

Summary

This Summary should be read in conjunction with the Commission's proposed draft Bill contained in Chapter 8 of this Paper. The Bill reflects the detail of the Commission's preliminary recommendations. A copy of the Bill will also be distributed separately together with the Summary for purposes of gathering comment.

The Commission invites comment on all the provisions in the proposed draft Bill.

References to paragraph numbers and clauses in the Summary refer to the correspondingly numbered paragraphs in the body of the Discussion Paper and to the clauses in the proposed draft Bill.

INTRODUCTION

The South African Law Reform Commission has been involved in an investigation into assisted decision-making for adults with impaired decision-making capacity since the end of 2001. The investigation was undertaken as a result of attention being drawn to the declining decision-making ability of persons with Alzheimer's disease, in particular, and the outdated and inappropriate ways in which the South African law currently deals with this situation. The Commission's work however has a broader focus: It attempts to deal with the shared problems faced by persons with diminished decision-making capacity – however this was caused.

Investigating the issue is in line with the increase in the number of persons suffering from diminished capacity and with extensive reform in this area of the law over the past two decades in other jurisdictions. It moreover follows on an attempt by the Commission to have the concept of the enduring power of attorney introduced in the South African legal system as far back as 1988.

This Discussion Paper follows on the publication for comment, in December 2001, of an Issue Paper (Issue Paper 18: Incapable Adults). The Discussion Paper 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 which are embodied in the proposed draft legislation.

DEFINING THE PROBLEM

Making decisions is an important part of human life. Although we take it for granted that adults can make decisions about their personal welfare, financial affairs and medical treatment, some adults cannot make such decisions for themselves because of diminished capacity as a result of mental illness, intellectual disability, physical disability or an incapacity related to ageing in general.

A legitimate expectation of the law is that it should establish a structure within which appropriate autonomy and self-determination is recognised and protected. Such a structure should provide appropriate substitute decision-making devices and the necessary protection from abuse, neglect and exploitation.

At present the law deals with decision-making incapacity by way of curatorships. The curatorship system has been criticised on the ground that it suffers from a number of serious and frustrating difficulties mainly relating to its high cost, prolonged procedure, paternalistic nature and potential for abuse. An individual can also allow another to act on his or her behalf through a power of attorney. A power of attorney however terminates on the incapacity of the person who granted the power. The latter is a major cause for concern: Frequently care givers are under the impression that the power granted by a person in their care will be effective until that person dies, even in cases where the person had severely diminished mental capacity and is therefore incompetent in the eyes of the law. This is an unsatisfactory position as care givers acting in good faith are putting themselves at risk of performing unauthorised acts for which they could be held personally liable.

The present state of affairs is complicated by the fact that South Africa has no specific statutory provisions dealing with adults with impaired decision-making capacity.

There is further no formal assisted decision-making device that clearly provides for mild, fluctuating or temporary impairment.

There is also no provision for some default arrangement to deal with situations where adults with incapacity have no family or carers to act on their behalf or where the existing formal measures have not been utilised.

These are the problems addressed in the Commission's preliminary recommendations listed below.

THE COMMISSION'S IN PRINCIPLE RECOMMENDATIONS

Against the above background the Commission on a preliminary basis proposes the following:

- 1. A change to the law is necessary to provide for an alternative to the curatorship system (without abolishing the latter) and to introduce the concept of the enduring power of attorney into our law. (Par 3.43)**
- 2. The common law concept of "capacity" should be developed for purposes of new statutory substitute decision-making measures to deal with the grey areas of temporary and fluctuating incapacity and to clearly reflect the internationally accepted notion that decision-making is function-based. (Par 4.29; 4.38) (Clause 4)**
- 3. Clear principles should govern any intervention in the affairs of an adult with incapacity. The central principle should be that intervention must be in the best interests of the adult with incapacity concerned. "Best interests"**

must be defined in terms of relevant international and constitutional principles reflecting respect for human dignity. (Par 5.13) (Clause 5)

4. **A multi-level system of substitute decision-making should be developed as alternative to the current curatorship system.** The proposed alternative system should contain the following elements: **(Par 6.49-6.53)**

