 311; English Law Commission **Consultation Paper 128** 1992 69; Schlesinger and Scheiner 1992 **Trusts and Estates** 40 referring to the position in some of the states in the USA. See also par 7.19 above for the South African common law position, and par 7.188 et seq below on the need to expressly exclude such decisions from the ambit of a personal welfare power.

731 See eg sec 1 of the Alberta, Canada Personal Directives Act, 1997.

732 Ibid.

733 SALRC **Discussion Paper 105**, par 7.167 et seq.

an ordinary power of attorney to *consent to medical treatment* on his or her behalf, we concluded that a principal would not be able to validly instruct an agent to consent to medical treatment on his or her behalf.[734] We also discussed whether individuals should indeed be allowed to delegate decision-making concerning personal welfare and health-related matters when they no longer have the skills to make such decisions themselves. We pointed out that in several jurisdictions, legislators found no in principle objections to the advance appointment of supported decision-makers dealing with personal welfare and health care matters of a principal. In fact they regard it as being consonant with enabling and empowering people to make their own decisions, and with the principle that any intervention in the affairs of a person with decision-making impairment should be that which is the least restrictive. The introduction of legislation of this nature moreover reflected a clear public demand for it.[735]

6.43 The methods used in other jurisdictions to realise advance decision-making for personal welfare and health care vary. Some jurisdictions extend the concept of the enduring power of attorney to personal welfare and health care issues. In other jurisdictions, substitute decision-making related to health care matters, in particular, are dealt with in healthcare-specific legislation. Such legislation typically includes provision for "directives" by a principal to an agent pertaining to health care matters. Several jurisdictions, however, prefer the enduring power method, which is developed strictly in accordance with the common law requirements for the power of attorney (as derived from the law of agency).[736] With this approach, the same legislation providing for enduring powers dealing with financial affairs usually also provides for the execution of

---

734 Ibid.

735 English Law Commission **Consultation Paper 128** 1992 83-84. See eg the positions or proposed positions in England (English Law Commission **Report No 231** 1995 par 1.25); Scotland (Adults with Incapacity [Scotland] Act 2000 sec 16); Alberta, Canada (Personal Directives Act, 1997); Manitoba, Canada (Health Care Directives Act, 1992); Ontario, Canada (Substitute Decisions Act, 1991 and Consent to Treatment Act, 1991); Newfoundland (Newfoundland Law Reform Commission **Discussion Paper** January 1992 101-102); United States (Uniform Health Care Decisions Act, 1993); Queensland, Australia (Queensland Law Reform Commission **Report No 49** 1996 91). Neskora 1997 **Louisiana Bar Journal** 512 et seq.

736 The power of attorney models (either limited to health care or extended to all personal care decisions) has also been adopted or recommended in New Zealand, in three Australian States, (Vicotria, the Australian Capital Territory and Queensland), England and Scotland.

powers in respect of personal welfare and health care matters.[737] In such legislation the required form of the mandate, the functions of the agent, and the safeguards built into the process to protect the principal (except for specific limitations enforced with regard to certain medical procedures) are generally the same in respect of agents managing financial affairs and agents managing personal welfare and health affairs.[738]

6.44 With regard to the health care aspect, both the above legislative approaches could include provision for authorisation by a principal pertaining to consent for general or day-to-day medical treatment; taking part in medical research; organ donation; sensitive medical treatment, such as certain reproductive procedures; and the cessation or refusal of medical treatment, which usually becomes relevant in the context of end-of-life decisions.

6.45 An enduring power for personal welfare and health care has the same advantages as those associated with the enduring power for financial matters. In particular, it promotes individual autonomy and dignity by giving people control over their lives after their ability to make decisions have become impaired.[739] Experience in other jurisdictions shows that the enduring power for financial affairs, after its initial introduction, has often had to be extended to include authority for personal welfare and health care matters because of strong public need.

Discussion paper recommendation, comment and evaluation

6.46 Discussion Paper 105 suggested that legislation should make it possible for a person to grant an enduring power of attorney to authorise another person to make some or all decisions about the principal's personal welfare.

6.47 It is significant to note that The National Health Act, 2003 in principle already acknowledges the concept of an enduring power for health care matters, by providing

---

737 See eg the proposed position in England (English Law Commission **Report No 231** 1995 par 1.25); Scotland (Scottish Law Commission **Report No 151** 1995 29); and New Zealand (Protection of Personal and Property Rights Act, 1988 [New Zealand Law Commission **Preliminary Paper 40** 2000 10 et seq]).

738 See eg the recommendations of the Scottish Law Commission (Scottish Law Commission **Report No 151** 1995 29).

739 Alberta Law Reform Institute Report **for Discussion No 11** 1991 16, 34.

that where a user is unable to give informed consent, the necessary consent for the provision of health services may be given by a person "mandated by the user in writing to grant consent on his or her behalf".[740] The Act defines "health services" as follows:

(a) health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution;

(b) basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution;

(c) medical treatment contemplated in section 35(2)(e) of the Constitution; and

(d) municipal health services.[741]

It should be noted that the National Health Act does not address withdrawal of treatment. The Commission therefore suggested that an agent acting under a personal welfare power should be allowed to consent to the provision of a health service on behalf of the principal, in accordance with the National Health Act as referred to above.

6.48 With regard to the time when an enduring power of attorney relating to personal welfare may be acted upon, the Commission noted in Discussion Paper 105 that it is generally found to be unacceptable that a principal who is still capable of consenting to medical treatment or making some personal welfare decisions should be divested of the power to make such decisions.[742] This view is based on the argument that people should not be encouraged to avoid making their own personal decisions when they are perfectly capable of doing so themselves. (This consideration does not apply to a power of attorney authorising financially-related decisions, as there can be many good and proper reasons – such as lack of expertise or time to handle complex financial matters – why persons of sound mind may wish to have someone else look after their financial affairs.)

---

740 Sec 7(1)(a)(i).

741 The relevant sections of the Constitution provides as follows:

- Sec 27(1)(a) and (e): "(1) Everyone has the right to have access to - (a) health care services, including reproductive health care"; … and "(3) No one may be refused emergency medical treatment".
- Sec 28(1)(c): "(1) Every child has the right – to basic nutrition, shelter, basic health care services and social services".
- Sec 35(2)(e): "(2) Everyone who is detained , including every sentenced prisoner, has the right –(e) to conditions of detention that are consistent with human dignity, including …the provision, at state expense, of … medical treatment".

742 See the comprehensive discussion of this view in SALRC Discussion Paper 105 par 7.185 et seq.

This approach would also clearly deal with situations where the principal has an episodic illness, where decision-making impairment may be only temporary and the authority of the agent may thus be periodic, lapsing when the person who made the power regains sufficient capacity to make his or her own decisions, and becoming reactivated if a recurrence of illness causes the principal to lose capacity again.[743] In accordance with these views, all jurisdictions involved in enduring power law reform, as referred to in this report, allow an agent under a personal welfare power to act only once the principal' ability to make decisions has been impaired.[744] The Commission supported this view in Discussion Paper 105.

6.49 The public response generally confirmed the above recommendations. Commentators supported the view that the authority granted to an agent in an enduring power of attorney should be as broad as the principal desires, and that individual needs should dictate its extent. In particular, it should be possible to provide for financial, personal welfare and health-related issues in an enduring power, and it should be left to the choice of an individual what the terms of the power should be. In consultations, the general view was that the possibility of granting an enduring power for personal welfare and/or health-related issues should at least be available to those who wish to utilise it. As with the enduring power relating to financial matters, commentators were concerned about possible misuse and abuse of personal welfare powers, and requested that any proposed reform adequately deals with these concerns. The Commission is thus of the view that there is sufficient motivation to recommend that the enduring power should be regulated in such a way as to make it possible for a principal to grant an agent the authority to take personal welfare decisions on his or her behalf.

6.50 The features of the personal welfare power in other jurisdictions generally correspond with those of the enduring power for financial affairs, except where it was found necessary to provide for additional safeguards with regard to certain aspects.[745] The Commission has developed its recommendations on this model. Fundamental issues provided for in the draft Bill (including execution formalities, matters pertaining to

---

743 Ibid.

744 Ibid.

745 See eg Queensland Law Reform Commission Report No 49 1996 327.

the appointment of agents, the registration of the power, powers and duties of the agent, and termination of the power) are the same, and thus are not reflected in separate provisions. In accordance with this approach, we do not discuss the personal welfare power separately below.

6.51 The Commission believes that the safeguards built into the proposed draft Bill with regard to enduring powers in general will adequately address any public concerns about the protection of the interests of principals who grant personal welfare powers. The fundamental difference between financial and personal welfare powers concerns the restriction on the commencement of the agent's authority in the case of a personal welfare power, as discussed in paragraph 6.48 et seq above.

Report recommendation

6.52 ***The Commission recommends that legislation should make it possible for a person to grant an enduring power of attorney in respect of personal welfare matters. "Personal welfare" should include matters relating to day-today issues (such as living, care, and employment arrangements), health care, and the general personal wellbeing of the principal. The draft Bill should provide that an enduring power relating to personal welfare may specifically authorise an agent to give consent on the principal's behalf for the provision of a health service to the principal, as contemplated in the National Health Act 61 of 2003. (Draft Bill, clauses 66(1) and 67(2), and the definition of "personal welfare" in clause 1.)***

6.53 ***The draft Bill should further provide that an agent should be entitled to exercise authority granted in terms of a personal welfare power only when the principal's ability to make decisions has been impaired (ie once the principal has become a person with "disability" as defined in clause 4 of the draft Bill). (Draft Bill, clause 90.)***

5 Effect of the CRPD on the enduring power of attorney and its regulation

6.54 The CRPD does not contain any provision which directly or expressly refers to the concept of the enduring power – that is, to the concept of a *competent* person planning in advance for a situation of impaired ability and appointing someone that he or she trusts to take care of his or her affairs if and when that situation arises. We accordingly indicated earlier in this report that we do not agree with the view that the CRPD requirements must be central to the concept of the enduring power of attorney. The reason for this view is that the context of the enduring power (an anticipatory

measure) differs vastly from the context of measures put in place by the state to support persons with disability (responsive measures).[746] Making an enduring power is clearly an important expression of personal autonomy, and the Commission believes that the CPRD should not be applied to such autonomous arrangements.[747]

6.55 Having said that, an inherent consequence of premising our recommendations thereon that article 12(2) of the CRPD provides for a universal legal capacity,[748] is that –

> … [C]ertain people with some degree of incapacity, including those with lifelong incapacities, may be able to grant a valid enduring power of attorney to appoint someone of their choice to deal with matters which they themselves would find very difficult, if not beyond their capacity.[749]

The Council of Europe, in a Recommendation dealing expressly with the effect of the CRPD on continuing powers of attorney, expresses a view that we (the Commission) agree with. The Council states that –

> … [M]edical trends towards early diagnosis of progressive conditions likely to result in incapacity, and the availability of treatments which slow the progress of such conditions, mean that there are many people who are aware that they are in the early stages of a progressive deterioration of

---

746 Compare the remarks on enduring powers of attorney by the Council of Europe: "Measures to address incapacity may be put into two broad categories, responsive and anticipatory. Responsive measures are initiated after impairment of capacity, responding to that incapacity, and generally require judicial or other public intervention. Anticipatory measures, on the other hand are put in place by a capable person, prior to any impairment of capacity" (Council of Europe **Recommendation on Continuing Powers of Attorney** par 12). "The enduring power of attorney is a method of self-determination for capable adults for periods when they are not capable of making decisions. It is an anticipatory measure, which subsequently have a direct impact on the granter's life during periods when their capacity to make decisions is impaired" (Ibid 2009 par 15).

747 See also the remarks in the Ireland Law Reform Commission **Report Vulnerable Adults** 2006 par 4.07 and 4.09): "[A]n EPA is a private law arrangement entered into voluntarily by a person with capacity setting out their wishes as to what is to occur if and when they lose capacity [par 4.07] … The EPA regime gives a number of choices to a potential donor apart from the preliminary decision as to whether or not to avail of the opportunity to execute an EPA. A donor may choose to execute a general or limited EPA, A general EPA will give the attorney power to made decisions generally in relation to the property, financial and business affairs and personal care decisions concerning the donor. Alternatively a donor may make an EPA covering property and financial affairs or personal welfare decisions … Within each of these categories it is open to the donor to delimit the nature of decisions covered and the attorney or attorneys chosen. In effect this means that it is open to the donor to choose how much autonomy they wish to cede to the EPA coming into effect upon registration [par 4.09]". (The extract deals with the detail of the recommendations of the Ireland Law Commission. The concept of wide automony inherent in granting an EPA is however similar to that recommended in this Report.)

748 See par 3.81 above.

749 Council of Europe **Recommendation on Continuing Powers of Attorney** par 15.

capacity, but who still have sufficient capacity to appoint someone to represent them.[750]

6 Placement of the enduring power of attorney within supported decision-making legislation

6.56 We indicated earlier in this report that because of the need to interrelate the two aspects, the Commission decided to deal with responsive support measures (the alternative to the current common law curatorship system) and anticipatory support measures (the enduring power of attorney) in their totality under this investigation.[751] The Commission also recommends that the two types of support measures should share a single administrative and supervisory structure in the Master of the High Court. Their inter-relatedness became clear particularly in the following context: in developing our final proposals, the balance between protection on the one hand, and less intrusion on the other hand, had to be kept clearly in mind in dealing with the safeguards provided for in respect of the two types of measures. A single statutory measure facilitated this process, and in practice would also reflect the significant difference in approach between the two measures. We indicated above that there is currently no single legislative source dealing with supported decision-making in South African law. Including all measures relating to supported decision-making within a single legislative structure would have the added benefit of making these measures more accessible to the public and professionals who utilise them, and to government officials responsible for their administration.

D Regulation of the enduring power

---

750 Ibid.

751 See par 1.9 above. See also the approach taken by the Law Reform Commission Ireland, in this regard (Ireland Law Reform Commission Report Vulnerable Adults 2006 100); see also the Victorian Law Commission's similar recent approach (Victorian Law Reform Commission Guardianship Final Report 2012 175 and 57.

1 Time from which the enduring power is effective

6.57 Authorisation is a unilateral juristic act, and it is generally accepted that an ordinary power of attorney is effective once the principal has brought his or her intention (that the agent must represent the principal) to the knowledge of the agent.[752] Although under common law a power of attorney could also be granted subject to a suspensive condition – that is, that the power would become effective only on the occurrence of an uncertain future event, most powers of attorney become effective immediately upon execution by the principal.[753]

6.58 In cases where the principal is still fully able to handle his or her affairs, there is no need for the agent to have immediate authority, and the principal might be reluctant to grant another person full power with immediate effect. To deal with this scenario, several jurisdictions have expressly created a mechanism that permits an enduring power to be drafted so it becomes effective only on the occurrence of a specified contingency, usually once the principal has decision-making impairment. This is referred to as a conditional or "springing" power of attorney in certain jurisdictions.[754] Although the common law in many jurisdictions allowed a power of attorney to be granted subject to a suspensive condition, enduring power legislation usually contains express provision in this regard, to remove any doubt.[755]

6.59 The major a*dvantage* of a conditional power is obviously that it can be executed by principals who still want to make their own decisions but are looking ahead and

---

752 Joubert 94 where the author explains that acceptance (by the agent) of the principal's intention is only relevant with regard to the question whether there is a contract between the principal and agent that regulates their relationship.

753 Cf Joubert 93-94, 102; Schlesinger and Scheiner 1992 **Trusts and Estates** 40.

754 Shlesinger and Scheiner 1992 **Trusts and Estates** 40; Frolik and Kaplan 257 et seq; Meyers 53 et seq; Alberta Law Reform Institute **Report for Discussion No 7** 1990 80-81; Queensland Law Reform Commission **Draft Report 1995** 100 et seq.

Frolik and Kaplan (at 257) point out that although other arrangements – such a limiting the scope of the enduring power, naming co-agents, or having different agents control different assets – can also mollify a principal's apprehension about the wide-ranging scope of power that an enduring power typically conveys, the conditional power most directly acknowledges that there is no present need for the agent's services.

755 See eg Alberta Law Reform Institute **Report for Discussion No 7** 1990 79-81; Queensland Law Reform Commission **Draft Report** 1995 101.

planning for the time when their ability might become impaired. Such a power would become effective only when needed (ie with the onset of impairment).[756] Because a determination of decision-making impairment needs to be made before the power may be used, a conditional power might be used less casually than the usual enduring power – which is regarded by some as an additional advantage.[757]

6.60 The primary *disadvantage* of the conditional power is that it is unclear when it *does* take effect.[758] Because its operation is triggered by decision-making impairment, that event may have to be conclusively established to a third person in order to induce such person to accept the authority of the agent.[759] The whole purpose of an enduring power is to facilitate management of the affairs of a person with skills impairment with minimal obstacles. Third parties, particularly financial institutions, may be uncertain that a conditional power has become effective without documentation to show that the triggering event has occurred. Disgruntled claimants might challenge an agent's actions by asserting that the conditional power has not yet taken effect. The result can be that the principal is subjected to the type of public exposure and humiliation that the enduring power was intended to avoid.[760] This problem could, however, be overcome by providing for additional safeguards in the relevant legislation, or by the creativity of the drafter of a conditional power. Typical formulations in this regard often involve requiring testimonials from one or more medical practitioners, sometimes practitioners who are named in the power itself.[761] The triggering event safeguards are discussed in paragraph 6.128 et seq below.

6.61 Some submit that an alternative to the conditional power could be to delay delivery of the enduring power; this would also address a principal's hesitance in

---

756 Shlesinger and Scheiner 1992 **Trusts and Estates** 40; Meyers 53-55; Frolik and Kaplan 256-257; Alberta Law Reform Institute **Report for Discussion No 7** 1990 80-81; Queensland Law Reform Commission **Draft Report** 1995 100 et seq.

757 Schlesinger and Schreiner 1992 **Trusts and Estates** 41.

758 Ibid; Meyers 53-55; Frolik and Kaplan 257 et seq; Alberta Law Reform Institute **Report for Discussion No 7** 1990 80-81; Queensland Law Reform Commission **Draft Report** 1995 100 et seq.

759 Ibid.

760 Shlesinger and Scheiner 1992 **Trusts and Estates** 41; Meyers 53-55; Frolik and Kaplan 257 et seq; Creyke 1991 **Western Australian Law Review** 141.

761 Frolik and Kaplan 258. Cf also Alberta Law Reform Institute **Report for Discussion No 7** 1990 85-90; Queensland Law Reform Commission **Draft Report** 1995 100 et seq.

granting immediate authority to an agent. This practice does not involve the creation of a conditional power. The instrument is a conventional enduring power, which takes effect immediately upon execution. Its operation is postponed by the simple device of depriving the agent of possession of the instrument until the principal needs support. This arrangement relies on the practical reality that third parties might not be willing to deal with agents who cannot furnish written evidence of their authority.[762] Typically, the person who prepared the power, usually a legal practitioner, holds it in safekeeping until such time as he or she determines that it is needed.[763] Although this alternative obviates the need for third parties to satisfy themselves that the power they see is in effect, it is also not free of pitfalls.[764] First, it is necessary to involve an additional person to retain custody of the written instrument while the power is suspended. Second, that person must, moreover, determine when it is appropriate to give the agent possession of the instrument; as a consequence, the same difficulties arise as those described above in respect of determination of the onset of impairment in the case of a conditional power.

Discussion paper recommendation, comment and evaluation

6.62 In Discussion Paper 105 it was recommended that legislation should allow for an enduring power of attorney to provide that the power will take effect at some future date, on the occurrence of the "incapacity" of the principal (ie when the principal has decision-making impairment). No adverse comment was received on this recommendation. Commentators accepted that one of the major reasons for granting an enduring power would indeed be the availability of a measure to provide for possible future impairment.

6.63 The Commission is of the opinion that the concept of the conditional power in particular constitutes a useful and practical method of managing one's affairs. The

---

762 Frolik and Kaplan 258; Alberta Law Reform Institute **Report for Discussion No 7** 1990 79-80; Law Reform Commission of British Columbia **Report on the Enduring Power of Attorney** 1990 11-12.

763 Ibid.

764 Law Reform Commission of British Columbia **Report on the Enduring Power of Attorney** 1990 12.

purpose of an enduring power is exactly to allow people to plan for the possibility of future decision-making impairment. The execution of a power does not necessarily mean that the principal is ready to hand authority to the agent immediately. The principal might wish to retain full control over his or her own affairs for as long as he or she is able to do so. The underlying concept of the conditional power is recognised by common law, and there seems to be no in principle reason why it should not be permitted in legislation dealing with enduring powers of attorney. Moreover, draft legislation prepared by the Commission in 1988 for the introduction of the enduring power included the option of a conditional power being granted by a principal.[765] It is clear that legislation enabling a conditional power should make provision for determining when the contingency has occurred. Possibilities in this regard are further discussed under triggering event safeguards in paragraph 6.128 et seq below. The Commission does not believe that the alternative of delaying delivery of the power should be regulated by legislation; principals should be free to use this alternative if they choose. It should be noted, however, that in law the power would exist, notwithstanding the fact that it has not been delivered; in law, the fact that the power is in a person's possession is irrelevant. In other jurisdictions, it seems to be accepted that principals would prefer the more formalised option of the conditional power if it is made available.[766]

6.64 The Commission does not support the practice of certain jurisdictions (referred to above) of expressly labelling an enduring power that will come into effect on the principal's subsequent decision-making impairment – as if this were something different from an enduring power. Our common law already allows an ordinary power of attorney to be granted subject to a suspensive condition. It is, however, recommended that the proposed draft legislation expressly provide for the possibility of granting such a power.

Report recommendation

6.65 ***The Commission recommends that a principal may provide in an enduring power of attorney that such power shall come into effect on the principal's***

---

765 Cl 2 of the proposed draft Bill (SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 52).

766 Cf Alberta Law Reform Institute **Report for Discussion No 7** 1990 80.

subsequent "disability" as defined in clause 4 of the draft Bill. (Draft Bill, clause 68(1)(d).)

2 Safeguards: Introduction

6.66 In jurisdictions where the enduring power of attorney has been introduced by legislation, its specific characteristics have usually been developed and refined with regard to the need for safeguards to protect the principal against abuse.

6.67 Controls and safeguards are important. Their purpose is considered to be fourfold:[767]

1 First, to provide sufficient evidence that an enduring power has been granted.

2 Second, to protect the principal against fraud and undue influence when signing the enduring power. Because a person may execute an enduring power while in a vulnerable state, measures must be provided for to protect the principal from pressure to appoint a self-interested agent.

3 Third, to ensure that principals who grant enduring powers properly understand the full implications of granting such powers. Lack of knowledge and understanding of the effect of an enduring power is apparently one of the greatest problems faced in other jurisdictions, with regard to enduring powers.

4 Fourth, to deal with the risk of mismanagement – whether negligent or fraudulent – by the agent, after the principal's ability to make decisions has been impaired. Unlike the position under an ordinary power of attorney, the principal under an enduring power can no longer supervise decision-making by the agent, or scrutinise the actions of the agent in the way that a person with full ability can. Protective devices are thus necessary to guard against exploitation.

---

767 Alberta Law Reform Institute Report **for Discussion No 7** 1990 28-29, 35-36; Creyke 1991 **Western Australian Law Review** 126; Atken 1988 **New Zealand Law Journal** 368.

6.68 The nature and extent of safeguards provided for differ from jurisdiction to jurisdiction, and are influenced not only by social circumstances but also by the characteristics of the specific type of enduring power. Increased possibilities for abuse in the case of powers enabling an agent to act in respect of financial as well as personal welfare matters, and in the case of conditional powers, have led legislators frequently to provide for additional safeguards. The law reform bodies of New Zealand and Alberta (Canada) both investigated misuse of enduring powers, after the concept was introduced in both jurisdictions. Both bodies indicated that misuse of enduring powers is most commonly financially related, and is likely to involve the misappropriation or misapplication of money or property of the principal by the agent.[768] In both jurisdictions, the advantages of the enduring power were realised in the majority of cases. However, research showed that some agents do abuse their powers in certain instances. This finding – and the fact that under the existing systems in these jurisdictions abuse was *possible* – led both bodies to recommend the introduction of additional safeguards.[769]

6.69 As a general approach, the extent of safeguards deemed necessary is weighed against the possible influence such safeguards could have on the efficiency of the enduring power.[770] As indicated previously, the major factor motivating the introduction of the concept is the need for a simple and cost-effective device enabling principals to have their affairs managed by a person of their choice, without professional or institutional interference. Safeguards against abuse should thus be provided, but should not be so onerous that they will unduly inhibit the use of enduring powers. In Alberta (Canada), where a system of enduring powers of attorney dealing with property matters has been in place since 1991, the Law Reform Institute in its 2003 investigation on the need for additional safeguards remarked as follows:

> It is necessary to recognize that, short of a comprehensive and completely state-guaranteed system of administration of the property of incapacitated persons, there is no way to give a 100% guarantee that no person who administers the affairs of an incapacitated person, including an attorney [ie agent] appointed by an EPA [enduring power of attorney], will abuse the

---

768 Alberta Law Reform Institute **Final Report No 88** 2003 6; New Zealand Law Commission **Preliminary Paper 40** 2000 5.

769 Alberta Law Reform Institute **Issues Paper No 5** 2002 3-4 and **Final Report No 88** 2003 x-xi; New Zealand Law Commission **Preliminary Paper 40** 2000 4-8.

770 Alberta Law Reform Institute **Final Report No 88** 2003 6.

> powers given to that person. Reasonable safeguards against abuse should be provided, but piling safeguard upon safeguard in the hope of marginally reducing the number of cases of abuse will reduce or destroy the utility of a useful device that is highly beneficial in the great majority of cases in which it is utilized.[771]

In concert with this view it seems that, broadly speaking, legislation dealing with enduring powers in other jurisdictions tends to favour simplicity over formality.[772]

6.70 Protection of the principal is usually achieved by introducing safeguards with regard to execution of the power; the event triggering onset of the power (in particular in the case of conditional powers); and supervision of the agent (usually by the Court or a relevant official body). In other jurisdictions the following legislative measures have been regarded as *minimum* standards in this regard:[773]

1 Express prescription in legislation of the capacity required of the principal to execute an enduring power.
2 Requiring attestation of the power by two witnesses who are not related to either the principal or agent.
3 Requiring a statement of intention by the principal that the enduring power is to survive the principal's decision-making impairment.
4 Provision for the possibility to terminate the enduring power or to have it supervised by a Court or some other official body.
5 Renunciation of authority by the agent to be impossible without notification of an official body or a Court.
6 Provision for objections to an enduring power.
7 Requiring that agents keep records which they may be called upon at any time to produce to a Court or official body – a requirement which is often spelt out in detail in informational notes accompanying the enduring power or the relevant legislation.

---

771 Ibid 6-7.

772 Cf Alberta Law Reform Institute Report **for Discussion No 7** 1990 35.

773 Creyke 1991 **Western Australian Law Review** 146; Atken 1988 **New Zealand Law Journal** 368; Schlesinger and Scheiner 1992 **Trusts and Estates** 38.

6.71 We discuss typical safeguards, their advantages and disadvantages, and standard motivations for introducing them below with reference to the development of the enduring power in other jurisdictions.[774] We also refer to the Commission's 1988 proposals, and the comments we received. As indicated above, respondents in general strongly emphasised the importance of building safeguards into any process introducing the concept of the enduring power in our law. Many people indicated that a variety of control measures (such as certain execution formalities, registration of the power, requiring a certain standard of behaviour from the agent, provision for terminating the power, and provision for control of the agent) would be necessary. However, there was relative consensus that control procedures should be kept as simple as possible, and that the aim should be to obtain a balance between the need for protection and providing for a simple and accessible procedure. Comments by representatives of the Office of the Master of the High Court in general supported the need for execution safeguards. Our recommendations in Discussion Paper 105 (in particular those with regard to signing and witnessing of an enduring power) relied heavily on the formalities required in the execution of a will in terms of the Wills Act, 1953.

3 Execution safeguards

6.72 Execution safeguards are mainly aimed at ensuring that the principal has the necessary capacity to grant the enduring power; that the principal understands that the document executed will endure beyond his or her impairment; and that the decision to grant the power is made free from the influence of the agent.[775]

6.73 Practice regarding execution formalities in other jurisdictions varies considerably. Most commonly it requires that the enduring power must be in writing and that the principal's signature must be witnessed. Additional measures frequently include express requirements regarding the capacity of the principal to execute an enduring power, often

---

774 See eg the work done in this regard in Scotland, England, Australia, Canada and New Zealand (Scottish Law Commission **Discussion Paper 94** 1991 247 et seq; Scottish Law Commission **Report No 151** 1995 28 et seq; English Law Commission **Consultation Paper 128** 83 et seq; New Zealand Law Commission **Preliminary Paper 40** 2000 3 et seq; Alberta Law Reform Institute **Final Report No 88** 2003 4 et seq. The information below is recorded mainly with reference to a summary of the in principle position in Canada, Australia, the United Kingdom and New Zealand supplied in a recent Final Report on Safeguards Against Abuse by the Alberta Law Reform Institute dated February 2003 (Alberta Law Reform Institute **Final Report No 88** 2003 Appendix C).

775 Cf Alberta Law Reform Institute **Final Report No 88** 2003 7.

including a lawyer's certificate; and requiring the enduring power to be in a prescribed form, and/or to include explanatory information for the benefit of the principal and the agent.

6.74 The execution safeguards in respect of an enduring power and a power granted to come into effect on the principal's decision-making impairment, generally do not differ.

6.75 In other jurisdictions, the view regarding personal welfare powers is that there is no good reason for additional safeguards to apply in respect of the form and execution of such powers. This obviously implies that where a power for personal welfare is granted, it should be expressly done, as for a financial power.[776] Where a specific form for execution of an enduring power is prescribed, a separate part of such prescribed form thus usually provides for the possibility of granting a personal welfare power.[777]

Discussion paper recommendation, comment and evaluation

6.76 In accordance with practice in other jurisdictions, and for the sake of accessibility and simplicity, Discussion Paper 105 suggested that legislation should reflect that requirements regarding formalities of execution for personal welfare powers should not differ from the formalities required in respect of financial powers. The legislation should clearly reflect that where an enduring power relating to personal welfare is granted, it should be expressly done (as for a power relating to financial affairs).

6.77 Comment received supported this view.

---

776 See SALRC **Discussion Paper 105**, par 7.67.

777 Creyke 1991 **Australian Law Review** 144; Scottish Law Commission; Adults with Incapacity (Scotland) Act 2000 sec 15, 16 and 19.

Report recommendation

6.78 ***The proposed draft legislation should expressly provide for the possibility of granting an enduring power for personal welfare (Draft Bill, clause 66). The Commission recommends that execution formalities in respect of enduring powers of attorney for financial affairs and for personal welfare do not differ. (Draft Bill, clauses 68 – 72 for general execution formalities.)***

Express requirements regarding capacity of the principal

6.79 In comparable jurisdictions, the generally accepted test for the capacity required of a principal to validly execute an enduring power of attorney is his or her ability to understand the nature and effect of the instrument. That is, the principal must be able to understand what an enduring power is and what it can generally be used for.[778] This is similar to the common law test for executing an ordinary power of attorney.[779] Initially, in most jurisdictions this test was implied in legislation dealing with enduring powers.[780] However, experience has shown that it is preferable to codify the common law principle to make it clear that although the legislation permits an enduring power to survive the decision-making impairment of the principal, it does not change the common law rule that the principal must have the necessary ability when the instrument is executed.[781] This would also clear up any uncertainty that might exist on what exactly the common law requirement is for granting a power of attorney.[782]

---

778 Cf Creyke 1991 **Western Australian Law Review** 131; Alberta Law Reform Institute **Report for Discussion No 7** 1990 57-59.

779 Cf also the basic requirement in South African law regarding the capacity of the principal (par 6.11 et seq above) which is similar.

780 Alberta Law Reform Institute **Report for Discussion No 7** 1990 57.

781 Ibid.

782 Ibid 57-59; Atkin 1988 **New Zealand Law Journal** 372.

6.80 The uncertainty in particular concerned the question of whether a higher standard of capacity should be required of a principal who executes a power of attorney, and thus also an enduring power. Proponents of a higher standard submitted that the principal must in fact have sufficient understanding to comprehend *all* the activities that the agent might undertake when using the power – that is, a more restrictive test must be applied than the common law test to execute a juristic act.[783] Opponents argued that a less stringent test would enable a greater number of principals (who might not qualify under the more onerous standard) to execute an enduring power.[784] The less stringent test establishes whether the principal has the ability to understand the nature and effect of the instrument. The validity of this test was confirmed in the English case *Re K,*[785] and is now commonly accepted in comparable jurisdictions as the true test for executing a valid enduring power.[786] The Court in this case held that the principal does not have to be capable of understanding the nature and effect of all the acts the agent is authorised to perform. Rather it was sufficient if it could be said that the principal understood that -[787]

- the agent would be able to assume complete authority over the principal's affairs, subject to any limitation in the power itself;
- the agent would be able to do anything with the principal's property which the latter could have done;
- the agent's authority would continue even if the principal became "mentally incapacitated"; and
- the enduring power would become effectively irrevocable once the principal had become "incapacitated".

In comment on this decision, it was said that the test enunciated in the decision is consistent with the fundamental principle that legal capacity is task-specific; and that

---

783 As in New South Wales, for instance, where the requirements were not described in legislation and the Court adopted the more restrictive test (***Ranclaud v Cabban (1988) NSW ConvR*** par 55-385, 57, 548 referred to by Creyke 1991 **Western Australian Law Review** 131).

784 Creyke 1991 **Western Australian Law Review** 131.

785 *1988 1 All ER 358.*

786 Cf Creyke 1991 **Western Australian Law Review** 131; Alberta Law Reform Institute **Report for Discussion No 7** 1990 58. The Australian Law Reform Commission even recommended that because of doubt Australian Capitol Territory legislation should expressly spell out the test set out in ***Re K*** as the standard test (Creyke 1991 **Western Australian Law Review** 131).

787 Creyke 1991 **Western Australian Law Review** 131; Alberta Law Reform Institute **Report for Discussion No 7** 1990 58.

"incapacity" in one area does not necessarily mean "incapacity" in another. Thus the fact that a person is incapable of managing his or her affairs does not necessarily mean that he or she lacks the capacity to grant a valid enduring power. The correct approach is to focus on the person's capacity to understand the specific juristic act in question. That is, is the person capable of understanding the nature and effect of granting an enduring power?[788]

6.81 In fine-tuning the concept of enduring power, however, many jurisdictions came to realise that in addition to expressly legislating what the required capacity of the principal is, further safeguards are needed to ensure that principals indeed have the necessary capacity when executing an enduring power. Different approaches reflected in examples from other jurisdictions include the following:

1 *Expressly defining the required level of understanding:* In some systems, the relevant legislation contains a definition of "competence" and prescribes that only a competent person may execute an enduring power.[789] This could include that the principal is required to know and understand specific listed things, including the possibility that the agent could misuse his or her authority.[790] To define "capacity" or "incapacity" in legislation pertaining to enduring powers is, however, very rare.[791]

2 *Requiring an informational statement by the principal*: According to this practice, the principal is required to certify that he or she has read the explanatory notes on enduring powers of attorney included in the enduring power (where such notes are indeed prescribed, as discussed in paragraph 6.110 below).[792] Opponents to this practice submit that people who usually sign documents without fully understanding them will in all likelihood not

---

788 Alberta Law Reform Institute **Report for Discussion No 7** 1990 58-59.

789 See eg the legislation proposed by the Law Reform Commission of Victoria in its **Report No 35** 1990 8-9. The relevant definition provides as follows:

> "An individual is competent if he or she is at least 16 and understands the general nature and effect of an enduring power".

790 As in Ontario, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 37).

791 In the USA for instance, this practice is apparently followed only in New Jersey (Schlesinger and Scheiner 1992 **Trusts and Estates** 41).

792 This is eg the position in England under the Enduring Powers of Attorney (prescribed Forms) Regulations 1987 (Scottish Law Commission Discussion **Paper No 94** 1991) 256.

take the trouble to read any explanatory notes included in an enduring power either, and will simply sign the document.[793]

3 *Requiring a lawyer's certificate*: Under this practice, legislation usually require a lawyer to certify –

- that he or she has explained the effect of the power to the principal;[794] and/or
- that the principal understood the effect of creating the enduring power, and that no fraud or undue pressure was involved in granting the power.[795]

In some cases, the lawyer must also certify that he or she interviewed the principal.[796] Opponents of this practice submit that lawyers, as part of their professional duty towards clients, must ensure that their clients understand the nature and effect of *any* legal document they are asked to sign. Wills, contracts, and other complex documents of great importance to clients are routinely signed without any certificate of explanation being attached.[797]

4 *Requiring a physician's certificate*: A registered medical practitioner is required to certify that the principal understands the effect of creating the enduring power, and that there is no reason to suspect fraud.[798] Opponents of this practice submit that a medical certificate would not prevent later challenge, unless it was made conclusive, which seems too extreme; that understanding the legal effects of an enduring power might not primarily be a medical issue, and that an opinion in this regard should rather be expressed by a lawyer; and that requiring a medical certificate could add considerably to the expense of executing an enduring power.[799]

5 *Requiring certification by witnesses*: In some jurisdictions, witnesses to the power are required to certify that in their opinion, at the time of signing the

---

793 Cf Scottish Law Commission Discussion **Paper No 94** 1991 256-257.

794 As in New South Wales (Scottish Law Commission Discussion **Paper No 94** 1991 256).

795 Cf the position in Scotland, the Republic of Ireland and the proposals of the Alberta Law Reform Institute (Alberta Law Reform Institute **Final Report No 88** 2003 (x), 40).

796 As in the Republic of Ireland (Alberta Law Reform Institute **Final Report No 88** 2003 40).

797 Cf Scottish Law Commission Discussion **Paper No 94** 1991 257.

798 As in the Republic of Ireland (Alberta Law Reform Institute **Final Report No 88** 2003 40).

799 Cf Scottish Law Commission Discussion **Paper No 94** 1991 258.

power the principal understood the nature and effect of the power.[800] Some people argue that a lawyer's certificate would give better quality control than a witness's affidavit, especially as the principal is likely to receive useful advice when consulting a lawyer.[801] However, providing for both alternatives would give the principal a choice.[802]

Discussion Paper recommendation, comment and evaluation

6.82 Although views were divided at the time, the Commission recommended in Discussion Paper 105 that the required capacity of the principal should be the same as that pertaining to any other juristic act. Accordingly, the person should understand the consequences of entering into the enduring power of attorney, and should also comprehend in broad terms the activities that the agent might undertake when using the power. That is, the principal must be able to comprehend the act of granting the power of attorney. The Commission at the time indicated that it was not aware of any justification to depart from the premise that was emphasised throughout , namely that capacity should be task-specific.

6.83 As indicated in paragraph 6.55 above, our understanding of the CRPD's article 12(2) would entail that "certain people with some degree of incapacity, including those with lifelong incapacities, may be able to grant a valid enduring power of attorney to appoint someone of their choice to deal with matters which they themselves would find very difficult, if not beyond their capacity". This would depend on the circumstances of each individual case.

6.84 The Commission believed, however, in accordance with the experience in other jurisdictions and in response to the public call for adequate protection of principals, that an appropriate safeguard would be necessary. It was suggested – without the benefit of public comment on this issue at the time – that a suitable, viable option would be to require certification of capacity by a commissioner of oaths. The same commissioner

---

800 Cf Alberta Law Reform Institute **Final Report No 88** 2003 37.

801 Ibid 8.

802 Ibid.

must be one of the witnesses to the power. This recommendation was made on the basis that commissioners of oath would be available at police stations, magistrates' offices, post offices, and various other government departments and institutions. In addition, we recommended that where the power is signed by someone else on behalf of the principal, or by the principal by making a mark or putting his or her thumb-print on the power, a commissioner of oaths should also be involved in execution of the document.[803] It was suggested that this same commissioner could then certify as to the capacity of the principal. In the interests of accessibility, we debated whether certification by two competent witnesses (who could be the same persons witnessing the power) would perhaps suffice instead. This possibility was rejected in view of the recommendation in that a witness could be someone as young as 14 years.[804]

6.85 To summarise, Discussion Paper 105 recommended that legislation should provide that for an enduring power to be valid, the principal must, at the time of executing the power, understand its nature and effect. Confirmation that the principal has the required capacity must be provided by a commissioner of oaths (who must be one of the persons who witness the power), whose certificate in this regard must be attached to the power at the time of its execution.

6.86 Commentators generally agreed with the standard of capacity recommended, and with the Commission's view that additional safeguards must be built into the process. However, the recommendation that a commissioner of oaths should certify the required capacity of the principal was not supported. Virtually all respondents expressed strong concerns about this possible requirement. It was submitted that many ex officio commissioners of oath would probably not have the knowledge and skills to determine whether a principal understand the implications of granting an enduring power. Possible alternatives suggested included professional health care workers, medical practitioners, notaries, and lawyers. Respondents were divided as to which of these alternatives would be the most viable in terms of accessibility and cost implications. The cost of obtaining the services of a professional person to grant a certificate was identified as a specific problem. After careful consideration, the Commission believes that it would be in the

---

803 See cls 72 and 73 of the proposed draft Bill in Chapter 8 of the Discussion Paper.

804 SALRC **Discussion Paper 105**, par 7.71.

interest of persons granting enduring powers for the law to provide for a range of suitable persons to act as "certificate provider", including professional persons (who do not necessarily know the principal personally), as well as a more affordable option. Other professionals who could have the skills relevant to forming the opinion required to be expressed in the certificate could, for instance, include a social worker or a financial adviser. To cater for a more affordable option, we recommend that a person who has personally known the principal for a substantial period of time (at least five years) and more closely than a mere acquaintance should also be able to provide the certificate. With regard to affordable options, the Commission also noted that affordable legal services are currently available through several non-governmental organisations. Such services can usually be accessed at a minimum cost.

