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**An Bille um Chinnteoireacht Chuidithe (Cumas)  
(Leasú), 2022**  
**Assisted Decision-Making (Capacity) (Amendment)  
Bill 2022**

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*Meabhrán Míniúcháin*  
*Explanatory Memorandum*

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**AN BILLE UM CHINNTEOIREACHT CHUIDITHE (CUMAS)  
(LEASÚ), 2022  
ASSISTED DECISION-MAKING (CAPACITY) (AMENDMENT)  
BILL 2022**

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**EXPLANATORY MEMORANDUM**

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**Key aspects of the Assisted Decision-Making (Capacity) (Amendment) Bill**

The Bill gives further effect to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and will provide the necessary amendments allowing for the commencement of the original Assisted Decision-Making (Capacity) Act 2015 ('the Act/the 2015 Act'). The Bill will streamline existing provisions in the 2015 Act and will also improve safeguards, reduce bureaucracy for those using options under the Act and enable the Decision Support Service (DSS) to undertake its role more effectively. The process of preparing to bring the original 2015 Act into force, by operationalising the Decision Support Service, also identified additional provisions which need to be added to the Bill.

In summary, the Bill provides for:

- Technical and procedural amendments to allow for the commencement of the 2015 Act in order to bring an end to wardship in Ireland and provide for a functional model of capacity assessment for relevant persons;
- Amended definitions of personal welfare and treatment decisions, to allow for participation by persons with capacity difficulties in health research and to clarify for medical professionals which person has authority to make decisions regarding actual medical treatment or clinical care where another person has capacity difficulties;
- Improved safeguarding provisions throughout the 2015 Act;
- Amendment of the 2015 Act to streamline or to tighten existing provisions in order to improve safeguards, reduce bureaucracy for those using options under the Act and to enable the DSS to undertake its role more effectively. This includes streamlining the of processes to allow the DSS to draw up its own forms and to give greater control over the DSS's own administrative procedures to the Director;
- Additional powers have been given to the DSS Director to investigate issues and seek informal resolution of complaints. The property management role for the Director contained in the original Act has been removed. The Director will provide for the remuneration of panel member decision-making representatives where there are insufficient assets in the estate of the relevant person;

- The Bill has been used to progress some provisions formerly included in the Disability (Miscellaneous Provisions) Bill 2016, which lapsed at the dissolution of the last Dáil. These provisions include other measures required for closer compliance with the UNCRPD, such as the monitoring structure that is required under the Convention in Ireland. The Bill also provides for the percentage of people with disabilities in the public service to be doubled from 3% to 6%, along with the repeal of certain statutory provisions to facilitate greater participation in public and civic life for people with disabilities;
- A new system for enduring powers of attorney (EPAs) whereby the enduring power of attorney will be created by the relevant person and registered with the DSS while s/he has capacity, enabling any problems with the enduring power of attorney to be resolved with the person herself / himself. The enduring power of attorney will come into effect through a notification process by the attorney to the DSS when the relevant person has lost capacity;
- Strengthened protections for the rights of wards when their wardship is reviewed and they are discharged from wardship and / or migrated to the 2015 Act's structures; and
- The removal of provisions permitting the use of restraint in private settings.

## PART 1

### PRELIMINARY AND GENERAL

#### 1. Short title and commencement

This section provides for the commencement of specific parts of the legislation. Part 8 provisions relating to the Advanced Healthcare Directives must be commenced by the Minister for Health.

#### 2. Definitions

The definition of certain terms used in the Bill.

#### 3. Repeals

The repeal of certain provisions of the 2015 Act, including:

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|----------------------------|--|
| <i>Section 57</i>          | <i>This</i> section provides for the transfer to the Director of certain functions in respect of existing wards, from the wardship court. This section is being repealed as it is not the intention to circumvent the discharge from wardship process, nor is it envisaged that the Director would manage the estates of relevant persons. |
| <i>Section 61 &amp; 70</i> | These sections are no longer required following the move to a two-step enduring power of attorney process.   |
| <i>Section 62</i>          | <i>This</i> deletes sections which permitted of use of restraint in private settings in the 2015 Act. Remaining subsections have been relocated.   |
| <i>Section 144</i>         | <i>This</i> section was intended to amend the Mental Health Act 2001, which is no longer being progressed as part of the Assisted Decision-Making (Capacity) Act but as part of a broader review of the 2001 Act.  |

## PART 2

### AMENDMENT OF PRINCIPAL ACT

#### **4. Amendment of section 2 of Principal Act**

This section provides for the amendment of certain definitions contained in the 2015 Act. The definitions of ‘intervener’ and ‘intervention’ have been amended to provide that the guiding principles set out in section 8 (Guiding Principles) of the Act of 2015 will apply to court friends and other persons deemed by the court to be suitable, willing and able to assist the relevant person.

The meaning of ‘Minister’, other than in Part 8, will be the ‘Minister for Children, Equality, Disability, Integration and Youth’. The definition of ‘personal welfare’ now permits a relevant person to engage in healthcare research and social care research, with certain exceptions. The definition of ‘property and affairs’ has been clarified.

The definition of ‘treatment’ has been moved from Part 8 definitions to Part 1 of the 2015 Act so as to be applicable to the entire Act. This will exclude treatment decisions from being included in enduring powers of attorney under Part 7, which will provide clarity for clinicians and medical professionals on which decision supporters are entitled to make decisions impacting medical care, privileging the position of designated healthcare representatives.

#### **5. Insertion of new section 4A into Principal Act**

A new section 4A has been included in the Act allowing for the making of certain regulations under the 2015 Act, with the exception of regulations concerning Part 8 which falls under the responsibility of the Minister for Health.