(a) A default arrangement as a first tier of substitute decision-making enabling family, carers and others legally to make day to day decisions regarding personal welfare matters on behalf of adults with incapacity. This arrangement should also allow for a person who has signing powers in respect of a banking account of his or her spouse who becomes incapacitated to retain this power after the incapacity of the spouse. It should in addition clarify the position of parents as surrogate decision-makers for their minor children who become adults with incapacity. **(Clause 6-10)**

(b) The possibility to apply to the Master of the High Court for a “specific intervention order” in circumstances where one-off decisions have to be made in respect of adults with incapacity and where the longer term measures referred to in the following two sub-paragraphs are not necessary. We propose that the Master may appoint a person to make a specific decision or take specific action on behalf of an adult with incapacity under an intervention order, or that the Master may take the necessary decision him or herself. The appointment, powers and duties, restrictions and reimbursement of the person acting in terms of a specific intervention order are provided for in detail in the proposed draft legislation. **(Clause 11-21)**

(c) The possibility to apply to the Master of the High Court for the appointment of a “manager” to care for and manage the property of an adult with incapacity on a long term basis. The Master should however always have the discretion to refer the matter to a Court for the appointment of a *curator bonis*. The appointment **(Clause 22-28)**, powers and duties **(Clause 29-38)**, restrictions **(Clause 39-42)** and termination

(Clause 43-48) of the manager are provided for in detail in the proposed draft legislation.

- (d)** The possibility to apply to the Master for the appointment of a “mentor” to take care of the personal welfare of an adult with incapacity on a long term basis. The Master should however always have the discretion to refer the matter to a Court for the appointment of a *curator personae*. The appointment **(Clause 49-54)**, powers and duties **(Clause 55-60)**, restrictions **(Clause 61-63)** and termination **(Clause 64-69)** of the mentor are provided for in detail in the proposed draft legislation.

5. The enduring power of attorney should be introduced into our law on the following basis: (Note that “principal” refers to an adult who grants an enduring power of attorney; and “agent” refers to a person who is authorised to act for a principal under an enduring power of attorney.)

- (a)** Legislation should make it possible to grant an enduring power of attorney (i e a power that endures the subsequent incapacity of the principal) as well as a conditional power (i e a power that comes into operation only on the incapacity of the principal). **(Par 7.40; 7.47) (Clause 70)**
- (b)** It should be possible to grant a power in respect of property (i e financial affairs) as well as personal welfare **(Clause 71)**. A power relating to personal welfare should be expressly granted (as is the case with a power relating to property). Requirements regarding execution formalities for personal welfare powers should not differ from those required in respect of property. **(Par 7.40, 7.178, 7.183)**
- (c)** We propose that an agent appointed under an enduring power of attorney must be a mentally competent adult. If the power relates to the principal’s property the agent may also be a juristic person. We further propose that the subsequent dissolution of a marriage (or permanent same sex life partnership) between the principal and the agent should be one of the

grounds on which the Master may withdraw an enduring power of attorney. **(Par 7.156, 7.184) (Clause 75)**

- (d)** Proper safeguards should be built into the process to protect the interests of the principal. These should include execution safeguards; triggering event safeguards (i.e. safeguards conclusively establishing or indicating whether the agent can continue to validly act under an enduring power of attorney or start validly acting under a conditional power of attorney); and supervisory safeguards.
- (e)** Execution safeguards should include the following: **(Par 7.54-7.86)**

 - (i) The power must be in writing and signed. **(Clause 72 and 73)**
 - (ii) It must be witnessed as prescribed. **(Clause 72 and 73)**
 - (iii) It must be in the prescribed form, or substantially in such form, and must contain the prescribed explanatory notes. **(Clause 72)**
 - (iv) It must contain a certificate by a commissioner of oaths that the principal had the required mental capacity at the time he or she executed the power. **(Clause 72)**
- (f)** As a triggering event safeguard, legislation should require that after having gained knowledge of the principal's incapacity 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. Together with the power the agent must file an affidavit by a person named in the power, or a report by a medical practitioner, stating that the principal is in the opinion of such person or medical practitioner mentally incapacitated. **(Par 7.87-7.103) (Clause 76)**
- (g)** Supervisory safeguards should include the following: **(Par 7.104-7.153)**