Report recommendation

6.87 ***The Commission recommends that legislation should provide that an enduring power will be valid only if the principal, at the time of executing the power, understood its nature and content. Confirmation that the principal had the required capacity should be provided by way of a "certificate of execution" granted and signed by a "certificate provider", who could be a professional person with skills relevant to providing the certificate (including a legal practitioner or health care practitioner) or someone who has known the principal for at least five years and more closely than a mere acquaintance. (Draft Bill, clauses 68(1)(h) and 70.)***

The enduring power to be in writing and signed

6.88 Every jurisdiction we examined has set two conditions as absolute minimum requirements, namely that an enduring power should be created by a written document, and the document must be signed by the principal (except where he or she is incapable of signing).[805] Apart from the fact that a written document would provide important

---

[805] Cf also Alberta Law Reform Institute **Report for Discussion No 7** 1990 36-38.

evidence from the view of both the principal and the agent, at a practical level a written document would be essential if third parties are to rely on the agent's authority. Except for helping to avoid false claims that a principal has granted an enduring power, this requirement will, however, not be a significant safeguard against abuse.[806]

6.89 To avoid discrimination against principals who are incapable of signing, other jurisdictions generally allow an enduring power to be signed on behalf of a principal in his or her presence and under his or her direction.[807] Instances where the principal is fully incapable of signing will be rare, as this would refer only to a principal who is both mentally capable of understanding the nature and effect of executing a power of attorney and is at the same time physically incapable of signing it. To decrease the risk of abuse, it has been suggested that signing by proxy should be expressly limited in legislation to those exceptional circumstances where it is justified in practice – that is, where the donor is physically incapable of signing the instrument.[808] A further safeguard would be to require that the proxy be someone other than the agent, a witness to the enduring power, or the spouse or partner of such agent or witness.[809]

6.90 Because of the important implications of an enduring power for an agent, some jurisdictions require the agent to acknowledge the appointment by signing the instrument, or by executing a prescribed form of acceptance (usually setting out the duties of the agent) which is then attached to the power.[810] Opponents of this practice submit that it would be inappropriate to invalidate an enduring power simply because the agent omitted to sign or acknowledge it, especially in cases of inadvertent non-compliance with such a requirement.[811] They moreover submit that additional problems and complexities could arise where, for instance, more than one agent was appointed and one of them omitted to sign the power, as it is unclear what effect this omission would have on the validity of the power.[812]

---

806 Ibid 4.

807 Ibid 4, 36-38.

808 Ibid 36-38.

809 Ibid.

810 Ibid.

811 Ibid.

812 Ibid.

6.91 The justification for an enduring power to be in writing and signed by the principal is self-evident. Persons who cannot sign because of physical disability, or who for some or other reason (eg illiteracy) can sign only by making a mark on the document should, however, not be discriminated against; granting an enduring power of attorney should also be accessible to such persons. Given the potential for abuse, however, we believe that certain restrictions should apply in respect of who may sign on behalf of a principal. In addition, we submit that allowing a principal to put his or her thumb-print on the document would supply additional protection in cases where the principal is illiterate and can only sign by making a mark. We do not believe there is sufficient justification for requiring the agent to sign the power. Creating a procedure with inherently potential problems such as those pointed out above would not be in accordance with our aim to create measures that are as simple and accessible as possible.

Discussion paper recommendation, comment and evaluation

6.92 Discussion Paper 105 suggested that legislation should provide that an enduring power of attorney must be in writing, and must be signed by the principal or by someone else in his or her presence acting on the direction of the principal (if he or she is physically incapable of signing). The person signing on behalf of the principal must be a person other than the agent, a witness, or the spouse or partner of such agent or witness at the time of executing the power. "Sign" should include the making of initials, and (only in the case of a principal) the making of a mark or thumb-print on the document.

6.93 Comment received supported these recommendations.

6.94 In further developing the recommendations in Discussion Paper 105, the Commission refined the definition of "sign" so as not to allow witnesses, the agent, or a person signing on behalf of the principal, to sign an enduring power by making initials

only.[813] We also considered how to increase protection of the interests of the principal who cannot sign the power him- or herself. To this end, it is proposed that the person who grants the certificate of execution (referred to in paragraph 6.86 – 6.87 above) must, in addition, verify the identity of the principal concerned; and must certify that the power signed on behalf of a specific principal, is indeed authorised by that principal.[814] Our final recommendations were also further refined to clarify that the electronic singing of an enduring power of attorney would not suffice.[815]

Report recommendation

6.95 ***The Commission recommends that an enduring power of attorney should be in writing and signed by the principal. Where the principal is physically incapable of signing (or where the principal "signs" by making a mark or placing his or her thumb print or initials only), additional requirements should apply to safeguard against abuse. In the latter circumstances, the "certificate provider" who grants the "certificate of execution" referred to in paragraph 6.87 above, must, in addition, verify the identity of the principal; and must certify that the power signed on behalf of the principal, is indeed authorised by that principal. (Draft Bill, clauses 68(1)(a), 69(1)(a), (2) and (5) and 70(1).) It is recommended that the draft Bill should exclude the Electronic Transactions and Communications Act 25 of 2002 from applying to enduring powers of attorney in certain respects. The***

---

813 The Discussion Paper draft Bill's definition of "sign" allowed the making of initials (definition of "sign" in cl 1 of the Discussion Paper draft Bill). This would have allowed anyone required to sign an enduring power of attorney (ie the principal, witnesses to the power, and any person signing on behalf of the principal) to sign by making initials. On reconsideration, this arrangement was believed to be undesirable as abuse in the context of execution of enduring powers could be facilitated by allowing witnesses, and especially persons signing on behalf of a principal, to sign by making initials. The Master might moreover have difficulty to ascertain, from the signature on the document, which signature (ie initials) belongs to the principal.

814 Cl 69(5).

815 The Commission noted that the law still very clearly requires a will to be in writing despite technological developments. It is believed that at least similar protection should be provided in the case of the enduring power of attorney. Schedule 2 of the draft Bill thus excludes the application of the Electronic Transactions and Communications Act 25 of 2002 to enduring powers of attorney in certain respects. The proposed exclusion will have the effect that an enduring power will not be valid if it has been electronically executed and signed electronically. The exclusion in the draft Bill's Schedule 2 has been modeled on the exclusion of the application of the said Act to a will made in terms of the Wills Act 7 of 1953 (see Item 1 of Schedule1, and Item 3 of Schedule 2 of the Electronic Transactions and Communications Act).

proposed exclusion will have the effect that an enduring power will not be valid if it has been electronically executed and signed electronically. (Schedule 2 of the draft Bill.)

Witnessing

6.96 Witnessing is a universal requirement for executing a valid enduring power of attorney. The main motivations for the requirement of witnessing are as follows: it confirms the identity of the principal and the absence of physical coercion, it minimises the risk of forgery, it impresses upon the principal the seriousness of the proposed action, and it provides evidence of authenticity to third parties who rely on the power.[816]

6.97 Various witnessing practices exist in different jurisdictions. The most common practice is that two independent witnesses must witness the principal's signature. Doubt has occasionally been expressed whether two witnesses would deter fraud to a greater extant than would a single witness, and in some jurisdictions legislation requires witnessing by one witness only.[817] In jurisdictions where more stringent measures are required, some or a combination of the following additional measures are used:

1 *Excluding certain classes of persons*: Almost every jurisdiction excludes certain people from acting as a witness to the execution of an enduring power. The most common approach is to exclude the agent and his or her spouse or partner.[818] Some jurisdictions also exclude the spouse of the principal and the spouse of any person signing on behalf of the principal.[819] Children of the principal may also be excluded.[820] In a few jurisdictions, the class of ineligible witnesses is much broader and the exclusion extends, for

---

816 Ibid 40.

817 Ibid 41.

818 Ibid 41-42.

819 As in most jurisdictions in Canada (Alberta Law Reform Institute **Final Report No 88** 2003 37).

820 As in Ontario, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 37).

instance, to "all relatives" of the principal and the agent,[821] or to "close relatives" of the agent.[822]

2 *Requiring witnesses to be from a prescribed class*: Measures in this regard usually refer to the judiciary or some legally related profession (eg a police officer, lawyer, justice of the peace or peace officer, a person authorised to take an affidavit, or even a High Court judge). In some jurisdictions, this class of witness is also required to certify that he or she explained the effect of the enduring power to the principal before its execution, or that the principal has the required capacity to execute the power.[823]

3 *Requiring attestation by a notary*: According to this practice, the principal is required to sign the enduring power before a notary, who will in practice be an attorney, who must also sign the power.[824] Although this is an unusual requirement, it has been suggested that in addition to providing protection against abuse it will serve to authenticate the signature – and possibly the authority – of the agent, to a third party to whom the power is presented.[825]

4 *Requiring a lawyer's certificate*: In some jurisdictions the witnesses (or one of them) are also required to certify to the principal's capacity. Frequently this witness is required to be a lawyer. The lawyer is usually required to certify that the principal appeared before him or her; is an adult; that the enduring power was signed by the principal on a specified date in the lawyer's presence, separate and apart from the agent; and that the principal appeared to understand the enduring power. Alternatively, a witness (who is not a lawyer) is required to give an affidavit to the same effect.[826] Where a lawyer's certificate is required, it is usually required that the certificate must be attached to the power before the agent acts upon

---

821 As in the Australian Capital Territory (Alberta Law Reform Institute **Final Report No 88** 2003 41).

822 As in Northern Australia (Alberta Law Reform Institute **Final Report No 88** 2003 41).

823 As in New South Wales and Queensland, Australia respectively (Alberta Law Reform Institute **Final Report No 88** 2003 41).

824 As in some states in the United States (Shlesinger and Scheiner 1992 **Trusts and Estates** 43).

825 Schlesinger and Schreiner 1992 **Trusts and Estates** 43.

826 See the recommendations of the Alberta Law Reform Institute (Alberta Law Reform Institute **Final Report No 88** 2003 (x)).

the authority of the power at a time when the principal has decision-making impairment.[827]

6.98 Each of the above options has its advantages and disadvantages, which are summarised below.[828]

1 Use of legal practitioners may provide added protection to the principal, especially elderly persons who might be pressured into granting enduring powers in favour of family members or carers. But this is at the expense of administrative simplicity, which is seen as one of the main advantages of an enduring power.[829]

2 Use of justices of the peace or similar officials would avoid significant expense, but if those officials are not easily available then that degree of formality might have the effect of inhibiting the use of enduring powers. Moreover, this class of witness would not necessarily have the requisite knowledge of the law to be in a position to give a helpful explanation to the principal about the nature and consequences of an enduring power. If it is further not required that they ensure that the principal understands the enduring power, there would be no use in adopting this alternative.

3 The requirement for unrelated witnesses might provide independent witnesses without increasing practical difficulties or complicating the procedure.

6.99 The Commission's 1988 recommendations reflected that we believed the witnessing practice with regard to an enduring power should be similar to that of executing a valid will, as prescribed in the Wills Act, 1953. Representatives of the Masters' Offices generally support this view. Relevant requirements in the Wills Act (as applied to the context of the enduring power) would require the following:

1 *If the power is signed by the principal or by someone else in his or her presence and by his or her direction:* The power should be witnessed by

---

827 Ibid (xiii).

828 Creyke 1991 **Western Australian Law Review** 134-135.

829 Alberta Law Reform Institute **Report for Discussion No 7** 1990 43.

two or more[830] competent witnesses present at the same time. Such witnesses must sign the power in the presence of the principal and each other.[831] A "competent witness" is someone above the age of 14 years who is not incompetent to give evidence in a Court of law.[832]

2 *If the power is signed by the principal by making a mark,[833] or by someone else in his or her presence and by his or her direction:* In addition to the requirements stated in the previous paragraph, a commissioner of oaths must certify that he or she is satisfied as to the identity of the principal. (The Commission's 1988 proposals required that the certification must be done by a magistrate, justice of the peace, commissioner of oaths, or notary.[834]) The power must be signed in the presence of the commissioner of oaths, and the certificate must be made as soon as possible after the power has been signed.[835] (It is interesting to note that the measures in the other jurisdictions referred to do not include additional requirements where someone else signs on behalf of the principal.)

3 The agent, and his or her spouse or partner, would be disqualified from acting as witnesses. According to the Wills Act, a witness or a person who signs a will on behalf of the testator, and the spouse of such witness or proxy, are all disqualified from benefiting from that will.[836]

As indicated, representatives from the Masters' Offices who commented, favoured these formalities. It was also pointed out that should the supervisory function with regard to enduring powers be given to the Masters of the High Court, requiring execution formalities similar to those in respect of a will would have the added benefit that most officials in the Masters' Offices are familiar with

---

830 The Commission's 1988 proposals required two witnesses.

831 The Wills Act, 1953 sec 2(1)(i), (ii), and (iii).

832 Ibid sec 1.

833 Note the discussion in par 6.93 et seq above on signing an enduring power by making a mark or by putting a tumb print.

834 SALRC Report **on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 53.

835 The Wills Act, 1953 sec 2(1)(v).

836 Ibid sec 4A(1).

the Wills Act. Thus, the extra responsibility would not create too heavy an additional workload for these Offices.[837]

6.100 The Commission believes that mandatory requirements relating to attestation by a notary, or witnesses belonging to a specified class, would be too cumbersome and are not viable in the South African context. In our country, the legislation proposed should aim to make new procedures as accessible as possible. Even requirements similar to those of the Wills Act could be cumbersome, although we acknowledge the advantages of these requirements. The absolute minimum witnessing requirement that could be imposed seems to us to be to require witnessing by a single independent witness. This approach was apparently followed in some jurisdictions in the earliest enduring power legislation.[838] However, subsequent developments aimed at curbing abuse frequently introduced more stringent measures. Requiring the bare minimum thus seems to be inadequate. A compromise between simplicity and protection could be to require witnessing in accordance with the Wills Act, 1953 as described in the previous paragraph.

Discussion paper recommendation, comment and evaluation

6.101 Discussion Paper 105 recommended that legislation should require that witnessing of an enduring power should be in accordance with the witnessing requirements for the execution of a valid will. These requirements are described in paragraph 6.99 above, and basically require witnessing by two independent competent witnesses. Discussion Paper 105 defined a "competent witness" as a person of 14 years or older who at the time of witnessing the enduring power is not incompetent to give evidence in a Court of law.

6.102 Commentators generally agreed with the Commission's view that requirements regarding the witnessing of an enduring power must be similar to that of executing a

---

837 See eg the comments of the Deputy Master of the High Court, Cape Town.

838 See eg the proposals of the Newfoundland Law Reform Commission (Newfoundland Law Reform Commission **Report on Enduring Powers of Attorney** 1988 75); and sec 95 of the New Zealand Protection of Personal and Property Rights Act, 1988

valid will, as prescribed in the Wills Act 7 of 1953. However, many respondents were strongly opposed to allowing a child of 14 years to witness a document as important as an enduring power. In response, the requirement was changed to say that a witness must be at least 18 years of age. In its final recommendations, the Commission added an independent provision expressly setting out the competency required of persons involved in executing an enduring power (including witnesses, persons signing an enduring power on behalf of the principal, and persons providing the certificate of execution). This provision expressly excludes the following persons from witnessing an enduring power: the agent appointed in the enduring power, the spouse of the principal, and any relative of the principal or the spouse of such relative.

Report recommendation

6.103 ***The Commission recommends that an enduring power of attorney should be witnessed by two witnesses. A "witness" must be 18 years or older at the date of execution of the power, and must not be incompetent to give evidence in a Court of law. Because of possible conflict of interest, certain persons should not be allowed to witness an enduring power of attorney. The latter includes the agent appointed in the power or any other power granted by the principal, or the spouse of the agent; the spouse of the principal; a "relative" (as defined in the proposed draft Bill) of the principal, or the spouse of such relative. (Draft Bill, clauses 68(1)(f), 69(1) and (4), and 71.)***

Statement of intent

6.104 An enduring power usually contains an express statement of intention either that it is *to continue* notwithstanding any later decision-making impairment of the principal (in the case of an ordinary enduring power), or that it is *to take effect* on the decision-making impairment of the principal (in the case of the so-called conditional power).[839] An

---

[839] Alberta Law Reform Institute **Final Report No 88** 2003 4; Schlesinger and Scheiner 1992 **Trusts and Estates** 40; Adults with Incapacity (Scotland) Act 2000 sec 15(3)(b). See par 6.57 et seq above for the position regarding the conditional power.

alternative approach, which is adopted in some states in the United States, would be to regard every power of attorney as an enduring power unless the principal indicates a contrary intention.[840] In some jurisdictions, the exact form of the statement is prescribed, whereas in others it is provided that the enduring power should contain a clause "to the effect that" it is to continue “notwithstanding incapacity”.

6.105 Motivation for requiring a statement of intent is that this step may imprint on a principal the extreme nature of the enduring power (ie that it will operate when the principal is not able to supervise its use), and will make the enduring nature of the power apparent to third parties from the face of the instrument.[841] This requirement is, however, not regarded as an effective safeguard against abuse.[842]

6.106 Requiring a statement of intent is not onerous. Neither does it detract from the simplicity of the enduring power concept. It is moreover regarded as one of the minimum formal requirements for the validity of an enduring power. The Commission therefore recommends that this requirement be included in enduring power legislation.

Discussion paper recommendation, comment and evaluation

6.107 Discussion Paper 105 suggested that legislation should require that an enduring power of attorney contain a statement to the effect that the power is to remain in force notwithstanding the subsequent “incapacity” of the principal, or that it is to take effect on the “incapacity” of the principal. (“Incapacity” would refer to decision-making impairment.”)

6.108 No dissenting comments were received on this recommendation.

Report recommendation

---

840 Alberta Law Reform Institute **Report for Discussion No 7** 1990 44.

841 Ibid.

842 Ibid; Alberta Law Reform Institute **Final Report No 88** 2003 4; Schlesinger and Scheiner 1992 **Trusts and Estates 38**.

6.109 ***The Commission recommends that an enduring power should be valid only if it contains a statement indicating the principal's intention that the power is either to continue to have effect notwithstanding the principal's subsequent "disability"; or that it shall come into effect on the principal's subsequent "disability". The meaning of "disability" is assigned in clause 4 of the draft Bill. (Draft Bill, clause 68(1)(d))***

Prescribed form of enduring power and explanatory information for the principal and agent

6.110 Practices in this regard vary from jurisdiction to jurisdiction. In some jurisdictions, requiring the enduring power to be in a specific prescribed (mandatory) form is an added execution safeguard. Proponents of this practice argue that a properly drafted prescribed form could reduce misuse and abuse, by making clear to the donor and third parties the powers granted to an agent. It could moreover increase accessibility by making an enduring power easier to use. That is, rather than having a power specially drafted, principals could purchase the prescribed form or copy a form printed in the legislation. This advantage would especially be true of a pre-printed "fill-in-the-blanks" form.[843]

6.111 Opponents of this practice point out that the rigidity implied in it militates against the very purpose of the concept of an enduring power. The enduring power is intended to be a flexible instrument, which can be designed to meet a variety of different situations.[844] Moreover, drafting a prescribed form that is sufficiently adaptable, yet at the same time not so vague as to be meaningless, may prove exceptionally difficult.[845] Finally, a mandatory prescribed form might actually reduce accessibility in cases where individuals from rural areas might find it difficult to obtain the form.[846] Some jurisdictions dealt with the criticism by providing for an enduring power to *substantially be* in the

---

843 Manitoba Law Reform Commission **Report 83** 1994 8.

844 Alberta Law Reform Institute **Report for Discussion No 7** 1990 48; Manitoba Law Reform Commission **Report No 83** 1994 8.

845 Ibid.

846 Manitoba Law Reform Commission **Report No 83** 1994 8.

prescribed form (ie it must contain at least the information in the prescribed form), or by making its use optional rather than mandatory.[847]

6.112 Whether an exact form is prescribed or not, several jurisdictions require that prescribed explanatory information given to the principal, and in some instances also the agent, should be included in the enduring power.[848] The purpose of this step is to explain to the layperson the basic nature and effect of an enduring power.[849] Some jurisdictions prefer to keep these notes to a minimum and as simple as possible, covering only issues of importance to the principal.[850] Others prefer the notes to be more detailed, covering a wider range of issues.[851] An example of explanatory notes where the information is kept to a minimum (ie primarily for the benefit of the principal) includes the following:[852]

1 Explaining the basic purpose of a power of attorney.
2 Emphasising the extent of the agent's authority and the need to restrict that authority if necessary.
3 Explaining the implications of granting an *enduring* power.
4 Explaining the concept of the conditional power, and giving information on granting such a power.
5 Informing principals of their right to revoke the power before their ability to make decisions has been impaired.
6 Advising principals on the need for obtaining the agent's consent to the appointment.[853]

Where the form of the enduring power is prescribed by legislation, the explanatory information is usually included in the prescribed format.[854]

---

847 See eg the Western Australian scheme (Creyke 1991 **Western Australian Law Review** 138).

848 See eg the recommended position in England where the Law Commission suggested that the form of the enduring power should be prescribed and include prescribed explanatory information (English Law Commission **Report No 231** 1995 115).

849 Alberta Law Reform Institute **Report for Discussion No 7** 1990 47-51.

850 See eg the recommendations of the Alberta Law Reform Institute (Alberta Law Reform Institute **Report for Discussion No 7** 1990 49-50).

851 See eg the position in England and Northern Ireland where the notes also aim to summarise the registration requirements contained in the legislation, the issue of appointment of joint agents and the agent's right to claim remuneration and reimbursement of expenses (Alberta Law Reform Institute **Report for Discussion No 7** 1990 49-50).

852 See eg the proposals of the Alberta Law Reform Institute (Alberta Law Reform Institute **Report for Discussion No 7** 1990 50).

853 Cf New Zealand Law Commission **Preliminary Paper 40** 2000 16-17.

6.113 The Commission in Discussion Paper 105 stated that in view of the need for accessible and affordable measures, a prescribed form should at least be made available through legislation, for those persons who do not have the means to make use of legal or other expert advice to assist them to draft an enduring power. However, the use of this form should not be mandatory. For the same reason, the Commission suggested that the prescribed form should include simple and easily understandable explanatory notes, which should be included in every enduring power irrespective of whether the power was in the prescribed form or not.[855] The notes should contain basic information, primarily for the benefit of the principal. The Commission believed that while an agent was not required to formally accept the authorisation in an enduring power by signing it, it would serve no purpose to include notes about the agent's responsibilities in explanatory notes attached to the power. More expansive information, including information about the agent's role, could be made available informally to the public by the Department of Justice and Constitutional Development.

Discussion paper recommendation, comment and evaluation

6.114 Discussion Paper 105 thus suggested that legislation should require that for an enduring power of attorney to be valid, it must –

- be in the prescribed form or substantially in the prescribed form; and
- include, at the time of its execution by the principal, the prescribed explanatory information.

6.115 Respondents generally believed that the proposed form for the enduring power was suitable and practical, and agreed that the explanatory information should be included in every enduring power. Suggestions for refinement of the form included the following:

1 The form should include provision for formal acceptance by the agent.

---

854 See eg the Western Australian scheme (Creyke 1991 **Western Australian Law Review** 138). Also in England and Northern Ireland explanatory information to be included in the enduring power is prescribed by regulation (Alberta Law Reform Institute **Final Report No 88** 2003 39-40).

855 Cf eg Alberta Law Reform Institute **Report for Discussion No 7** 1990 48.

2 The explanatory notes in the form should include information to ensure that the agent understands what is expected of him or her, and understands the consequences of failing his or her duty.

3 The explanatory information should emphasise the importance of regular reviews of the powers granted, to ensure that an enduring power remains an appropriate reflection of the wishes of the principal.

4 The form should include additional identifying information about the principal and agent, including their identity document (ID) numbers.

5 Strong views were expressed about the need for the form to be supplied by the legislator in all official languages. Many respondents submitted that an important document such as an enduring power should be drafted in the principal's mother tongue.

6.116 The Commission confirms its view that an enduring power is a highly personal document reflecting autonomous preferences by the principal. The unique circumstances of the principal will dictate the contents of the power. On reconsideration, and on the basis of the personal nature of the concept, the Commission deviated from its preliminary recommendation in Discussion Paper 105. The Commission is now of the view that the draft legislation should include an example of an enduring power, to assist the public and to facilitate the use of the concept. However, it should not be a legal requirement for an enduring power of attorney to be "substantially in the form of" that example. It should thus also not be required that every enduring power contains the informational notes attached to the example. The Commission is not convinced that the mandatory inclusion of these notes in every enduring power would indeed assist in curbing possible misuse and abuse of enduring powers. Misuse and abuse are amply addressed by other proposed measures, including the possibility of removal of the agent by the Master or the Court,[856] and by the provision for offences and penalties.[857]

6.117 An agent formally accepting an authorisation would go hand in hand with a statutory duty to act. For the reasons stated in paragraph 6.70, the Commission does not agree with comments that favour an agent to formally accept the authorisation. Our

---

856 See Cl 93.

857 See Cl 125.

approach is in accordance with common law rules governing ordinary powers of attorney.[858] Officials from the Masters' Offices, in particular, agreed with our approach, and pointed out that formal acceptance would serve little purpose because no agent can be forced to act under an enduring power.

6.118 Nothing would prevent a principal from executing an enduring power in his or her mother tongue. However, the Masters Division foresaw practical problems in this regard. Concerns were raised that enduring powers submitted to the Master for registration would need to be scrutinised for compliance with execution formalities, and this task would fall to officials who might not be sufficiently fluent in all official languages to perform this task. Making the proposed legislation and/or the example for an enduring power available in all official languages is a practical matter, which could be addressed by the Department of Justice and Constitutional Development once the legislation has been enacted.

6.119 With regard to the other suggestions referred to in paragraph 6.115 above, the Commission further developed the information in the example of an enduring power included in Schedule 1 to the draft Bill, and in the accompanying informational notes to include these suggestions. Provision is now made for information to properly identify the principal and the agent in the example of an enduring power.[859] The following relevant information is included for the benefit of the principal: Information on the importance of regular review of the power to ensure that it continues to convey the principal's wishes accurately. The following information has now been included for the benefit of the agent: information on the wideness of the powers granted to an agent;[860] on the time when an enduring power takes effect;[861] on whether the court may require an agent to give security for the proper performance of his or her duties;[862] on the responsibilities of an agent, including the meaning of a duty of care and a fiduciary duty owed to the

---

858 See par 6.17 above. Formal acceptance by the agent is not required for an ordinary power to be valid.

859 See also cl 68(1)(c) of the draft Bill.

860 See also cl 66 and 67 of the draft Bill.

861 See also cl 77 of the draft Bill.

862 See also par 6.159 et seq below and cl 82 of the draft Bill.

principal;[863] on the possibility of resignation by the agent;[864] and on termination of the agent's duties by the Master or the Court, if not performed properly.[865]

Report recommendation

6.120 ***The Commission recommends that a specific mandatory form of enduring power of attorney should not be prescribed. The draft Bill should contain an example of an enduring power of attorney, to provide guidance on the legally required content of an enduring power. The example should include explanatory notes for the information of the principal and the agent. (Draft Bill, clause 68(2); Schedule 1, and the Annexure to the Schedule.)***

Non-compliance with formalities

6.121 A particular difficulty with regard to execution formalities is that unless some form of relief is provided, an ignorant or inadvertent failure to comply with a specific formality will defeat the intentions of a principal who has the necessary capacity, who understands the enduring power, and who wants to appoint an agent in terms of the power.[866]

6.122 In some jurisdictions it has been suggested that an enduring power should not be invalid by reason of non-compliance with any formalities prescribed, other than the requirements of writing and signature. It is believed that a Court should have the power to "cure" technical defects in a document by looking at the intention of the principal rather than at the document itself.[867] It has, for instance, been recommended by law reform bodies that an enduring power should not be invalid under these circumstances if

---

863 See also cl 88 of the draft Bill. See also par 6.177 on the duty to keep records and to account.

864 See also cl 92 of the draft Bill.

865 See also cl 93 of the draft Bill.

866 Alberta Law Reform Institute **Final Report No 88** 2003 8.

867 English Law Commission **Report No 231** 1995 127.

the Court is satisfied "by clear and convincing evidence that the agent signed and understood the power",[868] or "that the persons executing it intended it to create an enduring power".[869]

6.123 The Commission agrees that purely technical grounds alone should not invalidate an enduring power. It may be that the principal will have suffered irreversible loss of capacity by the time the defects are discovered; or the power is rejected if, for instance, registration is required as a triggering event in the case of a conditional power. In such a case, a valid enduring power can no longer be executed.

Discussion paper recommendation, comment and evaluation

6.124 Discussion Paper 105 recommended that legislation should provide that the Court may declare a power of attorney that is signed by the principal, or by another person in his or her presence and by his or her direction, but which does not comply with the other required execution formalities, to be a valid enduring power – if the Court is satisfied that the persons executing the power intended to create an enduring power.

6.125 Respondents agreed in principle with this recommendation. They requested that the recommendation should be extended to cover past ordinary powers that were made in the belief that such powers will endure, as well as past acts performed under such powers. This request is discussed in paragraph 6.232 et seq below.

6.126 In developing our final recommendations, the Commission reconsidered its Discussion Paper recommendation to allow a document signed by some other person, in the presence of and by the direction of the principal, to be eligible for possible validation. We now believe that allowing this would increase the possibility of misuse and abuse. The final recommendation was thus reformulated to allow for documents signed only by the principal to be eligible for possible validation.[870]

---

868 Alberta Law Reform Institute **Final Report No 88** 2003 8.

869 English Law Commission Report **No 231** 1995 127.

870 See par 6.232 et seq below and cl 96 of the draft Bill.

Report recommendation

6.127 ***The Commission recommends that pure technical grounds alone should not invalidate an enduring power. It is recommended that legislation should provide the Court with the power to declare that a document not in the prescribed form shall be a valid enduring power of attorney, if the Court is satisfied that the document purported to be an enduring power was signed by the principal, that the principal understood the nature and effect of the document, and that the principal intended the document to be an enduring power of attorney in terms of the draft Bill. (Draft Bill, clause 72.)***

4 Triggering event safeguards

6.128 Triggering event safeguards are aimed at conclusively establishing or indicating when the agent may start validly acting under an enduring power. They are particularly relevant in the case of conditional powers. As indicted previously, a conditional power comes into force only when the contingency provided for in the enduring power – usually the onset of decision-making impairment in the principal – occurs.[871] The practices listed below are examples of mechanisms used, either individually or in combination, as triggering event safeguards in other systems. Our preliminary recommendations are given after discussing all three possibilities.

A declaration of occurrence of event

---

[871] See par 6.57 et seq.

6.129 This method usually consists of requiring testimonials from certain persons on the state of the principal's capacity, for instance:

1 Requiring a written declaration from a *person or persons named* in the power for this purpose, usually a person whom the principal trusts, that the decision-making impairment of the principal has occurred.[872] Where this is done it might be advisable to provide for naming alternative individuals, as the person might not be called upon to act for many years after the instrument is drafted, and by the time the event occurs they might no longer be available. It might also be advisable to provide that the same person may not both certify incompetence and act as agent, because of a possible conflict of interest.[873]

2 Requiring concurring written declarations from *two medical practitioners* that the decision-making impairment of the principal has occurred. Often this requirement is used as an alternative to the former. That is, where no person is named in the power to declare that the triggering event has occurred, or where the person named has died or is unable to act, the principal is protected against unwarranted declarations of that his or her ability has become impaired by the requirement that two medical practitioners must concur in the decision before the power can take effect.[874] This requirement is considered by some as the easiest and most conclusive manner by which to establish the incompetence of the principal.[875]

3 Requiring positive assessment of the principal's impairment from an "assessor" (who is of a class prescribed by regulation).[876]

4 Requiring a *Court order* – on application by a relevant public office, nearest relative, or interested person – that the triggering event has occurred.[877]

5 Requiring a certificate of "incapacity" under *mental health legislation*.[878]

---

872 As in Alberta, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 5).

873 Cf Schlesinger and Scheiner 1992 **Trusts and Estates** 41.

874 As in Alberta, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 5).

875 Cf Schlesinger and Scheiner 1992 **Trusts and Estates** 41, 43.

876 As in Ontario, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 5).

877 As in Manitoba, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 38); Schlesinger and Scheiner 1992 **Trusts and Estates** 41.

6.130 It should be noted that the effect of the declaration mechanism, whichever of the above is used, is that the power will come into effect upon the written declaration of the named person or body, and will not depend on whether such person or body has made a "correct" determination that the contingency has occurred. The principal in effect would be delegating to another person (or body) the power to make the power of attorney effective. Third parties would not have to be concerned with questions such a whether the principal was "really competent". The true position is clearly described by the Law Reform Commission of British Columbia in its analysis of this type of legislation:[879]

> It is not the occurrence of the triggering event that causes the power of attorney to take effect – it is the proof of that event in a particular fashion. If the person named in the instrument declared in writing that the contingency has occurred then the power of attorney takes effect whether or not the declaration was correct. It is the declaration that is critical.

6.131 In deciding on an appropriate declaration mechanism, two competing considerations have to be kept in mind. The first is the need to protect the principal against an unwarranted “declaration of incapacity” and consequent loss of power to manage his or her affairs – which suggests the need for strong safeguards. The second is the need to protect the principal against his or her own impairment, which may result in mismanagement or dissipation of such principal’s property – which suggests that procedures causing unnecessary delays should be avoided. [880]

Registration of the enduring power

6.132 According to this practice, the agent is usually required to register the enduring power with the Court (or a tribunal or public office), sometimes with notice to the principal

---

878 Ibid.

879 Law Reform Commission of British Columbia **Report on the Enduring Power of Attorney** 1990 17.

880 Cf the Alberta Law Reform Institute’s reasoning in its **Final Report No 88** 2003 20.

and certain prescribed persons, with provision for objection on grounds of prematurity, fraud, or unsuitability of the agent.[881] Application for registration can usually be made only when the principal is or is becoming incapable, and the Court usually has broad powers to make orders or determine questions regarding the enduring power.[882] In the latter sense, registration could also fulfil a supervisory purpose.[883]

6.133 The requirement of registration usually implies that the agent has very limited or no powers prior to registration and gains *full* authority only when the application for registration has been accepted by the Court or a relevant official office.[884] It could further entail that that the principal thereafter has no ability to acct, even though he or she may in fact have such ability.[885] Registration in this sense thus fails to take into account the likelihood of partial or fluctuating decision-making impairment. Registration may however give certainty to third parties.

6.134 Arguments for registration include the following:

1 Registration of an enduring power brings the document into the public domain. The advantage of this is it might discourage agents from abusing their powers, especially those agents who would have abused their powers had such powers remained in the private domain.[886]

2 Registration serves to provide a point of reference for those persons who have queries or concerns about the status of a particular document. As registration in this sense serves to enable proof of the power and establishes its validity, certain jurisdictions where registration has been

---

881 As eg in England (Alberta Law Reform Institute **Final Report No 88** 2003 39).

882 As eg in England, Scotland, the Republic of Ireland and Northern Australia (Alberta Law Reform Institute **Final Report No 88** 2003 39-41).

883 See the discussion in par 6.150 et seq below.

884 Cf Atken 1988 **New Zealand Law Journal** 368.

885 Cf the British model before recommendations for reform as discussed in the English Law Commission **Consultation Paper No 128** 86 et seq.

886 Cf English Law Commission **Report No 231** 1995 117; comments of Ms Margaret Meyer submitted to the Project Committee at its meeting on 1 December 2003.

rejected require the enduring power to be filed in a Court office or recorded in a specific public office.[887] Experts suggest that if no provision is made for the power to be registered or filed, alternative measures should be available to enable proof of the power.[888] Related to this is the argument that registration can serve as a point of departure from which allegations regarding misuse could be based. That is, if there is no record of an enduring power of attorney, how would the supervisory authority deal with alleged misuse of enduring powers of attorney?[889]

3 Registration distinguishes enduring powers of attorney from ordinary powers of attorney, as no formalities are required for ordinary powers of attorney. Registration also ensures that the requirements for enduring powers of attorney are complied with.[890] This argument is based on the premise that an enduring power of attorney should at least be required to comply with more stringent execution formalities than an ordinary power of attorney, because of its implications after the onset of the principal's decision-making impairment. If there is no registration requirement, there will be no control over whether the prescribed execution formalities (eg that the enduring power must be signed and witnessed in a prescribed way) have been complied with.

4 Finally, registration deals with the practical problems that can arise where the principal grants several enduring powers. Although a principal can make as many powers as he or she wishes, different agents might be given the power to deal with the same matters. In the case of ordinary powers of attorney, the only brake on such practice is the good sense of the principal or caution on the part of agents. As some enduring powers will be executed by principals when they face a decline in their faculties, good sense may be lacking. This is also a time when unscrupulous people might seek to take advantage of a principal's lack of competence.[891]

---

887 The United States Model Act (see par 6.3 above) for instance requires filing of an enduring power (Creyke 1991 **Western Australian Law Review** 128).

888 Cf Josling 31-32.

889 Comments of Ms Margaret Meyer submitted to the Project Committee at its meeting on 1 December 2003.

890 Ibid. Cf the requirements for an ordinary power of attorney as discussed in par 6.10 et seq above.

891 Creyke 1991 **Western Australian Law Review** 128.

6.135 Arguments against registration include the following:

1 In jurisdictions where registration was required, the number of people who registered enduring powers was low. People either did not go to the trouble of registering or, where the power was registered, third parties failed to check the register. Registration is therefore regarded by some as a waste of time and resources. [892]

2 Failure to register (if it were a requirement) would irrevocably invalidate the power and frustrate the expressed intention of the principal. This would create considerable risks for a principal l whose decision-making ability has become impaired.[893]

3 Registration is problematic because of its formality and possible cost, which might deter the public from utilising enduring powers.[894]

4 Where registration implies recording the enduring power in a public registry, objections to registration requirements can be expected on grounds of privacy infringement. The requirement would therefore have to be shaped so that it would convey sufficient information to those who need to know, while protecting the essential privacy of the principal and other persons involved.[895]

5 In several jurisdictions where registration was rejected, enduring powers of attorney schemes appear to be working satisfactorily without this additional safeguard.[896]

6.136 It would seem that generally registration is not a popular requirement, except with regard to the well-established requirement for registering enduring powers of attorney to

---

892 Ibid 129.

893 Ibid.

894 Carney 1999 **New Zealand Universities Law Review** 491.

895 Cf Alberta Law Reform Institute **Final Report No 88** 2003 21.

896 Eg in Ontario and Manitoba, Canada (Creyke 1991 **Western Australian Law Review** 129).

deal with the transfer of land.[897] In some jurisdictions where the registration requirement has been rejected, less onerous protective mechanisms have been adopted. These include focusing on defining and explaining the standards of behaviour of agents in prescribed explanatory notes attached to the enduring power, and supplementing this by giving a relevant official body – rather than a Court – an advisory and supervisory role.[898]

6.137 We note with interest that in the course of law reform to curb the abuse of enduring powers of attorney in Alberta (Canada) and New Zealand (see paragraph 6.3 above), both jurisdictions refrained from introducing registration as additional safeguard. The reasons advanced for this decision were mainly the following:[899]

1 The possible cost inherent in registration (based on the premise that a registration fee will be payable for spot audits done by a public registrar).
2 The possible intrusion into privacy which registration might entail.
3 Lack of effectiveness of a registration requirement, if there is no additional safeguard to ensure that registration *indeed takes place* (eg by providing that no-one is entitled to deal with an agent unless the enduring power of attorney bears a stamp of registration).
4 Registration's possible inhibiting effect – which was considered not to justify its possible benefits.

In contrast to the above arguments, registration was retained as a requirement in England, and was introduced as a requirement in law reform in Scotland, with regard to enduring powers of attorney. The reasons cited for retaining and introducing registration were mainly the following:[900]

---

897 In several legal systems, law reform bodies did recommend registration but it was not implemented in subsequent legislation (eg in Ontario and Manitoba, Canada; Tasmania and Victoria, Australia) (Creyke 1991 **Western Australian Law Review** 128). However, in both England and Scotland where reform has been effected recently, the requirement of registration has been retained (English Law Commission **Report No 231** 1995 119; Adults with Incapacity (Scotland) Act 2000 sec 19).

898 As suggested eg by the Australian Law Reform Commission in 1988 for introduction in the Australian Capitol Territory (Creyke 1991 **Western Australian Law Review** 130).

899 Alberta Law Reform Institute **Final Report No 88** 2003 22; see also New Zealand Law Commission **Preliminary Paper 40** 2000 7-8.

900 English Law Commission Report **No 231** 1995 117; Scottish Law Commission **Report No 151** 1995 34-36.

1 Registration of an enduring power will bring the document into the public domain.
2 It will provide a point of reference for persons who have queries or concerns about the status of a particular document.
3 It will distinguish enduring powers form ordinary powers of attorney.

The English Law Commission emphasised that the registration requirement is directed only at those principals who need it (ie registration is required to take place only after the onset of the principal's decision-making impairment). An agent may thus act under an enduring power of attorney while the principal is still mentally capable, without having the power registered.[901] Both law reform bodies also emphasised that the registration requirement they propose is a simple and straightforward procedure.[902]

Notice by the agent of intention to act

6.138 In some systems, requiring the agent to give notice of his or her intention to act under the power has been introduced as an alternative to registration, or as additional safeguard against abuse (in addition to registration). This applies to both conditional and continuing powers.[903]

6.139 This practice entails that *with the onset of the principal's decision-making impairment* and when the agent intends to act under the power (in the case of a conditional power), or to continue to act (in the case of a continuing power), the agent is required to give notice of this intention to specified persons designated by the power to

---

901 English Law Commission Report **No 231** 1995 118.

902 Ibid 117; Scottish Law Commission **Report No 151** 1995 34.

903 Cf the proposals of the Alberta Law Reform Institute, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 (x)).

receive the notice.[904] The notice must be given within a prescribed time.[905] Examples of requirements for persons to receive the notice are the following:

- Notice should be given to at least a specific minimum number of people, some of whom must include specified family members.[906]
- Notice should be given to every family member whose whereabouts are or ought reasonably to be known to the agent, and to any person designated in the enduring power to receive such notice. In this instance "family member" includes a spouse, adult interdependent partner, or parent of the principal; or an adult child, brother, or sister of the principal.[907]

6.140 Certain jurisdictions recognise that not all families are united and thus allow the principal to exclude, in the enduring power, a specific family member(s) from receiving the notice, especially where it is required that *all* family members be notified. In Alberta, Canada, the Law Reform Institute recommended that where the principal excludes *all* family members without appointing another person or persons to receive the notice, the proposed safeguard will not be operative. Thus they acknowledged the autonomy of the principal, despite the possibility that an agent might persuade a principal to exclude all family members. Where a principal does not have any family members to perform protective functions, another person can be named but does not have to be. The Institute considered it unduly intrusive to compel such a principal to name another person.[908]

6.141 The Commission in 1988 recommended a combination of the first two methods referred to above, namely registration of the enduring power subject to a declaration of

---

904 Ibid (xiv).

905 In Alberta, Canada it was recommended that the agent must give the notice before or within 30 days after exercising any power under the enduring power (Alberta Law Reform Institute **Final Report No 88** 2003 (xiv)).

906 In the Republic of Ireland it is required that notice should be given to at least two people, including the living-together spouse or, if none, to a child or alternatively another relative of the principal (Alberta Law Reform Institute **Final Report No 88** 2003 40).

907 As proposed by the Alberta Law Reform Institute (Alberta Law Reform Institute **Final Report No 88** 2003 14-15).

908 Ibid 13.

occurrence of event, before an agent may validly act under an enduring power. The Commission specifically recommended the following:[909]

1 After having gained knowledge of the principal's decision-making imapairment, the agent may not continue to act upon the power – or commence to act in the case of a conditional power – until it has been filed for registration with the Master of the High Court and has been endorsed by the Master.

2 Together with the power, an affidavit must be filed by the agent, stating that the principal is in the agent's opinion incapable of managing his or her affairs, and referring to the facts on which this opinion is based; and a report of at least one medical practitioner must also be filed (dated no more than seven days before the filing), dealing with the mental condition of the principal and the probable duration of that condition.