#### **6. Amendment of section 8 of Principal Act**

*Section 8* of the 2015 Act has been expanded to provide that an intervener under the Act additionally considers the views of an attorney appointed under the 1996 Act, a court friend or other suitable person appointed, and a designated healthcare representative.

#### **7. Amendment of section 9 of Principal Act**

*Section 7* of the Bill makes technical changes to allow for the inclusion of specifications made by the Director, as well as regulations made by the Minister, to form part of the definitions set out in the Act. These specifications have regard to the forms, information, attestation requirements and statements that must be complied with in relation to decision-making assistance agreements.

#### **8. Amendment of section 10 of Principal Act**

*Section 8* of the Bill makes technical changes to provide that decision-making assistance agreements are bound by specifications made by the Director, as well as regulations made by the Minister. These specifications have regard to the forms, information, attestation requirements and statements that must be complied with in relation to decision-making assistance agreements.

#### **9. Amendment of section 11 of Principal Act**

*Section 11* of the 2015 Act has been expanded to make persons ineligible for appointment as a decision-making assistant where they have been convicted of an offence against the child (or the property of that child) of the appointer.

Similar changes are introduced excluding a person who is the subject of a safety or barring order in respect of the child of an appointer from acting as a decision-making assistant.

A person is also ineligible from becoming a decision-making assistant if convicted of an offence under new section 15A.

#### **10. Amendment of section 13 of Principal Act**

A person is disqualified from becoming a decision-making assistant if they have been convicted of an offence under new section 15A.

A person is also disqualified where they have an enduring power of attorney accepted by the Director in respect of them, which would indicate that the person lacks capacity in respect of certain decisions and could therefore not act as a decision-making assistant.

Similarly, a person who has an enduring power of attorney registered in respect of them under the Powers of Attorney Act 1996, would be disqualified by reason of lacking capacity to act as a decision-making assistant.

#### **11. Amendment of section 14 of Principal Act**

The role of the decision-making assistant has been modified to reflect that they can 'assist' the appointer rather than 'advise', thereby clarifying the role and purpose of the decision-making assistant and giving primacy to the independent decision-making of the relevant person.

#### **12. Amendment of section 15 of Principal Act**

Complaints provisions relating to a decision-making assistant have been altered to allow for the Director to engage with the parties to resolve complaints informally. The Director will first carry out an investigation and determine whether the complaint is well founded or not. Where it is well founded the Director will have the discretion to refer the complaint to court or seek to resolve the complaint informally by clarification, or by the powers available to the Director under section 96(4) of the Act.

Time limitations in which the Director must deal with the complaint have been imposed, and the Director may follow up to ensure that the complaint has been resolved to the parties' satisfaction. The Director may choose not to accept a complaint and provide reasons for doing so, where there is an undue delay. This decision may be appealed to the courts.

#### **13. Insertion of new section 15A into Principal Act**

A new section 15A has been included to provide for offences in relation to a decision-making assistance agreement. These offences include the use of fraud, coercion or undue influence in the making, variation, or revocation of a decision-making assistance agreement.

#### **14. Amendment of section 16 of Principal Act**

*Section 14* of the Bill makes technical changes to allow the Director of the Decision Support Service to specify the forms to be used in connection with co-decision-making agreements, rather than requiring them to be prescribed by regulations made by the Minister. These specifications will include forms associated with making a co-decision-making agreement application, as well as the forms of notice, references, objections, reports and revocations.

#### **15. Amendment of section 17 of Principal Act**

*Section 15* of the Bill makes technical changes to provisions relating to co-decision-making agreements to ensure compliance with specifications made by the Director under section 31A, as well as regulations made by the Minister under section 31. These specifications will include forms

associated with making a co-decision-making agreement application, as well as forms of notice, references, objections, reports and revocations.

A new subsection (1A) has been introduced to allow for a relevant person, who already has a decision-making representation order in respect of themselves, to appoint a co-decision-maker in accordance with this section.

#### **16. Amendment of section 18 of Principal Act**

A person is ineligible from becoming a co-decision-maker where they have been convicted of an offence under new section 15A. These offences include the use of fraud, coercion or undue influence in the making, variation, or revocation of a co-decision-making agreement.

#### **17. Amendment of section 20 of Principal Act**

A co-decision-making agreement will be null and void if the co-decision-maker is convicted of an offence under new section 15A, which concerns the use of coercion or undue influence in the making, variation or revocation of the decision-making assistance agreement.

An agreement will also be null and void where a person has an enduring power of attorney accepted by the Director in respect of them, which would indicate that the person lacks capacity in respect of certain decisions and could therefore not act as a co-decision-maker.

Similarly, an agreement would be null and void where a person who has an enduring power registered in respect of them under the Powers of Attorney Act 1996.

#### **18. Amendment of section 21 of Principal Act**

*Section 18* of the Bill makes technical changes arising from changes to section 31 and the insertion of section 31A, which will allow the Director to specify certain forms in relation to decision support applications. These specifications will include forms associated with making a co-decision-making agreement application, as well as forms of notice, references, objections, reports and revocations.

New subsections (3A) and (3B) ensure that the notice requirements relating to applications for registration of a co-decision-making agreement in section 21, will not apply in relation to spouses, civil partners and cohabitants whose relationships are no longer subsisting.

#### **19. Amendment of section 22 of Principal Act**

Amendments to section 22 of the Act restrict the applicability of the meaning of ‘document’ to only apply in reference to subsection (6), which concerns the issuing of authenticated copies of co-decision-making agreements.

A new subsection (8) will provide for notice parties under section 21(3) to be informed of the outcome of an application to register a co-decision-making agreement.

