

## 8

# Proposed draft Bill

- 8.1 The Commission made preliminary recommendations for change in the course of the Discussion Paper. These suggestions are embodied in the draft Bill below.
- 8.2 The preliminary recommendations and draft legislation need to be debated thoroughly and the Commission invites comment from all parties who are interested in the issue under investigation. The Commission's in principle recommendations are listed in the SUMMARY at the beginning of this Paper with reference to the relevant paragraphs in the Paper and the clauses in the proposed draft Bill. Respondents are requested to respond as comprehensively as possible. Written comments should be submitted by post or e-mail as set out in the front of the Paper (p ii). **The closing date for comments is 31 March 2004.**
- 8.3 The proposed draft Bill consists of 8 Chapters and a Schedule dealing with the following:
- ◆ **Chapter 1** contains fundamental provisions dealing with decision-making on behalf of adults with incapacity. It sets out the basic principles which will underpin every decision taken on behalf of such adult in terms of the proposed legislation; and aims to clearly indicate to whom the legislation will apply and under what circumstances.
  - ◆ **Chapter 2** creates a first tier of substitute decision-making in providing for a general authority to act on behalf of an adult with incapacity with regard to personal welfare matters. In addition, it provides for continuing authority in relation to signing powers on bank accounts; and authority to act in respect of minors who become adults with incapacity. The provisions aim to legalise day to day decisions taken under certain circumstances by family, carers and others. The procedures created are intended to serve as "default" arrangements, i e they should apply where

other procedures provided for in the proposed legislation have not been utilised.

- ◆ **Chapter 3** enables one-off decisions in respect of property (i.e. financial affairs) or personal welfare to be made on behalf of an adult with incapacity. This measure is intended to render short term assistance and involves an application to the Master of the High Court to appoint a person to make a decision or take action (or the Master making the necessary decision him- or herself) on behalf of the adult with incapacity concerned.
- ◆ **Chapters 4 and 5** deal with the longer term management of the *property* and care for the *personal welfare* of adults with incapacity respectively. The provisions in these Chapters enable the appointment by the Master of the High Court of a *manager* (in respect of property) and a *mentor* (in respect of personal welfare). The procedures created should be seen as alternatives to the current common law system of *curator bonis* and *curator personae*. Note that the common law is not abolished: the proposed legislation aims at supplying the public with a choice by making more accessible procedures available.
- ◆ **Chapter 6** introduces and regulates the concept of the enduring power of attorney. It should be noted that the concept is developed on the basis of the common law principles pertaining to agency. The provisions in the draft Bill should thus be read in conjunction with these principles.
- ◆ **Chapter 7** provides for supplementary supervisory powers and duties of the Master as well as the Court in respect of the new measures created. The Commission's main aim in this regard was to make use of existing supervisory frameworks rather than create new frameworks since the latter approach might, because of the financial and human resources implications thereof, make implementation of the proposed measures problematic.
- ◆ **Chapter 8** provides for general matters, the most significant of which is the creation of an offence in respect of neglect and abuse of persons with incapacity by persons making decisions on behalf of such persons in terms of the proposed legislation.

- ◆ The **Schedule** contains model forms for enduring powers of attorney relating to property and to personal welfare respectively. The forms include explanatory notes for the information of the person executing the power. Although use of the forms is not obligatory it is recommended that the explanatory notes *must* be included in every enduring power of attorney at the time of its execution for it to be valid.

8.4 The Commission's aim was to keep the proposed legislation as simple and accessible as possible. For this reason the application procedures for the appointment of the three types of substitute decision-makers proposed (intervention orders; the appointment of a manager; and the appointment of a mentor) are basically the same. For the sake of clarity and with the aim of using plain language, the provisions relating to these appointment procedures are however repeated (with the small differences that apply in respect of each) in Chapters 3, 4 and 5 of the proposed draft rather than dealing with them together in a single Chapter. In some instances the powers and duties of the decision-makers referred to and of an agent acting under an enduring power of attorney also overlap with each other. Again, for the sake of clarity the provisions have been repeated under different chapters rather than dealing with them in a single chapter.