3 The Master may, before registering the power, call for further evidence regarding the principal's mental condition.

These recommendations formed the basis of the administrative and supervisory framework established in the 1988 recommendations. It was further recommended that the Court (as well as the Master) has the power to withdraw and cancel the registration of the power under certain circumstances.[910]

Discussion paper recommendation, comment and evaluation

6.142 In Discussion Paper 105, the Commission abided in principle by the proposals in its 1988 report. The Commission indicated that it believed that the arguments for registration referred to above provide strong motivation for introducing registration. We expected, at the time, that certain persons and bodies would not agree. Nonetheless, the

---

909 SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 53-54.

910 Ibid 53-57.

Commission submitted that neither the execution formalities nor the registration requirement proposed would detract from the independence of the agent or the autonomy of the principal after registration. After registration, the agent could operate without interference, as it was clear that the Commission did not propose obligatory submission of accounts or any further obligatory requirements or formalities. The registration requirement proposed was fairly straightforward and simple, and did not involve registration with a Court of law. In addition, we proposed that the affidavit required in respect of the condition of the principal should be made by a person named in the power, or alternatively by a medical practitioner. This proposed practice would be in line with emphasising the principal's right to autonomy (by naming a person to indicate the stage at which the power could become effective). Moreover, minimal or no costs would probably be involved in registration with the Master of the High Court. The Commission believed that registration would be useful, as it would publicly record the existence of an enduring power and would publicly identify the agent. The latter, especially, was seen as important for the protection of both the principal and the agent. The Commission, however, also pointed out that strong views had been expressed in other jurisdictions by law reform bodies that these reasons were not sufficient to make registration mandatory.[911] In some jurisdictions where registration has been rejected, notice by the agent to specified persons is required as the alternative triggering event safeguard.[912] In other jurisdictions, where more stringent methods are preferred, registration as well as notice to specified persons is required.[913]

6.143 At that stage the Commission believed that the latter procedure might be too cumbersome, whereas the former might be too informal. We invited comment on our recommendation that legislation should provide that after having gained knowledge of the principal's decision-making impairment, the agent may not continue to act upon an enduring power – or commence to act on a conditional power – if it has not been filed for registration with the Master of the High Court and been endorsed by the Master. We

---

911 See eg Alberta Law Reform Institute **Report for Discussion No 7** 1990 534 et seq.

912 See eg the recommendations of the Alberta Law Reform Institute in its latest report on the matter (**Final Report No 88** 2003 11).

913 See eg the recommendations of the English Law Commission (English Law Commission **Report No 231** 119-120); and the Adults with Incapacity (Scotland) Act 2000 sec 19.

recommended that together with the power, the agent must file one of the following documents:

- An affidavit by a person named in the power (which person may be the agent), dated not more than seven days before the filing of the power, stating that the principal is, in the opinion of such person, "incapacitated" (in accordance with the definition of "incapacity" proposed in clause 4 of the draft Bill included in Discussion Paper 105 at the time). The affidavit must refer to the facts on which the opinion is based.
- Alternatively, the agent can file a report by a medical practitioner to the same effect.

The Master should be enabled, before registering the power, to call for further evidence regarding the principal's mental condition if necessary.

6.144 Respondents in general supported the recommended registration requirement, and did not believe that it would be too cumbersome.

6.145 However, many respondents submitted that the triggering event safeguard (ie a declaration by a person named in the power, or a medical certificate) should rather be the compulsory submission of a medical certificate. Some pointed out that family of the principal, who would most probably be the persons named in the power, should not be burdened with this traumatic responsibility.

6.146 Several respondents expressed concern that the Master is not compelled in the draft Bill to attend to registration within a specified period of time. It was suggested that a time limit (for instance, 30 days) be included in the draft Bill.

6.147 In developing its final recommendations, the Commission confirms its preference for requiring the registration of an enduring power, for reasons referred to in paragraphs 6.134 and 6.142 above. The proposed registration requirement has been developed to

include a comprehensive application procedure. The latter includes the compulsory submission of evidence that the principal is a person with disability who requires support in exercising legal capacity at the time of application for registration of the power.[914] In the reformulation, the wide discretion of the Master to register the power has been curbed; he or she is now obliged to register the power if certain conditions are fulfilled.[915] Respondents' concerns about the lack of compulsory action by the Master within a certain specified time will be covered by the requirements for reasonable administrative action in the Administration of Justice Act, 2002.

6.148 In further developing the draft Bill, additional provisions have been included that require the Master to return to the agent a certified copy of the power, endorsed to the effect that it has been registered.[916] The certified, endorsed copy of the power will serve as evidence of the contents of the power and of the fact that it has been registered.[917]

Report recommendation

6.149 ***The Commission recommends that enduring powers of attorney must be registered. We recommend that an agent may not act in terms of an enduring power of attorney after the principal has become a person with "disability" as defined in clause 4 of the draft Bill, unless the power has been registered with the Master of the High Court. An application for registration, and the decision to register, must be made in accordance with the requirements of the proposed draft legislation. These requirements include that on registration, the agent must submit reports by one or more health care practitioners on the nature, extent, and probable duration of the principal's "disability", and whether the principal requires support in exercising legal capacity. The principal must have been served with a written notice of the agent's intention to register the enduring power and may object to the application for registration. (Draft Bill clauses 77 – 81.) The Master***

---

914 See cl 78(2)(e).

915 See cl 79.

916 Cl 80.

917 Cl 81.

must maintain proper record of all original enduring powers of attorney registered, and must, in addition, keep a register of all such powers. It is recommended that a certified copy of an enduring power, endorsed by the Master to the effect that it has been registered, should be regarded as proof of the content of the power and of the fact that it has been registered. (Draft Bill clauses 80, 81, and 100.)

5 Supervisory and accounting safeguards

6.150 The advantage of an enduring power is that it enables an honest agent to look after the affairs of the principal efficiently. The downside could be that it enables a dishonest agent to misuse and abuse his or her powers – although of course the same can be said of any device under which one person obtains control of another person's money or property.[918] Supervisory safeguards are aimed at generally ensuring that agents will not abuse their powers.

6.151 In many jurisdictions, a specific public office or administrative tribunal is given powers of supervision and control over agents who act under powers of attorney.[919] In other jurisdictions, such supervision and control is left to the Courts.[920] In both instances, typical supervisory powers relate to termination of the power; variation or substitution of the terms of the power; the appointment of substitute agents; review of particular decisions of the agent; and providing the agent with advice and directions in general.[921] In both instances, provision is usually made for specific procedures to be followed to protect the interests of the principal. For instance, notice must be given to a wide range of persons regarding any application to the Court or tribunal, and a legal representative

---

[918] Alberta Law Reform Institute Final **Report No 88** 2003 10.

[919] See eg the Western Australian model as discussed by Creyke 1991 **Western Australian Law Review** 138.

[920] See eg the New Zealand system (Atkin 1988 **New Zealand Law Journal** 370-371).

[921] Creyke 1991 **Western Australian Law Review** 138; Atkin 1988 **New Zealand Law Journal** 370-371.

must be appointed to represent the principal.[922] Some research suggests that the most practical and effective mechanism for dealing with abuse of enduring powers is through provision of easy access to a specific tribunal or a public office, rather than the Courts).[923] The choice of forum may prove crucial to the success of a system of enduring powers of attorney.[924] In jurisdictions where control over enduring powers was left to the Courts in addition to other supervisory bodies, the Courts – which are expensive to access – are rarely relied on for this purpose.[925]

6.152 Examples of typical supervisory and accounting safeguards include the following:

1 Requiring authorisation of more than one agent.
2 Requiring the agent to provide security to the satisfaction of a Court, public office, or tribunal.
3 Requiring enduring powers to be registered.
4 Compelling the agent to act under an enduring power and requiring a specific duty of care from the agent.
5 Requiring the agent to periodically submit accounts to certain persons or offices – for instance, specific relatives of the principal, a public office, or the Court.
6 Providing the agent with the opportunity to call for advice.
7 Providing for revocation and termination of the power.

It is clear that some of these safeguards would depend on enabling the Court, a public office, or other tribunal to play a supervisory role. As indicated previously, requiring the agent to keep records or to account for his or her actions, providing for termination of the power, and providing for objections to the power are frequently regarded as minimum supervisory requirements.

6.153 We indicated in Chapter 4 of this report that we are in favour of the Master of the High Court fulfilling administrative and supervisory role, with the High Court becoming

---

922 Cf Atkin 371.

923 Carney 1999 **New Zealand Universities Law Review** 492.

924 Ibid 494.

925 Ibid.

the supervisor of last resort. We envisage that the availability of the enduring power as an anticipatory measure for supported decision-making should form part of a broader system of supportive decision-making measures. It would be preferable if the same supervisory framework could be used throughout such a system. This view is in concert with the Commission's 1988 recommendations, which endowed the Master (with the Court as last resort) with the administrative and supervisory powers in respect of enduring powers of attorney.

Requiring more than one agent

6.154 To reduce the risk of mismanagement and exploitation, recommendations were made in certain jurisdictions requiring a principal to appoint a minimum of two agents who would have to act "jointly" (ie in concert with each other).[926] It was submitted that each agent would guard against abuse of the enduring power by the other agent, by checking on each other's conduct.[927] Other jurisdictions have strongly rejected this practice, arguing that such a requirement would interfere with the autonomy of the principal, would be cumbersome, would introduce additional complexity and inconvenience, and would create unnecessary potential for disagreement.[928] Moreover, one agent could delegate substantial power to the other, so there would still be potential for abuse.[929] Where more than one agent is appointed, the possibility of conflict is obvious and measures would have to be enacted to indicate how such conflict should be resolved.[930]

6.155 We believe that the disadvantages pointed out above clearly outweigh the advantages of compelling a principal to appoint more than one agent. We are thus not in

---

926 It is allowed under common law that a principal can together appoint two (or more) persons as agents to execute the same transaction (***Kinemas Ltd v Berman*** 1932 AD 246; Joubert 103-104; De Villiers and Macintosh 120-123).

927 Recommendations in this regard by the English Law Commission were, however, not implemented (Alberta Law Reform Institute **Report for Discussion No 7** 1990 62).

928 Alberta Law Reform Institute **Report for Discussion No 7** 1990 62, and **Final Report No 88** 2003 20.

929 Cf Alberta Law Reform Institute **Final Report No 88** 2003 20.

930 See eg the New Zealand model as discussed by Atkin 1988 **New Zealand Law Journal** 371-372; cf also English Law Commission **Consultation Paper No 128** 1992 99-100.

favour of recommending that the proposed legislation should include such a requirement.

Discussion paper recommendation, comment and evaluation

6.156 Discussion Paper 105 recommended that proposed legislation should not contain a requirement for mandatory joint agents to be appointed by a principal.

6.157 Comments supported this view.

Report recommendation

6.158 ***The Commission confirms that the mandatory appointment of joint agents is not supported*.**

Requiring that the agent provides security

6.159 A requirement that an agent under an enduring power provides security for the proper execution of his or her duties is regarded by some as a possible safeguard.[931] In practice this can be constructed by, for instance, giving the supervisor discretionary powers to decide whether security should be furnished, and making the registration of the power subject to the provision of security.[932]

6.160 In most jurisdictions, requiring security is not used as a safeguard against abuse of the principal's interests. The additional cost and inhibiting effect of requiring security are apparently regarded as disadvantages that would distract greatly from the cost-effectiveness of enduring powers, and would be likely to derogate from their use.[933]

---

931 See eg the 1988 proposals of the South African Law Commission as discussed in par 7.113 below. These proposals were not implemented.

932 Ibid.

933 Cf Alberta Law Reform Institute **Final Report No 88** 2003 23.

6.161 The Commission's 1988 recommendations provided that the Master of the High Court may require an agent to furnish security for the amount determined by the Master, unless the agent has been exempted from this under the enduring power.[934] The Master may also reduce or discharge any security given, or require that the agent furnish additional security.[935] According to these recommendations, registration of the power should be subject to furnishing such security (where it is required). The Commission's preliminary view as expressed in Discussion Paper 105 – again with the aim of providing a simple and accessible procedure – was that security should not be obligatory. The Commission was of the view that the costs and inhibiting effect of requiring security could detract from the cost-effectiveness of enduring powers, and could derogate from their use. There may, however, be circumstances where security could be necessary to protect the interests of the principal. The Commission at the time indicated that it believed that the Master would be in the best position, when registering an enduring power, to ascertain whether security was necessary in a specific case.

Discussion paper recommendation, comment and evaluation

6.162 Discussion Paper 105 recommended that legislation should provide that, except where the principal has exempted the agent in an enduring power of attorney from furnishing security, the Master should have the discretion to require security where it is necessary in a specific case. The Master should also be able to reduce or discharge any security given, or require that the agent furnishes additional security.

6.163 No dissenting comment was received on this preliminary recommendation.

6.164 In further developing the provision relating to security, the Master's discretion to require security was expressly limited to enduring powers relating to property,[936] and for

---

934 SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 54-55.

935 Ibid.

936 Cl 82(2).

the express purpose of securing proper performance of duties by the agent.[937] The Commission further expressly indicated that the reasonable cost of giving security must be paid out of the estate of the principal,[938] and that the Master has the authority to enforce the security under certain circumstances.[939]

Report recommendation

6.165 ***The Commission recommends that legislation should provide the Master of the High Court with the discretion, before registration of an enduring power, to require security from an agent authorised under an enduring power relating to property. The Master should be able to require security when satisfied that this is necessary for the proper performance of the agent's duties, except where the principal has exempted the agent from giving security. The Master should have the discretion to reduce, discharge, or increase the security subsequently, and to enforce the security if the agent fails to perform properly. The reasonable cost of giving security should be paid out of the estate of the principal. (Draft Bill, clause 82.)***

Registration of an enduring power

6.166 Registration is discussed in paragraph 6.132 e seq above under "Triggering event safeguards". Where registration is introduced to fulfill a supervisory purpose in addition to being a triggering event safeguard, the supervisor (usually the Court or other public office or tribunal) is generally granted broad powers in respect of enduring powers, including the power to revoke or terminate an enduring power.[940]

---

937 Cl 82(1)(a).

938 Cl 82(3).

939 Cl 82(4).

940 Eg the registration schemes in England, Scotland and Ireland (Alberta Law Reform Institute **Final Report No 88 2003** 22).

6.167 The advantages and disadvantages of registration, in terms of triggering event safeguards, also apply to its utilisation as a supervisory safeguard. It is indicated above that for various reasons registration is not a popular requirement.[941]

6.168 As indicated in our final recommendation in par 6.149 above, the Commission is in favour of registration as a triggering event safeguard. We also indicated that registration will serve as basis for supervisory safeguards such as withdrawal of the power. These safeguards are discussed in paragraph 6.150 et seq.

Imposing a duty to act and requiring a specific standard of care from an agent

6.169 In several jurisdictions, a statutory duty is imposed on an agent to act under an enduring power.[942] The main argument in favour of this practice is that without it, the appointment of an agent "may be an act of futility".[943] In the absence of a contractual undertaking by the agent, an enduring power of attorney would impose no legal obligation on the agent to exercise the authority which it confers.[944] In granting an enduring power, principals are preparing for their own decision-making impairment with the expectation that the agent will manage their affairs once their ability to do so themselves has become impaired. This expectation may be frustrated if the agent is under no legal duty to exercise the authority conferred by the power.[945]

6.170 Opponents of imposing a statutory duty raise the following concerns:[946]

---

941 Alberta Law Reform Institute **Report for Discussion No 7** 1990 54. See also par 6.135 et seq above.

942 Alberta Law Reform Institute **Report for Discussion No 7** 1990 67.

943 Ibid (referring to the views of the Law Reform Commission of British Columbia).

944 Authorisation under common law is usually closely related to an express or tacit agreement between principal and agent that the agent will execute the mandate (Joubert 168-169; Hutchison in **Wille's Principles of South African Law** 592; De Wet in **LAWSA Vol 1** par 114; Kerr 166). The existence of such agreement may, however, not be completely clear, especially where the agent tacitly accepts the mandate.

945 Alberta Law Reform Institute **Report for Discussion No 7** 1990 68; Manitoba Law Reform Commission **Report No 83** 1994 16-18.

946 Cf Scottish Law Commission **Discussion Paper No 94** 1991 292.

- It could be onerous and compliance with it could be difficult.
- A statutory duty would be unrealistic where the agent is a close relative of the agent.
- It might deter people from consenting to act as agent.
- The scope of a statutory duty is unclear – for instance, there could be uncertainty on whether it extends to attending to the needs of the principal's dependants.

Proponents, on the other hand, doubt whether a statutory duty will deter people from consenting to act as agents. They argue that even if it does, it is far preferable that people decline an appointment as agent rather than simply refraining from acting under the power after the onset of the principal's decision-making impairment. Proponents submit that a duty to act would reflect the understanding and expectations of most principals and agents. If in a particular case the duty to manage the principal's affairs proves to be too onerous or difficult, the agent can apply to the Court to be relieved of such duty.[947] Finally, any lack of clarity regarding the scope of a statutory duty can easily be addressed in the relevant legislation.[948]

6.171 Where a statutory duty to act is indeed imposed, it is usually done with qualifications with regard to the following:

1 The nature and scope of the duty (ie the standard of care expected from the agent in handling the affairs of the principal). The following practices are followed in other jurisdictions:

- Equating the nature and scope of the duty under an enduring power to that of a trustee. Opponents of this practice, however, argue that many of a trustee's duties are inappropriate in the context of an enduring power.[949]
- Dealing with the issue more directly by expressly requiring that the

---

947 See par 6.215 et seq below where resignation by the agent is discussed.

948 Alberta Law Reform Institute **Report for Discussion No 7** 1990 68-69; Manitoba Law Reform Commission Report **No 83** 1994 16-18.

949 Alberta Law Reform Institute **Report for Discussion No 7** 1990 69-70.

agent must act "with reasonable diligence to protect the interests of the principal".[950] Note that in some legal systems, the standard of care required from an agent under common law varies according to whether the agent is being paid or not. Where the agent is acting in a voluntary capacity (ie where he or she is not paid and is thus performing a favour rather than earning a fee), there is no obligation at all on the agent to act.[951] To impose a duty to act with reasonable diligence in cases where the agent is not paid thus amounts to requiring a higher standard of care from an agent than that required by the common law. In South Africa this distinction between a paid and an unpaid agent does not apply. Whether the agent is paid or not, the common law standard of care remains that of the reasonable person. Under South African common law, an agent acting under an ordinary power of attorney must carry out his or her instructions with due care and diligence. The standard of care is the normal one of a reasonable and prudent person in the circumstances of the case. This standard of care applies whether the agent acts gratuitously or for reward. [952]

2 The time when the duty arises. In most jurisdictions where a statutory duty is imposed, the duty usually arises either on the mental incompetence of the principal – and then only when the agent knows, or ought to know, that the principal is mentally incapable of managing his or her affairs;[953] or on execution of the power, subject to any explicit instructions given by the principal while still competent.[954] Opponents of the first-mentioned practice reject it because of the difficulties involved in determining the onset of

---

950 Ibid 70; see also the position in Western Australia (Creyke 1991 **Western Australia Law Review** 139).

951 This is the position, for instance, in Australia (Creyke 1991 **Western Australia Law Review** 133) and Canada (Manitoba Law Reform Commission Report **No 83** 1994 16).

952 Joubert 211-213; De Villiers and Macintosh 326 et seq; Kerr 167-170; de Wet in **LAWSA Vol 17** par 10; Hutchison in **Wille's Principles of South African Law** 600. ***Weber & Pretorius v Gavronsky Brothers*** 1920 AD 48 at 53 (on the normal standard or care required); ***Bloom's Woollens (Pty)Ltd v Taylor*** 1962 (2) SA 532 (A) (on the fact that payment of the agent does not play a role with regard to the standard of care required).

953 Alberta Law Reform Institute **Report for Discussion No 7** 1990 70-71.

954 Ibid; Manitoba Law Reform Commission Report **No 83** 1994 17.

decision-making impairment. Proponents, however, argue that this practice most accurately reflects the wishes of most principals. They also submit that if the second practice is followed, the agent could, in any event, act on the principal's instructions only if these were issued while the principal was mentally competent – and thus the agent might still have to make a determination as to the principal's competence.[955]

3 Whether the agent has accepted the appointment or not. Given the potential liability faced by an agent who does not act, it is considered fair to impose a duty to act only where the agent has demonstrated his or her acceptance of the agency, either expressly (for instance by signing or acknowledging the enduring power), or by implication (for instance, by acting in pursuance of the enduring power). Even though the power would probably have no legal effect in the absence of the agent's express or implied consent, it is believed that legislation imposing a duty to act should state clearly that the duty to act arises only if the agent has accepted the appointment.[956]

6.172 Examples of alternative practices, where legislators were reluctant to directly impose a duty to act and couple it with a specific standard of care, include the following:

1 Including in legislation certain general principles to guide an agent in making decisions.[957] The substitute judgment principle (requiring the agent to act as far as possible in the way the principal would have done) is frequently emphasised in this regard.[958] This principle focuses on respecting the wishes and thus promoting the autonomy of the principal. The agent would thus, for instance, be expected to continue to make

---

955 Ibid.

956 Ibid.

957 See the discussion on these principles in par 4.21 et seq. See also cl 5 of the draft Bill.

958 Creyke 1991 **Western Australia Law Review** 133. (See also the suggestions of the English Law Commission who recommended that the agent should be under no duty to act. However, if the agent acts he or she must act in the best interests of the principal taking into account the ascertainable past and present wishes and feelings of the principal; the need to encourage and permit the principal to participate in any decision-making to the fullest extent of which he or she is capable; and the general principle that the course least restrictive of the principal's freedom of decision and action is likely to be in his or her best interests (English Law Commission **Consultation Paper No 128** 1991 99)).

payments to sustain the standard of living in the principal's household at its customary level even if, to the agent, the expense might seem extravagant. Proponents of the substitute judgment principle concede that requiring adherence to it may need to be modified where the principal's wishes have not been expressed, where they are not able to be gauged, or where adherence to the principal's wishes would leave the principal destitute.[959]

2 Requiring the agent to keep accurate records and accounts. Opponents of this practice submit that accounting provisions – which are usually enforced by considerable penalties – are in any event standard in most legislation dealing with enduring powers.[960]

3 Spelling out the duties of the agent in prescribed explanatory notes that must be included in the instrument, and requiring a declaration by the agent at the time of execution of the power that he or she is willing to undertake the responsibilities as described in these notes.[961]

Discussion paper recommendation, comment and evaluation

6.173 The Commission in Discussion Paper 105 expressed the preliminary view that a duty to act should not be imposed by legislation.[962] The Commission was in particular concerned that this duty might deter people from consenting to act as agent. As pointed out by the Scottish Law Commission, a statutory duty could also impose particular difficulties where an attorney may be reluctant or unable to come to a decision, especially with regard to welfare decisions.[963] A duty to act and to exercise a particular standard of care would also be qualified by the general principles described in Chapter 4 above, which the Commission recommended should govern any intervention in the affairs of persons with decision-making impairment.[964]

---

959 Ibid.

960 Ibid.

961 Cf the proposals of the Australian Law Reform Commission (Creyke 1991 **Western Australian Law Review** 132-133).

962 SALRC **Discussion Paper 105** par 7.123.

963 Scottish Law Commission **Report No 151** 1995 39.

964 See also the Scottish Law Commission's remarks in this regard (**Report No 151** 1995 39).

6.174 Discussion Paper 105 thus suggested that a statutory duty to act should not be imposed on an agent. The common law duty of care was also not expressly included in the then proposed draft Bill. The Commission at the time observed that the Department of Justice and Constitutional Development could alert agents in guidelines about the required standard of action expected from them.[965]

6.175 No dissenting comments were received on this recommendation, and the Commission confirms that a statutory duty to act should not be imposed on an agent. However, in view of concerns raised about the protection of a principal against possible abuse by an agent, the Commission recommends that a requirement imposing the general common law duty of care should be expressly included in the proposed draft legislation.[966] Including a general duty would permit the standard of care to be adjusted depending on the circumstances of a particular case.[967] Addressing the content of the general duty of care in the explanatory notes attached to the example for an enduring power would further address public requests for supplementing these notes to include information to ensure that the agent understands what is expected of him or her.[968]

Report recommendation

6.176 ***The Commission confirms its preliminary view that a statutory duty to act should not be imposed on an agent. The proposed draft legislation should, however, refer to an agent's general common law duty of care to be afforded a principal. It is further recommended that the explanatory notes included in the example of an enduring power (referred to in our recommendation in paragraph***

---

965 SALRC **Discussion Paper 105** par 7.122.

966 See reference to the common law duty in par 6.19 above.

967 Compare eg the views held in other jurisdictions in this regard: Law Reform Commission of Nova Scotia Report on The Powers of Attorney Act 2015 165; Western Canada Law Reform Agencies' **Final Report** 2008 p 38 – 39; and the Victorian Parliament's **Enquiry into powers of attorney** 2010 165 et seq. In terms of the latter enquiry the duties of an agent should include the following: the duty to act honestly and in good faith; to put the principal's interests ahead of those of the agent; to keep accurate records; and to act within his or her powers (Victorian Parliament **Enquiry into powers of attorney** 2010 169.)

968 See Annexure A of Schedule 1 of the draft Bill where such guidelines are included.

6.120 above), should provide basic information on such duty for the benefit of the principal and the agent. (Draft Bill, clause 88, and the Annexure to Schedule 1 under "What are the responsibilities of an agent".)

Keeping records, requiring an inventory, and accounting

6.177 The most significant legal device for monitoring an agent under common law is the requirement that the agent account to the principal for his or her actions upon demand.[969] The agent must render an account to the principal of all that has been done under the power of attorney. The agent is also under a continuing obligation to allow the principal to inspect all relevant books and vouchers.[970] However, once the principal's abilities have become impaired, accounting by the agent to the principal would be meaningless, as the principal is unlikely to be able to use the accounting to detect mismanagement, and has no capacity to act on information reflecting mismanagement even if it is revealed.[971] To address this situation, it has become common practice in other jurisdictions to –

- require an agent under an enduring power to keep records, and to submit mandatory accounts to a supervisor (eg the Court or a relevant public office) at specific intervals (eg annually); or
- provide for the agent to submit accounts on application by a supervisor or certain others.[972]

6.178 Mandatory regular accounting has been rejected by many jurisdictions because of the burden it would place on non-professional agents. These jurisdictions prefer to empower the Court, on application by an interested party, to direct that the agent provide

---

969 ***Krige v van Dyk's Executors*** 1918 AD 110 at 113-114; ***Hansa v Dinbro Trust (Pty) Ltd*** 1949 (2) SA 513 (T) at 514. Joubert 225 et seq; Hutchison in Wille's **Principles of South African Law** 601; De Villiers and Macintosh 330 et seq; Kerr 186 et seq. See also De Wet in **LAWSA Vol 17** par 12.

970 Ibid.

971 Cf eg Alberta Law Reform Institute **Report for Discussion No 7** 1990 72-74; Manitoba Law Reform Commission Report **83** 1994; Scottish Law Commission **Discussion Paper No 94** 1991 280 et seq.

972 Ibid.

an account of transactions entered into on behalf of the principal.[973] Although this could be useful and effective, reform has shown that this practice also has disadvantages:[974]

- It could be costly and cumbersome.
- It could be difficult for an interested person to obtain enough information about the agent's conduct of the principal's affairs to make an application possible.
- There are likely to be cases where there is no "interested party" who is willing to undertake the cost and trouble of bringing an application.

6.179 Examples of alternative practices suggested by some law reform bodies to overcome the criticism against accounting on application include the following:

1 The agent is required to keep a list of the principal's property of which he or she takes control; to keep a record of all transactions in respect of such property; and to allow a "qualified person" to inspect the list of property and the record of transactions at reasonable intervals. A "qualified person" could include family members of the principal or a person named in the enduring power. The latter possibility aims to cater for cases where the principal has no family members, or where the principal has excluded his or her family members from fulfilling a protective function. In the case of refusal or non-compliance by the agent, there is usually provision for recourse to the Court or an official body.[975]

2 Allowing both mandatory regular accounting and accounting on application to the Court or other supervisory body – which would leave persons who fulfil a protective function with a choice. At the same time, deformalising mandatory accounting processes, by requiring that the accounts be submitted to a specific person rather than to the Court or an official body. This person could be either a person named by the principal in the enduring power, or in the absence of a named person, a person from a statutorily named list of persons (eg the spouse or partner, adult children, parents or

---

973 Ibid.

974 Alberta Law Reform Institute **Final Report No 88** 2003 10.

975 Ibid 11.

grand children of the principal) who, in order of preference, must be supplied with accounts on a regular basis.[976]

6.180 The Commission's 1988 recommendations provided for the following accounting mechanism, which differs somewhat from the examples from other jurisdictions referred to above: It should be compulsory for an agent, when called upon by the Master of the High Court, to account to the Master. Such an account should satisfy the Master that the agent acted in accordance with the principal's instructions in the enduring power.[977] This provision is supported by granting the Master the power to withdraw and cancel the registration of an enduring power if the agent refuses or fails to comply within a reasonable time with a request relating to the rendering of accounts.[978]

6.181 The Commission in Discussion Paper 105 indicated that it agrees with the suggestion that accounting should not be mandatory at specific intervals. Mandatory accounting would not only burden the agent but also the supervisor who would have to inspect or overview such accounts. It also agreed with providing the Master with the discretion to call for accounts. In addition to this, the Commission believed that it is of crucial importance that specific other persons (for instancre, a person named in the power or persons with an interest in the property of the principal such as family members of the principal), should also have the authority to request the agent to account. The most recent reform at the time recommended that family members of the principal or a person designated in the enduring power should be enabled to at reasonable intervals inspect and make copies of records of all transactions by which the agent deals with property or the rights of the principal.[979] Where the agent refuses to produce such records an administrative procedure is provided for to compel the agent to produce them (by providing that the family member or other person may approach the relevant tribunal or official body for assistance).[980] It was believed that although these requirements would

---

976 See eg Manitoba Law Reform Commission Report **No 83** 1994 18-21.

977 SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 55.

978 Ibid.

979 Alberta Law Reform Institute **Final Report No 88** 2003 11-12. "Family member" would include a spouse, adult interdependent partner or parent of the principal, or an adult child, brother or sister of the principal (ibid xiv).

980 Ibid.

not prevent a dishonest agent from looting the principal's property, they would (at least) put an agent on notice that his or her activities could be scrutinised at any time. [981]

Discussion paper recommendation, comment and evaluation

6.182 The Commission, in Discussion Paper 105, suggested that legislation should require an agent (authorised under an enduring power relating to property), to prepare and maintain a list (ie an inventory) of the property of the principal of which he or she takes control, and of all transactions entered into on behalf of the principal concerned (ie to keep a record of transactions). It was further suggested that legislation should compel an agent, when called upon by the Master to do so, to account to the Master. In addition to this, legislation should allow specified persons to inspect any list (inventory) or record kept by an agent in respect of the property of a principal that is under his or her control.[982]

6.183 Respondents generally supported strong accounting requirements in the interests of the principal.

6.184 On reconsideration, and in further developing the agent's accounting obligations, the Commission came to the conclusion that it does not make sense to require *all* agents appointed in terms of property powers to prepare and maintain inventories without an obligation on the Master to request inventories from all agents. On reconsideration, it is believed that requiring an agent to prepare and maintain a formal inventory is unnecessary if the Master will never require that such inventory be submitted. It makes more sense to expand the Discussion Paper requirement regarding "record keeping" to include the keeping of a record of all property under the agent's control in addition to keeping record of all transactions with regard to such property.[983] In this way a record of property under the agent's control will indeed be available should it become necessary.

---

981 Ibid 12.

982 See Cl 79 and 80 of the draft Bill included in Discussion Paper 105.

983 See cl 86 of the current proposed draft Bill.

6.185 Requiring a formal inventory is, however, indeed relevant in cases where the Master required an agent *before* registration of an enduring power to give security. The purpose of such inventory is to enable the Master to ascertain whether the amount of security required *before* registration is suitable with regard to the property to be administered. Requiring an inventory under these circumstances is retained in the amended clause 85. The amended clause, in addition and at the request of the Masters, requires that the inventory must be in a specific prescribed form which will facilitate control by the Master. Masters believe that the submission of a formal inventory will be relevant in the case of large estates only.

Report recommendation

6.186 ***The Commission recommends that legislation require an agent who has been required to give security before registration of the enduring power, to compile and submit to the Master an inventory containing prescribed information of the property and the value thereof in respect of which he or she is authorised to act. The inventory will enable the Master to ascertain whether the amount of security required before registration is suitable with regard to the property to be administered. (Draft Bill clause 85.)***

6.187 ***The Commission further recommends that an agent, authorised under an enduring power relating to property, should be compelled to keep a record of all property in respect of which he or she is authorised to act and of all transactions in relation so such property. (Draft Bill clause 86.) It is further recommended that an agent (whether authorised under a power related to property or to personal welfare), should, at any time after the registration of the enduring power when required by the Master to do so, submit a report on the exercise of his or her authority. In the case of a power related to property, the Master could require that the report contain a statement of monetary transactions. (Draft Bill, clause 87.)***

Providing for termination of an enduring power

6.188 Supervisory measures dealing with termination of an enduring power typically include provisions dealing with revocation of the power by the principal; termination, substitution and/or variation of the power by the Court or other supervisory body; renunciation of the power by the agent (ie resignation by the agent); and the effect of curatorship, or a similar measure, on an enduring power.

(i) Revocation by the principal

6.189 In accordance with common law principles an enduring power would be revocable by the principal at any time before the onset of "incapacity" or after recovery from some disabling condition.[984] After "incapacity" revocation by the principal is no longer possible. In order to be effective as against third parties to whom the act of authorisation was communicated by the principal, the act of revocation has to be communicated to them.[985] Where the authority is conferred by a power of attorney it would be preferable that the principal see to it that the power is surrendered – otherwise his or her revocation of authority will have no effect against a person who deals with the agent without knowledge that the authority has been revoked.[986]

6.190 Experience in other systems, however, shows that principals often do not know or understand that they may revoke an enduring power of attorney.[987] It has thus frequently been recommended by law reform bodies that it is preferable that legislation on enduring powers should contain express provision to that effect.[988]

---

984 The general legal position in South Africa with regard to ordinary powers of attorney is set out in par 6.7 et seq above. Cf also Atkin 371. It is interesting to note that in some states in the US an enduring power related to health care may be revoked by the principal at any time irrespective of the principal's mental capacity (Guilde 1997 **Illinois Bar Journal** 555 et seq).

985 ***Bulawayo Market Co v Bulawayo Club*** 1904 CTR 370. See also De Wet in **LAWSA Vol 1** par 123.

986 De Wet in **LAWSA Vol 1** par 123.

987 Cf Guilde 1997 **Illinois Bar Journal** 555 et seq.

988 Ibid. See also English Law Commission **Report No 231** 1995 122; Queensland Law Reform Commission **Draft Report** 1995 110.

6.191 It has been accepted that the test for capacity in the context of revocation is whether the principal is capable of understanding the nature and effect of the revocation.[989] This corresponds with the capacity required to grant an enduring power, thus ensuring that a person who revokes an enduring power will be able to grant a new power should he or she choose to do so. This test is also in keeping with the functional approach to mental capacity.

6.192 At common law, a power of attorney can be revoked informally and some jurisdictions allow a principal to revoke an enduring power in any manner communicated to the agent or to any other person.[990] Other jurisdictions, however, argue that although revocation should not be a complex procedure, oral revocation could lead to problems of proof and uncertainty. Revocation moreover has important legal consequences as it will leave the principal who subsequently looses capacity without a substitute decision-maker.[991] For these reasons, it has been recommended that revocation by a principal should be in writing; should be signed and witnessed in the same way as the enduring power is executed; and that the principal should take reasonable steps to notify the agent of the revocation.[992]

6.193 In some jurisdictions legislation expressly state that a substitute decision-maker cannot be authorised to revoke an enduring power on behalf of a person who has lost capacity and that the power to terminate an enduring power can be exercised only by a Court or other relevant tribunal.[993]

6.194 In most jurisdictions revocation of a personal welfare power by the principal is dealt with in the same way as execution of the power (ie requiring the same formalities as for the execution of a financial power).[994] In others less stringent formalities are required. It is argued that in the case of persons becoming progressively more ill they

---

989 Cf Alberta Law Reform Institute **Report for Discussion No 7** 1990 91; Queensland Law Reform Commission **Report No 49** 1996 131.

990 Cf Guilde 1997 **Illinois Bar Journal** 555 et seq referring to the position in some states in the United States.

991 Queensland Law Reform Commission **Report No 49** 1996 131.

992 Ibid.

993 Ibid 138-139.

994 See eg Queensland Law Reform Commission **Report No 49** 1996 327 et seq.

might no longer be able to write, dictate or sign a revocation although they might be able to *say* that they have changed their minds – and this should be sufficient.[995] This view prefers provision that a decision to revoke a personal welfare and health care power may be indicated "in writing, orally or in any other way in which the person can communicate".[996] Opponents of this approach, however, argue that an enduring power is an important legal document and that people who make them have a responsibility, for as long as they are able to do so, to review them periodically to ensure that the instructions they contain continue to reflect their maker's current wishes. Moreover, the method of revocation should not be so informal that it creates problems of proof and consequent uncertainty ,or the opportunity for well-intentioned but unwanted intervention.[997] It was suggested that middle-ground could be found in retaining the basic requirements for execution of an enduring power but relinquishing some of the more stringent aspects thereof (eg by still requiring writing but not that the revocation be in a prescribed form; by still requiring witnessing but not by a specific class; and by still requiring "certification" of the capacity of the principal but replacing this with verification of capacity by a witness [excluding the appointed agent, a relative of such agent, or a person providing health care to the principal] instead of formal certification by a medical practitioner).[998]

6.195 In Discussion Paper 105 the Commission acknowledged that experience in other systems indicated that it should preferably be stated expressly in legislation that a principal always retain the power to revoke an enduring power granted by him or her provided that such person is legally capable of doing so. The Law Commission of England, for instance, noted in its recommendations in this regard that even where a principal lacks capacity to make the decision in question, he or she may still have capacity to revoke the enduring power and that it is therefore necessary to clarify this

---

995 Cf Law Reform Commission of Queensland **Report No 49** 327-329.

996 Ibid.

997 Ibid.

998 Ibid 331.

aspect in legislation.[999] The Commission further believed that it is particularly important not to restrict or impose any delay on a principal's ability to revoke an enduring power and that therefore no formalities should be required in respect of such revocation.[1000] The same should apply in respect of personal welfare powers.

Discussion paper recommendation, comment and evaluation

6.196 The Commission suggested in Discussion Paper 105 that legislation should provide that an enduring power terminate if the principal revokes it at any time when he or she has the capacity to do so. We further suggested that no formalities should be required for revocation.

6.197 No dissenting comment was received on these recommendations.

6.198 In further developing the recommendations to revoke an enduring power, the terminology was amended to more clearly indicate what is intended and to attain uniformity with the requirements to grant an enduring power. In the latter regard it is required in clause 70(1) that the person granting the power must understand the nature and effect thereof.

6.199 In order for revocation of an ordinary power of attorney to be effective as against third parties to whom the act of authorisation was communicated by the principal, the common law requires that the act of revocation should be communicated to them. If one accepts that the authorisation is communicated by the principal to the agent by way of naming the agent in the written enduring power, it follows that the agent should be notified in writing of the revocation. The Commission is of the view that this additional

---

999 The Commission refers to a principal who lacks capacity to take the decision in question but who is still capable of indicating that "I don't want X deciding things for me any more". The Commission argues that it would be most unappealing to require that a treatment provider, for instance, must continue to honour the decisions of an agent when faced with a principal who in this way effectively revokes the authority granted (English Law Commission **Report No 231** 1995 122).

1000 Cf the English Law Commission's remarks in this regard specifically with reference to revocation of a health care power (English Law Commission **Report No 231** 1995 122).

requirement should be included in the proposed draft legislation on the basis of fairness. In other jurisdictions where this was not required, legislation provides for express protection to agents and third parties who act without knowledge of the revocation.

Report recommendation

6.200 ***The Commission recommends that legislation should provide that an enduring power of attorney may be revoked by the principal at any time when he or she understands that nature and effect of the revocation. The agent must be notified in writing of the revocation. If the power is revoked by the principal after its registration, the principal must notify the Master of the revocation to enable the Master to cancel the registration of the power. (Draft Bill, clause 91.)***

(ii) Termination, substitution, and variation of an enduring power by the Court or other supervisor

6.201 Most jurisdictions regard the power of the Court (or other supervisory body) to *terminate* an enduring power as one of the most fundamental and necessary safeguards which ought to be included in legislation dealing with enduring powers.[1001] It serves as an essential mechanism for reviewing the agent's conduct, terminating the agent's appointment, and removing the agent in order to protect the interests of the principal after the principal has lost the capacity to monitor the agent's conduct. Common characteristics of legislative provisions in this regard include the following:

1 The Court is given a broad discretionary power to terminate the enduring power if it considers this to be in the best interests of the principal rather than be limited to expressly stated circumstances for termination. Although opponents to a broad discretion argue that it might invite frivolous applications by disgruntled members of the principal's family, it is generally believed that the judicious exercise of discretion, and the Court's jurisdiction in respect of costs, will provide an effective safeguard against unwarranted claims.

1001 Refer to the information in SALRC **Discussion Paper 105** par 7.138 et seq.

2 The Court can usually terminate the power on application by the principal, by any interested person, or by any other person with leave of the Court.

3 An application for termination is permitted only after the "incapacity" of the principal (because the principal can revoke the power before his or her "incapacity", if necessary)

4 It is usually required that notice of the application to terminate the power should be given to the principal (unless the Court dispenses with this); to the agent; and to a relevant public office (the latter because of its interest in the fact that the "incapacitated" principal will possibly be left without someone to manage his or her affairs).

5 In some jurisdictions the Court may not terminate an enduring power without appointing a substitute agent. In this regard it should be noted that termination of the enduring power will usually create a void (except where the Court is obliged to appoint a substitute) and an application for the appointment of a curator (or similar device) will probably be necessary to fill the void. Many jurisdictions, however, see the usefulness of a termination order as being a quick and simple procedure for removing an agent ideally suited to emergency situations, where the removal of the agent is immediately necessary to protect the principal's interests.

6.202 As indicated in the previous paragraph, some jurisdictions empower the Court to appoint a *substitute* agent. Although the advantage of this is that the void left by the termination of the enduring power is filled, opponents of this practice argue that it is in conflict with some of the fundamental elements of an enduring power: the principal's personal selection of an agent; and the principal's desire to provide for his or her "incapacity" without Court intervention. Opponents believe that the enduring power should come to an end on termination thereof and the principal's affairs should then be dealt with by a curatorship order (or similar device). Some jurisdictions solved the problem by giving the Court the discretion to compel the person who applied for termination of the enduring power, or a relevant public office, to bring an application for a curatorship order on termination of the power; and to make arrangements for the interim management of the principal's affairs.[1002]

[1002] Ibid par 7.139.

