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Introduction

- 1.1 The South African Law Reform Commission (the Commission) has been involved in an investigation into assisted decision-making for adults with impaired decision-making capacity since the end of 2001.¹
- 1.2 This Discussion Paper follows on the publication for comment, in December 2001, of an Issue Paper (Issue Paper 18: Incapable Adults) which aimed at introducing the investigation to the public, initiating debate and defining the reform necessary. We take this opportunity to thank those who responded as well as those who supplied us with information in the course of drafting the Discussion Paper.
- 1.3 The Discussion Paper (which includes draft legislation), takes the investigation further. It defines more clearly the need for reform, submits for public comment preliminary conclusions reached by the Commission and tests public opinion on solutions identified by the Commission.
- 1.4 The Commission is committed to consulting with all relevant stakeholders. In addition to publishing this Discussion Paper for written comment we plan to engage in a consultation process with the Paper as basis. Consultation with and participation by persons with impaired decision-making capacity, their families and carers will play a crucial role. Hereafter the Commission will prepare a Report which will contain its final recommendations and refined legislation. The Report will be submitted to the Minister of Justice and Constitutional Development who may then implement the Commission's recommendations by introducing the proposed draft legislation in Parliament.

¹ The title of the investigation was changed from "Incapable Adults" to "Assisted decision-making: Adults with impaired decision-making capacity" by the Commission's project committee responsible for this investigation at its first meeting on 11 September 2002. The change was made to reflect the focus of the investigation and to do away with discriminatory terminology.

ORIGIN AND PURPOSE OF THE INVESTIGATION

- 1.5 The investigation was included in the Commission's research programme in July 2000. It resulted from a submission by a member of the public concerning the diminishing legal capacity of the elderly with specific reference to the problems encountered by persons with Alzheimer's disease, and the outdated and inappropriate ways in which the South African law currently deals with this situation.² Exploratory research and discussions confirmed that a change to the law might be necessary - especially in view of previous recommendations by the Commission for the introduction of the enduring power of attorney which were not promoted by the government. It was also established that problems related to diminished or diminishing legal capacity are not experienced by the elderly with Alzheimer's disease only, but by most persons with impaired decision-making capacity - however the incapacity is caused. A researcher was allocated to the investigation in July 2001 and an expert project committee, under the leadership of Judge Ben du Plessis, was appointed by the Minister of Justice and Constitutional Development in August 2002 to assist the Commission with its investigation.
- 1.6 In a nutshell the investigation deals with the need for assisted decision-making devices for adults with impaired decision-making capacity as far as it relates to decisions about financial affairs and personal welfare. We examine the currently available law dealing with these issues and the need for supplementary or alternative measures.

² Submission by Prof Jan C Bekker to the Minister of Justice and Constitutional Development 23 February 2000.

LIMITED SCOPE OF THE INVESTIGATION

- 1.7 We are not concerned in this investigation with public law matters (such as the ability to vote;³ or the question whether incapacity should be publicly notifiable).⁴ Nor with capacity in the fields of delict or crime⁵ or with matters such as the capacity to give evidence in a court of law;⁶ or behaviour of adults with incapacity - and their or others' possible liability - with regard to, for instance, driving a motor vehicle,⁷ handling dangerous objects,⁸ or practising specific professions⁹. We are also not concerned with issues of capacity relating to

³ According to the Electoral Act 73 of 1998 a person who has been declared by the High Court to be of unsound mind or mentally disordered, or who is detained under the Mental Health Act, 1973 may not be registered as a voter and is not permitted to vote (sec 8(c)-(d)).

⁴ Neither the Mental Health Act 18 of 1973 nor the new Mental Health Care Act 17 of 2002 (which has not come into operation yet) contains any provision in this regard. See par 3.37 below on the need to investigate making incapacity publicly notifiable.

⁵ The capacity to commit a delict or crime is influenced by mental condition. Because fault (in the form of intent or negligence) is generally speaking a requirement for criminal and delictual liability, a person who is *doli* or *culpa* *incapax* because he or she is mentally incapacitated, cannot incur liability (Barnard et al 35).

⁶ The capacity of persons with mental incapacity to give evidence in a court of law is regulated by the Criminal Procedure Act 51 of 1977 which states in sec 194 that no person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his or her reason, is competent to give evidence while so afflicted or disabled.

⁷ According to sec 15(1)(f)(iii), (iv) and (vii) of the National Road Traffic Act 93 of 1996 a person is disqualified from obtaining *or holding* a driver's licence if he or she is suffering from any form of mental illness to such an extent that it is necessary that he or she be detained, supervised, controlled and treated as a patient in terms of the Mental Health Act 18 of 1973; from any condition causing muscular incoordination; or from any other disease or physical defect which is likely to render such person incapable of effectively driving and controlling a motor vehicle. According to section 16 any person who has a driving licence and becomes aware thereof that he or she is disqualified from holding such licence must submit the licence for cancellation to the traffic authorities of the province concerned. Under sec 25(1)(b) a licence can also be cancelled if the holder would constitute a source of danger to the public by driving a motor vehicle on a public road. For purposes of the cancellation of a licence the holder can be requested to submit him- or herself to an examination and a test to determine his or her competency to drive a motor vehicle (sec 25(2)(a)). If a person fails to comply with a request to submit to testing, his or her licence can be cancelled forthwith (sec 25(4)).