#### **20. Amendment of section 24 of Principal Act**

*Section 20* of the Bill makes technical changes to provide that the form of an objection to a co-decision-making agreement will follow specifications made by the Director under section 31A, rather than regulations made by the Minister under section 31. These specifications also include forms associated with making a co-decision-making agreement application, as well as forms of notice, references, reports and revocations.

## **21. Amendment of section 25 of Principal Act**

*Section 21* of the Bill makes technical changes regarding access to co-decision-making agreements contained on the Register, involving the inspection of the Register and accessing a copy of a co-decision-making agreement contained on the Register.

These changes also provide for the inclusion of varied co-decision-making agreements to be the subject of inspection and authenticated copy requests. An authenticated copy of a co-decision-making agreement issued by the Director will be considered evidence of its contents.

## **22. Amendment of section 27 of Principal Act**

*Section 22* of the Bill makes technical changes to provide that the form of a report from the co-decision-maker will follow specifications made by the Director under section 31A, rather than regulations made by the Minister under section 31. These specifications also include forms associated with making a co-decision-making agreement application, as well as forms of notice, references, objections and revocations.

## **23. Amendment of section 28 of Principal Act**

*Section 23* of the Bill makes technical changes to provide that the form of an application to vary a co-decision-making agreement will follow specifications made by the Director under section 31A, rather than regulations made by the Minister under section 31. These specifications also include forms associated with making a co-decision-making agreement application, as well as forms of notice, references, objections, reports and revocation.

## **24. Amendment of section 29 of Principal Act**

*Section 24* of the Bill makes technical changes to provide that the form of an application to revoke a co-decision-making agreement will follow specifications made by the Director under section 31A, rather than regulations made by the Minister under section 31. These specifications will include forms associated with making a co-decision-making agreement application, as well as forms of notice, references, objections and reports.

Where there is a revocation of a co-decision-making agreement, it will be necessary to provide notification to the Director of the Decision Support Service, in such form as the Director will prescribe, and that notification will require statements to support the revocation including the reasons for the revocation, a statement by a healthcare professional and registered medical practitioner, evidence of notice to relevant parties and details of any changes in respect of decision support arrangements. The notification must be accompanied by the appropriate fee.

## **25. Amendment of section 30 of Principal Act**

Complaints provisions relating to a co-decision-maker have been altered to allow for the Director to engage the parties to resolve complaints informally. The Director will first carry out an investigation and determine whether the complaint is well founded or not. Where it is well founded, the Director will have the discretion to refer the complaint to court or seek to resolve the complaint informally by clarification, or by powers available to the Director under section 96(4) of the Act.

Time limitations in which the Director must deal with the complaint have been imposed, and the Director may follow up to ensure that the complaint has been resolved to the parties' satisfaction. The Director may choose not to accept a complaint and provide reasons for doing so, where there is an undue delay. This decision may be appealed to the courts.

## **26. Amendment of section 31 of Principal Act**

Changes to this section provide for a reduced number of regulations to be prescribed by the Minister, with an increased role for matters to be specified by the Director under section 31A.

The Minister will retain control of setting the various fees relating to co-decision-making. The Minister will continue to be responsible for the regulation bodies or classes of person that may inspect the Register, or seek authenticated copies of co-decision-making agreements. The Minister will retain responsibility for prescribing by regulation the class of healthcare professionals that may undertake capacity assessments under the Act.

## **27. Insertion of new section 31A into Principal Act**

A number of matters previously prescribed by regulation by the Minister will now be specified by the Director under 31A.

The amendments have been introduced as a means to streamline processes and provide the Director with control over matters relating to the form of co-decision-making applications, notice requirements, objections, variations, revocations and reports.

## **28. Amendment of section 36 of Principal Act**

*Section 36* has been amended to allow the cohabitant, adult child of the relevant person, or attorney appointed under the 1996 Act for the relevant person, to make an application to the court for a decision-making representative order or decision-making order, without seeking the prior approval of the court to make that application. It will also entitle that person to be on notice where an application to court is made in respect of the relevant person.

A new subsection (12) ensures that the notice requirements relating to applications for the registration of a co-decision-making agreement in section 21, will not apply in relation to spouses, civil partners and cohabitants whose relationships are no longer subsisting.

## **29. Amendment of section 38 of Principal Act**

A new subsection (8A) provides that where a court is making a decision-making representation order in respect of a relevant person who lacks capacity without the assistance of a co-decision-maker, conditions will be attached which provide that the decision-making representative will, in so far as is practicable, jointly make decisions with the relevant person.

The court will also make provision for the decision-making representation order to cease upon the appointment of a co-decision-maker.

## **30. Amendment of section 39 of Principal Act**

Changes to section 30 of the Bill provides that a person is not eligible to become a decision-making representative if convicted of an offence under new section 15A, which relates to the use of fraud or undue coercion in the making, varying or revocation of a decision-making assistance agreement.

## **31. Amendment of section 40 of Principal Act**

This section provides for amendments to disqualify a person from becoming a decision-making representative if convicted of an offence under new section 15A, which relates to the use of fraud or undue coercion in the making, varying or revocation of a decision-making assistance agreement.

A person is also disqualified where they have an enduring power of attorney accepted by the Director in respect of them, which would indicate that the person lacks capacity in respect of certain decisions and could therefore not act as a decision-making representative.

Similarly, a person who has an enduring power registered in respect of them under the Powers of Attorney Act 1996 would be disqualified by reason of lacking capacity to act as a decision-making representative.

### **32. Amendment of section 41 of Principal Act**

A new subsection (3) is inserted requiring a decision-making representative to jointly make decisions, in so far as is practicable, with the relevant person, in certain contexts. This scenario arises where a decision-making representative has been appointed as a result of no co-decision-maker being available to the relevant person.