6.203 Several jurisdictions empower the Court to *vary (*ie amend) the terms of an enduring power (by for instance, allowing the Court to impose limitations on the agent's authority, or to remove a limitation imposed by the principal).[1003] Opponents of this practice argue that to empower a Court to amend some provisions of an enduring power, but not the most important one (the selection of the agent) would be illogical. They believe that if the terms of the enduring power are no longer effective or sufficient to protect the interests of the principal, the preferable course of action would be to apply for the termination of the power and have an alternative mechanism (such as curatorship or similar device) put into place.[1004]

6.204 The Commission's 1988 recommendations provided for termination by way of administrative as well as judicial procedures as follows:[1005]

- The Court was given the power to, at any time, upon the application of the Master or any person who has a personal, financial or social interest with regard to the principal, *withdraw* an enduring power registered in terms of the proposed legislation and *direct that the registration thereof be cancelled* if the Court was of opinion that sound reasons existed for doing so.
- The Master was given the power to *withdraw* a power of attorney registered in his or her office in terms of the proposed legislation and *cancel the registration* thereof under certain circumstances. These circumstances (with the exception of one that deals with non-compliance with a request by the Master) addressed the position or status of the agent (rather than any abusive action on his or her part) and included the following: An indication by the agent in writing that he or she is no longer willing or able to carry out the instruction; refusal or failure by the agent to comply with a request by the Master made in terms of the proposed legislation; or
- the agent being convicted of an offence of which dishonesty is an element, being sequestrated, being certified under mental health legislation, or being placed under curatele.

1003 Ibid par 7.140.

1004 Ibid.

1005 SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 55-56.

> The Commission in Discussion Paper 105 supported this approach. In accordance with the 1988 proposals it was suggested that the Master's authority to withdraw the power should be limited to circumstances relating to the status or position of the agent while the Court should deal with concerns regarding the proper execution of the power by the agent.[1006]

6.205 With regard to the question of substitution and variation, the Commission argued as follows in Discussion Paper 105: On the one hand, giving the Court such powers would seem to negate the elements of personal selection and absence of Court intervention that are fundamental to the concept of the enduring power. This could be regarded as a radical departure from the principles of the law of agency that underlies the concept of the enduring power as pointed out at the beginning of this Chapter. On the other hand, it could be argued that strict agency principles will in any case be fundamentally altered by legislating that authority granted in a power of attorney can survive the "incapacity" of the principal. In the context of such new legislation regulating enduring powers, the interests of the principal might be better served by giving the Court powers to appoint a substitute agent and/or to vary the terms of the power instead of appointing a curator (or similar substitute).[1007]

6.206 The Commission in Discussion Paper 105 concluded against granting the Court or other supervisor the power to appoint a substitute agent. It was instead proposed that the Master should be given supervisory powers which should include the power to initiate the appointment of a supporter where there is a void left by the termination of the appointment of a supporter or an agent.[1008]

6.207 With regard to variation of the power, the Commission believed that granting the Court or other supervisor powers to amend the terms of the power would intrude on the principal's right to autonomy, which is central to the concept of the enduring power of attorney. The general power of the Court to withdraw an enduring power would be wide enough to enable any person who has concerns about the terms of the power to apply

---

1006 SALRC **Discussion Paper 105** par 7.141.

1007 Ibid par 7.142.

1008 Ibid par 7.143.

for the withdrawal of the power. This could be followed by the Master initiating procedures for putting alternative measures in place as suggested in the previous paragraph. In addition to this, it was suggested that the Master's proposed power to review any action taken or decision made by a supporter (as suggested in clause 94 of the proposed draft Bill in the Discussion Paper), should also deal with actions taken or decisions made by agents under enduring powers of attorney. In conclusion it was submitted that these control measures would be sufficient in circumstances where there is a need to vary or amend the terms of an enduring power of attorney.[1009]

Discussion paper recommendation, comment and evaluation

6.208 Discussion Paper 105 recommended that legislation should allow for the withdrawal of an enduring power of attorney under the following circumstances:

- The Court should be able to withdraw an enduring power of attorney at any time upon the application of the Master or any interested person; and to direct the Master to cancel the power.
- The Master should be able to withdraw an enduring power of attorney registered in his or her office in terms of the proposed legislation and cancel the registration thereof under certain specified circumstances. These should include the following: failure by the agent to perform any duty imposed upon him or her under the proposed legislation or refusal to comply with a request by the Master made in terms of the proposed legislation; the agent being convicted of an offence of which dishonesty is an element, or any other offence for which he or she has been sentenced to imprisonment without the option of a fine; the agent being sequestrated, (or where a juristic person has been appointed as agent, where such juristic person is wound up or dissolved); the agent suffering from mental incapacity; and the appointment of a manager, mentor or curator in respect of the person concerned, in so far as the authority granted by the power of attorney may be exercised by such manger, mentor or curator.

1009 Ibid par 7.144.

It was further recommend that if a registered enduring power of attorney is withdrawn and cancelled by the Master, the Master must notify the agent of such cancellation and the agent must on receipt of such notification return his or her endorsed copy of the power to the Master.[1010]

6.209 Discussion Paper 105 suggested that the substitution of an agent by the Court (or other supervisor) should not be allowed. Legislation should provide the Master with authority to initiate the appointment of a formal supporter where a void is left by the withdrawal of the appointment of an agent.[1011]

6.210 Discussion Paper 105 also suggested that the variation of the terms of an enduring power of attorney by the Court (or other supervisor) should not be allowed. The Master's power to review any action taken or decision made by a formal supporter, as was proposed in the then draft Bill, should include the power to deal with actions taken or decisions made by agents under enduring powers of attorney.[1012]

6.211 Commentators generally agreed with the above recommendation.

6.212 In further developing the recommendation, the Commission made the following main changes, which are reflected in the draft Bill:

1 It was believed not to be consistent with the private and autonomous nature of an enduring power to provide for a discretion to "withdraw" the enduring power. The Commission instead recommends that the Court and Master should be granted powers to "remove" the agent (under similar circumstances as initially recommended with regard to the "withdrawal"); and to in addition, provide for powers to the Master to cancel the registration of the power after the removal of the agent (noting that no agent may act under an enduring power after the onset of the principal's decision-making impairment without the power having been registered[1013]).[1014]

1010 Cl 85 of the proposed draft Bill in SALRC **Discussion Paper 105**.

1011 See cl 91 of the draft Bill in the Discussion Paper.

1012 See cl 112 of the proposed draft Bill in the Discussion Paper.

1013 See par 6.132 et seq and the recommendation in par 6.149. See also cl 77-81 of the draft Bill.

2 The Master's power to remove the agent on the agent's "incapacity" was replaced with a provision allowing the Master to remove the agent when the agent ceases to comply with the prescribed appointment requirements as per clause 73 (which provides that an agent may not be a person with disability at the time of execution of the power).[1015]

3 The Master's power to remove the agent on the appointment of a curator was deleted as unnecessary. In terms of the amended clause, the Court may remove an agent if good cause exists for doing so. Only the Court may appoint a curator and on doing so, it is believed that the Court itself should withdraw a previous appointment of a curator.

4 The amended clause now also provides for notice to the agent of the intended removal by the Master, and for the opportunity to object to any reasons given for the intended removal.[1016]

6.213 In its final recommendations, the Commission does not include its preliminary recommendation that the Master should initiate the appointment of a supporter where a void is left by the removal of an agent. The Commission proposes that, in view of the autonomous nature of the enduring power, any first application for the formal appointment of a supporter should be initiated by the person with decision-making impairment, or on his or her behalf.[1017]

Report recommendation

6.214 ***The Commission recommends that the draft Bill should provide that the High Court, as well as the Master, should have the power to remove an agent. This should be possible at any time after registration of the power and under certain***

1014 See cl 93 of the proposed draft Bill.

1015 Cl 93(2)(f).

1016 Cl 93(3).

1017 This should be done in terms of the provisions for application for the formalised measures of support (the appointment of a financial supporter and/or a personal welfare supporter) as provided for in Chapters 3 and 4 of the draft Bill. The draft Bill indeed contains provision for the Master to initiate the appointment of a replacement for a formal supporter where an initially appointed formal supporter resigned, died or where his or her appointment was withdrawn (see cl 109 of the draft Bill.)

specified circumstances only. Before removing an agent, the agent should be served with written notice of the intended removal and be given reasonable time to object to the removal. If the Court or the Master removes an agent, the agent as well as the principal who granted the power should be notified. On removing an agent, the Master should cancel the registration of the power except where a joint agent continues to act or a substitute agent (as previously appointed by the principal himself or herself in terms of clause 76 of the draft Bill), commences acting. (Draft Bill, clause 93.)

(iii) Resignation by the agent

6.215 Under common law termination of a power of attorney may also occur on the initiative of the agent.[1018] In such case the power will cease to have effect except where there are co-agents or substitute agents provided for.[1019] The major problem in the case of an enduring power would be to deal with the possibility of the agent wishing to renounce his or her duties *after* the principal has become "incompetent" and is consequently unable to authorise another agent. To avoid a lapse in arrangements made for the safeguarding of the principal's affairs, other jurisdictions followed the following practices:[1020]

1 Prohibiting the agent from renouncing without Court approval or without advising a relevant official body. In England and Scotland, for instance, it was recommended that the agent must give notice of his or her intention to resign to certain persons and bodies (including the principal, his or her primary carer, the relevant public office or tribunal, or the registration authority if the power had to be registered);[1021] and that such notice should become effective only after a period of time.[1022]

1018 See the common law position set out in par 6.24 et seq above.

1019 Atkin 1988 **New Zealand Law Journal** 371.

1020 Creyke 1991 **Western Australian Law Review** 136 et seq.

1021 See eg the recommendations of the English Law Commission (**Report No 231** 1995 121-122).

1022 See eg the recommendations of the Scottish Law Commission (**Report No 151** 1995 43-44). The Commission recommended that the resignation should become effective 28 days after notification to the relevant public office (Ibid 44).

2 Providing for sanctions in respect of an agent who fails to act under an enduring power. Opponents of this approach, however, argue that the agent will frequently be a member of the principal's family acting in a voluntary capacity. The law should encourage domestic arrangements of this kind and onerous conditions and sanctions should thus be avoided.

3 Deterring people from accepting the role of agent without proper appreciation of the responsibilities involved by spelling out in prescribed explanatory notes included in the power the responsibilities of an agent, and warning potential agents of the disadvantages to an "incompetent" principal if the agent resigns after the principal has become "incompetent". If the agent is committed to resigning, a relevant public office should be advised of this.

Discussion paper recommendation, comment and evaluation

6.216 Discussion Paper 105 indicated that the Commission was not in favour of practices aimed at preventing an agent from resigning or penalising an agent who wants to resign. The Commission believed that it would not be in the interests of the principal to persuade or force a reluctant agent not to resign. The Commission supported the approach followed by the Scottish and English Law Commissions as referred to in the previous paragraph which provides for notice by the agent of his or her intention to resign and the resignation only becoming effective after a reasonable period of time. It was believed at the time that this would allow the Master to, if necessary, deal with the void left by the resignation by using his or her authority to initiate the appointment of a formal supporter. It was suggested that the agent's intention to resign should also be brought to the attention of the principal and his or her primary carer.

6.217 Discussion Paper 105 thus suggested that legislation should require an agent who wishes to resign after the registration of an enduring power of attorney, to give written notice of this intention to the following: The Master in whose jurisdiction the

power is registered; the principal who granted the power; and the principal's primary carer. The resignation should become effective only 30 days after receipt of this notification by the Master. The Master should be obliged to cancel an enduring power in respect of which the agent has resigned.

6.218 No dissenting comment was received on these recommendations.

6.219 On reconsideration, the provision with regard to resignation by an agent was, however, extensively amended. The Discussion Paper draft Bill made the resignation of the agent dependent on "acceptance" by a joint or substitute agent that they will continue or commence acting in terms of the power.[1023] On reconsideration the Commission suggests the following: All concerned should be informed of the agent's intention to resign. This will enable joint appointees, relatives and carers of the principal to consider alternative arrangements (such as, for instance, a future application for the appointment of a formal supporter in terms of the proposed draft legislation), if necessary. It is believed to be unfair and undesirable to make resignation dependent on events not within the control of the agent who wishes to resign. It is also unnecessary for joint appointees to confirm their willingness to continue to act. They have been appointed by the agent and will automatically proceed unless they also resign. The Commission believes that the date of resignation must be clearly ascertainable to ensure clear cut-off lines with regard to responsibilities in terms of the proposed legislation. For this purpose the amended provisions state that the resignation becomes effective on the date specified by the agent. For practical purposes the period between the specified date of resignation and the date of the notification must be at least 30 days *(*in order to give the Master time to process the notification of the resignation). Notification of the resignation must be in writing and must be "served" on the Master.[1024] The amended procedure finally requires the Master to cancel the registration of the power in the case of

---

1023 Cl 84 of the proposed draft Bill in SALRC **Discussion Paper 105**.

1024 In terms of cl 1 of the current draft Bill, "serve" means to send by registered post or to deliver by hand, except where the Master otherwise directs in terms of cl 105. For practical purposes, Masters suggested that provision should be made for evasion of service or for circumstances where it is impossible to effect service. Cl 105 gives the Master the discretion to proceed without service if satisfied that service is evaded or that it is impossible to effect service.

resignation of the agent. Where joint or substitute agents will continue to act, or commence acting under the power, the Master is required to endorse the power accordingly.[1025]

Report recommendation

6.220 ***The Commission is of the view that an agent should be permitted to resign. It is recommended that an agent may resign by giving written notice of the intended resignation to the persons as specified in the draft Bill. The resignation becomes effective on the date specified by the agent in the notice, provided that the period between such date and the date of the notice must be at least 30 days. On resignation, the Master must cancel the registration of the power except where a joint agent continues to act, or a substitute agent commences acting. In any of the latter instances, the original power of attorney must be endorsed accordingly by the Master. (Draft Bill, clause 92.)***

[1025] See cl 93(5).

6 Other safeguards

Disqualified agents

6.221 Under common law the only disqualification for appointment as agent under a power of attorney is lack of legal capacity. Some jurisdictions enacted specific safeguards aimed at disqualifying certain persons or entities to be appointed as agent under an enduring power. The most common safeguards in this respect include the following:

1 Legislation expressly excludes certain persons from being appointed as agents under an enduring power. These mainly fall into two categories:

- First, those with a likely conflict of interest (ie who are considered untrustworthy, or who occupy a position of power or authority over the principal and whose appointment as agent might therefore be the product of undue influence - such as employees for community care facilities and close relatives or carers).[1026] Opponents of this practice submit that it is not for the legislator to exclude certain persons as untrustworthy – the principal must decide whether the agent is someone who can be trusted. With regard to close relatives and carers – in many cases excluding such persons would exclude the

---

[1026] Alberta Law Reform Institute **Report for Discussion No 7** 1990 60-62.

very people who are most likely to act in the principal's best interests.[1027]

- Second, those whose personal attributes (eg age and mental incapacity) render them unsuitable of effectively performing the functions of an agent.[1028] Opponents of this practice submit that an age restriction would serve little practical purpose as it is highly unlikely that a principal would appoint a minor as an agent. They further submit that they are in any event not convinced that an appointment of a person just below the age of majority, for instance, would necessarily be unsuitable. The choice of who to appoint should be left to the principal.[1029] With regard to the required mental capacity, opponents argue that it is extremely unlikely that a principal would appoint an agent who is mentally incapable of understanding the nature and effect of the appointment. They further argue that a Court (in exercising its discretion to remove an agent under an enduring power or to terminate a power) could more appropriately deal with this issue as it will consider the question of suitability of the agent with reference to the best interests of the principal.[1030]

2 Some jurisdictions do not allow a juristic person (an entity other than an individual human being) to be appointed as agent.[1031] Other jurisdictions, however, argue that to entirely exclude juristic persons would imply that persons who do not wish or are not able to appoint a relative or friend to act as agent under an enduring power may then be denied the advantages of legislation making enduring powers possible.[1032] In general it seems as if juristic persons are allowed to act as agents but with the following limitations: First, only specific types of juristic persons (eg recognised

---

1027 Ibid.

1028 Cf Scottish Law Commission **Discussion Paper No 94** 1991 262 et seq; Alberta Law Reform Institute **Report for Discussion No 7** 1990 60-62.

1029 Alberta Law Reform Institute **Report for Discussion No 7** 1990 60-62.

1030 Ibid.

1031 Scottish Law Commission **Discussion Paper No 94** 1991 264-265. Cf also par 7.13 above where it is indicated that common law allows the appointment of juristic persons as agents under an ordinary power of attorney.

1032 Queensland Law Reform Commission Draft **Report** 1995 103.

financial institutions such as banks, insurance companies and registered trust companies) are regarded as suitable for appointment.[1033] Second, the appointment of juristic persons is usually allowed in respect of enduring powers dealing with financial affairs only. The reason for this is that legislators usually envisage that the person entrusted with making personal decisions will be someone close to the principal, who is familiar with the principal's lifestyle and values. It would thus be inappropriate to confer authority to make decisions requiring sympathetic knowledge of personal preferences on a juristic person.[1034]

3 Experience in other jurisdictions showed that people who execute enduring powers of attorney will often appoint their husband or wife as their agent. However, if a couple later divorces, it is likely that the relationship has deteriorated to such an extent that it is no longer appropriate for either partner to continue to be nominated as the other's agent. In most jurisdictions an enduring power naming a spouse as agent is thus *automatically* invalidated or revoked or the spouse/agent is deemed to have resigned as agent upon divorce or judicial separation. Such invalidation, revocation or resignation becomes effective upon the divorce or other event referred to. Alternatively, legislation provides the principal with the *option* to include a provision to this effect in an enduring power should he or she so desires.[1035]

6.222 The following views underpinned the Discussion Paper recommendation:

1 With the exception of an unrehabilitated insolvent (who should not be eligible for appointment as agent under an enduring power dealing with property) the Commission agreed with the criticism raised in the previous

---

1033 Ibid; Scottish Law Commission **Discussion Paper No 94** 1991 32-34. Service providers such as nursing home operators are for instance regarded by some as not being suitable since they may inevitably be faced wit a conflict of interest if they were appointed (Queensland Law Reform Commission **Draft Report** 1995 103).

1034 Queensland Law Reform Commission **Draft Report** 1995 103-104. See also Scottish Law Commission **Discussion Paper No 94** 1991 32-34.

1035 See eg the position in some states in the United States (Schlesinger and Sheiner 1992 **Trusts and Estates** 44); the Republic of Ireland (Alberta Law Reform Institute **Final Report No 88** 2003 40); and Scotland (Adults with Incapacity [Scotland] Act 2000 sec 24(1)). Cf also English Law Commission **Report No 231** 1995 125.

paragraph against expressly excluding certain persons from being appointed as agents on grounds of possible conflict of interest or personal attributes.

2 On the strength of a pronounced public need for arrangements which would address the position of persons without family and friends to act as supporters, the Commission agreed to allow juristic persons to be appointed as agents. However, their eligibility for appointment was limited to appointment in respect of enduring powers dealing with property.

3 The Commission agreed with the practice in many other jurisdictions of providing for the effect of divorce on an enduring power. Provisions addressing this issue have in fact been included in the Wills Act, 1953 where the testator appointed a divorced spouse as beneficiary under his or her will.[1036] As automatic termination of the power under these circumstances would leave an immediate void with regard to the care of the principal or his or her property, the Commission suggested that dissolution of marriage (or a same sex life partnership) should be added to the grounds on which the Master may withdraw an enduring power. This would grant the Master time to initiate the appointment of a manager (financial supporter in the final recommendations) or mentor (personal welfare supporter in the final recommendations), or both, where necessary.

Discussion paper recommendation, comment and evaluation

6.223 Discussion Paper 105 suggested that legislation should provide that at the date of execution of an enduring power of attorney, an agent appointed under such power –

- must be a mentally competent adult;
- can be a juristic person if the enduring power relates to the principal's property only;

[1036] Sec 2B of the Wills Act, 1953. Note, however, that according to the Wills Act, the spouse could still be a beneficiary under the will if the testator died longer than 3 months after their divorce or the annulment of their marriage.

- must not be an unrehabilitated insolvent if the power relates to the principal's property;

It was further proposed that the subsequent dissolution of a marriage (or permanent same sex life partnership) between the principal and the agent should be added to the grounds on which a Master may remove an agent under an enduring power of attorney.

6.224 Comment was limited to the issue of allowing juristic persons to be eligible for appointment as agent in respect of personal welfare powers. There were strong divergent views on this matter. On the one hand, it was believed that personal welfare powers require a higher level of trust and personal interaction between principal and agent as is the case with enduring powers relating to property. On the other hand, respondents attached to social service organisations and institutions caring for persons with decision-making impairment were surprised that they would not be eligible to support many persons in their care who do not have family and friends to take up the role of agent. Respondents in general believed that a compromise could be reached by allowing "suitable" juristic persons to be appointed as agents also where the enduring power relates to personal welfare. The proposed draft legislation should, however, contain express guidance in the latter respect. After consultation and careful consideration, the Commission is of the view that, in response to an express public need as indicated above, it should be possible to appoint a juristic person as agent in respect of both enduring powers relating to property and personal welfare. The Commission recommends, however, that the where a juristic person is appointed, a specific person attached to the juristic person could be identified by the juristic person (for instance in the case of an enduring power relating to personal welfare) to take responsibility for the duties of the agent in respect of a specific principal. This approach would also address the need for personal contact and establishing a trust relationship between principal and agent. The juristic person would remain responsible for the acts and omissions of the person in his or her employ who in practice acts as agent for an identified principal.

6.225 On reconsideration, we decided against the qualification that the agent must not be an unrehabilitated insolvent. The draft Bill in Discussion Paper 105 indeed contained provision for the Master to remove an agent, in the case of an enduring power relating to

property, if the agent's estate is sequestrated.[1037] This provision is retained in the final recommendations (see clause 93(2)(c) of the current draft Bill). We also retained the provision (however with technical amendments), of the Discussion Paper draft Bill which enables the Master to remove an agent on the dissolution of a marriage, religious union or permanent life partnership between the agent and the principal (see clause 93(2)(e)).[1038]

Report recommendation

6.226 ***In its final recommendations, the Commission supports the Discussion Paper recommendations that the person appointed as agent must be 18 years of age or older at the date of execution of the enduring power, and must not be a person who requires support in exercising legal capacity. (Draft Bill, clause 73(1)(a).) A juristic person should also be allowed to act as agent. The proposed legislation should provide that an officer of the juristic person may be nominated to perform the powers of the agent (for instance, in the case of an enduring power relating to personal welfare). The juristic person should accept liability for the acts and omissions of the individual so nominated. (Draft Bill, clauses 73(1)(b) and 73(2).)***

6.227 ***Our final recommendations do not include the qualification that the agent must not be an unrehabilitated insolvent. The Commission, however, recommends that the Master must have the power to remove an agent (in the case of an enduring power relating to property) if his or her estate is sequestrated. (Draft Bill, clause 93(2)(c).)***

6.228 ***The Commission supports the Discussion Paper recommendation that the dissolution of a marriage, religious union or permanent life partnership between an agent and a principal should be ground for removal of the agent by the Master, except where the enduring power otherwise provides. (Draft Bill, clause 93(2)(e).)***

1037 Cl 85(2)(c)(i) of the draft Bill in SALRC **Discussion Paper 105**.

1038 Refer to cl 85(2)(e) of the draft Bill in the Discussion Paper.

Limitation on the value of the estate

6.229 In the United States, in particular, the 1964 Model Act (which established the concept of the enduring power) recommended that a financial limit be placed on the value of estates which could be subject to an enduring power.[1039]

6.230 Proponents of this practice believe that large and complex estates are not suited to management by means of an enduring power.[1040] Opponents, however, see no automatic correlation between the extent of the estate and the difficulty of managing it.[1041] They furthermore believe that the imposition of an arbitrary limit could involve costly and time-consuming valuations and would logically involve the termination of the power if the limit were exceeded at some later date.[1042] Limitations with regard to the value of the principal's estate has generally not been considered or recommended as a safeguard against abuse in more recent reform on enduring powers of attorney.

6.231 The Commission agrees with the above criticism raised against the possibility of limiting the use of enduring powers of attorney to smaller estates and does not recommend that a financial limit be placed on the value of estates which can be the subject of an enduring power of attorney.

1039 Alberta Law Reform Institute **Report for Discussion No 7** 1990 63. (See par 7.3 for information on the Model Act.)

1040 Ibid.

1041 Scottish Law Commission **Discussion Paper No 94** 1991 261-262. (This has been confirmed with regard to the South African situation in informal discussions with Ms Margaret Meyer (lecturuer at Justice College and representative of the Masters Offices) during August – October 2003 when drafting the proposed legislation attached to this Discussion Paper.)

1042 Ibid.

7 Validation of certain documents as enduring powers of attorney

(i) Foreign documents[1043]

6.232 In several jurisdictions portability of enduring powers of attorney (ie the ability of an enduring power, validly executed in one jurisdiction, to be recognised as valid in another) has been expressly addressed in enduring power legislation to avoid practical problems that may arise in this regard.[1044] The most pressing problem usually relates to the possible non-validity of an enduring power because of differences in execution formalities of enduring powers in different jurisdictions. If, for example, an enduring power is executed in England and complies with the law pertaining to enduring powers in England but not with South African legal formalities (on the assumption that South Africa indeed has legislation on enduring powers), the question arises whether the agent can exercise any authority under the power after the "incapacity" of the principal in respect of property situated in South Africa? And further: if the principal moves to South Africa (after "incapacity") and the agent wishes to manage the principal's affairs in South Africa, is the enduring power terminated because it might not comply with the required legal formalities in South Africa?

1043 Note that references to Dicey and Morris in the footnotes to the following two paragraphs refer to the common law position as discussed by the authors before the Rome Convention was implemented in the United Kingdom through the Contracts (Applicable Law) Act 1990. English law is regarded as a primary foreign source of South African conflict of law rules (Edwards in **LAWSA Vol 2** par 415).

1044 See eg Manitoba Law Reform Commission **Report No 83** 1994 34-36; Alberta law Reform Institute **Report for Discussion No 7** 1990 52-54; Scottish Law Commission **Discussion Paper No 94** 1991 302 et seq; and Creyke 1991 **Western Australian Law Review** 146 et seq for the position in some of the Australian jurisdictions.

6.233 To deal with the increasing mobility of populations, enduring power legislation in other jurisdictions frequently provides that an enduring power will be recognised as valid if it meets the requirements of the jurisdiction in which it was executed.[1045]

6.234 Questions relating to the validity in South Africa of an ordinary power of attorney with a foreign element (eg where the principal resides in England and grants a power to a family member in South Africa to manage his or her financial affairs in South Africa) are governed by the rules dealing with conflict of laws. According to these rules the "proper law" indicates the appropriate legal system governing contractual obligations involving an element external to the domestic law.[1046] It seems to be accepted that, between agent and principal, their mutual rights and obligations are governed by the proper law of the agency. This is, generally, the law of the place where the relationship of principal and agent is created (ie the place where the power of attorney is granted).[1047] The rights and obligations of the agent and principal vis a vis a third party are, however, governed by the proper law of the contract entered into with the third party.[1048] In particular, the question whether the agent's authority is terminated by the "incapacity" of the principal must be determined with respect to each contract entered into by the agent, and is governed by the proper law of the contract. The proper law of the contract is the law chosen and agreed on expressly or tacitly by the parties or if they do not so choose, it is the law which the parties are presumed to have intended to govern their contractual

---

1045 Ibid.

1046 Forsyth 274-175; Edwards in **LAWSA Vol 2** par 460 and the case law referred to by the authors.

1047 Dicey & Morris Vol 2 1339; Alberta Law Reform Institute **Report for Discussion No 7** 1990 52-54. (As far as could be ascertained this point has not been directly addressed yet by South African Courts.)

1048 Dicey & Morris Vol 2 1341; Forsyth 274-275; Edwards in **LAWSA Vol 2** par 460-462. Cf also Alberta Law Reform Institute **Report for Discussion No 7** 1990 52-54.

relationship.[1049] What their presumed intention is, is a complex question which depends on the circumstances of each case. It will be ascertained with reference to several connecting factors including the place where the contract was entered into, the place where the contract has to be executed, the domicile and nationality of the parties, and the nature and subject matter of the contract.[1050]

6.235 Apart from the complexities in ascertaining the parties' intention which could be inherent in applying the common law as described in the previous paragraph, it is clear that applying the common law (according to which the proper law of the agency governs the relationship between agent and principal) in the context of an enduring power could also result in undue restrictions on agents from other countries operating in South Africa if the enduring power executed in the other country does not comply with formalities prescribed here.[1051] The Commission in accordance with practice in this regard in other jurisdictions, believe that legislation should provide that if an instrument is a valid enduring power according to the law of the place where it has been executed, it should be regarded as such by the law of South Africa notwithstanding the fact that it does not comply with the formalities prescribed for enduring powers in South Africa.

Discussion paper recommendation, comment and evaluation

1049 ***Standard Bank of SA Ltd v Efroiken and Newman*** 1924 AD 171 at 185-186; Edwards in **LAWSA Vol 2** par 462; cf also Forsyth 274-275, 286-292. Although more recently there has been developments away from this approach towards an approach which regards the proper law as the law with which the contract is "most closely related" (***Improvair (Cape) (Pty) Ltd v Establissements Neu*** 1983 (2) SA 138 (C) at 145F-146C; ***Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*** 1986 (3) SA 509 (D) 525J-527A; the indirect approval by the Supreme Court of Appeal in ***Ex Parte Spinazze*** 1985 (3) SA 650 (A) at 665F-H; Edwards in **LAWSA Vol 2** par 462; Forsyth 274-275; and Dicey & Morris 1161-1162) the core of the rule laid down by the Supreme Court of Appeal (formerly the Appellate Division) in 1924 remains (***Blanchard, Krasner & French v Evans*** 2002 (4) SA 144 (T) at 149C-D; Edwards in **LAWSA Vol 2** par 462). As it will be rare for the parties to be presumed to have intended any legal system other than that with which the contract has the "closest connection" to govern their relationship, the hope has been expressed that the Supreme Court of Appeal will settle upon this test when the matter comes before it (Forsyth 287).

1050 Forsyth 287-288; ***Standard Bank of SA Ltd v Efroiken and Newman*** 1924 AD 171. Cf also Dicey & Morris 1191-1197.

1051 Eg Manitoba Law Reform Commission **Report No 83** 1994 34-36; Alberta law Reform Institute **Report for Discussion No 7** 1990 54.

6.236 Discussion Paper 105 recommended that legislation provide that, notwithstanding statutory formalities required for the execution of an enduring power of attorney, a foreign document should be regarded as an enduring power if, according to the law of the place where it was executed –

- it is a valid power of attorney; and
- the agent's authority under the power is not terminated by the subsequent mental "incapacity" of the principal**.**

6.237 Commentators supported this preliminary recommendation.

6.238 The Commission, in its final recommendations provided the Master with the discretion to register such a power, under specific circumstances, as an enduring power of attorney in terms of South African law. It is further provided that the person who granted the power should, thereupon, be considered an agent as contemplated in the draft Bill.

Report recommendation

6.239 ***The Commission recommends that the draft Bill should provide for a document executed in terms of foreign law, to be regarded as a valid enduring power of attorney in terms of the draft Bill. This should be possible if, according to the law of the place where the document was executed, it is a valid power of attorney; and if the document in its terms manifests an intention on the part of the person granting it to endure beyond the person's "disability" as defined in clause 4 of the draft Bill. The Master should be given the discretion to register such a document as an enduring power of attorney in terms of the draft Bill. (Draft Bill, clause 98.)***

(ii) Certain powers of attorney executed by a principal and acts performed by an agent before the commencement of the new legislation

6.240 In response to public concerns raised after the publication of Discussion Paper 105, the Commission considered the need to validate certain ordinary powers of attorney. These concerns was raised specifically with regard to powers granted prior to the envisaged commencement of the proposed new legislation by principals whose decision-making ability has subsequent to granting such ordinary powers become impaired. In this context, the Commission also considered the need to validate past acts performed under such ordinary powers by agents who acted in good faith. This issue was not provided for in the draft Bill included in Discussion Paper 105.

6.241 We indicated earlier in this report that our public consultation confirmed that many persons who previously granted ordinary powers of attorney (with the intention to provide for management of their affairs on their possible future impairment), were ignorant of the fact that an ordinary power of attorney lapses on the decision-making impairment of the principal.[1052] In discussions with family and carers of persons who previously granted ordinary powers of attorney (but whose ability has since become impaired), concerns were raised about the current validity of such ordinary powers. Concerns were also raised about the validity of acts performed by agents in terms of these ordinary powers after the impairment of the principals. Where a principal's ability has not become impaired since granting the ordinary power, the principal could revoke the power previously granted and could execute an enduring power of attorney under the envisaged new legislation when it comes into operation. However, where the principal's ability has already become impaired, the possibility of executing an enduring power of attorney under the proposed new legislation would no longer be available. The only alternative (under the proposed new legislation) would be to apply for the appointment of a formal supporter to support such person to exercise his or her legal capacity.

6.242 In the other jurisdictions referred to in this report where reform of the law with regard to enduring powers was addressed, different approaches were followed with regard to similar concerns. In Scotland, Ireland and New Zealand no recommendations were made with regard to the validation of powers previously granted, and the issue seemed not to have been considered. In Alberta, Canada recommendations were made

---

[1052] Par 2.62 above.

for validation where the parties in good faith acted in terms of ordinary powers of attorney after the principal's impairment.[1053] The proposals of the English Law Commission indicated that it believed that the needs of persons who are incapable at the time of enactment of new legislation dealing with enduring powers of attorney, should indeed be met, especially as such persons would not have the required capacity to make an enduring power of attorney in terms of new legislation. For the benefit of such persons transitional provisions have specifically been included in the draft legislation proposed at the time.[1054]

6.243 The Commission believes that the position of a person who previously elected to grant an ordinary power with the intention that the power should continue to have effect notwithstanding his or her subsequent decision-making impairment, should be addressed in the draft Bill in response to the public concerns raised. We agree with the view of the English Law Commission that this is necessary because these persons will be precluded from granting enduring powers under the proposed new legislation. To prevent abuse, and to protect the principal, validation should be possible only under limited and expressly prescribed circumstances. The same should apply in respect of the validation of acts performed by an agent under an ordinary power where the agent acted in good faith in terms of the power.

Report recommendation

6.244 ***Public concerns were raised about the current validity of ordinary powers of attorney granted (in the belief that such powers will endure the future decision-making impairment of these principals), by principals whose ability has since become impaired. It is recommended that it should be possible, under limited circumstances, to apply for the validation of such powers as enduring powers of attorney in terms of the proposed draft Bill, as well as for the validation of acts performed under such powers. The draft Bill should provide that the High Court,***

1053 Alberta Alberta Law Reform Institute **Final Report No 88** 2003 45.

1054 English Law Commission **Report No 231** 1995 130.

on the application of the agent appointed under an ordinary power of attorney, may order the Master to register such ordinary power as an enduring power of attorney under circumstances specified in the Bill. The High Court should also have the power to validate an act performed by an agent under an ordinary power of attorney. Validation of an ordinary power as an enduring power should be possible under limited circumstances only:

- ***The ordinary power of attorney must have been executed before the commencement of the new legislation.;***
- ***the principal must have become a person with "disability" (as defined in the draft Bill's clause 4) since the execution of the power and before the commencement of the new legislation;***
- ***the principal must have intended the ordinary power of attorney to continue to have effect notwithstanding the principal's subsequent "disability"; and***
- ***the principal must have understood the nature and effect of the power at the time of its execution.***

In order to validate an act performed by an agent as referred to, the Court should be satisfied that the agent reasonably believed that he or she acted in terms of a valid power of attorney that will continue to have effect notwithstanding the principal's subsequent "disability". The Court should also be satisfied that it would be just and equitable to validate the act in question. (Draft Bill, clauses 96 and 97.)

8 Terminology

6.245 A variety of terms are used in other legal systems to refer to the concept of a power of attorney that endures the decision-making impairment of the principal. Specific terms are moreover used for an enduring power which comes into operation with the onset of the principal's decision-making impairment only; and to distinguish between enduring powers granted in respect of financial affairs and those granted in respect of personal welfare matters. Different terms are also used to refer to what is traditionally known in the South African law of agency as the "principal" (the person granting

authority to another to act on his or her behalf) and the "agent" (the person to whom the authority is granted).

6.246 Examples of terminology used in other systems are as follows:

- *The instrument authorising another to act on behalf of an individual*:
  All jurisdictions referred to in this Paper use the basic common law term "power of attorney".[1055]
- *A power of attorney which continues after the "incapacity" of the person who granted the authority:*
  The following are used: "continuing power of attorney" (in England[1056] and Scotland[1057]); "enduring power of attorney" (in Canada,[1058] Australia[1059] and New Zealand[1060]); and "durable power of attorney" (mainly in United States legislation[1061]).
- *An enduring power of attorney which becomes operative only when the principal becomes incapable*:
  In most jurisdictions the literature refers to this as a "springing" power" although legislation seldom expressly uses this term. In legislation the concept is usually fully described eg by referring to the ability of a principal to grant a power which "shall have effect only if the principal becomes mentally incapable".[1062]

1055 See the common law meaning of an ordinary "power of attorney" in par 6.1 above.

1056 English Law Commission **Report No 231** 1995 par 1.25-1.26. In England the Law Commission suggested that the concept of "enduring power of attorney" (introduced in 1985 and permitting decision-making about property and affairs only) be replaced by a new form of power of attorney which should be known as a "continuing power of attorney" and which would also cover decisions about personal welfare and health care (Ibid).

1057 Adults with Incapacity (Scotland) Act, 2000 sec 15. Note, however, that Scotland uses the term "continuing" in respect of a financial power only.

1058 See eg the Enduring Powers of Attorney Act, 1991 of Alberta; Manitoba Law Reform Commission Report **on Enduring and Springing Powers of Attorney** 1994; and Law Reform Commission of British Columbia **Report on the Enduring Power of Attorney** 1990.

1059 Queensland Law Reform Commission **Report No 49 Vol 1** 1996 85 et seq; Powers of Attorney Act, 1998 (Queensland).

1060 New Zealand Protection of Personal and Property Rights Act 1988, sec 95.

1061 See the legislation referred to by Schlesinger and Scheiner 1992 **Trusts and Estates** 38 et seq.

1062 Cf the prescribed form of enduring power provided for in the New Zealand Protection of Personal and Property Rights Act, 1988.

- *An enduring power granted in respect of financial affairs* as distinguished from *one granted in respect of personal welfare and health care matters:*
  In some jurisdictions the two types of power are known by distinct terms eg "continuing power of attorney" (for a financial power), and "welfare power of attorney" (for a personal welfare and health care power);[1063] or "durable power of attorney" and "durable power for health care".[1064] In other systems both types are known simply as "continuing" or "enduring" powers and are then further described according to type: eg "enduring power of attorney in relation to property" and "enduring power of attorney in relation to personal care and welfare'.[1065] Note, however, that in some jurisdictions it is argued that it is incorrect to refer to a welfare and health care power as a "continuing" power since such power usually has no effect prior to the principal's decision-making impairment.[1066] Where legislation deals separately with health care issues (ie where it is not included in legislation on enduring powers of attorney), the authority granted is not referred to in terms of "power-of-attorney-terminology" but is usually referred to as a "health care directive", "advance directive", or "personal directive".[1067]
- *The person granting authority to act:*
  In this regard there is a variation of terms usually not linked to or associated with the rest of the terminology used. The following terms are used: "donor";[1068] "granter";[1069] or "the person making the enduring power".[1070]
- *The person executing the authority*:
  The terminology chosen sometimes follows the terminology used for the instrument. For instance, referring to a "welfare attorney" where the

---

1063 As eg in Scotland (Adults with Incapacity [Scotland] Act, 2000 sec 15 and 16).

1064 As eg in some states in the United States (Loue 1995 **The Journal of Legal Medicine** 461).

1065 As eg in New Zealand (Protection of Personal and Property Rights Act, 1988).

1066 Scottish Law Commission **Report No 151** 1995 29.

1067 See eg the position in certain provinces in Canada (Alberta Law Reform Institute **Report No 64** 1993 11-13; and the Alberta Personal Directives Act, 1997 sec 1 for a specific example).

1068 As eg in Alberta, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 v); England (English Law Commission **Report No 231** 1995 par 1.26); New Zealand (Protection of Personal and Property Rights Act, 1988).

1069 As eg in Scotland (Adults with Incapacity [Scotland] Act, 2000 sec 15).

1070 As eg suggested in Queensland, Australia (Queensland Law Reform Commission **Report No 49** 1996 Vol 3 (ix)).

instrument is referred to as a "welfare power of attorney".[1071] A variety of terms is, however, used in other jurisdictions, including the following: attorney";[1072] "chosen decision-maker;[1073] "agent" or "health care agent";[1074] and "done".[1075] Note that "agent" (the South African common law term) is used in legislation dealing specifically with advanced directives in health care only, and not in legislation dealing with enduring powers of attorney. Note also that corresponding terms are not necessarily used for the persons granting and executing authority: In New Zealand, for instance, the terms "donor" and "attorney" are used (where one would perhaps have expected the terms "donor" and "done" – as is preferred in England).[1076] A variety of approaches were followed by Law Commissions introducing terminology in respect of enduring powers. In Scotland, for instance, the Law Commission argued that using the term "attorney" for the appointee (although attorneys are further described as "continuing attorneys" or "welfare attorneys") is preferred because of its connotations to the common law fiduciary relationship in the law of agency between granter and "attorney". The Commission believed that adoption of a term other than "attorney" would involve setting out all the relevant common law rules in new statutory provisions pertaining to enduring powers.[1077] Contrary to this, the Queensland Law Reform Commission seemed to argue that using a term different from the traditional term used in respect of ordinary powers of attorney would clearly emphasise the difference between the traditional concept and the new concept of *enduring* power of attorney.[1078]

1071 As eg in Scotland (Adults with Incapacity [Scotland] Act, 2000 sec 15).

1072 As in Scotland (Adults with Incapacity [Scotland] Act, 2000 sec 17); and Alberta, Canada (Alberta Law Reform Institute **Issues Paper No 5** 2002 1).

1073 As eg recommended by the Queensland Law Reform Commission (Queensland Law Reform Commission **Report No 49** 1996 Vol 1 85).

1074 As eg in Alberta, Canada (the proposed Health Care Instructions Act [Alberta Law Reform Institute **Report No 64** 1993 45]).

1075 As eg proposed by the English Law Commission (English Law Commission Report **No 231** 1995 par 1.27).

1076 Cf the New Zealand Protection of Personal and Property Rights Act 1988 sec 94 and 95; English Law Commission **Report No 231** 1995 par 1.26-1.27.

1077 Scottish Law Commission **Report No 151** 1995 28-29.

1078 Queensland Law Reform Commission **Report No 49 Vol 1** 1996 85-86.

6.247 The Commission in its 1988 recommendations used the term "enduring power of attorney" to refer to the concept of a power of attorney that continues after the “incapacity” of the person who granted the authority. Although the concept of the conditional power was provided for in the proposed draft legislation, it was not referred to by a specific term but was *described* in the legislation proposed (as is the practice in other jurisdictions). The recommendations at the time only provided for enduring powers in respect of financial and property affairs (although this was nowhere expressly stated), and terminology for personal welfare powers was not at issue. The terms "agent" and "principal" (following the terms used in the law of agency) were respectively used for the person who is authorised to act for a principal and the person who grants an enduring power of attorney.