⁸ The Firearms Control Act 60 of 2000 provides that a competency certificate to possess a firearm may only be issued to a person of stable mental condition (sec 9(2)(d)). A licence to possess a firearm terminates if it appears that because of the holder's mental condition the possession of a firearm is not in his or her interest or that of any other person (sec 28; 102(1)(c)).

⁹ Usually practitioners of specific professions are bound by legal, ethical and disciplinary rules governing such professions (see eg the possibility of restricting medical practice by impaired persons through regulations made under sec 51 of the Health Professions Act 56 of 1974). Moreover, the common law rules regarding criminal and delictual liability could apply to behaviour by persons with mental incapacity endangering third parties.

marriage and divorce,¹⁰ or making a will.¹¹ Nor with the capacity to consent to sexual intercourse and the limitations the law place on certain groups of people to give valid consent thereto in order to protect them.¹²

- 1.8 The above issues are covered by the common law or specific statutory measures that are not identified for review under this investigation. In some instances they are or have been dealt with by the Commission under other investigations. Because of concerns raised in connection with behaviour of persons with Alzheimer's disease in particular, questions were nevertheless included in Issue Paper 18 regarding the need for additional measures to deal with issues related to the individual autonomy and public safety of such persons. The response to these questions confirmed that there is no need for law reform in this area at this stage.¹³
- 1.9 Finally, the investigation does not deal with the care, treatment and rehabilitation of mentally ill persons. These matters are regulated by mental health legislation. The investigation is also not concerned with the rights of the elderly in general. Recent developments in these two areas are discussed in paragraphs 3.20 - 3.22 below.

¹⁰ Under common law a "consenting mind" is a prerequisite for entering into a contract of marriage (*Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669). Substitute decision-making in respect of highly personal issues such as marriage and divorce is not allowed in our law (see par 6.3 and 7.19 below). Statutory measures that could apply to issues of divorce and incapacity are included in the Divorce Act 70 of 1979 (cf sec 3, 5 and 7). The Commission has recently included an investigation in its programme dealing with review of the law of divorce. This investigation will, amongst others, address specific concerns relating to divorce and incapacity as pointed out by some respondents to Issue Paper 18 (see par 3.38 below).

¹¹ Sec 4 of the Wills Act 7 of 1953 requires that a person making a will be capable of appreciating the nature and effect of such act. Consequently a will made by a mentally ill person is void. A will is valid if made during a lucid interval by a person who has been declared to be mentally ill. The Wills Act provides that the burden of proof that a testator was, at the time of making his or her will, mentally incapable of appreciating the nature and effect of the act rests on the person alleging the same (sec 7, and sec 4). This would appear to apply whether or not the testator had previously been declared by the Court to be mentally ill (*Wille's Principles of South African Law* 233; cf also the general position on onus of proof set out in par 4.11 below). Making a will is regarded as an act of too personal a nature to be entrusted to a legal representative. A curator and an agent appointed under a power of attorney can therefore not make a will on behalf of a person without capacity (cf Heaton in *Boberg's Law of Person's and the Family* 117-118; see par 7.19 below on the common law position regarding powers of attorney).

¹² This issue is covered by the Commission's recent investigation into sexual offences (SALRC *Report on Sexual Offences* 2003 par 3.5 et seq).

¹³ See par 3.37 below.

STRUCTURE OF THE PAPER

- 1.10 The rest of the Discussion Paper consists of seven chapters:
- ◆ Chapter 2 defines the legal problem investigated.
 - ◆ Chapter 3 discusses the need for reform with reference to the wider context and the response on Issue Paper 18.
 - ◆ Chapter 4 deals with the concept of capacity – the tests for and effects of incapacity with regard to decisions concerning personal welfare, financial affairs and health-related issues; and the need for new measures to reflect that capacity is a function-based concept.
 - ◆ Chapter 5 explores the principles that should underpin intervention in the affairs of persons with incapacity.
 - ◆ Chapter 6 deals with existing incapacity - the current legal measures and procedures available to deal with it, problems in this regard and possible solutions.
 - ◆ Chapter 7 provides information on representation by power of attorney and debates the possibility of introducing the concept of the enduring power of attorney into our law.
 - ◆ Chapter 8 contains proposed draft legislation embodying the Commission's preliminary recommendations.
- 1.11 Options for reform and the Commission's preliminary recommendations are set out throughout the Paper. The Commission's in principle recommendations with the corresponding clauses in the draft Bill are included in the SUMMARY on page v. Instructions on the submission of comment are supplied on page ii.