### **33. Amendment of section 42 of Principal Act**

A new subsection (3) provides for the Director to reimburse a panel member decision-making representative for their fair and reasonable expenses or remuneration, where insufficient assets are available in the estate of the relevant person. This is to ensure that a relevant person who requires a decision-making representative, and who does not have sufficient assets to cover the costs of one, will still be able to have access to decision-making supports with the costs being covered by the Decision Support Service.

A new subsection (4) is inserted requiring the Minister to prescribe by regulation, the level of expenses and remuneration of panel member decision-making representatives to be paid by the Decision Support Service.

### **34. Amendment of section 43 of Principal Act**

Subsections (3) to (5) are deleted. These subsections were included in the 2015 Act to confer on the Director the custody, control and management of some or all of the property of the relevant person. It is not considered appropriate for the Director to have a role in property management. This is considered to be a role more suited to an expert decision-making representative (decision-making representatives with financial and property management expertise will be available from the panel maintained by the Director for the court to draw from as necessary).

### **35. Amendment of section 44 of Principal Act**

Subsections (3) to (5) are deleted for the purpose of removing provisions relating to the restraint of a relevant person.

### **36. Amendment of section 45 of Principal Act**

*Section 36* of the Bill makes technical changes regarding access to decision-making representation orders contained on the Register, including the inspection of the Register and accessing a copy of a decision-making representation order from the Register.

Changes provide for the inclusion of varied decision-making representation orders to be included in the subject of inspection and authenticated copy requests. An authenticated copy of a decision-making representation order issued by the Director will be considered evidence of its contents.

A new subsection (6) requires the Director to keep a record of persons inspecting the Register or seeking a copy of an order.

### **37. Amendment of section 46 of Principal Act**

Amendments to section 46 provide for the Director to specify the form of a report, rather than the form being prescribed by regulation by the Minister.

The amendment also includes the consequential deletion of reporting on restraint flowing from the deletion of those provisions.

The inclusion of a general visitor as a person to whom a relevant person must make certain records available is also included. This will allow for the Director to instruct the general visitor to examine decision-making representative records regarding the relevant person.

### **38. Amendment of section 47 of Principal Act**

Complaints provisions relating to a decision-making representative have been altered to allow for the Director to engage the parties to resolve complaints informally. The Director will first carry out an investigation and determine whether the complaint is well founded or not. Where it is well founded, the Director will have the discretion to refer the complaint to court or seek to resolve the complaint informally by clarification, or by powers available to the Director under section 96(4) of the Act.

Time limitations in which the Director must deal with the complaint have been imposed, and the Director may follow up to ensure that the complaint has been resolved to the parties' satisfaction. The Director may choose not to accept a complaint and provide reasons for doing so, where there is an undue delay. This decision may be appealed to the courts.

### **39. Amendment of section 50 of Principal Act**

A reference to the 'cognitive ability' of a person has been removed within the context of medical reporting under this section of the Act.

### **40. Amendment of section 54 of Principal Act**

Amendments to section 54 of the Act provide that a committee of the ward may make an application to the wardship court on behalf of a ward for a review of their wardship.

### **41. Insertion of new section 54A into Principal Act**

A new section 54A provides for the provision of assistance to a ward where an application for a review of their wardship has been made to court. As part of the court proceedings, a ward may be assisted by a court friend or other suitable, willing, and able person.

Where there is no court friend, court assistant, or other legal practitioner available to assist the ward in court, the wardship court can direct the Decision Support Service to appoint a court friend for the ward. The section also requires that court proceedings, where there is no legal practitioner instructed, should be as informal as possible.

### **42. Amendment of section 55 of Principal Act**

Technical changes remove references to a 'former ward' across the section in favour of a 'person the subject of the declaration', which is a more correct use of language. Amendments also clarify the discharge process of a ward exiting wardship on the appointment of a decision-making representative, including how the relevant person's property is returned.

New subsections (6) to (8) provide that the wardship court applies certain provisions available to the court under Part 5 of the Act, which make proceedings for persons exiting wardship more similar to those applications under Part 5.

### **43. Insertion of new section 55A into Principal Act**

This new section provides for a review of declarations made by the wardship court under Part 6 regarding the person's capacity, within 12 months of the initial wardship court declaration or within 3 years where the wardship court is satisfied that the person is unlikely to recover. Where the relevant person is no longer considered to lack capacity, the court may

revoke a decision-making order or decision-making representation order, or make other directions.

Following a review of a person's capacity by the wardship court, subsequent reviews will be carried out under Part 5, and various provisions are cross-referenced to support this change.

#### **44. Amendment of section 58 of Principal Act**

The meaning of 'trust corporation' is narrowed to the definition contained in section 30(4) of the Succession Act 1965.

#### **45. Insertion of new sections 58A and 58B into Principal Act**

New section 58A has been included to govern the role of a trust corporation acting as an attorney for a donor under Part 7 of the 2015 Act – i.e. where a trust corporation has been given enduring power of attorney. The section provides that the Director may specify procedural requirements regarding the registration, information and documents, and statements required to enable a trust corporation to act as an attorney for a donor.

It sets out the requirements for an officer of the trust corporation to act on behalf of the corporation in relation to an enduring power of attorney.

New section 58B clarifies the liability of directors and officers of the corporation appointed as an attorney.

#### **46. Amendment of section 59 of Principal Act**

Changes to section 59 of the Bill incorporate section 58A relating to trust corporations into the general provisions on eligibility to act as an attorney.

There are also technical amendments ensuring that enduring powers of attorney must be compliant with specifications made by the Director under new section 79A, which allows the Director rather than the Minister to specify certain procedural requirements and enduring power of attorney forms relating to application, notice, objection, variation, revocation and reporting requirements. Previously only compliance with regulations prescribed by the Minister under section 79 was required.