Discussion paper recommendation, comment and evaluation

6.248 Discussion Paper 105 recommended that the terminology used by the Commission in its 1988 report (as described in the previous paragraph) should be adhered to. The Commission indicated that it preferred the terms "enduring power relating to property" and "enduring power relating to personal welfare" to distinguish between the two types of powers. It was further suggested that clear definitions should indicate the meanings of the different terms used in new legislation with regard to the concept of the enduring power of attorney.

6.249 No dissenting comment was received on this recommendation.

Report recommendation

6.250 ***It is recommended that the following terms should be used in the draft Bill to refer to matters relating to the enduring power of attorney: "principal"; "agent"; "enduring power of attorney relating to property"; and "enduring power of***

attorney relating to personal welfare". These terms should be clearly defined in the draft Bill. (Draft Bill, clause 1.)

CHAPTER 7
PROPOSED SUPPORTED DECISION-MAKING DRAFT BILL

A Introduction

7.1 The legislation the Commission proposes, as a result of its investigation into assisted decision-making, is set out in draft form below.

7.2 Discussion Paper 105, which preceded this report and which was published by the Commission in 2004, contained an earlier draft Bill. The current draft is the result of additional research, public comment and extensive consultation on the Discussion Paper. As indicated in Chapters 2 and 3, the draft Bill reflects the comprehensive additional research and consultation necessitated by the request to take into account relevant provisions of the CRPD.

B Terminology

7.3 ***Clause 1*** of the draft Bill contains definitions of terms used throughout the Bill.

C Format of the draft Bill

7.4 The draft Bill is divided into 7 Chapters, each dealing with a different aspect of the Commission's recommendations on supported decision-making, as follows:

- ***Chapter 1*** contains fundamental provisions. It sets out the objects of the legislation and indicates to whom the legislation will apply. In the latter regard it defines the Bill's pivotal concept of "disability". Chapter 1 also contains the guiding principles in accordance with which support in terms of the Bill must be provided.

- ***Chapter 2*** provides for informal support. In general it legitimises and sets parameters to such support, but also contains specific provision for continuing authority to access the bank account of a person with disability under certain circumstances.

- ***Chapters 3 and 4*** deal with the formalised measures of support (whether short- or long-term) that are central to the Commission's recommendations and which are recommended as an alternative to the current curatorship system. Chapter 3 covers support with regard to management of the financial affairs of a person with disability, and Chapter 4 deals with support in respect of personal welfare. Each of the two Chapters confers powers on the Master of the High Court to appoint the respective supporter. Each Chapter sets out the required information that must be submitted to the Master when applying for the appointment of a supporter; the criteria that must be taken into account in identifying a specific person for appointment; the powers that the Master may confer on a supporter; the duties of and restrictions on the person appointed; and the procedure for termination or withdrawal of an appointment. Chapters 3 and 4 contain more or less similar procedures for application, appointment, termination and review. Repetition of content across certain provisions is therefore unavoidable. However, the Commission believes that having two Chapters to deal separately with each of the two different measures would simplify the legislation considerably and contributes to its accessibility. This approach is particularly helpful because the majority of users who will refer to the proposed legislation are likely to be family members and carers of persons with disabilities. Also, in most instances, only one of the two measures might be necessary in respect of a person with disability at any time. Which measure is necessary will depend on the nature of the person's need for support at the time the application for support is made.

- ***Chapter 5*** introduces into South African law the concept of the enduring power of attorney. This Chapter provides for enduring powers with regard to financial and personal welfare matters. It allows a principal to stipulate

whether the power should come into effect immediately or only at the time of his or her subsequent disability. This Chapter specifies the requirements for execution and registration of an enduring power. It deals with the appointment of an agent, his or her duties and restrictions, the termination of the power and the possibility of removal of the agent. The Chapter also provides for the validation, as enduring powers, of certain documents executed before the coming into operation of the proposed legislation.

- ***Chapter 6*** deals with the supervisory framework recommended for administering the proposed system of support. It provides for the various powers, duties, operations and procedures of the Master of the High Court in this regard. It also provides for powers of review of the Master's decisions by the court.

- ***Chapter 7*** contains general provisions dealing with the establishment of an inter-sectoral committee, training matters, offences and penalties, and provision for incremental commencement. There is also provision for the repeal of Chapter VIII of the Mental Health Care Act 17 of 2002 and for the necessary transitional arrangements in this regard; and for the amendment of the Electronic Communications and Transactions Act 25 of 2002 to exclude its application to the enduring power of attorney in certain respects.

- An example of an enduring power of attorney is included in ***Schedule 1*** to provide guidance on the legally required content of an enduring power. An Annexure to the example contains explanatory notes for the information of the principal and the agent.

- ***Schedule 2*** reflects the extent of the suggested repeal of, and amendment to, the Mental Health Care Act, 2002 and the Electronic Communications and Transactions Act, 2002 respectively.

7.5 The Commission recommends that any consequential amendments that might be necessary, should receive attention when the legislation is in its final form.

REPUBLIC OF SOUTH AFRICA

SUPPORTED DECISION-MAKING BILL

(As introduced ……

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

BILL

To provide for statutory measures to enable persons with disability to access the support they may require in exercising their legal capacity; to introduce and regulate the enduring power of attorney; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING THAT –

- persons with disability continue to face barriers in their participation as equal members of society, including barriers with regard to exercising their legal capacity on an equal basis with others;
- human dignity, the achievement of equality and the advancement of human rights and freedoms are founding principles of our democracy;
- the Constitution of the Republic of South Africa, 1996 prohibits unfair discrimination against persons with disabilities; promotes equality before the law for everyone; provides that everyone has inherent dignity; and protects everyone's right to bodily and psychological integrity;
- South Africa also has international obligations in the field of human rights that promote equality and prohibit unfair discrimination against persons with disabilities, including those obligations specified in the Convention on the Rights of Persons with Disabilities that –
    - recognises the need to promote and protect the human rights of all persons with disabilities;
    - recognises the importance to persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices;

- stipulates that persons with disabilities have the right to recognition everywhere as persons before the law;
- stipulates that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
- stipulates that appropriate measures be taken to provide access by persons with disabilities to the support they may require in exercising their legal capacity; and
- stipulates that such measures must, in accordance with international human rights law, provide for appropriate and effective safeguards to prevent abuse;

AND IN ORDER TO –

- supplement the existing South African law to address the need for support to persons with disabilities in exercising their legal capacity in a manner which recognises constitutional principles and is in accordance with South Africa's international obligations; and
- introduce and regulate the enduring power of attorney,

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: –

ARRANGEMENT OF SECTIONS

CHAPTER 4
FORMAL SUPPORT IN EXERCISING LEGAL CAPACITY WITH REGARD TO PERSONAL WELFARE

Part 1
Appointment of personal welfare supporter

Part 2
Powers and duties of personal welfare supporter

Part 3
Restrictions

Part 4
Review

Part 5
Resignation, termination and withdrawal

CHAPTER 5
ENDURING POWERS OF ATTORNEY

Part 1
Introductory provisions

Part 2
Execution formalities

Part 3
Appointment of agent

Part 4
Registration of enduring power of attorney

CHAPTER 6
POWERS OF MASTER AND COURT

CHAPTER 7
GENERAL PROVISIONS

Part 1
Inter-sectoral Committee on Supported Decision-making and training

Definitions

1. In this Act, unless the context indicates otherwise –

"Administration of Estates Act" means the Administration of Estates Act, 1965 (Act No. 66 of 1965);

"administrator" means an administrator appointed in terms of Chapter VIII of the Mental Health Care Act;

"agent" means a person granted authority in an enduring power of attorney to act on behalf of the principal who grants the power;

"bank" means a public company registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990), and includes –

(a) a mutual bank under the Mutual Banks Act, 1993 (Act No. 124 of 1993); and

(b) except for purposes of section 26, a co-operative bank under the Co-operative Banks Act, 2007 (Act No 40 of 2007);

"Chief Master" in relation to any matter, means the Chief Master of the High Courts appointed in terms of section 2 of the Administration of Estates Act;

"Committee" means the inter-sectoral Committee on Supported Decision-making established in terms of section 117(1);

"continuing authority to access a bank account" means a continuing authority in respect of a bank account of a person with disability contemplated in section 12(2);

"court" means the High Court having jurisdiction;

"curator" means a curator bonis or a curator personae appointed by the High Court;

"data message" means data generated, sent, received or stored by electronic means, including a stored record, but does not include voice where voice is used in an automated message or transaction;

"disability" means disability as defined in section 4;

"enduring power of attorney" means an enduring power of attorney contemplated in section 64, and "***enduring power***" has a corresponding meaning;

"financial supporter" means a person appointed as such in terms of section 16 or considered to have been appointed as such in terms of section 122(1);

"health care practitioner" means a psychiatrist, medical practitioner, occupational therapist, psychologist, social worker or psychiatric nurse registered in terms of any relevant law;

"informal support" means support contemplated in section 6;

"joint agent" means one of two or more agents who have been granted authority in an enduring power of attorney;

"magistrate" means a magistrate as defined in the Magistrates Act, 1993 (Act No. 90 of 1993);

"Master", in relation to any matter, means the Master, Deputy Master or Assistant Master of the High Court appointed under section 2 of the Administration of Estates Act and who in terms of section 99 of this Act has jurisdiction in respect of the matter concerned;

"Mental Health Care Act" means the Mental Health Care Act, 2002 (Act No. 17 of 2002);

"Minister" means a member of Cabinet responsible for the administration of this Act;

"money" includes cash, a cheque, a bill of exchange, a promissory note or money in whatever form;

"National Health Act, 2003" means the National Health Act, 2003 (Act No. 61 of 2003);

"personal welfare" includes matters relating to day-to-day issues (such as living, care, and employment arrangements), health care, and the general personal wellbeing of a person with disability, but excludes matters relating to property;

"personal welfare supporter" means a person appointed as such in terms of section 45;

"prescribed" means prescribed by regulation in terms of this Act;

"primary carer", in relation to a person with disability, means someone, whether or not related to that person, who –

(a) takes primary responsibility for meeting the daily needs of that person but excludes someone who is employed for this purpose only; and

(b) is in substantial contact with that person;

"principal" means a person –

(a) who is 18 years of age or older; or

(b) who is under the age of 18 years and who have attained majority by reason of entering into a valid marriage,

who grants an enduring power of attorney in terms of this Act;

"property" includes –

(a) any movable or immovable property situated in the Republic;

(b) any intellectual property;

(c) any right of action;

(d) any right or interest in property;

(e) any contingent interests in property; and

(f) any contractual right to property;

"relative", in relation to a person with disability, or in relation to a person who grants an enduring power of attorney in terms of this Act, means a parent, adult child, grandparent or adult sibling of that person who is in substantial contact with that person;

"Republic" means the Republic of South Africa;

"serve" means to send by registered post or to deliver by hand, except where the Master otherwise directs in terms of section 105, and "***service***" has a corresponding meaning;

"spouse" means a spouse in the legal sense, and includes a spouse according to any law or religion and a partner in a permanent life partnership;

"sign" means making a full signature and, in the case of a principal executing an enduring power of attorney only, includes the making of initials, making a mark or placing a thumbprint;

"substitute agent" means a person appointed as such in terms of section 76;

"support" means any support of a person with disability in exercising his or her legal capacity;

"this Act" includes Schedule 2 and the regulations made under section 124;

"writing" includes information which is in the form of a data message, except where writing is required as a formality in the execution of an enduring power of attorney as contemplated in section 68, and "***written***" has a corresponding meaning.

CHAPTER 1
FUNDAMENTAL PROVISIONS

Objects of Act

2. The objects of this Act are –

(a) to provide for measures to enable persons with disability to access the support they may require in exercising their legal capacity on an equal basis with others by –

(i) recognising and regulating existing informal support; and

(ii) introducing and regulating alternative measures of formal support;

(b) to introduce and regulate the enduring power of attorney; and

(c) in accordance with constitutional principles and international law, to provide for appropriate and effective safeguards to prevent abuse.

Application of Act

3. This Act applies to persons who are –

(a) 18 years of age or older; or

(b) under the age of 18 years and who have attained majority by reason of entering into a valid marriage.

(2) This Act does not affect the current legal position with regard to -

(a) consent to marriage;

(b) consent to sexual relations;

(c) instituting or defending a divorce action;

(d) consent for the adoption of a child as required in terms of section 233 of the Children's Act, 2005 (Act No. 38 of 2005);

(e) discharging parental responsibility;

(f) the making of a will or any other testamentary disposition;

(g) voting at an election for any public office;

(h) consent required in terms of the Mental Health Care Act;

(i) consent required in terms of the Sterilisation Act, 1998 (Act No. 44 of 1998);

(j) consent required in terms of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996).

Disability

4. (1) Subject to subsection (2), for purposes of this Act a "disability" means any cognitive, developmental, mental, neurological, psychological, sensory or other impairment that may be permanent, temporary or episodic in nature and that hinders a person's ability in exercising his or her legal capacity on an equal basis with others.

(2) For purposes of this Act a person is not regarded as having a disability –

(a) if he or she is able to understand an explanation of the information relevant to the exercise of his or her legal capacity in a way that is appropriate to his or her circumstances;

(b) merely because in exercising his or her legal capacity he or she is taking or has taken unreasonable decisions; or

(c) by reason of an inability to communicate his or her decision pertaining to the exercise of his or her legal capacity, unless all reasonable steps to enable him or her to do so have been taken without success.

General principles

5. (1) The general principles set out in this section guide –

(a) the implementation of this Act;

(b) all proceedings, actions and decisions by any organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 in any matter concerning the support of a person with disability in terms of this Act; and

(c) any support provided by a supporter to a person with disability in terms of this Act.

(2) All proceedings, actions, decisions or support of, or in respect of, a person with disability in terms of this Act must –

(a) be in accordance with the right of the person not to be unfairly discriminated against;

(b) be in accordance with the person's right to be treated equitably and fairly;

(c) be in accordance with the person's right to inherent dignity;

(d) recognise the person's right to individual autonomy and independence;

(e) be necessary with regard to the person's needs and circumstances;

(f) be proportional to the person's circumstances;

(g) respect the rights, preferences and will of the person;

(h) take account of the cultural environment, values and beliefs of the person;

(i) encourage the fullest possible participation of the person;

(j) be free of conflict of interest and undue influence;

(k) in so far as they are ascertainable, take account of the person's past and present wishes and feelings in relation to the support;

(l) in so far as it is reasonable and practicable to do so, where any views in relation to the support have been made known to the person providing the support, take account of the views of –

(i) any person named by the person with disability as someone to be consulted;

(ii) the spouse, relatives and primary carer of the person with disability;

(iii) a curator, administrator, financial supporter or personal welfare supporter who has powers relating to the support to be provided;

(iv) any person whom the Master or the court has directed to be consulted; and

(v) any other person considered by the person providing the support to have an interest in the welfare of the person with disability or in his or her support; and

(m) take account of any other relevant matter.

CHAPTER 2
INFORMAL SUPPORT IN EXERCISING LEGAL CAPACITY
Part 1
Informal support

Lawful informal support

6. (1) Subject to subsection (2), informal support may lawfully be provided to a person with disability if –

(a) having regard to all the circumstances, it is reasonable for such support to be provided by the person who does so;

(b) the person who provides the support reasonably believes that the informal support is provided in accordance with the principles in section 5; and

(c) the person with disability has been consulted to the extent reasonably possible with regard to his or her need for the support, and has to the extent reasonably possible consented to the support being provided.

(2) Informal support may not be provided in respect of a matter for which, to the knowledge of the person seeking to provide the support –

(a) a curator bonis has been appointed by the court;

(b) a curator personae has been appointed by the court;

(c) a financial supporter has been appointed in terms of Chapter 3 or is considered to have been appointed in terms of section 122(1);

(d) a personal welfare supporter has been appointed in terms of Chapter 4; or

(e) provision has been made in an enduring power of attorney executed in terms of Chapter 5.

(3) Informal support does not require an appointment by the Master.

Expenditure in connection with lawful informal support

7. (1) Where informal support provided in accordance with this Act to a person with disability involves expenses incurred during the course of the support, and those expenses are borne by another person, that person is, subject to subsection (2), entitled to claim those expenses from the person with disability.

(2) Reasonable expenses incurred during the course of informal support may be claimed under subsection (1) only if the expenses –

(a) were necessary and useful in relation to the support provided; and

(b) were suitable in relation to –

(i) the standard of living of the person with disability; and

(ii) the actual requirements of the person with disability at the time when the goods were supplied or the services provided.

Prohibition on using threat or force

8. The person providing informal support to a person with disability may not –

(a) use or threaten to use force, or unduly influence the person with disability; or

(b) detain or confine the person with disability.

Restrictions with regard to property

9. Informal support of a person with disability does not extend to support with regard to –

(a) the alienation, mortgaging, granting of a servitude over or conferring of any other real right in immovable property belonging to that person;

(b) entering into any credit agreement, including one to which the National Credit Act, 2005 (Act No. 34 of 2005) applies;

(c) the investment or reinvestment of funds, or the withdrawal of an investment, on behalf of that person.

Restriction with regard to personal welfare

10. Informal support of a person with disability does not extend to support with regard to giving or refusing consent that is required in terms of the National Health Act, 2003 on behalf of, or in relation to, that person.

Keeping of records

11. A person providing informal support to a person with disability must keep sufficient records thereof for at least five years to be able to justify such support if subsequently called upon by the Master to do so.

Part 2

Continuing authority to access bank account of person with disability

Authority to access bank account continues on disability

12. (1) For purposes of this section, "bank account" means any transaction, savings, investment or loan account with a bank.

(2) If a person granted someone else written authority to access his or her bank account or facilities, and the person who granted the authority subsequently, as a result of disability, requires support in exercising legal capacity while the authority is still in force, the authority granted continues, subject to subsection (3), to be valid despite the person's need for support.

(3) A person who has continuing authority to access a bank account is not entitled to use the authority for any purpose other than the payment of the reasonable living expenses of the person who granted the authority or of the common household of that person and his or her spouse, if any.

Keeping of records

13. A person acting in terms of a continuing authority to access a bank account contemplated in section 12, must keep sufficient records thereof to be able to justify the activity if subsequently called upon by the Master to do so.

Withdrawal by Master of continuing authority to access bank account of person with disability

14. (1) Subject to subsection (2), the Master may upon the application of any person withdraw a continuing authority to access a bank account contemplated in section 12 if the Master is of the opinion that good cause exists for doing so.

(2) Before withdrawing a continuing authority to access a bank account under subsection (1), the Master must serve the person whose authority is sought to be withdrawn with written notice of the intended withdrawal –

(a) setting out the reasons for the intended withdrawal; and

(b) stating that the person may, within 30 days of the date of service of the notice in writing object to the intended withdrawal, giving the reasons for the objection, or may make other representations with regard thereto to the Master.

(3) Pending the withdrawal of a continuing authority to access a bank account under subsection (1), the Master –

(a) may in writing direct the manager of the bank where the account is held in respect of which that authority has been granted, to refuse any further withdrawals of money from the account, except with the written consent of the Master; and

(b) must in writing notify the person whose authority the Master intends to withdraw of a direction given in terms of paragraph *(a)*.

(4) After expiration of the period referred to in subsection (2)*(b)*, the Master may make any ruling the Master considers appropriate in the interests of the person who granted the authority to access his or her bank account**,** which interests may include the wellbeing of the spouse and minor children of that person.

(5) If the Master withdraws a continuing authority to access a bank account under subsection (1), the Master must in writing notify the following persons of the withdrawal and of the reasons therefor:

(a) The person whose authority has been withdrawn;

(b) the person who granted the authority and that person’s spouse and primary carer, if any; and

(c) the manager of the bank where the account is held in respect of which the continuing authority has been withdrawn.

Termination of continuing authority to access bank account of person with disability

15. A continuing authority to access a bank account contemplated in section 12 terminates –

(a) where that authority is held by the spouse of the person who granted the authority, on the dissolution of the marriage, religious union or permanent life partnership between that spouse and the person who granted that authority;

(b) on the appointment, in respect of the property of the person who granted that authority, of –

(i) a curator bonis; or

(ii) a financial supporter, or a person considered to have been appointed as such in terms of section 122(1); or

(c) on the registration, in terms of section 77, of an enduring power of attorney relating to property, executed by the person who granted the authority**.**

CHAPTER 3
FORMAL SUPPORT IN EXERCISING LEGAL CAPACITY WITH REGARD TO PROPERTY
Part 1
Appointment of financial supporter

Master may appoint financial supporter

16. The Master may, after considering an application that complies with section 17 but subject to section 18, appoint a financial supporter to support a person with disability in exercising legal capacity with regard to his or her property.

Application to appoint financial supporter

17. (1) Any person, including a person requiring support –

(a) who is 18 years of age or older; or

(b) who is under the age of 18 years and who has attained majority by reason of entering into a valid marriage,

may apply to the Master to appoint a financial supporter.

(2) The application must be made in writing in the prescribed form, under oath or solemn affirmation, and must –

(a) state the particulars and contact details of the applicant, including an address for service of notices and process;

(b) set out the relationship between the applicant and the person in respect of whom the application is made, and –

(i) the duration and intimacy of their association, if any; and

(ii) if the applicant is not the spouse or a relative of the person, the reason why the spouse or a relative does not make the application;

(c) state –

(i) the particulars and contact details of the person in respect of whom the application is made, including his or her marital status, estimated property value, and annual income; and

(ii) if the person is the owner of fixed property, the title deed description of the property;

(d) state the particulars regarding the support required;

(e) set out the grounds on which the applicant believes the person needs support;

(f) state that, within seven days immediately before submitting the application, the applicant had seen the person;

(g) include reports in the prescribed form by one or more health care practitioners, qualified to express an opinion regarding the person's disability, who –

(i) have recently interviewed and assessed the person;

(ii) are not related to the person; and

(iii) have no personal interest in the appointment sought,

in which the health care practitioner or each such practitioner sets out –

(aa) his or her opinion regarding the nature, extent and probable duration of the person's disability and the reasons for such opinion;

(bb) whether, in the health care practitioner's opinion, the person requires support in exercising legal capacity with regard to his or her property, and the reasons for such opinion;

(cc) whether, in the health care practitioner's opinion, the person who requires support can, when support is provided, be consulted meaningfully; and

(dd) any other fact or observation the health care practitioner would like to bring to the attention of the Master;

(h) state the particulars and contact details of persons who can provide further information relating to the person's impairment and need for support;

(i) nominate a suitable person to be appointed as financial supporter, and state –

(i) that person's particulars and contact details;

(ii) the reason why the person is nominated; and

(iii) whether the person is willing to accept the nomination;

(j) state whether a joint appointment is necessary, and if such appointment is necessary –

(i) nominate a suitable person to be appointed as joint financial supporter; and

(ii) state the information required in paragraph (i) (i) – (iii) in respect of the person jointly nominated; and

(k) state the particulars and contact details of the spouse, primary carer and relatives of the person in respect of whom the application is made, who are required to support the application in terms of subsection (3)(*b*).

(3) The applicant must attach to the application –

(a) proof to the satisfaction of the Master –

(i) that the person in respect of whom the application is made has consented to the application; or

(ii) failing which, that that person has been served with written notice of the application in the prescribed form, stating that he or she may within 30 days of the date of service –

(aa) in writing object to the application, giving the reasons for the objection; or

(bb) make other representations with regard thereto to the Master; and

(b) (i) affidavits from the spouse, primary carer and all relatives of the person in respect of whom the application is made, stating that they support the application; or

(ii) failing which, proof to the satisfaction of the Master that the persons referred to in subparagraph (i) have been served with written notice of the application in the prescribed form, wherein they have been informed that they may within 30 days of the date of service –

(aa) in writing object to the application, giving the reasons for the objection; or

(bb) make other representations with regard thereto to the Master.

(4) The applicant must submit to the Master any further information required by the Master.

(5) The Master must provide such reasonable assistance, free of charge, as is necessary to enable the applicant to comply with the requirements of this section.

Who may be appointed as financial supporter

18. (1) A financial supporter appointed by the Master in terms of section 16 must be an individual of 18 years of age or older, or a juristic person, who the Master considers suitable for appointment.

(2) In determining whether a person is suitable for appointment, the Master must –

(a) give preference to –

(i) the express preference of the person with disability to be supported, except where good cause exists for not giving effect thereto; and

(ii) a person who is aware of the impairment and circumstances of the person with disability and the needs arising therefrom; and

(b) have regard to –

(i) the accessibility of the person to be appointed to the person with disability and his or her primary carer, if any;

(ii) the ability of the person to carry out the functions and duties of a financial supporter;

(iii) any likely conflict of interest between the person to be appointed and the person with disability;

(iv) any undue concentration of power over the person with disability, or which is likely to arise;

(v) any adverse effects which the appointment of the person would have on the interests of the person with disability, which interests may include the wellbeing of the spouse and minor children of the person with disability; and

(vi) any other relevant matter.

(3) Nothing in this section precludes the Master from appointing –

(a) joint financial supporters;

(b) the same person as both financial supporter and personal welfare supporter to a person with disability.

(4) No Master may in his or her official capacity be appointed as financial supporter.

Disposal of application

19. (1) *(a)* Subject to paragraph (b), the Master must, after considering an application complying with section 17, either –

(i) appoint a financial supporter to support the person in respect of whom the application has been made, if the Master is satisfied that the person requires support; or

(ii) decline to make an appointment.

(b) The Master must decline to make an appointment and must direct the applicant to apply to the court for appropriate relief if –

(i) the application is opposed on the basis that the person concerned is not a person with disability; and

(ii) the Master considers referral to the court necessary.

(2) On making an appointment, the Master must determine the period within which the first review of the appointment must take place, if the period is to be less than the period provided for in section 38(1)*(b)*.

(3)*(a)* Whether the Master makes and appointment or declines to make an appointment, the Master must in writing notify the following persons of his or her decision –

(i) the applicant;

(ii) the person in respect of whom the application has been made and his or her spouse and primary carer, if any; and

(iii) any person notified of the application in terms of section 17(3)*(b)* who fobjected to the application or made representations with regard thereto to the Master; and

(iv) the person nominated as financial supporter in terms of section 17(2)(i).

(b) If the Master declines to make an appointment, the Master must supply the reasons for this decision.

Confirmation of appointment by letter of appointment

20. (1) The Master must issue a person appointed as financial supporter with a letter of appointment in the prescribed form confirming the appointment.

(2) Where a juristic person is appointed –

(a) the letter of appointment must be issued in favour of an individual who is an officer of the juristic person and who has been nominated by the juristic person to take the appointment;

(b) in the event of the death, resignation, dismissal or vacation of office by the individual referred to in paragraph *(a)*, the letter of appointment must be endorsed by the Master in favour of the successor in office of that individual;

(c) the juristic person accepts liability for the acts and omissions of the individuals referred to in paragraphs *(a)* and *(b)*.

(3) A person who is appointed as financial supporter may not provide any financial support purportedly in terms of that appointment until a letter of appointment has been issued to him or her in terms of this section.

Giving security

21. (1) The Master may, if satisfied that it is necessary to do so –

(a) before appointing a person as financial supporter, require the person to give security to the amount determined by the Master for the proper performance of his or her functions and duties;

(b) at any time after appointing a financial supporter, require that supporter –

(i) to give security to the amount determined by the Master for the proper performance of his of her functions and duties; or

(ii) if security was given in terms of paragraph *(a)*, to give additional security to the amount determined by the Master.

(2) The Master may at any time, on good cause shown, reduce or discharge the security given in terms of subsection (1).

(3) The reasonable cost of giving security is payable out of the estate of the person with disability who is being supported or is to be supported.

(4) If the financial supporter fails to perform his or her functions or duties in any way, the Master may enforce the security and recover from the financial supporter, or his or her sureties, the loss to the estate of the person with disability.

Part 2

Powers and duties of financial supporter

Powers conferred by letter of appointment

22. (1) The Master may, in a letter of appointment issued in terms of section 20, authorise a financial supporter to support a person with disability in –

(a) making a specific decision or specific decisions, or performing a specific act or specific acts, in respect of that person’s property;

(b) taking care of and administering that person's property, or such parts thereof as specified in the letter, and in performing all functions and duties incidental thereto;

(c) carrying on, subject to any other law, any business or undertaking of that person.

(2) The Master may make an authorisation granted in terms of subsection (1) subject to such conditions and restrictions as the Master considers appropriate.

(3) Without derogating from the generality of subsection (2), the Master may, if the Mastere considers it appropriate in the circumstances, make an authorisation subject to the condition that the financial supporter may only take a specified decision, specified decisions, or all decisions with the express consent of the person with disability.

Taking control of property

23. (1) A financial supporter must immediately after a letter of appointment has been issued to him or her, take under his or her control –

(a) the property in respect of which he or she has been appointed; and

(b) any document or record relating to that property.

(2)*(a)* If a financial supporter suspects that any property, document or record referred to in subsection (1) is being concealed or otherwise unlawfully withheld from him or her, the financial supporter may apply to a magistrate having jurisdiction for a search warrant.

(b) A magistrate may issue a warrant to search for and take possession of the property, document or record referred to in subsection (1) if it appears to the magistrate from a statement made under oath that there are reasonable grounds to suspect that that property, document or record is being concealed upon any person or at or upon any place or premises or upon or in any vehicle or vessel or container of whatever nature, or is otherwise being

unlawfully withheld from the financial supporter within the area of the magistrate's jurisdiction.

(c) A warrant issued in terms of paragraph *(b)* must be executed by day, unless the magistrate who issued the warrant authorises the execution thereof by night at times that must be reasonable, and the search of any person or entry upon and search of any place, premises, vehicle, vessel or container specified in that warrant must be conducted with strict regard to decency and order, including –

(i) a person's right to, respect for and protection of his or her dignity;

(ii) the right of a person to freedom and security; and

(iii) the right of a person to his or her personal privacy.

(d) The person executing a warrant in terms of this subsection must immediately before commencing with the execution –

(i) identify himself or herself or the person in control of the place, premises, vehicle, vessel or container, if that person is present, and hand to that person a copy of the warrant or, if that person is not present, affix the copy of the warrant to a prominent spot on the place, premises, vehicle, vessel or container; and

(ii) supply that person, at his or her request, with particulars regarding his or

her authority to execute the warrant

(e) The person who may, on the authority of a warrant issued in terms of paragraph *(b)*, enter and search any place, premises, vehicle, vessel or container, or any person thereat, thereon or therein, may use such force as may be reasonably necessary to overcome resistance to that entry or search.

(f) No person may enter upon and search any place, premises, vehicle, vessel or container, unless he or she has audibly demanded admission to the place, premises, vehicle, vessel or container and has notified the purpose of his or her entry, unless that person is upon reasonable grounds of the opinion that any document or record may be destroyed if admission is first demanded and the purpose of his or her entry is first notified.

(g) A warrant issued in terms of paragraph *(b)* may be issued on any day and is of force until –

(i) it is executed;

(ii) it is cancelled by the magistrate who issued it or, if that magistrate is not available, by any other magistrate with similar authority;

(i) the expiry of one month from the date of its issue; or

(ii) the purpose for which the warrant was issued, no longer exists,

whichever may occur first.

Inventory of property

24. (1) A financial supporter authorised in terms of section 22(1)*(b)* or *(c)*, or both, must within 30 days after a letter of appointment has been issued to him or her, or within such further period as the Master may allow, compile and submit to the Master an inventory that complies with the prescribed requirements.

(2) An inventory contemplated in subsection (1) must take account of the property and value thereof in respect of which the financial supporter has been appointed to provide support, and thereafter, whenever the financial supporter comes to know of property which is not mentioned in the inventory, within 30 days after he or she has come to know of such property or within such further period as the Master may allow, he or she must compile and submit to the Master an additional inventory thereof.

Prohibition on disposal of property not in inventory

25. A financial supporter may not dispose of property in respect of which he or she has been appointed to provide support if the property has not been mentioned in an inventory or additional inventory compiled in terms of section 24, unless the disposal takes place in the ordinary course of any business or undertaking carried out by the financial supporter in this capacity.

Bank accounts

26. (1) A financial supporter authorised in terms of section 22(1)*(b)* or *(c)*, or both –

(a) must, unless the Master otherwise directs, open a bank account at a bank within the Republic in the name of the estate of the person with disability, and must deposit therein all money received by the financial supporter in terms of his or her authority on behalf of the person's estate;

(b) may place money deposited in a bank account referred to in paragraph *(a)* and not immediately required for the payment of any claim against the person's estate, on interest-bearing deposit at a bank within the Republic.

(2) (a) Whenever required in writing by the Master to do so, a financial supporter must –

(i) in writing notify the Master of the name of the bank at which he or she has opened an account or placed a deposit in terms of subsection (1); and

(ii) submit to the Master a bank statement or other sufficient evidence of the state of any account opened.

(b) A financial supporter who complied with a request by the Master referred to in subsection (2)*(a)*(i), may not, without giving written notice to the Master, transfer any such account from any such bank to any other bank.

(3) All cheques or orders drawn upon an account referred to in subsection (1), must –

(a) contain the name of the payee and the reason for payment;

(b) be drawn to order; and

(c) be signed by the financial supporter.

(4) The Master and any surety for a financial supporter –

(a) have the same right to information as that of the financial supporter with regard to an account referred to in subsection (1); and

(b) may examine all documents and records in relation to that account, whether in the hands of the bank or of the financial supporter.

(5) The Master may, on good cause shown, in writing direct any bank with which an account has been opened in terms of subsection (1) to refuse, except with the written consent of the Master, any further withdrawals of money from that account, and the Master must in writing notify the financial supporter of any such direction.

Notification of address and change of circumstances

27. (1) A financial supporter must, on being appointed, supply the Master in writing with an address for the service upon him or her of notices and process.

(2) A financial supporter must notify the Master of –

(a) any change in the address supplied to the Master in terms of subsection (1);

(b) any change in the address of the person with disability;

(c) the death of the person with disability; and

(d) any event that may result in the withdrawal, in terms of section 41(2), of the appointment of the financial supporter.

(3) If a person appointed as financial supporter –

(a) dies, his or her executor referred to in section 1 of the Administration of Estates Act must, if aware of the appointment, notify the Master of the death of that person;

(b) becomes a person with disability, his or her primary carer must, if aware of the appointment, notify the Master of the impairment of the person.

(4) Before an intended absence of a financial supporter from the Republic for a period exceeding two months, the financial supporter must –

(a) notify the Master of this intention; and

(b) comply with such conditions as the Master considers necessary to impose.

(5) Notification of the Master –

(a) in terms of this section, must be in writing and must be served on the Master; and

(b) in terms of subsections (2) and (3), must be done within 30 days of the occurrence of the event to be notified or as soon as possible thereafter.

Notification of appointment and cessation

28. (1) The Master may in writing require that a financial supporter, who has been authorised to act in terms of section 22(1)*(b)* or *(c)*, or both, or who ceases to act as financial supporter, must within 30 days of the request or within such further period as the Master may allow, cause a notice of his or her authorisation or the cessation thereof to be published in the *Gazette*.

(2) The notice must be in the prescribed form and must state –

(a) the particulars of the person with disability to be supported or in respect of whom support has ceased;

(b) the particulars of the financial supporter and any joint financial supporter who has been appointed or whose appointment has ceased;

(c) whether notice is given of an authorisation or of the cessation thereof; and

(d) the date from which the authorisation or cessation is effective.

(3) The cost of the notice must be paid out of the estate of the person with disability who is to be supported, or in respect of whom support has ceased.

(4) The financial supporter who causes the notice to be published in the *Gazette* must submit a copy of the notice so published to the Master.

Keeping of records

29. A financial supporter must keep an appropriate record of the support provided to the person with disability, and must submit the record to the Master for inspection at such times as the Master may direct.

Report and account to Master on support provided

30. (1) A financial supporter authorised in terms of section 22(1)*(a)* must, when required in writing by the Master to do so, submit to the Master a report in the form required by the Master of his or her support provided to the person with disability.

(2) *(a)* A financial supporter authorised in terms of section 22(1)*(b)* or *(c)* or both, must, annually, on or before the date determined by the Master, submit to the Master a report of his or her support provided to the person with disability, which report must relate to the period of twelve months ending upon a date three months prior to the date so determined.

(b) A financial supporter referred to in paragraph *(a)* who ceases to provide support must, within 30 days of the cessation of the support, submit to the Master a report of the support provided between the date in respect of which his or her last report was submitted in terms of paragraph *(a)* and the date of cessation of the support.

(c) The reports referred to in paragraphs *(a)* and *(b)* must consist of a statement of monetary transactions that –

(i) complies with the prescribed requirements;

(ii) is supported by documents and records; and

(iii) contains such additional information as the Master may require.

(d) On good cause shown, the Master may –

(i) reduce or extend the period in respect of which a report referred to in paragraph *(a)* must be submitted;

(ii) extend the period within which a report referred to in paragraph *(b)* must be submitted;

(iii) vary the requirements referred to in paragraph *(c)* with regard to the reports referred to in paragraphs *(a)* and *(b)*.

Inspection of securities

31. (1) For purposes of this section, “securities” means any document or record that constitutes evidence of title to an asset, including a title deed reflecting ownership of

immovable property, a stock and share certificate, an investment certificate or a mortgage bond.

(2) A financial supporter authorised in terms of section 22(1)*(b)* or *(c)*, or both, must, if required by the Master in writing to do so and within the period specified by the Master, produce any securities held in his or her capacity as financial supporter for inspection by the Master or by a person nominated by the Master.

Fiduciary duty and duty of care

32. (1) In providing support in terms of this Act, a financial supporter must observe the utmost good faith and exercise the care and diligence that can be expected of a prudent person appointed to support a person with disability in exercising legal capacity with regard to that person's property.

(2) Any act or agreement that has the effect of exempting a financial supporter from, or indemnifying him or her against, liability for failing to observe the good faith or to exercise the care and diligence required in terms of subsection (1), is void as far as it has such effect.

Remuneration

33. (1) On good cause shown, the Master may allow a financial supporter authorised in terms of section 22(1)*(a)* to receive, out of the property of the person with disability, a reasonable amount in remuneration, which at the discretion of the Master may include reasonable expenses.

(2)*(a)* A financial supporter authorised in terms of section 22(1)*(b)* or *(c)*, or both, is entitled to receive out of the property of the person with disability or the income derived from such property, a remuneration that must –

(i) be assessed according to the prescribed tariff; and

(ii) be taxed by the Master.

(b) The Master may –

(i) reduce or increase the remuneration if there are special reasons for doing so; or

(ii) disallow the remuneration either wholly or in part, if the financial supporter failed to discharge his or her functions or duties, or discharged them in an unsatisfactory manner.

Part 3

Restrictions

Prohibition on using threat or force

34. In the course of performing his or her powers and duties, a financial supporter may not –

(a) use or threaten to use force, or unduly influence the person with disability he or she has been appointed to support; or

(b) detain or confine the person with disability.

Restrictions with regard to property

35. (1) A financial supporter may not alienate, mortgage, grant a servitude over or confer any other real right in immovable property in respect of which he or she has been appointed to provide support, unless the financial supporter –

(a) has been authorised to do so by the Master in a letter of appointment issued in terms of section 20;

(b) does so with the written consent of the Master; or

(c) has been authorised to do so by a court.

(2) A financial supporter, his or her spouse, child, parent, partner, associate or agent may not purchase or otherwise acquire any property of the person with disability, unless the purchase or acquisition was –

(a) in writing legally authorised by the person before he or she needed support in exercising legal capacity;

(b) in writing consented to by the Master; or

(c) authorised by a court.

Relationship with other support in terms of this Act

36. (1) In the event of conflict between the exercise of their respective powers by a financial supporter and a personal welfare supporter, the exercise of powers by the personal welfare supporter prevails, unless the Master on good cause shown otherwise directs.

(2) In the event of conflict in the exercise of their powers by a financial supporter and an agent appointed by the person with disability, the exercise of powers by an agent within the scope of his or her authority prevails, unless the Master otherwise directs.

No substitution allowed

37. A financial supporter may not substitute any other person to act as financial supporter in his or her place.

Part 4

Review

Periodic review of appointment by Master

38. (1) *(a)* The Master must periodically review the appointment of a financial supporter authorised in terms of section 22(1)*(b)* or *(c)*, or both.

(b) The first review must take place within three years after the date of appointment of the financial supporter, unless the Master has determined a shorter period in terms of section 19(2).

(c) A review other than the first review must take place within three years after the most recent review, unless the Master has determined a shorter period for such review.

(2) Notwithstanding subsection (1)*(b)* and *(c)*, the Master may at any time review the appointment of a financial supporter –

(a) at the Master's own initiative;

(b) on application by the person with disability who is being supported by the financial supporter; or

(c) on application by an interested person.

(3) The Master may conduct a review in the manner the Master considers appropriate to the circumstances of the particular case.

(4) In disposing of a review, the Master –

(a) must either –

(i) determine that the appointment of the financial supporter concerned continues with or without changes to his or her powers; or

(ii) withdraw the appointment subject to section 41(2) and (3);

(b) may appoint a joint financial supporter in terms of section 110;

(c) may give such further directions as the Master considers necessary.

Part 5

Resignation, termination and withdrawal

Resignation by financial supporter

39. (1) A financial supporter who wishes to resign must notify the following persons of his or her intended resignation:

(a) The person with disability and that person's spouse and primary carer, if any;

(b) in the case of joint appointments, all other persons appointed jointly with the financial supporter;

(c) the Master;

(d) a person appointed in terms of this Act as personal welfare supporter to the person with disability concerned; and

(e) any bank contemplated in section 26.

(2) Notification of the Master in terms of subsection (1) must be in writing and must be served on the Master.

(3) The resignation of the financial supporter becomes effective on the date specified by the financial supporter in the notification referred to in subsection (1), which may not be less than one month after the date of such notification.

(4) On the resignation of the financial supporter becoming effective, the Master must cancel the letter of appointment issued to the financial supporter, and must endorse the letter of appointment of any remaining joint financial supporter to reflect the resignation.

Termination of appointment on application by person supported

40. (1) A person who receives support with regard to his or her property may at any time apply to the Master to terminate the appointment of the financial supporter and any joint financial supporter supporting that person.

(2) The application must –

(a) be made in writing; and

(b) include reports in the prescribed form by one or more health care practitioners, qualified to express an opinion regarding the person's disability, who –

(i) have recently interviewed and assessed the applicant;

(ii) are not related to the applicant; and

(iii) have no personal interest in the termination sought,

in which the health care practitioner or each such practitioner sets out –

(aa) his or her opinion on whether the applicant has recovered from disability, and the reasons for such opinion;

(bb) whether, in the health care practitioner's opinion, the applicant can exercise legal capacity with regard to his or her property without support, and the reasons for such opinion; and

(cc) any other fact or observation the health care practitioner would like to bring to the attention of the Master.

(3) The applicant must submit to the Master any further information required by the Master.

(4) The Master must provide such reasonable assistance, free of charge, as is necessary to enable the applicant to comply with the requirements of this section.

(5) In disposing of the application, the Master must either –

(a) terminate the appointment of the financial supporter and any joint financial supporter who is supporting the applicant, if the Master is satisfied that the applicant can exercise legal capacity with regard to his or her property without support;

(b) decline to terminate the appointment of the financial supporter and any joint financial supporter who is supporting the applicant; or

(c) amend the powers of the financial supporter concerned.