 - (i) The Master of the High Court should have the discretion in respect of enduring powers relating to property to require the agent to

furnish security – except where the principal has exempted the agent from furnishing security. **(Par 7.114) (Clause 77)**

(ii) The following restrictions should be placed on an agent's authority: **(Par 7.178; 7.183; 7.187; 7.192 7.196)**

- No agent should be allowed to use or threaten to use force to secure the doing of an act which the principal resists, or be able to restrict the principal's liberty of movement except to avert a substantial risk of significant harm to the principal. **(Clause 81)**
- In the case of an enduring power relating to personal welfare an agent should not be entitled to exercise any authority unless the principal is incapable of making any decision regarding the matter in question; the authority of the agent should not extend to giving any consent required in terms of the Mental Health Care Act, 2002; and the agent should be restricted to exercising any powers granted in respect of consent to medical treatment of the principal in accordance with the provisions of the National Health Bill, 2003. In the latter regard it should be made clear that that such powers do not extend to refusing consent to the carrying out or continuation of life-sustaining treatment. **(Clause 82)**

(iii) An agent appointed under an enduring power relating to property should be required to prepare and maintain a list of the property of the principal of which he or she takes control and to keep record of all transactions entered into on behalf of the principal. An agent appointed under an enduring power relating to personal welfare should be required to keep record of the exercise of his or her powers. Agents should be compelled, when called upon by the Master to do so, to account to the Master for the exercise of their powers. In addition to this, specified persons (including persons named in the power or persons with an interest in the property or

personal welfare of the principal) should be allowed to inspect any such list or record kept by an agent. **(Par 7.129) (Clause 79 and 80)**

(iv) Legislation should provide for the termination of an enduring power of attorney. The following is proposed in this regard: **(Par 7.130-7.153)**

- A principal must be able to revoke an enduring power at any time when he or she has the capacity to do so. We further recommend that no formalities should be required for such revocation. **(Par 7.137) (Clause 83)**
- Although it should be possible for an agent to resign, he or she should be required to give written notice of this intention to the Master in whose jurisdiction the power is registered, to the principal who granted the power and to the principal's primary carer. The resignation should become effective only 30 days after receipt of this notification by the Master. **(Par 7.150) (Clause 84)**
- The Court should be able to withdraw an enduring power of attorney at any time upon application by the Master or any interested person. **(Par 7.145) (Clause 85)**
- The Master should be able to withdraw an enduring power of attorney registered in his or her office under certain specified circumstances dealing mainly with a change in status of the agent or the agent not complying with the requirements of the Master in terms of the proposed legislation. **(Par 7.145) (Clause 85)**
- If a curator, manager or mentor is appointed for an adult with incapacity, any powers that an agent may have in terms of an enduring power should terminate in so far as such powers may be exercised by the curator, manager or mentor. **(Par 7.153) (Clause 85)**

- (h) The substitution of an agent by the Court or Master should not be allowed. Legislation should provide the Master with authority to initiate the appointment of a manager or mentor where a void is left by the withdrawal or termination of the appointment of an agent. **(Par 7.146) (Clause 91)**
 - (i) The variation of the terms of an enduring power of attorney by the Court or Master should not be allowed. **(Par 7.147)**
 - (j) As regards portability of an enduring power we propose that notwithstanding the formalities of execution recommended in paragraph 5(e) above, a document should be regarded as an enduring power of attorney if, according to the law of the place where it was executed, it is a valid power of attorney and the agent's authority thereunder is not terminated by the subsequent mental incapacity of the principal. **(Par 7.165) (Clause 87)**
6. **Finally, we recommend that any person who acts on behalf of an adult with incapacity in terms of the proposed legislation should perform his or her duties under the supervision of the Master of the High Court (and in the last instance of the Court).** Supervisory measures are provided for throughout the proposed legislation and are reflected in the recommendations above. Supplementary powers of the Master (including general powers of investigation and enquiry; powers to make interim rulings; and powers to review decisions taken on behalf of adults with incapacity in terms of the proposed legislation) are provided for in **clauses 88-94**. Access to Court is dealt with in **clause 95**.

INVITATION TO COMMENT

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. Respondents are requested to respond as comprehensively as possible. **The closing date for comments is 31 March 2004.**