Consequential amendments are made that facilitate the new two-stage process for enduring powers of attorney.

A new subsection (5A) prohibits an attorney from consenting or refusing treatment on behalf of the donor, which assist in clarifying that only a designated healthcare representative has authority to make decisions on clinical or medical care.

A new subsection (5B) prohibits the donor, in an enduring power of attorney, from authorising the attorney to consent or refuse treatment in an enduring power of attorney. The inclusion of any such powers in an enduring power of attorney will be null and void.

#### **47. Amendment of section 60 of Principal Act**

The section modifies statements that are required as part of the enduring power of attorney registration process. The registration process will require the inclusion of a statement that the donor understands that they may vary or revoke the enduring power of attorney at any time prior to notification and acceptance of that notification by the Director.

The attorney must also provide a statement to the effect that they understand the enduring power of attorney process.

#### **48. Amendment of section 65 of Principal Act**

*Section 65* of the 2015 Act has been expanded to make persons ineligible from acting as an attorney where they have been convicted of an offence against the child (or the property of that child) of the donor.

Similar changes are introduced excluding a person who is the subject of a safety or barring order in respect of the child of an appointer from acting as a decision-making assistant.

A person is also ineligible from becoming a decision-making assistant if convicted of an offence under new section 15A, which relates to fraud, coercion or undue influence being used in the making, variation or revocation of a decision-making assistance agreement.

#### **49. Amendment of section 66 of Principal Act**

Amendments to this section provide that a person is disqualified from becoming an attorney if they have been convicted of an offence under new section 15A, which relates to fraud, coercion or undue influence being used in the making, variation or revocation of a decision-making assistance agreement.

A person is also disqualified where they have an enduring power of attorney accepted by the Director in respect of them.

Similarly, a person who has an enduring power registered in respect of them under the Powers of Attorney Act 1996 would be disqualified by reason of lacking capacity to act as an attorney.

#### **50. Amendment of section 67 of Principal Act**

*Section 67* is amended to reflect the role of a court within the context of the new two-part enduring power of attorney process. Where the court believes a person has lost capacity prior to notification of the enduring power of attorney to the Director, it may exercise powers under section 77(3) as if the enduring power of attorney had been notified and accepted by the Director.

#### **51. Amendment of section 68 of Principal Act**

Subsection (1) has been replaced to reflect changes brought about by the introduction of a new two-part enduring power of attorney process. The amendment obliges the donor or attorney to make an application to register the enduring power with the Decision Support Service within three months of its execution.

*Section 51* of the Bill makes technical changes to allow for notice and enduring power of attorney registration forms to be specified by the Director under section 79A. This will aid the streamlining of processes under Part 7, where the Director is considered best place to specify the forms to be used in relation to enduring powers of attorney.

New subsections (3A) and (3B) provide for certain circumstances in which notice of an application to register an enduring power of attorney need not be given in relation to spouses, civil partners and cohabitants whose relationships are no longer subsisting.

Changes also provide for the inclusion of a trust corporation to register an enduring power of attorney as an attorney for the donor.

#### **52. Amendment of section 69 of Principal Act**

Amendments to section 69 include the removal of a reference to section 62, which is being repealed.

The criteria to be met for the registration of an enduring power of attorney are expanded to include provisions regarding trust corporation applications.

A new subsection (1A) allows the Director to accept an enduring power of attorney which differs in an immaterial way from the appropriate form specified.

Notice requirements may, with court approval, be waived by the Director where all reasonable efforts have been made to satisfy those requirements.

Where the Director registers or refuses to register the enduring power of attorney, the donor or attorney must inform notice parties of the outcome.

### **53. Amendment of section 71 of Principal Act**

Amendments to section 71 include the removal of a reference to sections 61 and 62, which are being repealed as a result of the move to a new two-step enduring power of attorney process, and the removal of restraint provisions from the Act.

Technical amendments have also been introduced as a consequence of the adoption of a new two-part enduring power of attorney process. This new two-part process will allow for the registration of the enduring power of attorney by the donor, who may then make changes to, or revoke, the enduring power prior to notification to the Director that the donor has lost capacity (which will be given by the attorney at a future point upon the loss of capacity of the donor).

### **54. Insertion of new sections 71A to 71D into Principal Act**

New sections 71A to 71D provide for a new enduring power of attorney notification process.

*Section 71A* outlines the steps to be taken by the attorney following a loss of capacity by the donor. The attorney must notify the Director and provide all necessary forms, fees and statements, along with a copy of the notice given to certain prescribed persons, as set out in section 71A(3). Provision is also introduced for certain circumstances in which notice need not be given, such as where a marital relationship or civil partnership no longer subsists.

Prior to the acceptance of an enduring power of attorney by the Director, an attorney may take certain actions to maintain the donor's assets, including the making of relevant urgent decisions contained in the enduring power of attorney. Decisions in relation to the remuneration of the attorney may also be taken. The attorney must report such actions taken to the Director.

Where there are two attorneys for the donor, they should jointly make a notification to the Director.

*Section 71B* permits notice parties or other permissible persons to object to the notification of an enduring power of attorney on certain grounds. This objection will be reviewed by the Director who will find the objection to be well founded or not, and notify the parties of that decision. On finding an objection well-founded, the Director may refuse to accept notification that a donor has lost capacity, with the result that the EPA will not come into force. A person notified of the Director's decision in relation to the objection may appeal that decision to the court.

*Section 71C* requires the Director to review the formal notification that a donor has lost capacity against set criteria and to carry out necessary enquiries before accepting or rejecting the notification.

Where the notification is rejected, the Director must give reasons for their decision, which may be appealed to the court.