(6) The Master must in writing notify the following persons of his or her decision in terms of subsection (5), and of the reasons therefor:

(a) The applicant and his or her spouse and primary carer, if any;

(b) the financial supporter and any joint financial supporter whose appointment has been terminated or sought to be terminated; and

(c) the personal welfare supporter appointed in respect of the person with disability concerned, if any.

(7) Where the appointment is disposed of as contemplated in subsection (5)*(a)* or (5)*(c)*, the Master must notify any bank contemplated in section 26 of such termination.

(8) On terminating the appointment of a financial supporter, the Master must cancel the letter of appointment issued to the financial supporter, and that of any joint financial supporter whose appointment is being terminated.

Withdrawal of appointment by court or Master

41. (1) A court may at any time, upon application by an interested person, withdraw the appointment of a financial supporter, if the court is of the opinion that good cause exists for doing so, and direct the Master to cancel the letter of appointment issued to that supporter.

(2) Subject to subsection (3), the Master may withdraw the appointment of a financial supporter –

(a) if the financial supporter –

(i) fails to perform satisfactorily any function or duty imposed upon him or her by or in terms of this Act; or

(ii) refuses or fails to comply with any lawful request by the Master;

(b) if the financial supporter has been convicted in the Republic or elsewhere of –

(i) any offence of which dishonesty is an element; or

(ii) any offence other than an offence referred to in subparagraph (i) for which he or she has been sentenced to imprisonment without the option of a fine;

(c) if the financial supporter's estate is sequestrated;

(d) if, where a juristic person has been appointed as financial supporter, the juristic person is wound up, deregistered, dissolved or unable to carry on its activities;

(e) on the dissolution of a marriage, religious union or permanent life partnership between the financial supporter and the person with disability being supported by the financial supporter; or

(f) if, having regard to the factors referred to in section 18, the financial supporter is in the Master's opinion no longer suitable to hold the appointment.

(3) Before withdrawing the appointment of a financial supporter, the Master must serve the supporter with written notice of the intended withdrawal –

(a) setting out the reasons for the intended withdrawal; and

(b) stating that the financial supporter may within 30 days of the date of service of the notice, in writing object to the intended withdrawal giving the reasons for the objection, or may make other representations with regard thereto to the Master.

(4) *(a)* If the court or the Master withdraws the appointment of a financial supporter, the Master must in writing notify the following persons of the withdrawal:

(i) The person whose appointment as financial supporter has been withdrawn;

(ii) the person with disability and that person's spouse and primary carer, if any;

(iii) in the case of joint appointments, all other persons appointed jointly with the financial supporter;

(iv) the personal welfare supporter appointed in respect of the person with disability concerned, if any; and

(v) any bank contemplated in section 26.

(b) The notification contemplated in subsection (4)*(a)*(i) to (iv) must include the reasons for the withdrawal.

(5) On withdrawing the appointment of a financial supporter, the Master must cancel the letter of appointment issued to that supporter, and must endorse the letter of appointment of any remaining joint financial supporter to reflect the withdrawal.

Return and cancellation of letter of appointment

42. When a person ceases to be a financial supporter, he or she must by hand or registered post forthwith return his or her letter of appointment and all certified copies thereof to the Master for cancellation.

Discharge

43. After a person's appointment as financial supporter has ceased, the Master must, on written application by that person, grant him or her written discharge in respect of his or her functions and duties in terms of this Act, if those functions and duties have been completed to the satisfaction of the Master.

Destruction of records

44. Subject to any other law prescribing a longer period, a financial supporter who has been discharged in terms of section 43 may, after five years have elapsed from the date of discharge, and with the written consent of the Master destroy all documents and records in his or her possession relating to the support provided by him or her.

CHAPTER 4
FORMAL SUPPORT IN EXERCISING LEGAL CAPACITY WITH REGARD TO PERSONAL WELFARE

Part 1
Appointment of personal welfare supporter

Master may appoint personal welfare supporter

45. The Master may, after considering an application that complies with section 46, but subject to section 47, appoint a personal welfare supporter to support a person with disability in exercising legal capacity with regard to his or her personal welfare.

Application to appoint personal welfare supporter

46. (1) Any person, including a person requiring support –

(a) who is 18 years of age or older; or

(b) who is under the age of 18 years and who has attained majority by reason of entering into a valid marriage,

may apply to the Master to appoint a financial supporter.

(2) The application must be made in writing in the prescribed form, under oath or solemn affirmation, and must –

(a) state the particulars and contact details of the applicant, including an address for service of notices and process;

(b) set out the relationship between the applicant and the person in respect of whom the application is made, and –

(i) the duration and intimacy of their association, if any; and

(ii) if the applicant is not the spouse or a relative of the person, the reason why the spouse or a relative does not make the application;

(c) state the particulars and contact details of the person in respect of whom the application is made, including his or her marital status, estimated property value and annual income;

(d) state the particulars regarding the support required;

(e) set out the grounds on which the applicant believes the person needs support;

(f) state that, within seven days immediately before submitting the application, the applicant had seen the person;

(g) include reports in the prescribed form by one or more health care practitioners, qualified to express an opinion regarding the person's disability, who –

(i) have recently interviewed and assessed the person;

(ii) are not related to the person; and

(iii) have no personal interest in the appointment sought,

in which the health care practitioner or each such practitioner sets out –

(aa) his or her opinion regarding the nature, extent and probable duration of the person's disability, and the reasons for such opinion;

(bb) whether, in the health care practitioner's opinion, the person requires support in exercising legal capacity with regard to his or her personal welfare, and the reasons for such opinion;

(cc) whether, in the health care practitioner's opinion, the person who requires support can, when support is provided, be consulted meaningfully; and

(dd) any other fact or observation the health care practitioner would like to bring to the attention of the Master;

(h) state the particulars and contact details of persons who can provide further information relating to the person's impairment and need for support;

(i) nominate a suitable person to be appointed as personal welfare supporter, and state –

(i) that person's particulars and contact details;

(ii) the reason why the person is nominated; and

(iii) whether the person is willing to accept the nomination;

(j) state whether a joint appointment is necessary, and if such appointment is necessary –

(i) nominate a suitable person to be appointed as joint personal welfare supporter; and

(ii) state the information required in subparagraphs (i) (i) to (iii) in respect of the person jointly nominated; and

(k) state the particulars and contact details of the spouse, primary carer and relatives of the person in respect of whom the application is made, who are required to support the application in terms of subsection (3)(*b*).

(3) The applicant must attach to the application –

(a) proof to the satisfaction of the Master –

(i) that the person in respect of whom the application is made has consented to the application; or

(ii) failing which, that that person has been served with written notice of the application in the prescribed form, stating that he or she may within 30 days of the date of service –

(aa) in writing object to the application, giving the reasons for the objection; or

(bb) make other representations with regard thereto to the Master; and

(b) (i) affidavits from the spouse, primary carer and all relatives of the person in respect of whom the application is made, stating that they support the application; or

(ii) failing which, proof to the satisfaction of the Master that the persons referred to in subparagraph (i) have been served with written notice of the application in the prescribed form, wherein they have been informed that they may within 30 days of the date of service –

(aa) in writing object to the application, giving the reasons for the objection; or

(bb) make other representations with regard thereto to the Master.

(4) The applicant must submit to the Master any further information required by the Master.

(5) The Master must provide such reasonable assistance, free of charge, as is necessary to enable the applicant to comply with the requirements of this section.

Who may be appointed as personal welfare supporter

47. (1) A personal welfare supporter appointed by the Master in terms of section 45 must be an individual of 18 years of age or older, or a juristic person, who the Master considers suitable for appointment.

(2) In determining whether a person is suitable for appointment, the Master must –

(a) give preference to –

(i) the express preference of the person with disability to be supported, except where good cause exists for not giving effect thereto; and

(ii) a person who is aware of the impairment and circumstances of the person with disability and the needs arising therefrom; and

(b) have regard to –

(i) the accessibility of the person to be appointed to the person with disability and his or her primary carer, if any;

(ii) the ability of the person to carry out the functions and duties of a personal welfare supporter;

(iii) any likely conflict of interest between the person to be appointed and the person with disability;

(iv) any undue concentration of power over the person with disability, or which is likely to arise;

(v) any adverse effects which the appointment of the person would have on the interests of the person with disability, which interests may include the wellbeing of the spouse and minor children of the person with disability; and

(vi) any other relevant matter.

(3) Nothing in this section precludes the Master from appointing –

(a) joint personal welfare supporters;

(b) the same person as both personal welfare supporter and financial supporter to a person with disability.

(4) No Master may in his or her official capacity be appointed as personal welfare supporter.

Disposal of application

48. (1) *(a)* Subject to paragraph *(b)*, the Master must, after considering an application complying with section 46, either –

(i) appoint a personal welfare supporter to support the person in respect of whom the application has been made, if the Master is satisfied that the person requires support; or

(ii) decline to make an appointment.

(b) The Master must decline to make an appointment and must direct the applicant to apply to the court for appropriate relief if –

(i) the application is opposed on the basis that the person concerned is not a person with disability; and

(ii) the Master considers referral to the court necessary.

(2) On making an appointment, the Master must determine the period within which the first review of the appointment must take place, if the period is to be less than the period provided for in section 59(1)*(b)*.

(3) *(a)* Whether the Master makes an appointment or declines to make an appointment, the Master must in writing notify the following persons of his or her decision:

(i) The applicant;

(ii) the person in respect of whom the application has been made and his or her spouse and primary carer, if any; and

(iii) any person notified of the application in terms of section 46(3)*(b)* who objected to the application or made representations with regard thereto to the Master; and

(iv) the person nominated as personal welfare supporter in terms of section 46(2)*(i)*.

(b) If the Master declines to make an appointment, the Master must supply the reasons for this decision.

Confirmation of appointment by letter of appointment

49. (1) The Master must issue a person appointed as personal welfare supporter with a letter of appointment in the prescribed form confirming the appointment.

(2) Where a juristic person is appointed –

(a) the letter of appointment must be issued in favour of an individual who is an officer of the juristic person and who has been nominated by the juristic person to take the appointment;

(b) in the event of the death, resignation, dismissal or vacation of office of the individual referred to in paragraph *(a)*, the letter of appointment must be endorsed by the Master in favour of the successor in office of that individual;

(c) the juristic person accepts liability for the acts and omissions of the individuals referred to in paragraphs *(a)* and *(b)*.

(3) A person who is appointed as personal welfare supporter may not provide any personal welfare support purportedly in terms of that appointment until a letter of appointment has been issued to him or her in terms of this section.

Part 2

Powers and duties of personal welfare supporter

Powers conferred by letter of appointment

50. (1) The Master may, in a letter of appointment issued in terms of section 49, authorise a personal welfare supporter to support a person with disability in –

(a) making a specific decision or specific decisions, or performing a specific act or specific acts, in respect of that person's personal welfare;

(b) taking care of that person's personal welfare, or such aspects thereof as specified in the letter, and in performing all functions and duties incidental thereto.

(2) In addition to the powers referred to in subsection (1), the Master may in a letter of appointment expressly authorise a personal welfare supporter to –

(a) give consent for the provision of a health service to the person with disability as contemplated in section 7(1)*(a)*(ii) of the National Health Act, 2003;

(b) give consent for a person with disability to be admitted to a residential facility as contemplated in section 21(3)*(a)* of the Older Persons Act, 2006 (Act No. 13 of 2006).

(3) The Master may grant the power referred to in subsection (2)*(b)* only on a unanimous motivated recommendation by –

(a) the personal welfare supporter, or proposed personal welfare supporter, of the person with disability concerned;

(b) the person in charge of the residential facility; and

(c) a health care practitioner who –

(i) has recently interviewed and assessed the person with disability;

(ii) is not related to the person; and

(iii) has no personal interest in the admission of the person to the residential facility concerned.

(4) The Master may make an authorisation granted in terms of subsection (1) or (2) subject to such conditions and restrictions as the Master considers appropriate.

(5) Without derogating from the generality of subsection (4), the Master may, if the Master considers it appropriate in the circumstances, make an authorisation subject to the condition that the personal welfare supporter may only take a specified decision, specified decisions or all decisions with the express consent of the person with disability.

Notification of address and change of circumstances

51. (1) A personal welfare supporter must, on being appointed, supply the Master in writing with an address for the service upon him or her of notices and process.

(2) A personal welfare supporter must notify the Master of –

(a) any change in the address supplied to the Master in terms of subsection (1);

(b) any change in the address of the person with disability;

(c) the death of the person with disability; and

(d) any event that may result in the withdrawal, in terms of section 62(2), of the appointment of the personal welfare supporter.

(3) If a person appointed as personal welfare supporter –

(a) dies, his or her executor referred to in section 1 of the Administration of Estates Act must, if aware of the appointment, notify the Master of the death of that person;

(b) becomes a person with disability, his or her primary carer must, if aware of the appointment, notify the Master of the impairment of the person.

(4) Before an intended absence of a personal welfare supporter from the Republic for a period exceeding two months, the personal welfare supporter must –

(a) notify the Master of this intention; and

(b) comply with such conditions as the Master considers necessary to impose.

(5) Notification of the Master –

(a) in terms of this section, must be in writing and must be served on the Master; and

(b) in terms of subsections (2) and (3), must be done within 30 days of the occurrence of the event to be notified or as soon as possible thereafter.

Keeping of records

52. The Master may at any time in writing require a personal welfare supporter to keep an appropriate record of the support provided to the person with disability, and to submit the record to the Master for inspection at such times as the Master may direct.

Report to Master on support provided

53. A personal welfare supporter must, when required in writing by the Master to do so, submit to the Master a report in the form required by the Master of his or her support provided to the person with disability.

Fiduciary duty and duty of care

54. (1) In providing support in terms of this Act, a personal welfare supporter must observe the utmost good faith and exercise the care and diligence that can be expected of a prudent person appointed to support a person with disability in exercising legal capacity with regard to that person’s personal welfare.

(2) Any act or agreement that has the effect of exempting a personal welfare supporter from, or indemnifying him or her against, liability for failing to observe the good faith or exercise the care and diligence required in terms of subsection (1), is void in so far as it has such effect.

Remuneration

55. On good cause shown, the Master may allow a personal welfare supporter to receive, out of the property of the person with disability, a reasonable amount in remuneration, which at the discretion of the Master may include reasonable expenses.

Part 3

Restrictions

Prohibition on using threat or force

56. In the course of performing his or her powers and duties, a personal welfare supporter may not –

(a) use or threaten to use force, or unduly influence the person with disability he or she has been appointed to support; or

(b) detain or confine the person with disability.

Relationship with other support in terms of this Act

57. (1) In the event of conflict between the exercise of their respective powers by a personal welfare supporter and a financial supporter, the exercise of powers by the personal welfare supporter prevails, unless the Master on good cause shown otherwise directs.

(2) In the event of conflict in the exercise of their powers by a personal welfare supporter and an agent appointed by the person with disability, the exercise of powers by an agent within the scope of his or her authority prevails, unless the Master otherwise directs.

No substitution allowed

58. A personal welfare supporter may not substitute any other person to act as personal welfare supporter in his or her place.

Part 4

Review

Periodic review of appointment by Master

59.(1)*(a)* The Master must periodically review the appointment of a personal welfare supporter authorised in terms of section 50(1)*(b)*.

(b) The first review must take place within three years after the date of appointment of the personal welfare supporter, unless the Master has determined a shorter period in terms of section 48(2).

(c) A review other than the first review must take place within three years after the most recent review, unless the Master has determined a shorter period for such review.

(2) Notwithstanding subsection (1)*(b)* and *(c)*, the Master may at any time review the appointment of a personal welfare supporter –

(a) at the Master's own initiative;

(b) on application by the person with disability who is being supported by the personal welfare supporter; or

(c) on application by an interested person.

(3) The Master may conduct a review in the manner the Master considers appropriate to the circumstances of the particular case.

(4) In disposing of a review, the Master –

(a) must either –

(i) determine that the appointment of the personal welfare supporter concerned continues with or without changes to his or her powers; or

(ii) withdraw the appointment subject to section 62(2) and (3);

(b) may appoint a joint personal welfare supporter in terms of section 110;

(c) may give such further directions as the Master considers necessary.

Part 5
Resignation, termination and withdrawal

Resignation by personal welfare supporter

60. (1) A personal welfare supporter who wishes to resign must notify the following persons of his or her intended resignation:

(a) The person with disability and that person's spouse and primary carer, if any;

(b) in the case of joint appointments, all other persons appointed jointly with the personal welfare supporter;

(c) the Master; and

(d) a person appointed in terms of this Act as financial supporter to the person with disability concerned.

(2) Notification of the Master in terms of subsection (1) must be in writing and must be served on the Master.

(3) The resignation of the personal welfare supporter becomes effective on the date specified by the personal welfare supporter in the notification referred to in subsection (1), which may not be less than one month after the date of such notification.

(4) On the resignation of the personal welfare supporter becoming effective, the Master must cancel the letter of appointment issued to the personal welfare supporter, and must endorse the letter of appointment of any remaining joint personal welfare supporter to reflect the resignation.

Termination of appointment on application by person supported

61. (1) A person who receives support with regard to his or her personal welfare may at any time apply to the Master to terminate the appointment of the personal welfare supporter and any joint personal welfare supporter supporting that person.

(2) The application must –

(a) be made in writing; and

(b) include reports in the prescribed form by one or more health care practitioners, qualified to express an opinion regarding the person's disability, who –

(i) have recently interviewed and assessed the applicant;

(ii) are not related to the applicant; and

(iii) have no personal interest in the termination sought,

in which the health care practitioner or each such practitioner sets out –

(aa) his or her opinion on whether the applicant has recovered from disability, and the reasons for such opinion;

(bb) whether, in the health care practitioner's opinion, the applicant can exercise legal capacity with regard to his or her personal welfare without support, and the reasons for such opinion; and

(cc) any other fact or observation the health care practitioner would like to bring to the attention of the Master.

(3) The applicant must submit to the Master any further information required by the Master.

(4) The Master must provide such reasonable assistance, free of charge, as is necessary to enable the applicant to comply with the requirements of this section.

(5) In disposing of the application, the Master must either –

(a) terminate the appointment of the personal welfare supporter and any joint personal welfare supporter who is supporting the applicant, if the Master is satisfied that the applicant can exercise legal capacity with regard to his or her personal welfare without support;

(b) decline to terminate the appointment of the personal welfare supporter and any joint personal welfare supporter who is supporting the applicant; or

(c) amend the powers of the personal welfare supporter concerned.

(6) The Master must in writing notify the following persons of his or her decision in terms of subsection (5), and of the reasons therefor:

(a) The applicant and his or her spouse and primary carer, if any;

(b) the personal welfare supporter and any joint personal welfare supporter whose appointment has been terminated or sought to be terminated; and

(c) the financial supporter appointed in respect of the person with disability concerned, if any.

(7) On terminating the appointment of a personal welfare supporter, the Master must cancel the letter of appointment issued to the personal welfare supporter, and that of any joint personal welfare supporter whose appointment is being terminated.

Withdrawal of appointment by court or Master

62. (1) A court may at any time, upon application by an interested person, withdraw the appointment of a personal welfare supporter, if the court is of the opinion that good cause exists for doing so, and direct the Master to cancel the letter of appointment issued to that supporter.

(2) Subject to subsection (3), the Master may withdraw the appointment of a personal welfare supporter –

(a) if the personal welfare supporter –

(i) fails to perform satisfactorily any function or duty imposed upon him or her by or in terms of this Act; or

(ii) refuses or fails to comply with any lawful request by the Master;

(b) if the personal welfare supporter has been convicted in the Republic or elsewhere of –

(i) any offence of which dishonesty is an element; or

(ii) any offence other than an offence referred to in subparagraph (i) for which he or she has been sentenced to imprisonment without the option of a fine;

(c) if, where a juristic person has been appointed as personal welfare supporter, the juristic person is wound up, deregistered, dissolved or unable to carry on its activities;

(d) on the dissolution of a marriage, religious union or permanent life partnership between the personal welfare supporter and the person with disability being supported by the personal welfare supporter; or

(e) if, having regard to the factors referred to in section 47, the personal welfare supporter is in the Master's opinion no longer suitable to hold the appointment.

(3) Before withdrawing the appointment of a personal welfare supporter, the Master must serve the supporter with written notice of the intended withdrawal –

(a) setting out the reasons for the intended withdrawal; and

(b) stating that the personal welfare supporter may, within 30 days of the date of service of the notice, in writing object to the intended withdrawal giving the reasons for the objection, or may make other representations with regard thereto to the Master.

(4) If the court or the Master withdraws the appointment of a personal welfare supporter, the Master must in writing notify the following persons of the withdrawal, and the reasons therefor:

(a) The person whose appointment as personal welfare supporter has been withdrawn;

(b) the person with disability and that person's spouse and primary carer, if any;

(c) in the case of joint appointments, all other persons appointed jointly with the personal welfare supporter; and

(d) the financial supporter appointed in respect of the person with disability concerned, if any.

(5) On withdrawing the appointment of a personal welfare supporter, the Master must cancel the letter of appointment issued to that supporter, and must endorse the letter of appointment of any remaining joint personal welfare supporter to reflect the withdrawal.

Return and cancellation of letter of appointment

63. When a person ceases to be a personal welfare supporter, he or she must by hand or registered post forthwith return his or her letter of appointment and all certified copies thereof to the Master for cancellation.

CHAPTER 5
ENDURING POWERS OF ATTORNEY

Part 1
Introductory provisions

When power of attorney is enduring

64. A power of attorney is an enduring power of attorney if it complies with the execution formalities required in section 68.

Subsequent disability of principal

65. Notwithstanding any other law to the contrary, an enduring power of attorney is not terminated by the subsequent disability of the principal.

Types of enduring power of attorney

66. (1) An enduring power of attorney may confer authority in respect of property or personal welfare, or both property and personal welfare.

(2) Nothing in this Act contained prevents a principal from conferring authority on an agent with regard to the principal's property and personal welfare in the same document.

Extent of enduring power of attorney

67. (1) An enduring power of attorney may extend to all matters, or to any specified matter or matters, relating to a principal's property or personal welfare and may in either case be subject to conditions and restrictions.

(2) An enduring power of attorney relating to personal welfare may authorise an agent to give consent on the principal's behalf for the provision of a health service to the principal as contemplated in section 7(1)*(a)(*i) of the National Health Act, 2003 if the principal is unable to give informed consent.

Part 2

Execution formalities

Formalities required in execution of enduring power of attorney

68. (1) An enduring power of attorney is valid only if it –

(a) is in writing;

(b) contains the date on which it is executed by the principal;

(c) contains the full names, identity numbers and most recent addresses of the principal and the agent;

(d) contains a statement indicating the principal's intention that the enduring power –

(i) is to continue to have effect notwithstanding the principal's subsequent disability; or

(ii) is to come into effect on the principal's subsequent disability;

(e) contains a grant of authority to the agent in general or specific terms in accordance with the principal's needs;

(f) is, in accordance with section 69, signed by or on behalf of the principal and witnessed by two witnesses;

(g) contains the full names and identity numbers of the witnesses referred to in paragraph *(f)*; and

(h) contains a certificate of execution referred to in section 70(1), and is signed by the certificate provider who has granted that certificate in accordance with that section.

(2) An enduring power of attorney may be in the form of the example in Schedule 1.

Requirements regarding signing and witnessing

69. (1) Subject to subsection (2), an enduring power of attorney must be signed at the bottom of each page and at the end of the document by –

(a) the principal concerned or the person signing the enduring power in terms of subsection (2); and

(b) the two witnesses referred to in section 68(1)*(f)*.

(2) If a principal is physically incapable of signing an enduring power of attorney, the enduring power may be signed on behalf of the principal by any other person in the presence of the principal and at the principal's direction.

(3) The principal or the person signing the enduring power of attorney in terms of subsection (2), must sign the enduring power or acknowledge his or her signature in the presence of the two witnesses and of the certificate provider referred to in section 70(1).

(4) The two witnesses must sign the enduring power of attorney –

(a) in the presence of the principal and each other, and of the certificate provider referred to in section 70(1); and

(b) in the presence of any other person who signed the enduring power in terms of subsection (2).

(5) If an enduring power of attorney is signed by a principal by the making of initials, making a mark or placing a thumb print, or by any other person in terms of subsection (2) –

(a) the certificate provider referred to in section 70(1), must in addition certify that he or she has satisfied himself or herself of the identity of the principal, and that the enduring power thus signed is the enduring power of that principal; and

(b) the additional certificate referred to in paragraph (a) must be made at the time the enduring power is signed, and must be included in the enduring power at the time of its execution.

Certificate of execution

70. (1) The certificate of execution referred to in section 68(1)*(h)* must be granted and signed by a person, (hereinafter referred to as a "certificate provider")

(a) who -

(i) is a legal practitioner as defined in the Legal Practice Act, 2014 (Act No. 28 of 2014);

(ii) is a health care practitioner; or

(iii) has other professional skills relevant to forming the opinion required to be expressed in the certificate of execution; or

(b) who has known the principal for at least five years and as more than an acquaintance.

(2) A certificate of execution referred to in subsection (1) must state that the certificate provider –

(a) is satisfied that at the time the principal grants the enduring power of attorney, the principal understands the nature and effect thereof; and

(b) has no reason to believe that the principal is acting under undue influence or that any other factor vitiates the granting of the enduring power of attorney.

(3) A certificate of execution referred to in subsection (1) must be made at the time the enduring power of attorney is signed by the principal, and must be included in the enduring power at the time of its execution.

(4) A certificate provider must, in addition to signing the certificate of execution referred to in subsection (1), sign each page of the enduring power of attorney, excluding the page on which his or her certificate appears, in the presence of –

(a) the principal and of the two witnesses referred to in section 68(1)*(f)*; and

(b) any other person who signs the enduring power in terms of section 69(2).

Competency of persons involved in execution of enduring power of attorney

71. (1) A person who –

(a) witnesses an enduring power of attorney in terms of section 68(1)*(f)*;

(b) signs an enduring power of attorney on behalf of the principal in terms of section 69(2);

(c) provides the certificate of execution referred to in section 70(1),

must, at the date of execution of the enduring power, be 18 years of age or older and not be incompetent to give evidence in a court of law.

(2) A person referred to in subsection (1) may not be –

(a) an agent appointed in the enduring power of attorney or any other power of attorney granted by the principal or the spouse of such agent;

(b) the spouse of the principal; or

(c) a relative of the principal or the spouse of that relative.

Court may validate non-compliance with execution formalities

72. Where a principal who has purported to execute an enduring power of attorney in terms of this Act has since its execution become a person with disability, and where the enduring power is invalid by reason only of non-compliance with any of the execution formalities in section 68, the court may, upon application of the agent, make an order validating the enduring power if the court is satisfied that –

(a) the document purported to be an enduring power of attorney was signed by the principal;

(b) the principal understood the nature and effect of the document; and

(c) the principal intended the document to be an enduring power of attorney in terms of this Act.

Part 3

Appointment of agent

Who may be appointed as agent

73. (1) An agent appointed in an enduring power of attorney must be –

(a) an individual who at the date of execution of the enduring power is 18 years of age or older, and is not a person with disability who requires support in exercising legal capacity; or

(b) a juristic person.

(2) Where a juristic person is appointed as agent –

(a) an individual who is an officer of the juristic person may be nominated by the juristic person to perform the powers granted in the enduring power;

(b) the juristic person accepts liability for the acts and omissions of the individual referred to in paragraph *(a)*.

(3) No Master may in his or her official capacity be appointed as agent.

Appointing more than one agent

74. Nothing in this Act contained prevents a principal from –

(a) appointing joint agents in an enduring power of attorney;

(b) appointing different agents, whether in the same enduring power or separate enduring powers, to act in relation to the principal's property and his or her personal welfare, respectively.

Relationship between different agents in event of conflict

75. In the event of conflict between the exercise of their respective powers by different agents appointed in respect of a principal's property and his or her personal welfare as referred to in section 74*(b)* –

(a) the conflict must be resolved in accordance with any direction given in this regard by the principal in the enduring power of attorney; or

(b) if no such direction is given, the exercise of powers by the agent appointed to act in respect of the principal's personal welfare prevails, unless the Master on good cause shown otherwise directs.

Substitution of agent

76. A principal may not in an enduring power of attorney authorise an agent to appoint a substitute agent, but the principal may himself or herself appoint a person in the enduring power, substituting an agent on the occurrence of an event specified by the principal in the enduring power.

Part 4

Registration of enduring power of attorney

Registration of enduring power of attorney on disability of principal

77. Notwithstanding section 65, an agent may not act or continue to act in terms of an enduring power of attorney after the principal has become a person with disability, unless the enduring power has been registered with the Master in terms of this Act.

Application for registration

78. (1) An application for the registration of an enduring power of attorney must be made to the Master by the agent appointed in the enduring power.

(2) The application must be made in writing in the prescribed form, under oath or solemn affirmation, and must –

(a) state the particulars and contact details of the agent applying for registration, including an address for service of notices and process;

(b) state whether any joint appointment is made in the enduring power of attorney, and if so –

(i) state the particulars and contact details of the joint agent; and

(ii) indicate whether the joint agent joins the application for registration of the enduring power;

(c) state the particulars and contact details of the principal, including his or her marital status;

(d) state the estimated value of the principal's property in respect of which the agent is authorised to act in terms of the enduring power;

(e) include reports in the prescribed form by one or more health care practitioners, qualified to express an opinion regarding the principal's disability, who –

(i) have recently interviewed and assessed the principal;

(ii) are not related to the principal;

(iii) are not the agent appointed in the enduring power to be registered; and

(iv) have no personal interest in the enduring power,

in which the health care practitioner or each such practitioner sets out –

(aa) his or her opinion regarding the nature, extent and probable duration of the principal's disability, and the reasons for such opinion;

(bb) whether, in the health care practitioner's opinion, the principal requires support in exercising legal capacity, and the reasons for such opinion; and

(cc) any other fact or observation the health care practitioner would like to bring to the attention of the Master;

(f) state the particulars and contact details of the principal's spouse and primary carer, if any; and

(g) include the original enduring power of attorney or enduring powers of attorney to be registered.

(3) The agent must attach to the application proof to the satisfaction of the Master that –

(a) the principal and his or her spouse and primary carer, if any;

(b) any person named in the enduring power of attorney for this purpose; and

(c) any joint agent who has not joined in the application for registration,

have been served with written notice of the application in the prescribed form, wherein they have been informed that they may within 30 days of the date of service –

(i) in writing object to the application, giving the reasons for the objection; or

(ii) make other representations with regard thereto to the Master.

(4) The agent must submit to the Master any further information required by the Master.

(5) The Master must provide such reasonable assistance, free of charge, as is necessary to enable the agent to comply with the requirements of this section.

Disposal of application

79. (1) The Master must, after considering an application complying with section 78, either –

(a) register the enduring power of attorney if the Master is satisfied that –

(i) the enduring power complies with the execution formalities in section 68; and

(ii) the principal is a person with disability who requires support in exercising legal capacity with regard to the matter to which the enduring power relates; or

(b) decline to register the enduring power of attorney.

(2) *(a)* Whether the Master registers the enduring power of attorney or declines to register it, the Master must in writing notify the following persons of his or her decision:

(i) The agent who applied for registration of the enduring power;

(ii) the principal and his or her spouse and primary carer, if any; and

(iii) any person who was notified of the application for registration in terms of section 78(3) and objected to the registration or made representations with regard thereto to the Master.

(b) If the Master declines to register the enduring power of attorney, the Master must supply the reasons for this decision.

Endorsed copy of enduring power of attorney to agent after registration

80. The Master must after registering an enduring power of attorney, return a certified copy of the original enduring power, endorsed to the effect that it has been registered, to the agent.

Proof of registration

81. The certified and endorsed copy of an enduring power of attorney referred to in section 80 is evidence of the contents of the enduring power and of the fact that it has been registered.

Giving security

82. (1) Unless an agent has been exempted from giving security by the principal in an enduring power of attorney relating to property, the Master may, if satisfied that it is necessary to do so –

(a) before registering the enduring power, require the agent to give security to the amount determined by the Master for the proper performance of his or her functions and duties;

(b) at any time after the registration of the enduring power, require the agent –

(i) to give security to the amount determined by the Master for the proper performance of his or her functions and duties; or

(ii) if security was given in terms of paragraph *(a)*, to give additional security to the amount determined by the Master.

(2) The Master may at any time, on good cause shown, reduce or discharge security given in terms of subsection (1).

(3) The reasonable cost of giving security is payable out of the estate of the principal.

(4) If the agent fails to perform his or her functions or duties in any way, the Master may enforce the security and recover from the agent, or his or her sureties, the loss to the estate of the principal.

Part 5

General powers and duties of agent

Notification of change of address and circumstances

83. (1) An agent must notify the Master of –

(a) any change in the address supplied to the Master in terms of section 78(2)*(a)*;

(b) any change in the address of the principal;

(c) the death of the principal; and

(d) any event that may result in the removal of the agent in terms of section 93(2).

(2) If, after the registration of an enduring power of attorney, the agent –

(a) dies, his or her executor referred to in section 1 of the Administration of Estates Act must, if aware of the existence of the enduring power, notify the Master of the death of the agent;

(b) becomes a person with disability, his or her primary carer must, if aware of the existence of the enduring power, notify the Master of the impairment.

(3) Notification of the Master in terms of this section must –

(a) be in writing and must be served on the Master; and

(b) be done within 30 days of the occurrence of the event to be notified, or as soon as possible thereafter.

Notification of registration and cancellation of enduring power of attorney relating to property

84. (1) The Master may, after the registration or cancellation of the registration of an enduring power of attorney relating to property, in writing require that the agent must within 30 days of the request, or within such further period as the Master may allow, cause a notice of the registration or cancellation to be published in the *Gazette*.

(2) The notice referred to in subsection (1) must be in the prescribed form and must state –

(a) the particulars of the principal;

(b) the particulars of the agent and any joint agent;

(c) whether notice is given of the registration or the cancellation of registration of an enduring power of attorney; and

(d) the date from which the registration or cancellation is effective.

(3) The cost of the notice must be paid out of the estate of the principal who granted the enduring power of attorney in respect of which the notice has been published.

(4) The agent who causes the notice to be published in the *Gazette* must submit a copy of the notice so published to the Master.

Inventory of property

85. An agent who has been required to give security in terms of section 82(1)*(a)*, must within 30 days of registration of the enduring power of attorney, or within such further period as the Master may allow, compile and submit to the Master an inventory that complies with the prescribed requirements, of the property and the value thereof in respect of which the agent is authorised to act.

Keeping of records

86. An agent appointed in an enduring power of attorney relating to property must, after registration of the enduring power, keep a record of all property in respect of which he or she is authorised to act, and of all transactions in relation to that property.

Report to Master on support provided

87. *(a)* An agent must at any time after the registration of an enduring power of attorney, when required in writing by the Master to do so, submit to the Master a report in the form required by the Master of the exercise of his or her authority in terms of the power.

(b) In the case of an agent appointed in respect of property, the Master may require that the report include a statement of monetary transactions.

Fiduciary duty and duty of care

88. (1) In performing any duty or exercising any power in terms of an enduring power of attorney, an agent must observe the utmost good faith and exercise the care and diligence that can be expected of a prudent person authorised to act on behalf of another with regard to his or her property or personal welfare, or both.

(2) Any act or agreement that has the effect of exempting an agent from, or indemnifying him or her against, liability for failing to observe the good faith or exercise the care and diligence required in terms of subsection (1), is void in so far as it has such effect.

Part 6
Restrictions

Prohibition on using threat or force

89. In the course of performing his or her authority, an agent granted authority under an enduring power of attorney may not –

(a) use or threaten to use force, or unduly influence the principal who granted such authority; or

(b) detain or confine the principal.

Restriction with regard to personal welfare

90. Authority granted in terms of an enduring power of attorney relating to personal welfare may be exercised only when the principal has become a person with disability.

Part 7

Revocation, resignation and removal

Revocation by principal

91. (1) An enduring power of attorney may be revoked by the principal at any time when the principal understands the nature and effect of the revocation, by in writing notifying the agent and any joint agent appointed in the enduring power of the revocation.

(2) If the enduring power of attorney is revoked after registration thereof, the principal must in addition to the notification referred to in subsection (1), notify the Master in writing of the revocation.

(3) The Master must, on receipt of the notice of revocation referred to in subsection (2), cancel the registration of the enduring power of attorney.

Resignation by agent

92. (1) An agent who wishes to resign after an enduring power of attorney conferring authority upon the agent has been registered, must notify the following persons of his or her intended resignation:

(a) The principal and his or her spouse and primary carer, if any;

(b) in the case of joint agents, all other persons appointed jointly with that agent;

(c) in the case of a substitute agent having been appointed by the principal in the power, that substitute agent;

(d) the person appointed in terms of this Act as financial supporter to the person with disability concerned, if any;

(e) the person appointed in terms of this Act as personal welfare supporter to the person with disability concerned, if any; and

(f) the Master.

(2) Notification of the Master in terms of subsection (1) must be in writing and must be served on the Master.

(3)*(a)* Subject to paragraph (b) the resignation of the agent becomes effective on the date specified by the agent in the notification.

(b) The period between the date specified by the agent in terms of paragraph (a) and the date of the notification must be at least 30 days.

(4) On the resignation of the agent becoming effective, the Master must cancel the registration of the enduring power of attorney, except where a joint agent continues to act or a substitute agent commences acting, in which case the Master must –

(a) endorse the original enduring power to reflect the resignation; and

(b) issue the remaining joint agent or substitute agent with a certified copy of the enduring power so endorsed.

Removal of agent by court or Master

93. (1) A court may at any time after the registration of an enduring power of attorney, upon application by an interested person, remove the agent if the court is of the opinion that good cause exists for doing so, and direct the Master to cancel the registration of the enduring power.

(2) Subject to subsection (3), the Master may at any time after the registration of an enduring power of attorney remove the agent –

(a) if the agent –

(i) fails to perform satisfactorily any function or duty imposed upon him or her by or in terms of this Act; or

(ii) refuses or fails to comply with any lawful request by the Master;

(b) if the agent has been convicted in the Republic or elsewhere of –

(i) any offence of which dishonesty is an element; or

(ii) any offence other than an offence referred to in subparagraph (i), for which he or she has been sentenced to imprisonment without the option of a fine;

(c) in the case of an enduring power relating to property, if the agent's estate is sequestrated or where a juristic person has been appointed as agent, if the juristic person is wound up, deregistered, dissolved or unable to carry on its activities;

(d) in the case of an enduring power relating to personal welfare and where a juristic person has been appointed as agent, if the juristic person is wound up, deregistered, dissolved or unable to carry on its activities;

(e) except where the enduring power otherwise provides, on the dissolution of a marriage, religious union or permanent life partnership between the agent and the principal; or

(f) if the agent ceases to comply with the requirements of section 73.

(3) Before removing an agent, the Master must serve the agent with written notice of the intended removal –

(a) setting out the reasons for the intended removal; and

(b) stating that the agent may, within 30 days of the date of service of the notice, in writing object to the intended removal giving the reasons for the objection, or may make other representations with regard thereto to the Master.

(4) If the Master removes an agent, the Master must in writing notify the following persons of the removal, and of the reasons therefor:

(a) The agent who has been removed;

(b) the principal and his or her spouse and primary carer, if any;

(c) in the case of joint agents, all other persons appointed jointly with the agent who has been removed; and

(d) in the case of a substitute agent having been appointed by the principal in the power, such substitute agent.

(5) On removing an agent, the Master must cancel the registration of the enduring power of attorney, except where a joint agent continues to act or a substitute agent commences acting, in which case the Master must –

(a) endorse the original enduring power to reflect the removal; and

(b) issue the remaining joint agent or substitute agent with a certified copy of the enduring power so endorsed.

Return and cancellation of endorsed copy of enduring power of attorney

94. When the registration of an enduring power of attorney is cancelled, the agent must by hand or registered post forthwith return his or her endorsed copy of the enduring power and all certified copies thereof to the Master for cancellation.

Destruction of records

95. Subject to any other law prescribing a longer period, the agent may, after five years have elapsed form the date upon which he or she ceased to be an agent in terms of an enduring power of attorney relating to property, and with the written consent of the Master, destroy all documents and records in his or her possession relating to the exercise of his or her authority under the enduring power.

Part 8

Validation of certain documents as enduring power of attorney

Validation of power of attorney executed before commencement of this Act

96. (1) Where a principal who executed a power of attorney before the commencement of this Act has since the execution of that power of attorney become a person with disability, the court may, on application of the person appointed as agent in that power of attorney, order the Master to register that power of attorney as an enduring power of attorney if the court is satisfied that the principal –

(a) became a person with disability before the commencement of this Act;

(b) signed that power of attorney;

(c) intended that power of attorney to continue to have effect notwithstanding the principal's subsequent disability; and

(d) understood the nature and effect of the power of attorney granted.

(2) The Master must, after registering a power of attorney as an enduring power of attorney, return to the agent a certified copy of the original power of attorney endorsed to the effect that it has been registered as an enduring power of attorney.

(3) An appointment as agent in a power of attorney registered as an enduring power of attorney in terms of subsection (1) has all the consequences of an appointment as agent as provided for in this Act.

Validation of acts performed before commencement of this Act

97. The court may validate an act performed by an agent before the commencement of this Act in terms of a power of attorney that was executed before the commencement of this Act by a principal, who has since the execution of the power of attorney, become a person with disability, if the court is satisfied that –

(a) the principal became a person with disability before the commencement of this Act;

(b) the principal intended the power of attorney to continue to have effect notwithstanding his or her subsequent disability;

(c) the agent reasonably believed that he or she acted in terms of a valid power of attorney that will continue to have effect notwithstanding the principal's subsequent disability; and

(d) it is just and equitable to validate the act in question.

Recognition of foreign document as enduring power of attorney

98. (1) Notwithstanding section 68, a document is an enduring power of attorney if, according to the law of the place outside the Republic where it was executed –

(a) it is a valid power of attorney; and

(b) that power of attorney in its terms manifests an intention on the part of the person granting it to endure beyond the person's disability.

(2) The Master may register a power of attorney contemplated in subsection (1) as an enduring power of attorney, and the person in whose favour the enduring power of attorney is granted is thereupon considered an agent as contemplated in this Act.

(3) Sections 80 and 81 apply, with the necessary changes required by the context, in respect of a power of attorney registered as an enduring power of attorney in terms of this section.

CHAPTER 6
POWERS OF MASTER AND COURT

Jurisdiction of Master

99. (1) Jurisdiction of the Master over a matter concerning the property or personal welfare of a person with disability in respect of whom support is provided, or is to be provided, in terms of this Act, lies –

(a) in the case of a person with disability who is ordinarily resident within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; or

(b) in the case of a person who is not so resident, with the Master appointed in respect of the area of jurisdiction in which the greater or greatest portion of the property of that person is situated.

(2) On good cause shown, a Master who has exercised jurisdiction in terms of subsection (1) may transfer jurisdiction to another Master on the written application of –

(a) a financial or personal welfare supporter who supports a person with disability; or

(b) an agent appointed in an enduring power of attorney.

Keeping of records

100. (1) The Master must establish and maintain proper files and records of –

(a) all documents, including original enduring powers of attorney, relating to his or her functions and duties with regard to the support of a person with disability in terms of this Act; and

(b) any other matter necessary for the performance of his or her functions or duties in terms of this Act.

(2) Any document that is or purports to be an enduring power of attorney, and which is received by the Master in the course of his or her functions or duties in terms of this Act, must be recorded by the Master in a register of enduring powers of attorney.

Allowing inspection and obtaining copies of documents

101. Subject to any other law, the Master must, upon the request of an interested person, allow that person during normal office hours –

(a) to inspect any document kept or recorded by the Master in terms of this Act;

(b) upon payment of the prescribed fee, to obtain a certified copy of, or certified extract from, any document referred to in paragraph *(a)*.

Making enquiries

102. (1) The Master may make such enquiry of his or her own accord or at the request of another person, including a person with disability, as the Master considers necessary to fulfil his or her functions or duties in terms of this Act, and thereupon make such order or give such direction as the Master considers appropriate.

(2) The Master may conduct an enquiry in terms of this section in the way the Master considers appropriate.

Causing enquiry into financial, medical or social circumstances of person with disability

103. If satisfied that it is necessary to do so, the Master may, before appointing a financial supporter or personal welfare supporter to support a person with disability or at any time thereafter, cause an enquiry to be conducted by a suitably qualified person into the financial circumstances, medical condition or social circumstances of the person with disability.

Requesting information and making copies of documents

104. (1) The Master may in writing require any person to submit to the Master information available to that person, and any document or record in the possession or under the control of that person, which contains or is suspected to contain any information that the Master considers necessary for the effective performance of his or her functions or duties in terms of this Act.

(2) The Master may examine and make copies of, or take extracts from, any document or record referred to in subsection (1).

Service of documents

105. Where a document is required to be served in terms of this Act, the Master may direct that service is not required if the Master is satisfied that –

(a) the person who is to be served is evading service; or

(b) it is impossible to effect service.

Summons and questioning

106. (1) The Master may summon any person who, in the opinion of the Master, may be able to give material information or produce any document or record relating to the performance of the Master's functions or duties in a matter under consideration by the Master in terms of this Act –

(a) to appear before the Master at a place and time stated in the summons to be questioned under oath or solemn affirmation in connection with the matter under consideration;

(b) to produce any document or record specified by the Master, which document or record the Master may retain for examination for a period not exceeding two months.

(2) A summons issued by the Master in terms of this section must be –

(a) in the prescribed form;

(b) signed by the Master; and

(c) served in the same manner as a subpoena in civil proceedings issued by a magistrate's court.

(3) A person summonsed to be questioned may, at that person's own cost, be assisted by a legal representative who may question the person only in so far as it is necessary to clarify answers given by the person.

(4) A person summonsed to be questioned or to produce a document or record is, notwithstanding any other law to the contrary, obliged to answer the questions or to produce the document or record.

(5) A questioning in terms of this section must be private and confidential unless the Master, either generally or in respect of any particular person, directs otherwise.

(6) A person questioned by the Master in terms of this section must answer each question truthfully and to the best of his or her ability.

(7) No incriminating answer or information obtained, or incriminating evidence that is directly or indirectly derived from a questioning or from the production of any document or record in terms of this section, is admissible as evidence against the person concerned, in criminal proceedings in a court of law or before any body or institution established by or under any law, except in criminal proceedings where that person stands trial on a charge relating to –

(a) the administering or taking of an oath or the administering or making of an affirmation in connection with such questioning;

(b) the giving of false evidence in connection with such questioning;

(c) the making of a false statement in connection with such questioning;

(d) the production of any document or record; or

(e) a failure to answer fully and satisfactorily any question lawfully put to him or her by the Master in terms of this section,

and then only to the extent that the answer or statement is relevant to prove the offence charged.

(8) The Master presiding at a questioning must record the proceedings or cause them to be recorded.

(9) A person questioned in terms of this section may, at his or her own cost, obtain a copy of the record of such questioning.

(10) A person who, in answer to a summons issued in terms of this section, attends a questioning is entitled to the fees and allowances prescribed under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) for attendance as a witness in civil proceedings.

Notifying deeds office of immovable property included in financial supporter's inventory

107. (1) The Master must, on receipt of an inventory or additional inventory submitted by a financial supporter in terms of section 24, in which immovable

property has been included, supply the officer in charge of the deeds office where the property is registered with a notice containing –

(a) the first names, surname and identity number of the person in respect of whose property the inventory or additional inventory was submitted, and also in respect of the financial supporter appointed to support that person; and

(b) the particulars of the immovable property.

(2) Subject to other rights in regard to the immovable property referred to in subsection (1), the officer in charge of the deeds office may not register any transaction in respect of that immovable property the particulars of which that officer has been supplied with in terms of subsection (1), unless the transaction was entered into by the financial supporter concerned –

(a) with the written consent of the Master; or

(b) in terms of a court order.

Failure by financial or personal welfare supporter to perform functions or duties

108. If a financial supporter or personal welfare supporter –

(a) fails to perform satisfactorily any function or duty imposed upon him or her in terms of this Act; or

(b) refuses or fails to comply with any lawful request by the Master,

the Master may, after giving the financial or personal welfare supporter not less than one month's notice of such intention, apply to the court for an order directing the financial or personal welfare supporter to perform the function or duty, or to comply with the Master's request.

Powers on death, resignation or withdrawal of financial or personal welfare supporter

109. (1) Subject to subsection (2), the Master may, when a sole financial or personal welfare supporter dies or resigns, or when his or her appointment is withdrawn, appoint such other person as the Master considers suitable to be a financial or personal

welfare supporter, whichever is applicable, to support the person with disability to whom the matter relates.

(2) *(a)*The Master must, if the Master considers it necessary before making an appointment in terms of subsection (1), in such manner as the Master considers best to bring it to their attention, call upon the following persons to nominate, in such manner as the Master considers appropriate, a suitable person to support the person with disability:

(i) The spouse, primary carer and all relatives of the person with disability; and

(ii) any other person with an interest in the property or personal welfare of the person with disability.

(b) The Master must –

(i) on receipt of a nomination contemplated in paragraph *(a)*; or

(ii) when the persons called upon in terms of paragraph *(a)* have failed to make a nomination,

unless the Master considers it necessary to postpone the appointment, appoint such person as financial or personal welfare supporter as the Master considers suitable.

(3) *(a)* Sections 18, 20 and 21 apply, with the necessary changes required by the context, to the appointment of a financial supporter in terms of this section.

(b) Sections 47 and 49 apply, with the necessary changes required by the context, to the appointment of a personal welfare supporter in terms of this section.

Making joint appointments at any time

110. (1) On good cause shown, the Master may, at any time after having appointed a financial or personal welfare supporter, appoint a suitable person as joint financial or joint personal welfare supporter to support a person with disability.

(2) Section 109 applies, with the necessary changes required by the context, to an appointment made in terms of subsection (1).

Interim rulings

111. (1) Without prejudice to any other powers conferred on the Master by or in terms of this Act, the Master may make such interim order or ruling as the Master considers appropriate, including the appointment of an interim financial or personal welfare supporter, pending the disposal of any proceedings in terms of this Act.

(2) If the Master makes an interim order or ruling in terms of subsection (1), the Master must in writing notify the following persons of the ruling, and of the reasons therefor:

(a) The applicant in the proceedings pending disposal; and

(b) the person with disability in respect of whom the interim ruling is made and his or her spouse and primary carer, if any.

Powers of review

112. (1) A person with disability, or any person with an interest in the property or personal welfare of that person, may in writing object to the Master, giving the reasons for the objection, with regard to any decision made, action taken or failure to act in respect of the property or personal welfare of that person by –

(a) a financial supporter;

(b) a personal welfare supporter; or

(c) an agent appointed in an enduring power of attorney registered in terms of this Act.

(2) The Master must serve the person against whose act, omission or decision the objection is made with written notice of the objection –

(a) including a copy of the written objection and of any document which may have been submitted to the Master in support of the objection; and

(b) stating that the person may, within 30 days of the date of service of the notice, submit his or her written comments on the objection to the Master.

(3) After expiration of the period referred to in subsection (2)*(b)*, the Master must –

(a) review the act, omission or decision objected against; and

(b) make a ruling with regard thereto as the Master considers appropriate, which may include the substitution of the Master's own decision for the decision being set aside.

(4) The Master must in writing notify the following persons of his or her ruling in terms of subsection (3)*(b)*, and of the reasons therefor:

(a) The person who objected in terms of subsection (1);

(b) the person against whose decision, act or omission the objection was made;

(c) the person with disability and his or her spouse and primary carer, if any; and

(d) any other person the Master considers necessary.

Judicial review of Master's decisions

113. (1) Every appointment by the Master, and every decision, action, failure to act, ruling, order or direction by the Master, in terms of this Act is subject to review by the court at the request of any interested person.

(2) A court hearing a review referred to in subsection (1) has the power –

(a) to take evidence;

(b) to exercise the same discretionary powers as are conferred upon the Master in this Act;

(c) to remit the matter to the Master for further consideration;

(d) to confirm, vary or reverse the decision under review, as justice may require, and may substitute its own decision for that of the Master; and

(e) to give any such other order, including an order as to costs, as it considers appropriate..

Notifying public of right of judicial review

114. The Master must, when notifying any person about an appointment, decision, action, ruling, order or direction by the Master in terms of this Act, in writing inform the person in plain language of that person's right to take the matter on review to the court.

Master's fees

115. The Master may charge the prescribed fee for anything done by the Master in connection with any of his or her functions or duties in terms of this Act.

Costs

116. (1) Subject to subsection (2), the reasonable cost of an enquiry conducted or caused to be conducted by the Master in the course of his or her functions and duties in terms of this Act, whether of the Master's own accord or at the request of another person, must be paid out of the estate of the person with disability.

(2) The Master may –

(a) where an enquiry is conducted at the request of another person and the Master is satisfied that the request was frivolous or vexatious or otherwise without good cause, in writing require the other person to pay the amount the Master considers reasonable for the cost of the enquiry;

(b) regardless of whether an enquiry is conducted of the Master's own accord or at the request of another person, in writing require any person –

(i) whose action or omission caused the enquiry; or

(ii) who acted unreasonably, or unreasonably failed to act, in relation to the subject matter of the enquiry,

to pay the amount the Master considers reasonable for the cost of the enquiry.

(3) *(a)* The Master may in writing require any person who requests an enquiry, before execution of the enquiry, to give security for the payment of the cost of the enquiry to the amount the Master considers reasonable.

(b) If the person required to give security in terms of paragraph *(a)* fails to pay the cost of the enquiry in respect of which security was given, the Master may enforce the security and recover from that person or his or her sureties the cost of the enquiry.

(4) Before requiring a person in terms of subsection (2) to pay any costs or portion thereof, the Master must notify the person and invite him or her to make representations in respect of the request.

CHAPTER 7
GENERAL PROVISIONS

Part 1
Inter-sectoral Committee on Supported Decision-making and training

Establishment of Inter-sectoral Committee on Supported Decision-making

117. (1) There is hereby established a committee to be known as the Inter-sectoral Committee on Supported Decision-making for the monitoring of matters related to the implementation and application of this Act.

(2) The Committee consists of –

(a) the Chief Master, who is the chairperson of the Committee;

(b) the Director-General of the national Department of Health;

(c) the Director-General of the national Department of Social Development;

(d) the Chairperson of the South African Human Rights Commission; and

(e) three members of civil society, including at least one person with disability and at least one person nominated by an organisation that represents persons with disability.

(3) The Chief Master must appoint the members contemplated in subsection (2)*(e)*.

(4) Each member of the Committee may designate an alternate to attend a meeting of the Committee in his or her place.

(5) *(a)* The members of the Committee must designate one of its members as deputy chairperson of the Committee, and when the chairperson is not available, the deputy chairperson must act as chairperson.

(b) If neither the chairperson nor the deputy chairperson is available, the members present at a meeting must elect a person from their own ranks to preside at that meeting.

Meetings of Committee

118. (1) The Committee must meet at least twice every year, and meetings must be held at a time and place determined by the chairperson.

(2) The procedure to be followed at meetings of the Committee, including the manner in which decisions are taken and the manner in which the Committee conducts its affairs, are to be determined by the Committee.

(3) The Committee must report on every meeting in writing to the Minister within one month of the meeting.

Responsibilities, functions and duties of Committee

119. (1) The Committee is responsible for monitoring the implementation and application of this Act.

(2) The Committee may make recommendations to the Minister with regard to the amendment of this Act and its regulations.

(3) The Chief Master, in consultation with the available Committee members, must –

(a) within one year of the commencement of this Act, submit a report to Parliament on its monitoring of the implementation of this Act; and

(b) every year thereafter submit a report to Parliament on its monitoring of the application of this Act.

Responsibilities of Chief Master with regard to training

120. The Chief Master must ensure the development of training courses for officials attached to the office of the Master and those training courses must promote –

(a) the use by the Master of uniform norms, standards and procedures in applying this Act; and

(b) the application of this Act by the Master in an appropriate, effective and sensitive manner.

Part 2

Repeal and amendment of laws and transitional arrangements

Repeal and amendment of laws

121. Subject to section 122, the laws mentioned in Schedule 2 are repealed or amended to the extent indicated in the third column of that Schedule.

Transitional arrangements with regard to repeal of Chapter VIII of Mental Health Care Act

122. (1) Any person who was appointed as an administrator in terms of section 59 of the Mental Health Care Act –

(a) before the date of commencement of this Act; or

(b) after the date of commencement of this Act as contemplated in subsection (2),

is for all purposes considered to have been appointed in terms of this Act as a financial supporter with the powers set out in section 22(1)*(b)* of this Act, and if the power to carry on any business or undertaking was granted to that person in terms of section 63(3)*(b)* of the Mental Health Care Act that person also has the powers referred to in section 22(1)*(c)* of this Act.

(2) An application for the appointment of an administrator in terms of section 60 of the Mental Health Care Act that was submitted to the Master before the date of commencement of this Act, and in respect of which a letter of appointment was not issued before that date must, be finalised, and the letter of appointment be issued in terms of the Mental Health Care Act as if Chapter VIII of that Act had not been repealed by this Act.

(3) Any referral made or appeal lodged in terms of Chapter VIII of the Mental Health Care Act, which is pending at the date of commencement of this Act, must be finalised in terms of that Act, as if that Chapter had not been repealed by this Act.

(4) The date determined by the Master for the annual lodging of a complete account by an administrator in terms of section 65 of the Mental Health Care Act read with section 83(1)*(a)* of the Administration of Estates Act, is after the date of commencement of this Act considered to be the date determined under section 30(2)*(a)* of this Act.

(5) The Master must determine the date for the first review referred to in section 38(1)*(b)* when a financial supporter, who is considered to have been appointed as such in terms of subsection (1), lodges his or her first report contemplated in section 30(2)*(a)*.

(6) Any security lodged in terms of section 63 of the Mental Health Care Act by an administrator who is considered to have been appointed as a financial supporter in terms of subsection (1), is considered to be security lodged under section 21(1) of this Act.

(7) Any record or document in possession of the Master relating to the appointment in terms of Chapter VIII of the Mental Health Care Act of an administrator who is considered to have been appointed as a financial supporter in terms of subsection (1), must be incorporated into, and is considered to form part of, the records to be kept by the Master in terms of section 100 of this Act.

Saving of common law

123. This Act does not affect curatorship in terms of the common law.

Part 3

Miscellaneous

Regulations

124. The Minister may make regulations regarding –

(a) any matter which may or must be prescribed in terms of this Act;

(b) any form which may or must be prescribed in terms of this Act;

(c) any matter in respect of which Master's fees contemplated in section 115 are payable, including –

(i) the tariff of the fees;

(ii) the manner in which the fees are to be paid;

(iii) the funds from which the fees are to be paid, including charging fees upon the estate of the person with disability to whom the matter in question relates;

(d) the tariff of remuneration payable to a financial supporter in terms of this Act, and prohibiting the charging or recovery of remuneration at a higher tariff than the tariff so prescribed;

(e) the keeping of any registers or records in terms of this Act, including the custody and preservation of original enduring powers of attorney; and

(f) generally, any other ancillary or incidental administrative or procedural matter that is necessary to prescribe for the proper implementation of this Act.

Offences and penalties

125. (1) Any person who –

(a) provides support in terms of this Act contrary to the general principles in section 5;

(b) contravenes or fails to comply with any prohibition, restriction, limitation, condition, notice, letter of appointment, order, request, instruction, directive, authorisation, duty, obligation, permission or exemption given, issued, granted or imposed in terms of this Act;

(c) evades the service on him or her of a summons issued in terms of section 106 or who –

(i) without lawful cause fails to attend at the time and place determined in the summons or, having appeared, without lawful cause fails to remain in attendance until he or she is excused from further attendance by the Master;

(ii) refuses to be sworn or affirmed for purposes of a questioning under that section; or

(iii) fails to answer fully and satisfactorily any question lawfully put to him or her, or to produce any document or record that he or she was required to produce, in terms of that section;

(d) in any application, record, inventory, report, statement of monetary transactions, notification or document submitted in terms of this Act knowingly

makes a misleading, false or deceptive statement, or conceals any material fact or misrepresents a fact; or

(e) ill-treats or wilfully neglects a person with disability in relation to whom he or she has any authority, function, duty or responsibility by virtue of this Act,

is guilty of an offence.

(2) Any person convicted of an offence in terms of subsection (1) is liable on conviction –

(a) in the case of an offence referred to in subsection (1)*(a)* or *(b)*, to a fine or to imprisonment for a period not exceeding one year, or to both that fine and that imprisonment;

(b) in the case of an offence referred to in subsection(1)*(c)*, *(d)* or *(e)*, to a fine or to imprisonment for a period not exceeding five years, or to both that fine and that imprisonment.

(3) *(a)* Subject to paragraph *(b)*, a financial supporter authorised in terms of section 22(1)*(b)* or *(c)*, or both –

(i) who fails to deposit money into a bank account when required to do so by or in terms of this Act; or

(ii) who uses or knowingly permits any joint financial supporter to use any property in the estate of a person with disability, except for the benefit of that estate,

is, in addition to any other penalty to which he or she may be liable, liable to pay into that estate twice the amount that he or she has so failed to deposit or twice the value of the property so used.

(b) On good cause shown, the Master may exempt a financial supporter in whole or in part from liability that he or she may have incurred under paragraph *(a)*.

Short title and commencement

126. (1) This Act is called the Supported Decision-making Act, 20 … and comes into operation on a date determined by the President by proclamation in the *Gazette*.

(2) Different dates may be determined in terms of subsection (1) for the commencement of different provisions of this Act, and dates so fixed may differ in respect of different areas.

SCHEDULE 1

EXAMPLE OF ENDURING POWER OF ATTORNEY
(Section 68(2) of the Supported Decision-making Act, 20 ..)

Purpose of Schedule 1

An example of an enduring power of attorney is included in this Schedule to provide guidance on the legally required content of an enduring power as provided for in the Supported Decision-making Act, 20 … . This Schedule is not part of the Supported Decision-making Act, 20.. and does therefore not have the force of law.

ENDURING POWER OF ATTORNEY

(Section 68(2) of the Supported Decision-making Act, 20 …)

THIS ENDURING POWER OF ATTORNEY is made in terms of the Supported Decision-making Act, 20…
ON (Date)
…….
BY
……..…….
(Full names, identity number, and address of principal)

*1. CANCELLATION OF PREVIOUS POWERS OF ATTORNEY

I revoke the power of attorney previously given by me on ……
(Date of power of attorney now being revoked)
appointing …….. ……..
(Full names, identity number, and address of agent appointed in the power of attorney now being revoked)

2. APPOINTMENT OF AGENT

(a) I hereby appoint ……...
(Full names, identity number, and address of agent)
to be my agent.

*(b) In addition to the person I appointed as my agent under paragraph 2(a), I appoint the following person/s to act *jointly / *jointly and severally with that person as my agent …….....
(Full names, identity number, and address of joint agent/s)

*(c) If a person I have appointed as my agent or joint agent under paragraph 2(a) or (b), is or becomes unable to act, then I appoint the following person/s as substitute for that person/s…….
(Full names, identity number, and address of substitute agent/s)

3. AUTHORITY GRANTED TO AGENT

***3.1 The appointment in paragraph 2 in respect of my property is –**

(a) *a general authority to act on my behalf / *authority to act on my behalf in the following respects only ……

(b) in relation to *the whole of my property / *the following property only……

*(c) subject to the following conditions and restrictions ……....

***3.2 The appointment in paragraph 2 in respect of my personal welfare is –**

(a) authority to act on my behalf in relation to my personal welfare *generally / *the following specific matters relating to my personal welfare only ……

*(b) subject to the following conditions and restrictions ……....

---

* Delete if not applicable; or delete the option that is not applicable.

4. STATEMENT OF INTENT REGARDING OPERATION OF ENDURING POWER OF ATTORNEY

*(a) I intend that the authority granted in paragraph 3 of this enduring power of attorney in relation to **my property** ***is to continue to have effect notwithstanding my subsequent disability / *is to come into effect only on my subsequent disability.

*(b) I intend that the authority granted in paragraph 3 of this enduring power of attorney in relation to **my personal welfare** is to come into effect only on my subsequent disability.

***5. GIVING SECURITY IN RESPECT OF ENDURING POWER OF ATTORNEY RELATING TO PROPERTY**

I hereby *exempt / *do not exempt my agent from giving security to the amount which the Master of the High Court may determine.

***6. PAYMENT OF AGENT**

I authorise my agent to take annual payment from my property to the amount of ……...

SIGNED BY ……
(Signature of principal or person acting on behalf of the principal)

IN THE PRESENCE OF

1 ……
(Full names, identity number, and signature of witness 1)

2 ……
(Full names, identity number, and signature of witness 2)

CERTIFICATE OF EXECUTION
(Sections 68(1)(h) and 70 of the Supported Decision-making Act, 20 ..)

I, ……
(Full names and address of certificate provider)
in my capacity as (*give particulars in the space provided*):
*__Legal Practitioner__ ……
*__Health Care Practitioner__……
*__Person with relevant professional skills__……
*__Person who has known the principal for at least 5 years and as more than an acquaintance__
…….. ……
certify that I have satisfied myself that at the time the principal named in this enduring power of attorney grants this enduring power, *he / *she understands the nature and effect of this enduring power; and that I have no reason to believe that *he / *she is acting under undue influence or that any other factor vitiates the granting of the enduring power of attorney.

SIGNED BY ……
(Signature of certificate provider)

ON……
(Date)

---

* Delete if not applicable; or delete the option that is not applicable.

ANNEXURE to SCHEDULE 1

Information for principal and agent

Purpose of Annexure
The information in this Annexure to Schedule 1 contains a simplified explanation of important aspects of an enduring power of attorney as provided for in the Supported Decision-making Act, 20.. and is not intended to derogate from or to add to the contents or that Act. The information could be included in an enduring power of attorney for the benefit of the principal and the agent. This Annexure is not part of the Supported Decision-making Act, 20.. and does therefore not have the force of law.

What is an enduring power of attorney?
An enduring power of attorney is a legal document that enables one to plan in advance for a stage when one might need support in exercising legal capacity regarding one's property or personal welfare, or both. It enables another person (the agent), to make decisions on behalf of the person granting the enduring power (the principal) in accordance with the principal's instructions.

What are the consequences of giving an enduring power of attorney?
The effect is to authorise the agent to make decisions and to act on behalf of the principal. In exercising this authority, the agent must act in support of the principal rather than substitute his or her own decisions for those of the principal. This requires that the agent to take the principal's wishes into account; and to assist in communicating such wishes to others and in realising them in executing the duties obtained in terms of the enduring power.

Who can make an enduring power of attorney?
An enduring power of attorney can be made only by a person –

- who is 18 years of age or older, or who is under the age of 18 years and has attained majority by reason of entering into a valid marriage; and
- who is able to understand the nature and effect of an enduring power of attorney. This means that the person must understand what an enduring power of attorney is, and what, in a general sense, it can be used for.

What types of decisions can be covered by an enduring power of attorney?
One can include in an enduring power of attorney almost any kind of decision-making authority relating to one's property and personal welfare, or both. However, the following limitations must be noted:

For an enduring power of attorney that relates to personal welfare, the law, generally, prohibits an individual from acting or taking decisions about certain very personal matters on behalf of another person. These matters include marriage, divorce, adopting a child, and making a will. In addition, the Supported Decision-making Act, 20.. restricts an agent from making certain decisions about medical treatment on behalf of a principal. For example, an agent may not make decisions about granting or refusing consent for the principal to receive mental health care treatment, or about whether the principal may or may not be sterilised or have an abortion.

How wide are the powers an agent has in respect of the affairs of the principal?
An enduring power of attorney can be general in scope or very limited, depending on any restrictions included by the principal in the enduring power. The principal should decide what type of authority he or she wishes to give to the agent, and clearly indicate that in the enduring power.

When does an enduring power of attorney take effect?
As a rule, an enduring power of attorney relating to *personal welfare* takes effect only once the principal cannot exercise his or her legal capacity without support. This differs from the position of an enduring power relating to *property*, where an agent may act on behalf of the principal irrespective of whether the principal can act independently or not, unless the enduring power expressly states that it will take effect only once the principal needs support in exercising his or her legal capacity.

Must an enduring power of attorney comply with specific execution formalities?
To be legally valid, an enduring power of attorney must comply with the formalities as required by the Supported Decision-Making Act, 20..:

- It must be in writing and be dated.
- It must be signed by the principal in the presence of two witnesses. The principal may sign by making a full signature, making initials, making a mark or by placing his or her thumbprint on the enduring power. If the principal is physically incapable of signing the enduring power, some other person may sign the enduring power in the presence of the principal, and by the direction of the principal. Where the principal does not sign by making a full signature, additional formalities are required. Note also that certain persons are prohibited from witnessing an enduring power of attorney and from signing on behalf of the principal.
- It must contain a statement indicating the intention of the principal; that is, that the enduring power is to continue after its execution to have effect notwithstanding any disability of the principal that occurs after the execution of the enduring power; or that it is to take effect only on the disability of the principal.
- It must contain instructions regarding the extent of the authority granted to the agent.
- A certificate of execution must be included in the enduring power. The certificate provider must certify that the principal understands the nature and effect of the enduring power when the power is granted, and that there is no reason to believe that the principal was unduly influenced or that any other factor negates the legal force of the enduring power. A legal practitioner, a health care practitioner, or a person with other professional skills relevant to the purpose of the certificate must give the certificate. Alternatively, the certificate may be given by a person who has known the principal for at least five years and as more than an acquaintance.

Who should the principal choose as agent?
The agent must be a person who is 18 years of age or older; who is trustworthy; and willing to act as agent. The agent may not be a person who requires support in exercising legal capacity. One may also choose a juristic person as agent, in which case a natural person nominated by the juristic person will perform the duties of the agent.

More than one person can be appointed as agent. They may be appointed to act jointly (make decisions together), or jointly and severally (in which case they can all act together but they can also act separately if they wish). The principal may also name a specific person in the enduring power to act as substitute if the chosen person becomes unable to act as agent.

It is important for the principal to discuss the decision to appoint a specific person as agent with that person before appointing him or her.

Should an agent be paid?
A principal is under no legal obligation to pay his or her agent, and an agent has no right to claim payment. It is advisable for the principal to discuss the issue of payment with the agent. Should a principal wish to pay his or her agent, this must be stipulated in the enduring power of attorney. Any payment of an agent will be taken from the property of the principal.

The Master of the High Court may require an agent to give security for the proper performance of his or her duties

If a principal does not wish his or her agent to give security, the principal must expressly exempt the agent from this in the enduring power of attorney. If the principal does not exempt the agent, the Master of the High Court may require the agent at the time of registration of the enduring power, or at any later time, to give security, if the Master has good reasons for doing so. Note that security can only be required in the case of an enduring power relating to *property.* In addition, the reasonable cost of giving security is payable from the estate of the principal.

An enduring power of attorney must be registered

An agent is required to register the enduring power of attorney with the Master of the High Court at the stage when the principal needs support in exercising legal capacity. Once it has been established that the principal requires support, the agent will not be able to legally act in terms of the enduring power unless it is so registered.

What are the responsibilities of an agent?

A person who accepts an appointment as agent under an enduring power of attorney takes on serious responsibilities.

An agent should take particular note of the general principles that should guide support of a person in exercising their legal capacity, as required by the Supported Decision-making Act, 20..; and of the specific provisions of that Act that apply to an agent's general powers and duties.

An agent owes the principal a certain standard of care. This means that an agent must carry out the instructions under the enduring power with the care and diligence that can be expected of a careful person who acts on behalf of another person in managing that person's affairs. This standard of care applies whether or not the agent is paid for his or her services.

An agent owes the principal a fiduciary duty. This means that the principal has placed trust in the agent to properly exercise the powers granted to the agent, and the agent must act accordingly. Generally speaking, a list of duties arising from this position of trust would include the following:

- To act with the utmost good faith.
- To act in the best interests of the principal.
- To act within the authority granted by the enduring power.
- Not to benefit personally in carrying out any function or duty as agent.
- To fully disclose to the principal any interests that may conflict with the agent's responsibilities in terms of the enduring power.
- Not to misuse confidential information gained through being the agent.
- In the case of an enduring power relating to *property*, not to mingle the agent's property and that of the principal, except where there is already an interest in the same asset (for example where a spouse is appointed as agent).
- In the case of an enduring power relating to *property*, to keep proper records (including statements of monetary transactions) to show how the principal's property is handled; and to permit inspection of such records.

An agent must report to the Master of the High Court if required to do so. The Master may require an agent to report to the Master about how he or she has exercised authority in terms of the enduring power of attorney. In the case of an enduring power relating to property, the Master may require the agent to include in such report a statement of monetary transactions executed in terms of the enduring power.

Can a principal amend or revoke an enduring power of attorney?
The principal can amend or revoke an enduring power of attorney made by him or her at any time, as long as the principal is still capable of understanding the nature and effect of the amendment or revocation. It is in fact important that the principal, from time to time, reviews the enduring power after its execution and amends it if necessary. This revision will ensure that the enduring power continues to convey the principal's wishes accurately. Revocation of an enduring power is valid only if written notice thereof is given to the agent. If revocation takes place after registration of the enduring power, the Master must also be notified about the revocation so that the Master can cancel the registration.

If one revokes an enduring power of attorney and executes a subsequent enduring power, the revocation of the earlier power should be clearly indicated in the subsequent enduring power. This would ensure that there is certainty about which of the two documents the principal regards as reflecting his or her most recent wishes with regard to the authority granted to the agent.

Can an agent's powers be terminated?
The Court, or the Master of the High Court, may remove an agent if the agent does not properly carry out his or her duties in terms of the enduring power of attorney.

An agent may resign. If, after the registration of an enduring power of attorney an agent wants to resign, then he or she must inform the Master of the High Court of this intention.

SCHEDULE 2

Laws repealed or amended

<table>
<tr><th>No. and year of Act</th><th>Short Title</th><th>Extent of repeal or amendment</th></tr>
<tr><td>Act No. 17 of 2002</td><td>Mental Health Care Act, 2002</td><td>The repeal of Chapter VIII</td></tr>
<tr><td>Act No. 25 of 2002</td><td>Electronic Communications and Transactions Act, 2002</td><td>1.The amendment of –
(a) Schedule 1 by the addition of the following item:
<table>
<tr><td>5.</td><td>Supported Decision-making Act, 20..</td><td>11, 12, 13, 14, 16, 18, 19 and 20</td></tr>
</table>
(b) Schedule 2 by the addition of the following item:
<table>
<tr><td>5.</td><td>The execution, retention and presentation of an enduring power of attorney as defined in the Supported Decision-making Act, 20..</td></tr>
</table></td></tr>
</table>

ANNEXURES

LIST OF ANNEXURES

Formal input received from interested persons and bodies after the publication of Issue Paper 18, Discussion Paper 105, and the extension of the investigation to include taking into account the requirements of the United Nations Convention on the Rights of Persons with Disabilities.

1	Respondents on Issue Paper 18
2	Respondents on Discussion Paper 105
3	Public Workshops on Discussion Paper 105, 1-15 March 2004
4	Consultative meetings with Chief Master 16 September 2004, 7 August 2007, 5 June 2012
5	Consultative meetings with representatives of national Department of Social Development, 3 June 2004, 11 November 2009 and 8 December 2009
6	Consultative meeting with constitutional and medical experts, 28 September 2004
7	Foreign and international experts consulted, 4-8 October 2004, 18 October 2004, 25 August 2008, 15 March 2005
8	Consultative meeting with representatives of residential institution for persons with disabilities, 18 June 2005
9	Workshop for Masters Office Officials, 29-31 August 2005
10	Consultative meeting with Traditional Leaders, 7 November 2005
11	Information and consultation sessions with Dementia South Africa, 7 July 2005, 25 August 2008 and 29 March 2012
12	Consultative meeting with representative of Human Rights Commission, 21 October 2009
13	Consultative meetings with representatives of national Department of Health, 6 November 2009, 4 December 2009, 14 December 2011, and 15 July 2014
14	Consultative meetings with representatives of national Department of Women, Children and People with Disabilities 16 November 2009, 8 December 2009 and 6 April 2010
15	Consultation session with representatives of the Department of International Relations and Cooperation, 7 January 2010
16	Workshop for Masters Office Officials, 27-28 October 2011
17	Information and consultation session for government and disability sector stakeholders, 16 February 2012
18	Working session with representatives of the SA Human Rights Commission and the Centre for Disability Law and Policy (UWC), 30 March 2012
19	Consultative meeting with representative of Legal Resources Centre, 9 June 2012.
20	Consultative meeting with representatives of the Banking Association South Africa (BASA) 18 June 2014

Apart from the above, the researcher and representatives of the advisory committee were involved throughout the investigation in numerous personal discussions with

members of the public and stakeholders; presentations at workshops and seminars held by interest groups; and training sessions for Masters Officials, social workers attached to non-governmental organisations, and hospital staff.

Annexure 1

Respondents on Issue Paper 18

SUBMISSIONS RECEIVED ON ISSUE PAPER 18 FROM PERSONS ATTACHED TO INSTITUTIONS

	INSTITUTION
1	Afrikaanse Chirstelike Vroue Vereniging Head Office
2	Algoa Bay Council for the Aged
3	Alzheimer's S A KwaZulu-Natal
4	Alzheimer's S A Pretoria Branch
5	Alzheimer's S A National Office
6	Association for the Aged (TAFTA)
7	Association for the Aged Darnall KwaZulu-Natal
8	Association for the Mentally Handicapped (OASIS)
9	Association of Trust Companies in South Africa
10	Autism South Africa
11	Brain Injury Group
12	Cape Peninsula Welfare Organisation for the Aged
13	Department of Health (Directorate Mental Health and Substance Abuse)
14	Department of Health (Directorate Chronic Diseases Disabilities and Geriatrics)
15	Durban and Coastal Mental Health
16	Family Advocate Pretoria
17	Free State Province Department Social Welfare
18	Garankuwa Management Committee for the Aged and Disabled
19	Gauteng Health Department
20	Gauteng Office of the Premier (State Law Advisers)
21	General Council of the Bar of South Africa
22	Halt Elder Abuse Line (HEAL)
23	Health Services Province of KwaZulu-Natal
24	Howick and District Council for Care of the Aged
25	Johannesburg Bar Council
26	Justice College (Ms M Meyer)
27	Law Society of the Cape of Good Hope
28	Legislative Services (Law Reform): Department of Justice New Brunswick Canada
29	Master of the High Court Bloemfontein
30	Master of the High Court Cape Town
31	Master of the High Court Kimberley
32	Master of the High Court Pietermaritzburg
33	Mbango Valley Association for the Aged and Disabled Port Shepstone
34	Multiple Sclerosis South Africa
35	National Council for Persons with Physical Disabilities in South Africa
36	Northern Cape Government Department of Health
37	Occupational Therapy Association of South Africa
38	Old Mutual (Legal Services)
39	Peter F Caldwell Attorneys
40	Pietermaritzburg and District Council for the Aged
41	PIMSA (Partners Interfaith Mission) Vukani Ma-Afrika Care of the Aged and Disabled: Shalom Mediation and Legal Advisory Orange Farm
42	Potchefstroom Service Centre for the Aged
43	Pretoria Council for the Care of the Aged
44	Project for the Elderly Disabled Disadvantaged and the Poorest Atteridgeville
45	Provincial Administration Western Cape (Legal Services)
46	Seniors for Seniors
47	Sinodale Kommissie vir die Diens van Barmartigheid (Dutch Reformed Church)

48	Society for the Care of the Retarded
49	Society of Advocates KwaZulu-Natal
50	South African Association for the Aged
51	Southern African Catholic Bishops' Conference
52	South African Federation for Mental Health
53	South African National Council for the Blind
54	South African Police Service (Legal Component, Detective Service and Crime Intelligence)
55	Stroke Support Group
56	Studium Philosophicum
57	Suid-Afrikaanse Vrouefederasie
58	The Banking Council S A
59	University of Cape Town Department Psychiatry (Prof T Zabov)
60	University of Cape Town Forensic Psychiatry Unit Valkenberg Hospital (Dr S Kaliski)
61	University of Pretoria Department Anthropology (Prof C Boonzaaier)
62	University of Pretoria Department Private Law (Prof CJ Davel)
63	University of Pretoria Department Private Law (Prof JMT Labuschagne)
64	University of Pretoria Department Public Law (Prof PA Carstens)
65	University of Stellenbosch Departments Psychiatry and Internal Medicine (Dr F Potocnik, Dr C Bouwens and Prof W Pienaar)
66	University of the Witwatersrand Department Neuroscience (Prof M Vorster)
67	University of Zululand Department Anthropology and Development Studies (Prof G Buijs)
68	Western Cape Forum for Intellectual Disability
69	Western Cape Province Department of Social Services
70	Yeowart Attorneys Notaries Administrators of Estates

SUBMISSIONS RECEIVED ON ISSUE PAPER 18 FROM INDIVIDUALS

1	Anonymous member of the public 1	Private individual
2	Anonymous member of the public 2	Private individual
3	Balisi Rev M	Private individual
4	Bekker Prof JC	Private individual
5	Coetzee Santie	Social worker
6	Groenewald Mabel	Private individual

Annexure 2

Respondents on Discussion Paper 105

SUBMISSIONS RECEIVED ON DISCUSSION PAPER 105 FROM PERSONS ATTACHED TO INSTITUTIONS

	INSTITUTION	NAME
1	Action Elder Abuse	Lindgren Pat (Director)
2	Affrox Rehabilitation	Wundram Kathy (Rehabilitation Standards)
3	Afrikaanse Christelike Vroueverenigning Head Office	Smit Soekie (Manager Professional Services)
4	Alta Du Toit Nasorg Sentrum	Basson R (Manager)
5	Alzheimers SA	Beukes Kathy (National Executive Director)
6	Alzheimers SA National Office	-
7	Alzheimers SA Pretoria	Badenhorst CH
8	Association for Autism	Klein Adv M (Council Member)
9	Association for Retired Persons and Pensioners	Visser JH (National Chairman)
10	Bisset Boehmke McBlaim Attorneys	Crowhurst John
11	Christian Medical Fellowship of South Africa	Van den Hollander D
12	Cliffe Dekker Attorneys	Dose Alec (Consultant)
13	Grey Power	Nel Dr LJ
14	Inkazinulo Care for the Aged	Nziza David
15	Law Society of South Africa	Martin Chris
16	Liberty Group Limited	Boscia Lucy
17	Master of the High Court Bloemfontein	Management Team
18	Master of the High Court Pretoria	Strauss F and Botha A (Curatorship Division)
19	Mbango Valley Association	Vos Peter (Director)
20	NG Church Social Work Services Free State	Burger Minnie (Director Care of the Aged and Persons with Special Needs)
21	Department of Health (National)	Chief Director Legal Services
22	Old Mutual	Oosthuizen MJ (Law Division)
23	Peter F Caldwell Attorneys	Peter Caldwell
24	RFJ Yeowart Attorneys	Yeowart RFJ and NJ
25	Rand Aid Association	Matthews Ayanda (Manager Training and Compliance)
26	S A Association for the Scientific Study of Mental Handicap	Cruickshank John (Committee Member)
27	Studium Philoshophicum St Francis House of Studies	Ennis Fr Hyacinth
28	The Banking Council S A	Grobler Stuart
29	University of Pretoria Centre for Child Law	Davel Prof CJ (Director)
30	Vrystaat Residential Care Centre	Vosser S (Director)
31	WBD Jones Attorneys	Jones WBD
32	Walkers Attorneys	Jacobs JH

SUBMISSIONS RECEIVED ON DISCUSSION PAPER 105 FROM INDIVIDUALS

1 Eaton G	Private individual
2 Du Toit ER	Private individual
3 Haveman GG	Private individual
4 Stekhoven Dr P	Social worker in private practice Cape Town
5 Strydom W	Private individual

Annexure 3

Public Workshops on Discussion Paper 105

1-19 March 2004

PERSONS WHO ATTENDED PUBLIC WORKSHOPS ON DISCUSSION PAPER 105

PIETERMARITZBURG

	NAME	INSTITUTION
1	Balgobind Fiona	Pietermaritzburg Association for the Aged
2	Barnes Connie	KwaZulu-Natal Department of Health (Community Psychiatric Services)
3	Batista Jomari	La Gratitude Home for the Aged
4	Brooks Lorna	Allison Homes Trust
5	Cronje Sr Me	La Gratitude Home for the Aged
6	Davis Kathleen	Alzheimer's SA
7	Dawdall Veronica	Private individual
8	Dladla Spiwe	St Antonine's Old Age Home Wasbank
9	Douglas Beverley	KwaZulu-Natal Department of Health (Greys Hospital)
10	Du Preez Mrs	Umgeni Care and Rehabilitation Centre
11	Dunn Dr JA	Fort Napier Psychiatric Hospital
12	Edwards Susan	Master of the High Court Pietermaritzburg
13	Emmet Enid	Howick and District Council for Care of the Aged
14	Esmade Sr Jeany	Golden Pond Retirement Village
15	Frankson Joy	Isabel Beardmore Home for the Aged
16	Groenewald Pennie	La Gratitude Home for the Aged
17	Hegarty Jenny	Golden Pond Retirement Village
18	Hughes John	Howick and District Council for Care of the Aged
19	Jenkins AJ	Austen Smith Attorneys
20	Jerome Sr	Villa Assumpta
21	Jogessar Dr SB	Fort Napier Psychiatric Hospital
22	Joubert Petro	Magistrates Court Pietermaritzburg
23	Kanla Bongi	Kwa Zulu-Natal Department of Health (Community Psychiatric Services)
24	Kriel Anita	Fort Napier Psychiatric Hospital
25	Lamberta Sr	Villa Assumpta
26	Landers D	KwaZulu-Natal Department of Health (Community Psychiatric Services)
27	Landsberg Judy	Howick and District Council for Care of the Aged
28	Lategan M	Isabel Beardmore Home for the Aged
29	Longbottom Val	Kwa Zulu-Natal Department of Health (Community Psychiatric Services)
30	McLeod Pat	Howick and District Council for Care of the Aged / Alzheimer's SA
31	Maharaj Kushil	Townhill Psychiatric Hospital
32	McCullough Robert	Magistrates Court Pietermaritzburg
33	McEwen Alan	KPMG Pietermaritzburg
34	Mhlaluka NG	KwaZulu-Natal Department of Health (Mental Health and Substance Abuse)
35	Milisi SW	KwaZulu-Natal Department of Health (Community Psychiatric Services)
36	Mlalusi NG	KwaZulu-Natal Department of Health (Mental Health and Substance Abuse)
37	Moodley Vami	Kwa Zulu-Natal Department of Health (Community Psychiatric Services)
38	Myers Annetjie	Umgeni Care and Rehabilitation (Howick)
39	Mzila Nomathemba	KwaZulu-Natal Department of Health (Community Psychiatric Services)
40	Nathan Barbara	Alzheimer's SA
41	Ndlovu Thulani	St Antonine's Old Age Home
42	Ngubane VG	Umgeni Care and Rehabilitation Centre
43	Nzimakwe Prof Doris	Thembelani Training and Consultancy
44	Padayachee S	Lawyer's for Human Rights Pietermaritzburg