Where the notification is accepted, the Director will provide an authenticated copy of the enduring power of attorney to both the donor and attorney. The attorney must inform certain notice parties of the outcome of the process.

*Section 71D* provides that an enduring power of attorney which has been accepted by the Director cannot be revoked unless done so under the provisions of the Act that allow for the revocation of the enduring power.

Following notification and acceptance of the enduring power, an attorney cannot resign from their role unless with the consent of the court.

Following acceptance of an enduring power by the Director, the donor cannot extend or restrict the scope of the enduring power of attorney, or give consent or instruction to create any obligation or liability on the attorney or other persons.

#### **55. Amendment of section 72 of Principal Act**

Amendments to this section require that the Director shall indicate in the Register which enduring powers of attorney have been registered and which have been the subject of a notification accepted by the Director. The acceptance of a notification by the Director indicates that a donor has lost capacity and the enduring power will come into force.

*Section 55* of the Bill makes technical changes regarding access to enduring powers of attorney contained on the Register, including inspection of the Register and accessing a copy of an EPA from the Register.

Changes also provide for the inclusion of varied enduring powers of attorney to be the subject of inspection and authenticated copy requests. An authenticated copy of an enduring power of attorney issued by the Director will be considered evidence of its contents.

A new subsection (4A) provides that an authenticated copy of an EPA issued by the Director will be evidence of its contents.

#### **56. Amendment of section 73 of Principal Act**

Technical changes are made as a result of the move to a new two-step enduring power of attorney process and the specification by the Director of certain matters under section 79A. New provisions are included regarding notice of applications to revoke or vary an EPA.

Technical amendments have also been introduced as a consequence of the adoption of a new two-part enduring power of attorney process. This new two-part process will allow for the registration of the enduring power of attorney by the donor, who may then make changes to, or revoke, the enduring power prior to the subsequent notification to the Director that a donor has lost capacity, which must be undertaken by the attorney.

*Section 56* of the Bill also makes technical changes to provide for the forms to be used to apply for variation and revocation to be specified by the Director under section 79A, rather than through regulations made by the Minister under section 79. This will allow for the streamlining of processes within the Decision Support Service.

Subsections (5) and (6) are being deleted as a result of new provisions being created under section 73A, which will provide for the revocation of enduring powers of attorney, where an attorney has notified the Director that a donor has lost capacity and where that notification has been accepted.

### **57. Insertion of new section 73A into Principal Act**

A new section has been introduced providing that, where the donor of an EPA regains capacity subsequent to the acceptance by the Director of a notification that they had lost capacity, an application can be made requesting –

- (a) the Director to rescind the acceptance of that notification;
- (b) the Director to rescind the acceptance of that notification and recognise the revocation of the enduring power of attorney.

The application is required to be accompanied by the appropriate statements and the Director will consider whether the criteria for rescinding or revoking the enduring power have been met. The Director must give reasons for their decision and the decision may be appealed to the court.

Where the Director rescinds the acceptance of a notification that a donor has lost capacity under (a) above, the enduring power of attorney will still be considered registered and remains valid, so that power can come into force again should the donor lose capacity again at a future point. Where the enduring power of attorney has been revoked as per (b) above, the Register will be amended appropriately and the EPA will cease to exist entirely.

The donor or attorney must inform certain notice parties of the outcome of the application to rescind or revoke.

### **58. Amendment of section 74 of Principal Act**

*Section 74* is being amended allowing an attorney to resign from their role prior to a notification being given to the Director that the donor of a registered EPA has lost capacity. The attorney must notify the donor of their resignation. Where there is more than one attorney and where the enduring power of attorney permits, the enduring power of attorney may endure and subsequently enter into force in respect of the remaining attorney(s).

Where the enduring power of attorney has been the subject of a notification to the Director that the donor has lost capacity and that notification has been accepted, the attorney can only resign with the permission of the court.

### **59. Amendment of section 75 of Principal Act**

Technical amendments have been introduced as a consequence of the adoption of a new two-part enduring power of attorney process. This new two-part process will allow for the registration of the enduring power of attorney by the donor, who may then make changes to, or revoke, the enduring power prior to notification to the Director that they have lost capacity. It is the role of the attorney to notify the Director when the donor has lost capacity.

*Section 59* of the Bill also makes technical changes to provide for the form of reports to be specified by the Director under section 79A, rather than through regulations made by the Minister under section 79. This will allow for the streamlining of processes within the Decision Support Service.

Subsection (5) has been deleted as a consequential amendment required following the deletion of restraint provisions in the 2015 Act.

The term ‘Relevant period’ is defined for the purposes of reporting under the section.

#### **60. Amendment of section 76 of Principal Act**

Complaints provisions relating to an attorney are altered to allow for the Director to engage with the parties to a complaint to resolve complaints informally. The Director will first carry out an investigation and determine whether the complaint is well founded or not. Where it is well founded the Director will have the discretion to refer the complaint to court or seek to resolve the complaint informally by clarification, or by the powers available to the Director under section 96(4) of the Act.

Time limitations in which the Director must deal with the complaint have been imposed, and the Director may follow up to ensure that the complaint has been resolved to the parties' satisfaction. The Director may choose not to accept a complaint and provide reasons for doing so, where there is an undue delay. This decision may be appealed to the courts.

#### **61. Amendment of section 77 of Principal Act**

Technical amendments are introduced as a result of a move to a new two-step enduring power of attorney process. This new two-part process will allow for the registration of the enduring power of attorney by the donor, who may then make changes to, or revoke, the enduring power prior to notification to the Director that they have lost capacity.

The section synchronises the role of the court in the two-stage process and allows the court to consent to the resignation of an attorney even after notification that the donor of a power has lost capacity has been accepted by the Director (i.e. even after an EPA comes into force).