45	Philip Sheila	Alzheimer's SA
46	Pillay M	Townhill Psychiatric Hospital
47	Potgieter AW	Master of the High Court Pietermaritzburg
48	Potgieter Leandra	Pietermaritzburg Mental Health Society
49	Rance Sandra	Victoria Memorial Home
50	Robertson Claire	Amberglen Care Centre
51	Robertson Lynn	Amberglen Care Centre
52	Rubheka Sr Pius	St Antonine's Old Age Home
53	Sefton Geraldine	Alzheimer's SA
54	Singh Veditha	Pietermaritzburg Mental Health Society
55	Sithole Delisile	St Antonine's Old Age Home
56	Stevens-O'Connor Joanne	Pietermaritzburg and Durban Council for Care of the Aged
57	Stradling Rose	Pietermartizburg and Durban Council for Care of the Aged
58	Syfert Louise	Pietermaritzburg and Durban Council for the Care of the Aged
59	Szudrawski Hannah	Venn Nemeth and Hart Attorneys
60	Tomlinson Richard	Shepstone Wylie Tomlinsons Attorneys
61	van der Linde Barbara	La Gratitude Home for the Aged
62	Van Wyk Edith	Isabel Beardmore Home for the Aged
63	Van Zyl Margaret	Pietermaritzburg and Durban Council for the Care of the Aged
64	Warburton Jeanette	Alzheimer's SA
65	Zondi Nomcebo	KwaZulu-Natal Department of Health (Legal Services)

DURBAN

	NAME	INSTITUTION
1	Aboobaker MA	West Park School
2	Andpatin Gloria	Epilepsy South Africa Durban and Coast Branch
3	Andrews A	Ann Robin Lodge
4	Antelme M	Twilanga Retirement Village
5	Bannon Matron Desiree	Centenary Home
6	Benade Sara	Alzheimer's SA
7	Byroo Desiree	Aryan Benevolent Home
8	Dalais Sue	Twilanga Retirement Village
9	Farris Anne	Mothwa Haven
10	Fortune Dudley	Bill Buchanan Association
11	Ghirdari Nareth	Aryan Benevolent Home Chatsworth
12	Harmse Bill	Alzheimer's SA
13	Hartslief Bronwyn	Doone Village
14	Hattingh Helena	Tuinsig Old Age Home
15	Lalla Reena	Durban Association for the Aged
16	le Roux Malyna	Tuinsig Old Age Home
17	Legkoba SA	Kwa Mashu Christian Care Society
18	Leitch Collette	The Salvation Army Thembela Home Greyville
19	Leppens Mary	Association for the Aged
20	Lewis Colleen	Lahle House Home for the Elderly
21	Mc Arthur L	Headway Natal
22	Mokholo Martha	Age in Action
23	Murugan Bobby	Association for the Aged Darnall
24	Naude Ruth	Down's Syndrome Association
25	Ngidi Sifiso	Izzy Geshen Lamont Home for the Frail Aged
26	North Sue	Lahle House Home for the Elderly
27	Ogg Anne	Alzheimer's SA
28	Paruk Suraya	Durban and Coastal Mental Health Society
29	Pather T	West Park School
30	Paul Elizabeth	The Salvation Army Thembela Home Greyville
31	Roberts Felicity	Association for Retired Persons and Pensioners Durban
32	Robinson Sr Wendy	Psychiatric nurse in private practice
33	Saayman Braam	Mothwa Haven
34	Sanderson Craig	Alzheimer's SA

35 Seerabpers Kenny	Durban Association for the Aged Darnall
36 Sewduth Vijay	Age in Action
37 Shaman Femada	Association for the Aged
38 Stranex Adv Mark	Society for Advocates KwaZulu-Natal
39 Taylor Carol	Doone Village
40 Thakur Pearl	Highway Aged
41 Tolllman . Dr Shirley	Neuro-psychologist in private practice
42 Trickey Anelda	Friedman and Associates
43 Webster John	Hibiscus Retirement Villages
44 Wilford Gladys	Alzheimer's SA
45 Wright Wendy	Pietermaritzburg and Durban Council for Care of the Aged

PORT ELIZABETH

	NAME	INSTITUTION
1	Anstey Irene	Alzheimer's SA
2	Bebington KL	ECHO Foundation Aged Care Port Elizabeth
3	Blunden Merle	Port Elizabeth Mental Health Society
4	Bosch HE	Alzheimer's SA
5	Coetzer Lindi	Law Faculty (Street Law Project) University of Port Elizabeth
6	Daniels May	Association for the Physically Disabled
7	Elliot-Gentry Mrs	Private individual
8	Elliott-Gentry Mr	Private individual
9	Fisher D	Uitenhage Mental Health Society
10	Goldman Gareth	Port Elizabeth Mental Health Society
11	Hendrick Kaye	Hunters Craig Psychiatric Hospital Port Elizabeth
12	Komle Mawabo	Master of the High Court Port Elizabeth
13	Labuschagne Leona	Perpetual Care Trust for the Profoundly Disabled and its Hugg Homes
14	Lai Mr Alan	Psychiatric Aftercare Havens
15	Leo Ingrid	Association for the Physically Disabled Port Elizabeth
16	Maye Tenjiwe	Port Elizabeth Mental Health Society
17	Meyer John C	Psychiatric Aftercare Havens
18	Parker MC	Alzheimer's SA
19	Pfeffer Marilyn	DJ Sobey Home for the Aged
20	Pettitt l	Alzheimer's SA
21	Prag Hanita	Uitenhage Mental Health Society
22	Rademeyer Paul	Private individual
23	Robb Dianne	Psychiatric Aftercare Havens
24	Septoe Sheldene	Port Elizabeth Mental Health Society
25	Shaw Ronald	Port Elizabeth Mental Health Society
26	Smith Dr Neville	Port Elizabeth Down Syndrome Association
27	Strumpher Prof Juanita	Department Nursing Science University of Port Elizabeth
28	Strydom Tilly	Association for the Physically Disabled Port Elizabeth
29	Van Niekerk W	Port Elizabeth Mental Health Society (Schizophrenia Support)
30	Van Rooyen Santa	Algoa Bay Council for the Aged / Alzheimer's SA
31	Ward G	Alzheimer's SA
32	Xakaxa Nwabisa	Port Elizabeth Mental Health Society (Care Giver support)

JOHANNESBURG

	NAME	INSTITUTION
1	Aggenbach Leonie	Johannesburg Association for the Aged
2	Allen Jean	Alzheimer's SA Gauteng
3	Arendse Henriette	Alzheimer's SA National Office
4	Beukes Kathy	Alzheimer's SA National Office
5	Booyens Susan	Witwatersrandse Tuiste vir Bejaardes Parktown-West
6	Booysen Linda	North Gauteng Mental Health Society
7	Bosman Adv Francis	Hofmeyr, Herbstein & Gihwala Attorneys (Centre for Family Law)
8	Bowen Peter	Alzheimer's SA Pretoria
9	Broekmann Dr R	Gauteng Department of Health

10	Bulibana Maluta	South African National Council for the Blind
11	De Beer Gerhard	Wilsenach and Van Wyk Attorneys
12	De Vos Hele	Occupational Therapist in private practice
13	Fields Tracy	Law School University of the Witwatersrand
14	Flemmer Jock	Cluny Farm Care Centre
15	Grobler S	Banking Council of South Africa
16	Herman Emmie	Suid Afrikaanse Vroue Federasie Millennium Centre
17	Janse Van Vuuren L	Hofmeyr, Herbstein & Gihwala Attorneys
18	Karp Lionel	Lionel Karp and Associates Attorneys
19	Kotze Barry	Barry Kotze Attorneys
20	Kotzenberg C	National Department of Health (Non-Communicable diseases)
21	Krause Linda	Cullinan Care and Rehabilitation Centre
22	Leos Elios	Attorney in private practice
23	Manthata Motlatjo	Gauteng Department of Health
24	Marais Gerda	Master of the High Court Pretoria
25	Marais Hettie	National Council for People with Physical Disabilities SA
26	Martin Margaret	Alzheimer's SA Gauteng
27	Matthews Ayanda	Rand Aid Association
28	McDonald Kevin	South African Inherited Disorders Association
29	McDonald Alice	South African Inherited Disorders Association
30	O'Neill Bethy	Queenshaven Old Age Home
31	Pretorius MM	Cullinan Care and Rehabilitation Centre
32	Pretorius Tina	Suid Afrikaanse Vroue Federasie Millennium Centre
33	Rams Gerda	Cluny Farm Care Centre
34	Reddy Vimla	First Rand Banking Group Legal Services
35	Retief Colin	Standard Bank of SA Ltd
36	Seape Dr SL	Sterkfontein Psychiatric Hospital Krugersdorp
37	Singh Karuna	Central Gauteng Mental Health Society
38	Sithole John M	Age in Action Gauteng
39	Spies Dr GM	School of Medicine University of Pretoria
40	Strassheim Peter	Epilepsy SA and SA National Council for Physical Disabilities
41	Strauss Freidelein	Office of the Master of the High Court Pretoria
42	Strydom Marie	National Department of Health
43	Thomse Lenie	Queenshaven Care Centre
44	Tolley Annatjie	Witwatersrandse Tuiste vir Bejaardes, Parktown-West
45	Van Niekerk M	Ekklesiapark Home for the Aged
46	Vassanjee Tamizin	Group Legal Department ABSA Bank
47	Vorster Prof M	Department of Neurosciences University of the Witwatersrand
48	Weinkove John	Life Care Psychiatrists
49	Wernberg Maria	Standard Bank of SA Ltd
50	Willemse Karen	Parkinson Association SA

BLOEMFONTEIN

	NAME	INSTITUTION
1	Botha Ds W	Dutch Reformed Church Social Work Services
2	Du Plessis Jannie	Master of the High Court Kimberley
3	Eillers Albert	Duncan and Rothman Attorneys Kimberley
4	Erlank H	Master of the High Court Bloemfontein
5	Fick Prof Gerhard	Department Private Law University of the Free State
6	Heyns Prof Malan	Dept Psychiatry University of the Free State and Alzheimer's SA
7	Hoddad Vernon	Attorney in private practice Kimberley
8	Howitson Dorothy-Ann	Association for Persons with Physical Disabilities Northern Cape
9	Jamneck Corne	Free State Department of Health
10	Jonker Renee	Alzheimer's SA
11	Kruger Prof Willem	Department Community Health University of the Free State
12	Laten Sandra	Alzheimer's SA
13	Mollekar Nirosha	Duncan and Rothman Attorneys Kimberley
14	Mosala Mamswazi	Mangaung Society for the Care of the Aged
15	Mostert Ariel	Symington and De Kock Attorneys

16	Murray Adv Henriette	Society for Advocates Free State
17	Petzer Mr Kobie	Northern Cape Mental Health Society
18	Rademeyer Sandra	Free State Department of Health
19	Sevenster EM	Alzheimer's SA
20	Stofberg Retha	Yonder Care Centre Kimberley
21	Van der Merwe Dr W	Private individual
22	van der Merwe Yvonne	Private individual
23	Venter HC	Master of the High Court Bloemfontein
24	Vorster Engela	Association for Persons with Disabilities Northern Cape
25	Vosser Stefan	Vrystaat Nasorgsentrum
26	Walker Dr Stephen	Department Psychology University of the Free State
27	Wright Adv Germa	Society for Advocates Free State

GEORGE

	NAME	INSTITUTION
1	Adendorff Elsabe	Harry Comey Santa Centre
2	Badenhorst Elsabee	Emmaus Beskermde Werksentrum vir Gestremdes
3	Barnard Barney	Private individual
4	Barnard Jean	Alzheimer's SA
5	Brink Erika	George Service Club / Lytleton Care Centre
6	Coetzer Sr Lenie	George Service Club
7	De Beer Ronette	Emmaus Beskermde Werksentrum vir Gestremdes
8	De Waal Dr Ian	George Provincial Hospital
9	Deysel Elzane	Bergville Nursing and Care Centre
10	Deyzel Marianna	Social worker in private practice (Neuro Clinic, Medi Clinic, George)
11	Du Pisanie Andreo	Private individual
12	Fettis Sr Ina	Geneva Fontein Retirement Village
13	George Vidonia	Child and Family Welfare George
14	Goosen Carol	Tuiniqua Care Centre and Alzheimer's SA
15	Goosen Mike	Brilliant Concepts
16	Goosen Pierre	Dutch Reformed Church in South Africa (Clinical Pastoral Care)
17	Goosen Rachel	Harry Comay Santa Centre
18	Hart Janet	Alzheimer's SA
19	Jacobs John	Harry Comay Santa Centre
20	Jantjies Yvonne	Harry Comay Santa Centre
21	Jeneker Ds Chris	United Reformed Church Blanco
22	Lutske Basie	Basie Lutske Brokers Ltd
23	Meyer Madeleine	Family and Marriage Society of SA
24	Muller Stephen	Harry Comay Santa Centre
25	Nel Janine	Harry Comay Santa Centre
26	Nevay Denyse	Alzheimer's SA
27	Nothnagel Riccon	George Service Club
28	Riddick Lisa	Geneva Fontein Retirement Village
29	Schackleton Barry	Alzheimer's SA
30	Shackleton Marj	Alzheimer's SA
31	Shackleton Ray	Alzheimer's SA
32	Smit Gerd	Alzheimer's SA
33	van Wyk Salome	Millers Attorneys
34	Van Zyl Col J	Private individual

CAPE TOWN

	NAME	INSTITUTION
1	Aanhuizen Lucille	Rehoboth Age Exchange Centre
2	Arendse Andries	Alzheimer's SA Stellenbosch
3	Baker Zanab	Islamic Social Welfare Association
4	Barday Raygaanan	Community Law Centre
5	Barochovitz Karen	Alzheimer's SA Cape Town
6	Baudains Pat	Adams Farm Home

7	Becker Lily	Department of Social Development University of Cape Town
8	Botha Adv Sanet	Provincial Government Western Cape (Legal Services)
9	Bouwer Cilla	Private individual
10	Carstens Lanette	Seapark Nursing Care Centre
11	Collins Sandra	Age in Action Western Cape
12	Crous B	Alzheimer's SA Strand
13	De Goede Hestelle	BADISA (Dutch Reformed and United Reformed Church in SA welfare organisation) Kraaifontein
14	De Goede Noeline	Epilepsy SA
15	Du Plessis Stephny	Bellcare Bellville
16	Du Toit Sr Anita	Bellville Seniors Centre
17	Engelbrecht Blanche	Christelike Maatskaplike Raad Parow
18	Farinha Claudia	First Rand Bank Corporate Property Finance (Legal Division)
19	Garden Ann	Cape Peninsula Organisation for the Aged
20	Gassner Adv Barbara	Cape Bar Council
21	Hammond Marie	Private individual
22	Jacobs Johann	Walkers Attorneys Cape Town
23	Killian Sanette	Seapark Care Centre
24	Krynauw Stelsia	Christelike Maatskaplike Raad Goodwood
25	Le Roux Ronelle	Private individual
26	Le Roux Tommie	Private individual
27	Leitha Joan	Autism South Africa
28	Lilley Marilyn	Private individual
29	Lindgren Pat	Action Elder Abuse South Africa
30	McFairland Nancy	Institute of Aging University of Cape Town
31	Moore Shane	OASIS Association for Intellectual Disability
32	Nadasen Dr Sagie	Sanlam Life (Law Service)
33	Ohlson Matron Ruth	Society for Care of the Aged Hermanus
34	Pope Ann	Department of Private Law University of Cape Town
35	Roelofse Marinda	Department of Health Western Cape (Mental Health Programme)
36	Sauls Jenny	Society for Care of the Aged Hermanus
37	Smit Lindi	Psycho-geriatric social worker in private practice
38	Swart Marilyn	Private individual
39	Theunissen Hanche	Seapark Nursing Care Centre
40	Van der Merwe Vivienne	Western Cape Forum for Intellectual Disability
41	Van der Westhuizen Prof W	Millers Attorneys Cape Town / George
42	Vorster Dr Willem	Alexandra Psychiatric Hospital
43	Wessels M	Alzheimer's SA Strand
44	Yeowart James	RFJ Yeowart Attorneys
45	Yeowart Nicholas	RFJ Yeowart Attorneys
46	Zabov Prof Tuviah	Department Psychiatry University of Cape Town

NELSPRUIT

	NAME	**INSTITUTION**
1	Chirwa Robert Moosa	Magistrate's Court Eerstehoek
2	Cloete Elsa	South African Theatre Sisters' Association Nelspruit
3	Cruse Jackie	Alzheimer's SA
4	Davis Lauren	Themba Hospital Kabokweni (Clinical Psychologist)
5	Ferreira HP	Magistrate's Court Witbank
6	Hlangani Daphne	Mpumalanga Mental Health Society
7	Hlatshwayo Nomsa	Mpumalanga Mental Health Society
8	Makhaya Dr Koos	Makhaya and Associates
9	Maluleka Patrick	Mpumalanga Mental Health Society
10	Markram Martin	Wenakker Home for the Disabled Nelspruit
11	Masela Doctor	Disabled People South Africa Mpumalanga
12	Masete SA	Mpumalanga Department of Health
13	Mathye Given	Mpumalanga Mental Health Society
14	Mbuli Busisiwe	Mpumalanga Department of Health (Mental Health Services)
15	Mogale Sipho	Mpumalanga Department of Health (Mental Health Services)

16	Mogame P	Limpopo Department of Health
17	Mokoka Katjie Thabo	Mpumalanga Department of Health (Mental Health Services)
18	Moloena Benedict	Mnisi Attorneys
19	Mosher Lucretia	Mpumalanga Council for Disabled People
20	Mtrose Sibulelo	Mpumalanga Department of Health
21	Ntuli Emily	Disabled People South Africa Mpumalanga
22	Okojie Dr ES	Mpumalanga Department of Health (Mental Health Services)
23	Rogatschnig Marc	Themba Hospital Kabokweni (Clinical Psychologist)
24	Saasa Ms Monicah	Mpumalanga Department of Health (Mental Health Services)
25	Scholtz Annadien	Sunfield Homes
26	Silubane Colly	NOMVUYO
27	Thumbathi Beatrice M	Mpumalanga Department of Health (Mental Health Services)
28	Van Zyl Karen	Mpumalanga Council for Disabled People

POTCHEFSTROOM

	NAME	INSTITUTION
1	Benade Petro	Groenwilgers Retirement Centre
2	Booysen Yvonne	SA Vroue Federasie Huis Anna Viljoen
3	Du Plooy Selma	Witrand Care and Rehabilitation Centre
4	Janse van Rensburg A	Witrand Care and Rehabilitation Centre
5	Luboc FC	Witrand Care and Rehabilitation Centre
6	Rankin Pedro	Department Social Work North West University
7	Reynecke Magda	North-West Department of Health (Mental Health)

FOR SALRC ADVISORY COMMITTEE

	NAME	WORKSHOPS ATTENDED
1	Judge B Du Plessis (Project leader)	Johannesburg
2	Prof J Bekker	Johannesburg, Pietermaritzburg, Durban, Port Elizabeth
3	Ms M Meyer	All
4	Mr L Vitus	Johannesburg, Bloemfontein, George, Cape Town
5	Ms A-M Havenga (Researcher)	All

WRITTEN RESPONSES RECEIVED ON WORKSHEETS FROM PERONS ATTACHED TO INSTITUTIONS, ORGANISATIONS AND SUPPORT GROUPS

	INSTITUTION	NAME
1	Alzheimer's SA George	MER Shackleton
2	Alzheimer SA Howick	Kathleen Davis
3	Alzheimer's SA KwaZulu-Natal	Anne Ogg
4	Alzheimer's SA Pietermaritzburg	Geralidine Sefton
5	Association for Persons with Physical Disabilities Northern Cape	Dorothy-Ann Howitson
6	Association for Retired Persons and Pensioners Durban	Felicity Roberts
7	Association for the Aged Durban	Femada Shaman
8	Badisa (Dutch Reformed and United Reformed Church in SA welfare orgisation) Kraaifontein	Marlene Bernhardt
9	DJ Sobey Home for the Aged	Marilyn Pfeffer
10	Department of Health (Directorate (Non-Communicable Diseases)	Ms C Kotzenberg
11	Epilepsy SA	Noeline De Goede
12	Evelyn House Management Committee	HG Roper
13	Family and Marriage Society of SA George	Madeleine Meyer
14	Groenwilgers Retirement Centre Potchefstroom	Petro Petro
15	Gauteng Department of Health	Dr Rita Thom and Dr R Brukman
16	Howick and District Coucil for Care of the Aged / Alzheimers SA	Enid Emmet

17	Howick and District Council for Care of the Aged	John Huges
18	Howick and District Council for Care of the Aged / Alzheimer's SA	Pat McLeod
19	Master of the High Court Kimberley	Jannie Du Plessis
20	Master of the High Court Pietermaritzburg	Susan Edwards
21	Mpumalanga Health Department	P Mohlakoane M Rogatschnig and L Davis
22	Mothwa Haven Durban	AF Saayman F
23	National Council for Persons with Physical Disabilities in SA	Monica Gerhard
24	OASIS Association for Intellectual Disability Cape Town	Shane Moore
25	Pietermaritzburg and Durban Council for Care of the Aged	Jo-Anne Stevens-O'Connor
26	Rand West Care Centre	John Weinkove
27	St Antonine's Old Age Home Wasbank	Sr Pius Kubheka and SC Dladla
28	Townhill Psychiatric Hospital Pietermaritzburg	M Pillay
29	Sanlam Life (Law Service)	Dr Sagie Nadassen
30	Umgeni Care and Rehabilitation Centre	VG Ngubane VG
31	University of Cape Town Departments Psychiatry and Mental Health	Prof Tuviah Zabow
32	University of the Free State Department Psychology	Dr Stephen Walker
33	Western Cape Forum for Intellectual Disability	Vivienne Van der Merwe
34	Western Cape Provincial Government Directorate Legal Services	Adv Sanet Botha

WRITTEN RESPONSES RECEIVED ON WORKSHEETS FROM INDIVIDUALS

1	McDonald Alice	Private individual
2	McDonald Kevin	Private individual
3	Petorius CJM	Private individual
4	Strassheim Peter	Health and disability lawyer in private practice, Johannesburg
5	Smit Lindi	Psycho-geriatric social worker in private practice Cape Town

Annexure 4

Consultative meetings with Chief Master of the High Court 16 September 2004, 7 August 2007, 5 June 2012

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH CHIEF MASTER OF THE HIGH COURT: PRETORIA, 16 SEPTEMBER 2004

REPRESENTATIVES OF MASTERS DIVISION	
1 Mr John Baloyi	Chief Director (Head of Masters Division)
2 Mr Koos van der Merwe	Chief Director
FOR SALRC ADVISORY COMMITTEE	
1 Judge Ben Du Plessis	Project Leader
2 Prof J Bekker	
3 Ms M Meyer	
4 Mr L Vitus	
5 Ms A-M Havenga	Researcher

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH CHIEF MASTER OF THE HIGH COURT: PRETORIA, 7 AUGUST 2007

REPRESENTATIVES OF MASTERS DIVISION	
1 Mr Hassen Ebrahim	Chief Master
2 Adv L Basson	Chief Director
FOR SALRC ADVISORY COMMITTEE	
1 Judge Ben Du Plessis	Project Leader
2 Ms M Meyer	Member of committee
3 Ms A-M Havenga	Researcher
FOR SALRC	
1 Ms T Madonsela	Full-time member

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH CHIEF MASTER OF THE HIGH COURT: PRETORIA, 5 JUNE 2012

REPRESENTATIVES OF MASTERS DIVISION	
1 Adv Lothar Basson	Chief Master
FOR SALRC ADVISORY COMMITTEE	
1 Judge Ben Du Plessis	Project Leader
2 Ms M Meyer	Member of committee
3 Ms A-M Havenga	Researcher

Annexure 5

Consultative meetings with representatives of the national Department of Social Development Pretoria, 11 November 2009 and 8 December 2009

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF NATIONAL DEPARTMENT OF SOCIAL DEVELOPMENT: PRETORIA 11 NOVEMBER 2009

REPRESENTATIVES OF SOC DEV	
1 Ms Manthipi Molamu	Director Disabilities
2 Mr Pierre Du Preez	Director Legislative Drafting
3 Ms Thuli Mahlangu	Director Older Persons
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF NATIONAL DEPARTMENT OF SOCIAL DEVELOPMENT: PRETORIA 7 DECEMBER 2009

REPRESENTATIVES OF SOC DEV	
1 Ms Manthipi Molamu	Director Disabilities
2 Mr Pierre Du Preez	Director Legislative Drafting
3 Ms Lungile Ndlovu	Asst Director Disability and Old Age Grants
4 Ms Shellah Mokaba	Dep Director Disability and Old Age Grants
5 Ms Thuli Mahlangu	Director Older Persons
6 Mr Krish Shynmugam	Dep Director Disabilities
7 Ms Jackie Mbonani	Chief Director Welfare Services
8 Ms sophi Mkahsive	Directorate Disabilities
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

Annexure 6

Consultative meeting

with constitutional and medical experts

Pretoria, 28 September 2004

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH CONSTITUTIONAL LAW AND MEDICAL EXPERTS

NAME	**INSITUTION**
1 Prof Ian Currie	Department of Administrative Law Law School University of the Witwatersrand
2 Prof G Modi	Department of Neurology Medical School University of the Witwatersrand
3 Dr Felix Potocnik	Department Psycho-geriatrics Faculty of Health Sciences University of Stellenbosch
4 Prof SAS Strauss	Department of Criminal Law and Procedure University of South Africa
5 Prof Frans Viljoen	Centre for Human Rights University of Pretoria
FOR SALRC ADVISORY COMMITTEE	
1 Judge B Du Plessis	Project leader
2 Prof J Bekker	Advisory Committee member
3 Ms T Mahlangu	Advisory Committee member
4 Ms M Meyer	Advisory Committee member
5 Prof S Selemani	Advisory Committee member
6 Mr L Vitus	Advisory Committee member
7 Ms A-M Havenga	Researcher

Annexure 7

Foreign experts and practitioners consulted

4-8 October 2004

FOREIGN EXPERTS AND PRACTITIONERS CONSULTED

NAME	INSTITUTION
1 Ms Julie Barr	Office of the Public Guardian Falkirk Scotland
2 Prof Kees Blankman	Department Private Law: Vrije Universiteit Amsterdam Netherlands
3 Dr Renee Bouwma	Stichting Mentorschap Rotterdam Netherlands
4 Ms Lorna Brownlee	Civil Justice Division: Justice Department Scottish Executive Edinburgh
5 Prof Juliet Cheetham	Mental Welfare Commission for Scotland Edinburgh
6 Mr Stuart Fowler	Office of the Public Guardian Falkirk Scotland
7 Ms Alison Goodwin	District Mental Health Department: South West Edinburgh Scotland
8 Mr Tony Jevon	Mental Welfare Commission for Scotland Edinburgh
9 Ms Jan Killeen	Alzheimer Scotland Action Dementia Edinburgh
10 Mr Marcel Kooi	Bewindvoering Zuidlaren Netherlands
11 Ms Hilary Patrick	School of Law: Edinburgh University
12 Mr Klaas Petter	Brancheverenigingvoor Professionele Bewindvoerders en Inkomens Beheerders Utrecht Netherlands
13 Ms Yvonne Van Gilse	Stichting Mentorshcap Utrecht Netherlands
14 Dr Veroni Verhulst	Brancheverenigingvoor Professionele Bewindvoerders en Inkomens Beheerders Utrecht Netherlands
15 Dr Robert Warmerdam	Brancheverenigingvoor Professionele Bewindvoerders en Inkomens Beheerders Utrecht Netherlands
FOR SALRC ADVISORY COMMITEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

Prof Blankman and Ms Hillary Patrick were consulted in follow-up meetings on 18 October 2004 and 25 August 2008; and 15 March 2005 respectively.

Annexure 8

Consultative meeting

with representative of residential institution for persons with disabilities 18 June 2005

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVE OF RESIDENTIAL INSTITUTION FOR PERSONS WITH DISABILITIES

NAME	**INSITUTION**
6 Mr S Vosser	Manager Vrystaat After Care Centre
FOR SALRC ADVISORY COMMITTEE	
1 Judge B Du Plessis	Project leader
2 Prof J Bekker	Advisory Committee member
3 Ms T Mahlangu	Advisory Committee member
4 Ms M Meyer	Advisory Committee member
5 Prof S Selemani	Advisory Committee member
6 Mr L Vitus	Advisory Committee member
7 Ms A-M Havenga	Researcher

Annexure 9

Workshop for Masters Office Officials on proposed draft Bill on Assisted Decision-making and Masters Office needs and procedures

Pretoria, 29-31 August 2005

PERSONS WHO ATTENDED WORKSHOP FOR MASTERS OFFICE OFFICIALS

	OFFICIAL	OFFICE
1	Baloyi Mr J	Management
2	Basson Mr L	Management
3	Daniels Ms E	Port Elizabeth
4	Davids Mr C	Kimberley
5	Edwards Ms S	Pietermaritzburg
6	Jozana Mr SC	Umtata
7	Luther Ms M	Management
8	Makutu Mr KR	Polokwane
9	Matikinca Ms Z	Bisho
10	Mbewana Mr S	Cape Town
11	Mndebele Ms N	Johannesburg
12	Modibela Mr PM	Mmabatho
13	Neethling Ms J	Pretoria
14	Potgieter Mr A	Pietermaritzburg
15	Sigcau Ms N	Pretoria
16	Smit Mr JF	Grahamstown
17	Strauss Ms F	Pretoria
18	Strauss Mr J	Bloemfontein
19	Thango Mr K	Pietermaritzburg
20	Tsatsi Mr MD	Pietermaritzburg
21	Tsolekile Ms AA	Durban
22	Van der MerweMr H	Management
23	Van Wyk Mr H	Pietermaritzburg
24	Venter Ms P	Management
FOR SALRC ADVISORY COMMITTEE		
1	Judge B Du Plessis	Project Leader
2	Prof J Bekker	Advisory Committee member
3	Ms M Meyer	Advisory Committee member
4	Ms Z Seedat	Advisory Committee member
5	Mr L Vitus	Advisory Committee member
6	Ms A-M Havenga	Researcher

Annexure 10

Consultative meeting with Traditional Leaders

Pretoria, 7 November 2005

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH TRADITIONAL LEADERS

REPRESENTATIVES OF PROVINCIAL AND NATIONAL HOUSES OF TRADITIONAL LEADERS		
EASTERN CAPE HOUSE	1	Inkosikazi N Gaika
	2	Nkosi MJN Matanzima
	3	Prince ZB Ncamashe
FREE STATE HOUSE	4	Morena ML Mohale
	5	Mrs M Nkosi
MPUMALANGA HOUSE	6	Kgosi MF Mashile
	7	Inkose MG Mkhatshwa
	8	Kgosigadi AS Mohlala
	9	Ms M Mavimbela
	10	Mr AM Sithole
NATIONAL HOUSE	11	Morena MF Mopeli
	12	Khosi FP Kutama
	13	Nkosi TJ Mabandla
	14	Inkhosi MS Mahlalela
	15	Prince ZS Makaula
	16	Mr ZM Matebese
	17	Kgoshi CE Mathebe
	18	Inkosi WT Mavundla
	19	Inkosikazi DN Mhlauli
	20	Kgosi MJ Pilane
	21	Kgosigadi AGG Moroka
	22	Morena MI Motloung
	23	Inkosi MB Mzimela
	24	Hosi PC Ngove
	25	Inkosi VJ Nhlapo
	26	Kgosi SV Suping
NORTH WEST HOUSE	27	Kgosi LM Mabalane
	28	Mr Babeotwejang
	29	Kgosi TF Mankuroane
OTHER		
MASTERS' DIVISION REPRESENTATIVE	30	Mr L Venter
S A LAW REFORM COMMISSION	31	Prof I Maithufi (Member of Commission)
	32	Mr M Cronje (Researcher)
	33	Ms G Moloi (Researcher)
FOR SALRC ADVISORY COMMITTEE		
1 Prof J Bekker		
2 Ms M Meyer		
3 Prof S Selemani		
4 Ms Z Seedat		
5 Mr L Vitus		
6 Ms A-M Havenga (Researcher)		

Annexure 11

Information and consultation sessions with Dementia South Africa, Cape Town 7 July 2005, 25 August 2008 and 29 March 2012

PERSONS WHO ATTENDED AN INFORMATION AND CONSULTATION SESSION WITH DEMENTIA SOUTH AFRICA ON 29 MARCH 2012

NAME	INSTITUTION / ORGANISATION
66 Borochovitz Karen	Director, Dementia S A
67 Donneson Renee	Jewish Care S A
68 Duvenhage Madelein	LIvewell S A
69 Jutzen Bobby	Private individual
70 Lindgren Pat	Elder Abuse S A
71 Painter Lizann	Private individual
72 Russon Rhita	Jewish Care S A
73 Sacha Diana	Jewish Care S A
74 Lindy Smit	Aged Care (Private Social Work Practice)
75 Ms Gerda van Schalkwyk	VisagieVos Attorneys Social Awareness Programme
76 Mr Francois Vos	VisagieVos Attorneys Social Awareness Programme
FOR SALRC	
1 Adv Margaret Meyer	Advisory Committee Member
2 Adv Anna-Marie Havenga	Researcher

Information on the investigation was also presented to a Dementia South Africa workshop for medical and psychiatric experts on 7 July 2005 in Cape Town. An informal discussion with representatives of Dementia South Africa and international expert Prof Kees Blankman, Vrije Universiteit, Amsterdam, were also held on 25 August 2008.

Annexure 12

Consultative meeting with representative of South African Human Rights Commission 21 October 2009

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

REPRESENTATIVES OF SAHRC	
1 Ms Simmi Pillay	Disability Coordinator
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

Annexure 13

Consultative meetings with representatives of the national Department of Health 6 November 2009, 4 December 2009, 13 December 2011 and 15 July 2014

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF THE NATIONAL DEPARTMENT OF HEALTH 6 NOVEMBER 2009

REPRESENTATIVES OF DOH	
1 Prof Melvyn Freeman	Chief Director Non-communicable Diseases
2 Mr Sipho Phakati	Director Mental Health
3 Ms S Singh	Directorate Chronic Diseases and Disabilities
4 Mr Hennie Kleynhans	Directorate Legal Services
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF THE NATIONAL DEPARTMENT OF HEALTH 4 DECEMBER 2009

REPRESENTATIVES OF DOH	
1 Prof Melvyn Freeman	Chief Director Non-communicable Diseases
2 Mr Sipho Phakati	Director Mental Health
3 Ms S Singh	Directorate Chronic Diseases and Disabilities
4 Mr Hennie Kleynhans	Directorate Legal Services
5 Ms Elmarie Bekker	Directorate Geriatrics
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF THE NATIONAL DEPARTMENT OF HEALTH 13 DECEMBER 2011

REPRESENTATIVES OF DOH	
1 Prof Melvyn Freeman	Chief Director Non-communicable Diseases
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF THE NATIONAL DEPARTMENT OF HEALTH 15 JULY 2014

REPRESENTATIVES OF DOH	
1 Prof Melvyn Freeman	Chief Director Non-communicable Diseases
2 Mr Sipho Phakati	Director Mental Health

FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

Annexure 14

Consultative meetings with representatives of Department Women, Children and Persons with Disabilities

16 November 2009, 8 December 2009 and 6 April 2010

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF THE DEPARTMENT OF WOMEN, CHILDREN AND PERSONS WITH DISABILITIES PRETORIA, 16 NOVEMBER 2009

REPRESENTATIVES OF DWCPD	
1 Mr Benny Paline	Chief Director Persons with Disabilities
2 Mr Zain Bulbulia	Deputy Director Persons with Disabilities
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF THE DEPARTMENT OF WOMEN, CHILDREN AND PERSONS WITH DISABILITIES PRETORIA, 8 DECEMBER 2009

REPRESENTATIVES OF DWCPD	
1 Mr Benny Paline	Chief Director Persons with Disabilities
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF THE DEPARTMENT OF WOMEN, CHILDREN AND PERSONS WITH DISABILITIES PRETORIA, 6 APRIL 2010

REPRESENTATIVES OF DWCPD	
1 Mr Benny Paline	Chief Director Persons with Disabilities
2 Mr Surprise Makgope	Directorate Persons with Disabilities
FOR SALRC ADVISORY COMMITTEE	
1 Mr Tienie Cronje	Acting Deputy Chief State Law Adviser Law Reform
2 Ms A-M Havenga	Researcher

Annexure 15

Consultative meeting with representatives of Department International Relations and Cooperation

7 January 2010

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION

REPRESENTATIVES OF DIRCO	
1 Adv Andre Stemmet	Senior State Law Adviser International Law
2 Adv Thandisa Naidu	Assistant State Law Adviser International Law
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
5 Ms A-M Havenga	Researcher

Annexure 16

SALRC Workshop for Masters Office Officials

Pretoria, 27-28 October 2011

PERSONS WHO ATTENDED SALRC WORKSHOP FOR MASTERS OFFICE OFFICIALS

OFFICIAL	OFFICE
1 Erlank Mr H	Pietermaritzburg
2 Harmse Mr B	Cape Town
3 Jansen Mr F	Bloemfontein
4 Lamprecht Ms R	Port Elizabeth
5 Mashigo Mr M	Polokwane
6 Mgobozi Ms N	Mthatha
7 Ollewagen Mr W	Durban
8 Strauss Ms F	Pretoria
9 Van der Merwe Mr K	Grahamstown
10 Van Rensburg Mr W	Kimberley
11 Vele Mr VE	Thohoyandou
FOR SALRC ADVISORY COMMITEE	
1 Ms M Meyer	Advisory Committee Member
2 Ms A-M Havenga	Researcher

Annexure 17

SALRC Information and Consultation Session for government and disability sector stakeholders

Pretoria, 16 February 2012

PERSONS WHO ATTENDED SALRC INFORMATION AND CONSULTATION SESSION FOR GOVERNMENT AND DISABILITY SECTOR STAKEHOLDERS ON PROPOSED DRAFT BILL'S COMPATIBILITY WITH UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

NAME	INSTITUTION / ORGANISATION
1 Ms Karen Borochovitz	Dementia South Africa
2 Dr Helene Combrinck	Centre for Disability Law & Policy, University of the Western Cape
3 Mr John Cruickshank	S A Association for the Scientific Study of Mental Handicap
4 Mr Jabu Dikgale	Down Syndrome South Africa
5 Ms Vanessa Dos Santos	Down Syndrome South Africa
6 Dr Ilze Grobbelaar-Du Plessis	Law Faculty, University of Pretoria
7 Ms Willene Holness	Legal Resources Centre, Durban
8 Mr S Jazbhay	Law Society of South Africa
9 Mr Serges Kamga	Centre for Human Rights, Law Faculty, University of Pretoria
10 Ms Ilse Koen	Alzheimer's South Africa
11 Mr Lufuno Makhoshi	National Department of Health
12 Ms Ivy Masilela	South African Federation for Mental Health
13 Ms Sarah Mosupye	National Department of Justice and Constitutional Development
14 Mr Benny Paline	Department Women, Children and People with Disabilities
15 Mr Moosa Salie	World Network of Users and Survivors of Psychiatry / Ubuntu Centre
16 Ms Lorraine Schirlinger	Alzheimer's South Africa
17 Ms Nomvula Sibanyoni	National Department of Health
18 Ms Thansazile Skhosana	National Department of Justice and Constitutional Development
19 Adv Andre Stemmet	National Department of International Relations and Cooperation
20 Ms Elsette Strachan	Dementia South Africa
21 Mr Peter Strasheim	For South African Association for Learning and Educational Differences
22 Ms Charlene Sunkel	South African Federation for Mental Health
23 Prof Leslie Swartz	Department Psychology, University of Stellenbosch
24 Ms Anthea van den Burg	Human Rights Commission
25 Ms Zabeth Zuhlsdorff	Rand Aid Association
FOR SALRC ADVISORY COMMITTEE	
1 Judge Ben Du Plessis	Project Leader
2 Prof Jan Bekker	
3 Ms Margaret Meyer	
4 Mr Lage Vitus	
5 Ms Anna-Marie Havenga	Researcher

Annexure 18

Working Session with representatives of S A Human Rights Commission, and others Cape Town, 30 March 2012

PERSONS WHO ATTENDED A WORKING SESSION WITH REPRESENTATIVES OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION, AND OTHERS ON THE PROPOSED DRAFT BILL'S COMPATIBILITY WITH THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

NAME	INSTITUTION / ORGANISATION
1 Ms Anthea van den Burg	S A Human Rights Commission
2 Ms Judith Cohen	S A Human Rights Commission
3 Ms Fadlah Adams	S A Human Rights Commission
4 Dr Helene Combrinck	Centre for Disability Law & Policy, University of the Western Cape
5 Ms Annie Robb	Ubuntu
6 Prof Leslie Swartz	Department Psychology, University of Stellenbosch
FOR SALRC	
1 Mr Michael Palumbo	SARLC Secretary
2 Ms Margaret Meyer	Advisory Committee Member
3 Ms Anna-Marie Havenga	Researcher

Annexure 19

Consultative meeting with representative of Legal Resources Centre Durban, 6 June 2012

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVE OF THE LEGAL RESOURCES CENTRE

REPRESENTATIVES OF LRC	
1 Ms Willene Holness	Attorney LRC Durban
FOR SALRC ADVISORY COMMITTEE	
1 Ms M Meyer	Advisory Committee member
2 Ms A-M Havenga	Researcher

Annexure 20

Consultative meeting with representatives of the Banking Association South Africa (BASA) 18 June 2014

PERSONS WHO ATTENDED CONSULTATIVE MEETING WITH REPRESENTATIVES OF BASA

REPRESENTATIVES OF BASA	
1 Mr Stuart Grobler	Senior General Manager, Banking and Financial Services
2 Mr Nicky Lala-Mohan	General Manager, Legislation
FOR SALRC ADVISORY COMMITTEE	
1 Judge B Du Plessis	Project leader
2 Ms M Meyer	Advisory Committee member
3 Ms A-M Havenga	Researcher