#### **62. Amendment of section 78 of Principal Act**

Amendments enable the Director to remove an instrument creating an enduring power from the Register of enduring powers of attorney where an attorney has disclaimed the power of attorney, is disqualified, resigns, dies or is otherwise unable to continue as an attorney, and where there is only one attorney. Where there is more than one attorney, amendments provide for the Director to note a disclaimer by an attorney on the Register and in those circumstances the EPA endures in respect of the remaining attorney or attorneys.

#### **63. Amendment of section 79 of Principal Act**

This section provides for a reduced number of regulations to be prescribed by the Minister, the remainder of which will be specified by the Director under section 79A, for streamlining purposes. The Minister retains responsibility for the prescribing of regulations regarding the class of healthcare professionals that may undertake capacity assessments under the Act, the bodies or classes of person that may inspect and seek copies from the Register of EPAs held by the Director, the safeguards to be applied in relation to health and social care research involving relevant persons, the fees to be paid and the circumstances in which fees can be waived by the Director.

#### **64. Insertion of new section 79A into Principal Act**

*Section 79A* of the Act provide for technical amendments ensuring that enduring powers of attorney are compliant with specifications made by the Director under new section 79A, which allows for the Director, rather than the Minister, to specify certain procedural requirements and enduring power of attorney forms relating to application, notice, objection, variation, revocation and reporting requirements. Previously, only compliance with regulations prescribed by the Minister under section 79 was required. When specifying matters the Director must have regard to the guiding principles of the Act, and ensure that forms are accessible.

#### **65. Amendment of section 80 of Principal Act**

This section introduces cross-referencing changes as a result of the move to a new two-step enduring power of attorney process. This new two-part process will allow for the registration of the enduring power of attorney by the donor, who may then make changes to, or revoke, the enduring power prior to notification to the Director that they have lost capacity. It is the role of the attorney to notify the Director when the donor has lost capacity.

#### **66. Amendment of section 82 of Principal Act**

The definition of “treatment” has been deleted from Part 8 as a result of the inclusion of the definition in section 2. This will allow for clarity as to which decision supporters are entitled to make clinical or medical decisions, with the position of designated healthcare representatives being privileged for medical decisions.

#### **67. Amendment of section 92 of Principal Act**

An amendment is made to include an attorney appointed under the Powers of Attorney Act 1996 in the list of persons who do not require the leave of the court to make an application for an advance healthcare directive. This will clarify that there will be parity between persons who have appointed an attorney under the 1996 Act and those appointed under the 2015 Act.

#### **68. Amendment of section 95 of Principal Act**

Amendments to section 95 allow for the Director to consult with, and request information from, other bodies related to the treatment or care of a relevant person, or the functioning of a decision support arrangement.

#### **69. Insertion of new sections 95A and 95B into Principal Act**

New section 95A provides for the making of regulations, to be set by the Minister, to allow the Director to share data in relation to the safeguarding of relevant persons. Such regulations may permit the Director to disclose data to a public authority or public body in the interests of a relevant person or another person. The regulations will also define which public bodies and authorities data may be disclosed to, the type of such data being shared and its purpose, along with the conditions by which it may be disclosed.

The introduction of new section 95B provides for the Director to specify those forms that may be in electronic format and those which may not. Electronic documents may be certified as true copies by the Director.

#### **70. Amendment of section 96 of Principal Act**

Amendments improve cross referencing of complaints provisions throughout the original 2015 Act and specify the powers that the Director shall have in conducting investigations of complaints throughout the Act, save for complaints under Part 8 related to advance healthcare directives. The Director will be allowed to investigate matters on their own initiative without needing a complaint, and it will be an offence to hinder or obstruct the Director in the conduct of an investigation. The Director will be empowered to pay witness expenses.

#### **71. Insertion of new sections 96A and 96B into Principal Act**

The new section 96A has been introduced to provide for the Director, in the course of conducting an investigation into decision supporters throughout the Act, except designated healthcare representatives, to make an application to the court for a temporary prohibition, where the Director believes there is a risk of immediate harm involved. Applications can be made *ex parte* when submitted with a supporting affidavit. Where a prohibition order is granted, the Director must serve a copy of same on the

person(s) concerned. The period of prohibition will be set out in the court order.

Where the prohibition order would result in a person being deprived of a decision support that they need, it will be possible to appoint alternative supports for the duration of the order.

The new section 96B provides for the Director to specify the form of a signature on a range of matters, and is designed to allow the Director flexibility in terms of the procedural requirements within the Act.

#### **72. Amendment of section 98 of Principal Act**

Technical changes are made regarding the role of the Director in engaging specialist advisors. The section replaces the requirement on the Director to secure the Minister for Health's approval in authorising the appointment of specialist advisors by transferring the approval required to the Minister for Children, Equality, Disability, Integration and Youth. This reflects the Minister for CEDY's new responsibility for the majority of provisions under the 2015 Act and the provision of funding for the DSS.

#### **73. Amendment of section 99 of Principal Act**

Amendments in this section are made to clarify that the role of the special visitor is to assist the Director in performing his or her supervisory function, as referred to in section 95(1)(e). This includes the investigation of complaints and objections as well the performing of the Director's functions under section 96, which includes investigations. It also incorporates the undertaking of assessments of capacity, where the Director brings an application under Part 5 of the Act.

It is proposed to replace the reference to the Minister for Health in subsection (4) (which provides for the Minister to set terms and conditions and remuneration for special and general visitors) with a reference to the Minister for Children, Equality, Disability, Integration and Youth.

The section also provides for the Director to direct a special or general visitor to visit any relevant party, and not just decision supporters or the relevant person.

#### **74. Amendment of section 100 of Principal Act**

Additional subsections (13) and (14) are introduced to incorporate the role of a court friend in assisting a ward of court under Part 6 of the 2015 Act. The amendments clarify that provisions relating to the role of a court friend will also apply to a court assistant, and are linked to earlier amendments that strengthen the provision of assistance to wards exiting wardship and the related court proceedings.

#### **75. Amendment of section 101 of Principal Act**

Amendments to this section extends the use of the decision-making representative panel to Part 6 of the 2015 Act. Following a review undertaken by the wardship court, a person who is being discharged from wardship is entitled to have a decision-making representative appointed from the panel maintained by the Decision Support Service, where no other person is available to act as a decision-making representative.

#### **76. Amendment of section 102 of Principal Act**

The timeline for the Mental Health Commission to forward its annual report on the activities of the Director is extended to 3 months, and the report will be sent to both the Minister for Children, Equality, Disability, Integration and Youth as well as the Minister for Health.

#### **77. Amendment of section 103 of Principal Act**

This section provides that the code of practice for guiding persons and healthcare professionals regarding whether a person lacks capacity should also provide guidance for supporting decision-making by relevant persons.

The inclusion of guidance on supporting a person to make a decision before proceeding to assess his or her capacity is in line with the guiding principles.

The power to develop a code for those interacting with relevant persons in certain professional contexts is expanded.

A power is created for the Director to develop a code of practice providing guidance for assisting a ward in court. Clarification is provided that a code relating to court friends also applies to a court friend assisting a ward of court.

#### **78. Amendment of section 139 of Principal Act**

Amendments provide a ward with the right to be present in the wardship court when his or her capacity is being reviewed under Part 6 (Wards) of the Act. The section provides that a ward has the same rights as a relevant person in relation to court proceedings under the Act.

#### **79. Amendment of section 143 of Principal Act**

Subparagraphs (b) and (d) relating to amendments of the Civil Registration Act 2004 (No. 3) are deleted. As both section 2(2A) and section 59F of the Civil Registration Act 2004, which related to capacity to consent to a civil partnership, were repealed by section 8 of the Marriage Act 2015 (No. 35) with effect from 16 November 2015, paragraphs (b) and (d) of section 143 of the Act of 2015 are now unnecessary.

#### **80. Amendment of section 145 of Principal Act**

*Section 145* (Offence of ill-treatment or wilful neglect) of the Act of 2015 provides for the offence of ill-treatment or wilful neglect of a relevant person by a decision-making assistant, co-decision-maker, decision-making representative, attorney or designated healthcare representative.

The purpose of the proposed amendment to section 145 is to improve the clarity of the provision.

#### **81. Amendment of section 146 of Principal Act**

Amendments strengthen the mandatory review of the operation of the Act that is required to be carried out, including providing for a report to be generated and to be laid before the Oireachtas within a specified timeframe. Review of Part 8 is excluded, which is the responsibility of the Minister for Health.

### **PART 3**

#### **AMENDMENT OF OTHER ACTS**

#### **82. Amendment of Juries Act 1976**

This section provides for an amendment to the Juries Act 1976 (No.4) to provide that a person who is deaf shall not be ineligible for jury service by reason only of his or her requiring the services of a sign language interpreter. It also provides that the existing prohibition from serving in respect of a person with a mental illness or disability, and who is receiving medical treatment, or is resident in a hospital or similar institution, is replaced with a functional capacity test.

### **83. Amendment of Electoral Act 1992**

This section deletes paragraph (i) in section 41 of the Electoral Act 1992, to repeal the prohibition of a person of ‘unsound mind’ from standing for election to the Dáil (and thereby also removing the disqualifications for membership of the Seanad and for election to the European Parliament also).

### **84. Amendment of the National Disability Authority Act 1999**

This section provides amendments to the National Disability Authority Act 1999. It makes provision for the Authority to provide information and assistance to the Irish Human Rights and Equality Commission as part of the monitoring mechanism for the Convention.

The second amendment providing for NDA staff to become civil servants is proposed as currently the pension liabilities for staff of the NDA (as public servants) is met, as it arises, from the Board’s annual allocation. Civil servant of the State status will mean that the pension liabilities are met from the Vote for Superannuation. The change has no impact on the independence of the Authority in the discharge of its functions.

### **85. Amendment of the Disability Act 2005**

*Section 46* of the Disability Act 2005 is amended to bring civilian staff of the Garda Síochána back within the terms of Part 5 of the Disability Act 2005 (No. 14) (providing for 3% public sector employment quota for people with disabilities). This group of civil service staff was inadvertently removed from the scope of Part 5 by the enactment of the Garda Síochána Act 2005 (No. 20).

*Section 47* of the Disability Act 2005 is also amended to provide for revised compliance targets regarding the employment of persons with disabilities. From the period 1 January 2024 up to and including 31 December 2024, not less 4.5% of persons employed in a public body are persons with disabilities and that from 1 January 2025 onwards, 6% of persons employed in a public body will be people with disabilities.

### **86. Amendment of the Irish Human Rights and Equality Commission Act 2014**

This section provides for two amendments to the Irish Human Rights and Equality Commission Act 2014. It provides for the Irish Human Rights and Equality Commission to act as *amicus curiae* before the Court of Appeal, as well as before the High and Supreme Courts as already provided for. It also creates a statutory basis for Irish Human Rights and Equality Commission’s role in the monitoring framework in relation to the UNCRPD.

### **87. Amendment of section 42 of the Freedom of Information Act 2014**

This section will amend section 42 of the Freedom of Information Act 2014 providing that records relating to an investigation by the Director, or persons delegated by the Director, will not be subject to release under Freedom of Information requests.

*An Roinn Leanaí, Comhionannais, Michumais, Imeachtha agus Óige Bealtaine, 2022.*